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THE CAMBRIDGE JOURNAL OF

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Professor John Finnis

Martin Wilson

Professor Martin Kemp

Finally, we thank three individuals who played an important role in setting our direction.

The Rt Hon Lady Arden

The Rt Hon Lord Sumption

William Fulp

Desert, Ukrainian Money Project *(Oleg Tistol 1997, mixed media, 39 x 56 cm).*
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Foreword by Martin Wilson, Honorary Editor and Chief General Counsel at Phillips

As I read the insightful, entertaining, scholarly, and diverse articles in this issue of *The Cambridge Journal of Law, Politics, and Art*, I wonder to myself how these three elements have become so intertwined. Perhaps it is not surprising as art has always been an expression of power, human identity, perceived truth, and aspiration—qualities also shared by politics and law. This link is therefore certainly not new, but it is perhaps only in recent years that we have become so conscious of it.

25 years ago I answered an advertisement in *The Times* for the position of in-house lawyer at Christie's auction house. At that time, the concept of an art lawyer did not exist. There was, after all, no great need for lawyers in a discreet world based upon gentlemen's agreements, which functioned very smoothly on the basis of reputations, influence, and relationships. It was, in short, a world apparently untouched by the concerns of law and politics.

Over the following 25 years of my career as an art lawyer, all of that was to change dramatically. The catalyst for that change was not, as one might imagine, the evolving complexity of business in general. Rather, it was a series of historical, political, and technological events which catapulted art and the sale of art into the centre of wider discussions around justice, power, and identity.

The first such event was a belated realisation, in the late 1990s, that the war from 1933 to 1945 in Europe had been an assault not only upon nations and upon people, but upon culture and identity. That attack, which was accompanied by so many personal tragedies, had remained largely unaddressed in the immediate aftermath of the war, allowing artworks stolen by the Nazi regime to continue to circulate in the art market. By the late 1990s, prompted by the opening of European archives, museums, collectors, and the art market were hit with a wave of restitution claims by descendants of the victims of spoliation. Law, ethics, and commercial reality were all brought into play in resolving the resulting disputes.

On the heels of the wartime restitution claims came a focus upon ancient cultural heritage looted from conflict zones. While the 1970 UNESCO Convention had prepared the ground, the signatory 'art market' countries were very slow to introduce the national legislation necessary to put into practice the aims of the convention. As a consequence, cultural heritage in conflict zones all over the world continued to be the target of looting. Events in the Middle East would, however, challenge that inaction. Following the invasion of Iraq in 2003, unprotected archaeological sites and museums in Iraq were subjected to widespread looting. Afghanistan, Syria, and Libya suffered similar looting as law and order broke down amid their respective conflicts. Because this looting was widely reported in the West, the outcry was such that the art market was compelled to demonstrate that it had in place measures to ensure that looted antiquities from conflict zones were not finding their way into the salerooms. Politicians followed, albeit in the slipstream, introducing national legislation requiring the art market to carry out due diligence regarding the provenance of antiquities. None of these measures will stop the destruction and looting which are inherent to conflict, but they will perhaps help to prevent the fruits of that destruction appearing in the art market. Once again, progress was not achieved by any single measure but by the application of a combination of law, ethics, and commercial reality.

The third catalyst was the question of transparency and compliance. Discretion and confidentiality have always been central to the operation of the art world—and usually for good reason. Sellers understandably prefer not to advertise the circumstances which necessitate the sale of artworks, such as divorce and death. Buyers are also often keen not to advertise their wealth for reasons of personal security. Agents introduce a further layer of opacity, trying to preserve their commercial relationships by keeping confidential the identity of their principals. But in the modern art world, where huge sums are being transacted, a balance needs to be found between transparency and discretion. This need has been met by the passing of laws and regulations in many countries imposing onerous obligations on art market participants to carry out detailed due diligence on their clients and make disclosures to other art market participants. The art market is coming to terms with these critically important new obligations and, in doing so, having to acclimatise to a new environment of legal and compliance rigour—as well as a greater level of transparency, which is to be welcomed.

More recently, there has been a reappraisal of the display and ownership of art which was acquired—not in modern day conflict zones—but from colonies during colonial times or as a result of ancient conflicts. Many countries have, over time, been denuded of their artistic heritage and are understandably upset to see that heritage on display in the collections and museums of the world. This matters because, as the countries who have endured colonisation and invasion know all too well, art is closely linked to history and cultural identity. Politicians, collectors, and the art market are beginning to grapple with the question of 'who owns history?'. As a result, we are also hopefully progressing towards reconciling the role of the global museum with efforts to recover heritage which was lost in the context of power imbalances.

Even now law, politics, and art are moving into a new phase with the growth of cryptocurrency, non-fungible tokens, digital art, and online sales. In doing so, lawyers, politicians, and artists will test new boundaries and challenge our perception of authenticity, originality, ownership, and value.

As a result of these events, art law is now a recognised discipline, rich not only in legal questions, but also in the consideration of wider political, artistic, and ethical questions. This journal is a wonderful reflection of that, and illustrates, for me, why this is such a fascinating area in which to work and about which to write. It is a privilege for me to have been asked to write this foreword and I hope that you will enjoy diving into this collection as much as I have.

Foreword by The Rt Hon Lady Arden DBE, Former Justice of the UK Supreme Court

I am honoured to be asked to write a short Foreword to this Issue of *The Cambridge Journal of Law, Politics, and Art*. I was an enthusiastic contributor to the first Issue.

If you read that Issue, I welcome you back and feel sure that you will be pleased with the varied content of this Issue too.

If you are a new reader, you may already know why you have taken up this Issue. If not, I would like to explain in brief why I think its subject matter is important, and why it might be important to you.

It seems to me that the *Journal* is likely to expand our horizons because it brings together three subjects which often sit in splendid isolation from each other, namely the Law, Politics, and Art. We tend to think about issues and debate them only within their separate silos. The combination can give us new insights for many reasons.

It can shed new light on the strengths and weaknesses of each of those subjects. Literature and art, in particular, can be used to expose deficiencies in the law which are open to criticism and debate. The combination of law and literature is also an effective way of explaining the law. In addition, the combination of all three topics can be used to advocate change in the law. An obvious example of these points is the work of Charles Dickens.

By like token, the law itself can be used to uncover the boundaries of our unwritten constitution. It is sometimes used by litigants for exactly that purpose. In turn, politics must make judgments on matters which are in general beyond legal expertise, but it is often beneficial for there to be a rich discussion outside politics as well.

Space does not permit me to take more than a sample of the contributions to this Issue. Some articles focus on one of the three subjects or leave the possibilities for cross-fertilisation between them unspoken. Others confront the combination of some or all the subjects directly. A striking example of this is Alejandro Posada Téllez's thought-provoking contribution, 'Is Peace Merely about the Attainment of Justice?', on transitional justice. When conflict ends, war criminals may be made accountable by being prosecuted in domestic courts or (post the Second World War) in international courts and tribunals. Another solution is an official reconciliation process aimed at allowing the society to heal. Téllez points out that a reconciliation process may bring about justice for the individual and accountability, which is highly valuable in itself, but it will not necessarily produce a permanent political solution or lasting peace for the society. With the war in Ukraine, these questions are timely and apposite.

Another example is the topic of individual identity and autonomy, which arises in more than one contribution. If we truly believe in the importance of individual expression and personality, we should, I think, be very concerned to know about society's failings in this regard. These failings may be because politics and the law, operating within their respective domains, have not kept up with social change and expectations. We need to know more about what makes us different from one another and how to adjust for those differences. Contributions in this Issue are helpful to that end.

This is a new journal which is probably unique in making its focus the combination of the three separate subjects of the Law, Politics and Art. I congratulate the Founder, the editors, and the contributors on the excellence of their respective contributions.

Happy reading!

A word by Alexander (Sami) Kardos-Nyheim, Founder and Editor-in-Chief

The role of *The Cambridge Journal of Law, Politics, and Art* in current public discourse

I am often asked what I am trying to *do* with this journal. The expectation is that in a world full of action, the role of any consequential organisation is to be doing *something*, to be making a point, to constantly rationalise, to assert control in some way over circumstances or concepts that are within no one's control. This is in my view one of the great problems with the art world today, and also with the fields of law and politics.

In the art world, we feel a need to turn works of beauty, soul, and craftsmanship into objects whose meaning can be extracted, boiled down, and comprehensively explained. Art History courses today teach students to rationalise the artist's intention and explain a colour scheme or a brushstroke by reference to a political event or other circumstance. We leave nothing to mystery anymore. We do not allow ourselves to be haunted by the blurred, rufescent, august scene of J.M.W. Turner's *Rain, Steam and Speed* (opposite). Instead, we conclude that this is a painting "about" the Industrial Revolution and its mechanical destruction of natural beauty. Perhaps it is that too, but I suggest that we lose Turner's genius and the spiritual power of this object through attempts to demonstrate our own intellectual capacity for interpretation. We inappropriately confront mystery with logic.

In the law, the growing recourse to the judiciary for the resolution of essentially political questions is a different disease with the same cause. The law operates—or is meant to operate—in binaries, giving narrow answers to specific questions by reference to strict tests which adhere to clear and established principles. The law is essentially logical. Asking a judge to rule on whether it is in a child's "best interests" to continue living, or to interfere with an unpopular government policy, not only demonstrates a failure of the political system and creates an unhealthy constitutional reliance (as Lord Sumption argued so well in his contribution to our last issue), but also pits hard logic against questions of humanity and morality, which are inherently fluid.

Similarly, the increased politicisation of the arts, visible in everything from Fine Arts courses to Arts Council funding criteria, is a similarly dangerous phenomenon. The Arts Council now chiefly awards funding to projects with a political dimension: either the background of the artist or the nature of the work must appeal to a political objective, such as the overturning of colonial legacies. Many Fine Arts courses now require coursework to meet similar criteria. Besides the appropriateness of officials deciding on what is 'worthy' art (dare I say, think of the Nazis' 'Degenerate Art'), there is also a tragic opportunity cost. Think of the many struggling 'non-political' artists that are not supported; of the wealth of artwork born not out of politics but out of soul and personal meaning, that is not created, or ever seen. That is the true cost to our culture and it is the product of this inappropriate interaction.

The three domains of human pursuit that this journal covers—law, politics, and art—of course interact and overlap in fascinating ways. They add new dimensions and important perspectives to one another. However, the corresponding danger is that sometimes those interactions are inappropriate and in fact damaging to the individual integrity and nuances of those fields. Sometimes a work of art need not be more than an object of individual human meaning and power. Sometimes a legal ruling need not be more than a specific, anodyne conclusion on a point of law. Sometimes an artist-in-training or an arts awards body need not look to ticking political boxes but to valuing art that comes from a place of subjective struggle and truth.

Turning back to the original question of what this journal is about: this journal is aware of the opportunities and risks that come with placing these three fields in such close proximity. This journal is also aware of the risks of agendas, particularly political agendas. As such, as an institution the role of *The Cambridge Journal of Law, Politics, and Art* is to be nothing but a neutral vessel for the free expression of ideas and thoughts: a place of stillness and reflection at a time of constant motion and little self-awareness. Our editorial processes are rigorous and our activities around the world teeming with ambition. But this journal has no ambition or agenda other than to allow others to express themselves truly freely, constrained only by the limitless bounds of the English language.

I set up this journal because I was exasperated with censorship, at home and abroad. Censorship, however labelled, however well-intentioned, however (seemingly) morally-driven, is still a muzzle on free expression and ultimately free thinking, and is the necessary ingredient for the decline of any culture. We are defined by the quality of our thoughts and the quality of our thoughts is often determined by our ability to express them. This journal will never be bullied into taking a view. Nor will it ever tell anyone else to take or not to take a view. An antidote to today's problems is not to stymie debate but to improve the quality of public discourse and educate everyone, *God forbid!*, to be able to think for themselves. I want this publication to be the freest and purest forum in the world for the exposure of new, brilliant, daring thought.

In many ways the West is in decline. But if there is anything special left that we can offer the world, let it at least be that feeling of freedom and autonomy that leads to the greatest moments of genius and creativity; that rush of innovation and ideas that comes with feeling like there is nothing in your way, no moral-arbitering-Sword of Damocles hanging over you, waiting for you to make a mistake. That is why our editorial guidelines welcome everything from scientific research to black-letter law to creative writing. That is why the contributors to this journal include everyone from Sixth Formers to Supreme Court Judges, painters to politicians, archaeologists to advocates. That is why this journal has even developed its own technology to safely process sensitive information from political dissidents around the world.

Look once again at Turner's *Rain, Steam and Speed*. A mechanised train uncompromisingly steams forward against a mystical, classical background where a rowboat moves slowly by human effort across a quiet body of water. Metallic logical and (and perhaps moral) self-assuredness pierce a warm and hazy stillness that used to leave room for the unknown and for a slower, more contemplative pace. This was an atmosphere where truth, subtle thinking, and honest feeling did not have to battle against so much noise to be heard. This new journal is one of the last, determined remnants of that old, if romanticised, atmosphere. We will not stifle certain ways of thinking because we think better. We will observe, ponder, and respect what we see. We will publish *all* reasoned thinking because we believe that if we have moral courage and genuine openness to difference, then we can nurture and stimulate an improved quality of public discourse.

This second issue of *The Cambridge Journal of Law, Politics, and Art* is another important step in that direction, and dare I say, another work of cultural significance.

Rain, Steam and Speed *(J.M.W. Turner 1844, oil on canvas 91 x 122 cm).*
© The National Gallery, London.

A very special team

The staff of this journal are formidable. This journal started as an idea; then a one-man-band; then a team of six core editors who met in a dusty corner of a Cambridge restaurant; then a group of 36 editors and sub-editors across our three thematic departments; and now an international organisation of over 180 editors, designers, business developers, events managers, global ambassadors, and coordinators, only the core of whom can be acknowledged here and overleaf. This group of people, drawn not only from the University of Cambridge but from around the world, share an unreasonable ambition to turn an idea into a major international publication known for its academic rigour, prestige of contributors, and strength of character.

It is humbling to have worked with this remarkable group of people. Every single member of *The Cambridge Journal of Law, Politics, and Art* has worked hard, shown great skill, and above all has demonstrated enormous creativity and vision in bringing this journal forward.

Some special thanks are due.

Uma-Johanna Shah has stood in the gap during this journal's most testing periods. As Design Editor, Uma is responsible for the beauty, quality, and structure of this journal.

Stella Maria Sendas Mendes has had the unenviable but vital task of coordinating all of the journal's operations. As Managing Editor, Stella has energised and organised this journal, showing great leadership, humour, and panache in the process.

Jack Graveney is the intellectual force behind this journal. As Content Editor, Jack has led the Editors—a team that has ensured this journal has an almost unmatched rigour and precision in its editorial processes and the quality of publication we put out.

As her homeland came under attack by Russian forces and refugees swarmed to her beautiful home in leafy St Albans, Constance Uzywshyn did not flinch. In her capacity as Executive Editor, Constance continued to bring in the breadth and calibre of contributions that allows this journal to call itself world-class. She has also played a valued role in leading this journal's many talented staff.

William Fulp is the business brain behind this journal. A former New York stockbroker with a special talent for rearing funds and raising horses (or is it the other way around?), William has not only ensured the financial stability of the journal but has also provided and is implementing a vision for long-term growth and international distribution that, I hope, will make this journal a feasible global publication.

I can state with confidence that you would not be holding this journal in your hand had it not been for the extraordinary efforts, through thick and thin, of the five individuals named above. As much as I have been responsible for the birth of this journal, so too have I at times been its greatest liability. The personal friendship, understanding, and integrity of those mentioned above have ensured the life and grwoth of this journal in spite of that.

I must also warmly thank Michael Sandle RA for his sincerity, warmth, and humour. Sandle is one of the most important artists of our time. It is this journal's honour to have his work on our front cover.

Additional thanks are due to those who, in an advisory capacity, have influenced the direction of this journal.

Martin Wilson has brought unique insights from industry and art law that will guide the direction for years to come. Sergiu Sall Simmel has provided applied and highly useful advice for the organisational effectiveness of this journal, as well as its future expansion to North America. Eduarda Gasparini's superb creative ability, inquisitiveness, and moral support have played an important role in bringing this journal to its final stage. Peter Dixon is one of the most remarkable men I will ever meet and this journal is lucky to have his generosity and creative input. Nathalie Edwardes-Ker's incredible intellect, strength, and warmth have given me the courage and inspiration to push through with this journal during its toughest times, and I will always be grateful to her for this: I owe her far more than can could ever be expressed here.

Lord Sumption, Lady Arden, Professor John Finnis, and Professor Matthew Kramer—some of the greatest legal minds of our time—have played an important role in ensuring this journal retains its moral courage to uphold freedom of reasoned expression, now and into the future.

The Premonition *(Gabriella Kardos 2013, oil on canvas 170 x 170 cm).*
© Gabriella Kardos. Photograph by Bindu Bhutani.

The Creation of Eve *(Matilda Baxendale-Kirby 2022, Metallic ultraHD Photo Print 73 x 108 cm).*
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Night (Birgitta Kumlien 2020, oil on canvas 80 x 80 cm).
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THE CAMBRIDGE JOURNAL OF

LAW, POLITICS, AND ART

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Professor John Finnis is the leading philosopher of natural law. He also successfully nominated Aung San Suu Kyi for the Nobel Peace Prize and has been one of Australia's foremost constitutional advisors. He is Professor Emeritus of Law and Legal Philosophy at University College, Oxford.

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Martin Wilson is a specialist in art law with extensive experience in global art transactions and resolving disputes. He currently holds the position of Chief General Counsel and Head of Fiduciary Services at Phillips, an international auction house with its headquarters in London and New York, and offices all over the world. He previously served as Global Managing Director and General Counsel to the President's Office for Christie's.

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Professor Martin Kemp is an art critic and an authority on Leonardo da Vinci. He authenticated the Leonardo painting *Salvator Mundi*, and attributed the painting *La Bella Principessa* to Leonardo. He is Professor Emeritus of Art History at Oxford and a Fellow of Trinity College, Oxford.

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An Allegory of Prudence *(Gabriella Kardos 2019, etching with watercolour E.V. 28 x 22 cm).*
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Virgin Mary and Child, from the Series of Icons *(Halyna Hryhoryeva 1997, oil on canvas, 100x 80cm).*
Private Collection.

Ukraine's master painter, Halyna Hryhoryeva is recognised for her timeless and classical themes. "I aim to show the perfection of nature as well as the beauty of the woman." This particular painting is a contemporary rendition and reference to Kyiv's St. Sophia Cathedral's 11th Kyivan Rus mosaics and frescoes.

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Why would an Atheist Write a Commentary on the Bible?

Matthew H. Kramer

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This article is based on a lecture that he recently delivered in Cambridge.

I became an atheist at the age of eight. After one of my Hebrew-school teachers devoted a 90-minute class to recounting her experiences in a Nazi concentration camp during the Second World War, I went home and read a lengthy encyclopaedia article on Nazi Germany. Within four hours of reading that article, I had irretrievably lost my belief in God. Over the years, my disbelief in God has become even more robust than my disbelief in Santa Claus and the tooth fairy.

However, unlike some atheists and most agnostics, I am hardly uninterested in God and religion. For one thing, my attitude toward God is not one of indifference; rather, it is one of revulsion. That attitude stems partly from my systematic study of the Bible for the past 40 years. Although my main areas of scholarly expertise are political and legal and moral philosophy—rather than theology or the philosophy of religion—my principal avocation since the early 1980s has been the writing of a commentary on the Bible. Why would an atheist engage in such an endeavour?

I began to read the Bible systematically in early 1982 because I wished to enhance my understanding of philosophy. From the mediaeval period through the early twentieth century, virtually every Western philosopher of any consequence presupposed that his readers were intimately acquainted with the Bible. While studying Philosophy as an undergraduate, I was particularly struck by the fact that nearly all the great figures of the early modern era—Thomas Hobbes, John Locke, Baruch Spinoza, George Berkeley, and so forth—were thoroughly grounded in the Scriptures. Their philosophical works invoke Biblical passages and characters with easy familiarity. Even the fervid atheist Friedrich Nietzsche in the nineteenth century displayed an impressive knowledge of the Bible. (Nietzsche's *The Antichrist* is a tour de force of Biblical exposition, however far-fetched some of it may be.) Thus, while I was still an undergraduate, I recognized that I could not fully understand many of the premier texts of the Western philosophical tradition without an excellent knowledge of the Scriptures.

I began to study the Bible systematically during my first year as a postgraduate. (For the first decade of that study, I devoted 2-3 hours every day to the endeavour. Thereafter, I have devoted 60-90 minutes to it each day.) I had acquired a pretty good knowledge of the Hebrew Scriptures as a boy, but now I was setting out to read both the Hebrew Scriptures and the New Testament with the eye of a philosopher. During the first 18 months, I read the Bible from cover to cover three times without writing anything beyond marginal annotations. Thereafter, however, I began to compose a passage-by-passage commentary to make sense of the text as I went along. The commentary—which for the first several years was handwritten—has now grown to approximately 3,600 pages. I have written it purely for my own edification, but over the years I have gradually polished it into something that might eventually be suitable for publication.

At very few junctures in my commentary does my atheism become apparent. Poking holes in Biblical claims about God is far too easy and is thus uninteresting. Instead, my commentary seeks to understand those claims from the perspectives of the people who advanced them. I am continually asking why the writer of some book of the Bible would think that the ascription to God of a certain property or command or action or accomplishment is so important. Very often, the answer to the question just broached is that the Scriptural authors were resolutely concerned to differentiate their God from the gods of surrounding peoples. For example, the Torah's prohibition on boiling a kid in its mother's milk (Exodus 23:19, 34:26; Deuteronomy 14:21)—a prohibition that is the basis of the strict separation between meat dishes and milk dishes in modern kosher cooking—is best explained by reference to the pagan fertility rites that were widespread in the ancient Middle East. Instead of deriving principally from hygienic considerations or from solicitude for animals, the Torah's prohibition almost certainly stemmed principally from a determination to distinguish sharply between the Hebrew religion and the neighbouring creeds whose adherents paid homage to fertility goddesses by sacrificing kids and calves in their mothers' milk.

My original aim of improving my understanding of Western philosophy has been realised. Though I do not write on the philosophy of religion, my study of the Bible has significantly shaped my thinking about a number of issues in the areas of philosophy on which I do write. Over the years, however, that original aim has come to be supplemented by other reasons for my avocation as a Biblical scholar. Such a pastime not only improves one's understanding of Western philosophy, but also greatly enhances one's understanding of Western culture more broadly. While the Bible has heavily influenced many philosophers, it has likewise heavily influenced countless artists and writers and composers (among others). Some of the richness of Western art and literature and music is lost on anyone who does not possess a good knowledge of the Scriptures.

Let me offer a single fine-grained example to underscore this point. In the famous scene in *Tess of the d'Urbervilles* where Alec d'Urberville rapes or seduces Tess, Thomas Hardy writes as follows: 'But, might some say, where was Tess's guardian angel? Where was the providence of her simple faith? Perhaps, like that other god of whom the ironical Tishbite spoke, he was talking, or he was pursuing, or he was on a journey, or he was sleeping and not to be awaked'.[1] Now, unless readers know that the phrase 'ironical Tishbite' refers to Elijah, and unless readers are familiar with the story of the confrontation between Elijah and the Baal-worshippers in 1 Kings 18, they are likely to miss the full ironic significance of Hardy's wording. (Indeed, they will probably be rather puzzled by his wording.) In particular, they will not readily grasp that Hardy in his brief discussion of God's providence—'the providence of her simple faith'—was redirecting against God a classic and sardonic expression of disbelief in the existence of an alternative deity.

A further benefit of Biblical study lies in the literary magnificence of many parts of the Scriptures. The exquisite story of Joseph and his brothers in the final quarter of Genesis is itself sufficient to ensure the Bible a place among the greatest works of world literature, yet a number of other Biblical narratives—such as the story of David and Absalom, and the Parable of the Prodigal Son—are at almost that same level of supreme excellence. Much of the Bible's poetry (in Job, quite a few of the Psalms, Hosea, Isaiah, Jeremiah, Micah, the Song of Solomon, and so forth) is among the finest produced in any language. Thus, although long stretches of the Bible are tedious or repellent or baffling, a student of the Scriptures encounters many literary jewels as well.

Familiarity with the Bible broadens one's mind in a number of respects. Coming to grips with cosmological assumptions and ethical assumptions very different from one's own is an edifying venture. Moreover, anyone who examines the Bible with intellectual honesty cannot fail to be aware of its many shortcomings, some of which are egregious. One's awareness of those shortcomings can temper one's criticism of other religions. Consider, for example, the current propensity of Muslim extremists in various parts of the world to engage in murderous mayhem. On the one hand, the claim that their evil acts of carnage have nothing to do with Islam is simplistic at best. Anyone who has perused the Koran with intellectual honesty will be aware of the hideous passages on which the Islamist fanatics can and do seize in order to 'justify' their terrorism. On the other hand, the perception of a basic divide between the Koran and the Bible in this respect is likewise simplistic. The Bible teems with as many ghastly passages as the Koran. It lends itself to being cited in support of iniquities just as readily as does the Koran. Hence, given that there are no grounds for thinking that the sacred texts of Christianity and Judaism are indissolubly linked to terrorism, there are no grounds for any corresponding accusation against the sacred texts of Islam. An acquaintance with the Bible enables one to recognize this point clearly.

The abundance of rebarbative passages in the Bible is another reason for atheists to familiarise themselves with it. Although my commentary seldom gives voice to the atheistic repugnance that I feel toward God, my systematic study of the Bible has made me thoroughly familiar with the numerous discreditable aspects of the Biblical texts. Thus, I can retort knowledgeably to believers who suggest that moral principles are in need of God and the Scriptures as their foundations. Even if the correct basic principles of morality were somehow in need of foundations beyond themselves, the Bible would be too nefarious for the purpose. Those principles would not be strengthened by being associated with the genocidal directives of the God of the Hebrew Scriptures, or with the scurrilous fulminations of Christ against his opponents, or with the Stalin-like gloating of the God of the New Testament at the thought that everyone who has not been sufficiently deferential toward Him will suffer torture for all eternity.

Lest the foregoing paragraph may seem too glum, I shall conclude with a relatively light-hearted reason for studying the Bible. A survey of the Biblical texts reveals a host of common sayings that have taken on meanings very different from their original meanings. Hence, a knowledge of the Bible is invaluable for anyone inclined to be pedantic. I could offer more than twenty examples of the sayings that I have in mind, but I have space here for only a few.

In Deuteronomy 8:3 and in Matthew's and Luke's gospels (with Christ's response to the first temptation), we encounter the aphorism 'Man does not live by bread alone'. In the present day, that maxim is almost universally taken to mean that bread is necessary but not sufficient for human flourishing. In its original Biblical context, by contrast, the maxim means that bread is sufficient but not necessary for human flourishing. (In Deuteronomy, bread was unnecessary because God sent manna instead; in the gospels, bread was unnecessary because Christ was able to survive on purely spiritual sustenance.)

Another expression almost universally used today with a meaning markedly different from its meaning in its original Biblical context is the claim that certain people are—or behave as if they are—'a law unto themselves'. When such a formulation is invoked today, it is almost always employed disapprovingly to indicate that certain people arrogantly regard themselves as unbound by the legal or moral restrictions that apply to other people. However, when Paul coined that phrase in his Letter to the Romans 2:14, he was using it commendatorily with reference to righteous Gentiles. Those Gentiles conducted themselves in accordance with the moral requirements of God's Law even though the Law had never been revealed to them through the Scriptures. Such people were not in need of any acquaintance with the Scriptural presentation of the Law, because they were 'a law unto themselves'.

One further example of a saying that has taken on a meaning at odds with its original Biblical meaning is the assertion that 'the left hand does not know what the right hand is doing'. In contemporary usage, such an assertion indicates that some endeavour or situation has become muddled as a result of a dearth of coordination between different individuals or between different components of an organisation. Quite dissimilar was the message of Christ when he

1 Thomas Hardy, *Tess d'Urbervilles* (Broadview Press 1996) 103.

enjoined his followers in the Sermon on the Mount to refrain from making public their charitable deeds: 'But when you give alms, do not let your left hand know what your right hand is doing, so that your alms may be in secret; and your Father who sees in secret will reward you' (Matthew 6:3-4). Christ was counselling his disciples that they should not ostentatiously exhibit their virtues in order to win the esteem of their contemporaries. Instead, they should be so modestly discreet in their almsgiving that even their left hands would not know what their right hands had doled out.

To be sure, the Bible is by no means the only source of commonly misconstrued adages. Shakespeare's works, which are another preoccupation of mine, are likewise such a source. (For example, Hamlet's remark about 'a custom more honoured in the breach than the observance' is hardly ever quoted in accordance with its original meaning.) Still, precisely because the Bible has wielded such an immense influence on virtually all aspects of Western culture, it is a uniquely rich provenance of sayings that have entered into everyday discourse. And because the Bible today is much more often echoed than read, its sayings are frequently misunderstood. Thus, I recommend Biblical study not only for the serious reasons recounted above, but also because it is a wonderful basis for pedantic one-upmanship!

A Note on the Controversy concerning Eric Gill

Peter Brooke

Peter Brooke is a painter and writer, mainly on interactions between art, politics and religion. He has a PhD from Cambridge on 'Controversies in Ulster Presbyterianism, 1790-1836' (1980) and he is the author of the major study of the Cubist painter, Albert Gleizes: Albert Gleizes, for and against the twentieth century *(Yale University Press 2001).*

On 12 January 2022, there was an attempt to destroy, or at least damage, the statue of *Prospero and Ariel* installed outside the BBC's Broadcasting House in London, on the grounds that its sculptor, Eric Gill, was a 'paedophile'. A petition has been launched on the website of the left-wing petition organiser, 38 degrees, calling for the removal of the statue. At the time of writing (February 2022), it has nearly reached its target of 3,000 signatures. Save the Children has withdrawn its recommendation that one of the many type-fonts developed by Gill—Gill Sans—should be used in its publicity material.

In the course of the media response to the attack, Gill was described as a 'known paedophile' who 'sexually abused his two eldest daughters'[1] and 'a monster, a depraved paedophile who abused his daughters and others…a man who committed horrific sexual crimes'.[2] The Wikipedia entry on Gill has a section on his 'sexual crimes.' The 38 Degrees petition reads:

> Please sign to demand that the BBC remove the sculpture depicting a naked child, created by known paedophile Eric Gill, which is above the main entrance of BBC Broadcasting House. Gill had an incestuous relationship with his sister, sexual relationships with two of his pubescent daughters and even his family dog. The BBC likes to think a naked boy submissively leaning into the raised leg of a wizard is simply a metaphor for broadcasting. To the BBC Eric Gill was a major British artist rather than a child and animal abuser. Why is this important? I believe that the BBC would regain some credibility with their reputation, if they were seen to act upon the image of a naked child created by a known pedophile. It will show that they do not approve of the crimes committed by their past stars, Savile, King, Hall and Harris and show that they don't condone anybody who carries out child abuse.[3]

Comments left by signatories include: 'To have a sculpture made by a pedo outside a building that harbers [sic] pedos is a disgrace to decent normal people. pull down the statue and also the building the BBC is a disgrace to the British people'; 'The BBC are a disgrace from savil to hall and all the other monsters they helped. the pedos statue want smashed into a million bits and the building burnt to the ground'; 'Because it's absolutely grim mate, how is there a child penis on a sculpture of all things?? We don't even celebrate some of our greatest heroes yet we apparently support wizards and pedos, no thanks I'll stick to dungeons and dragons'.[4]

The controversy, such as it is, turns on whether it is right to admire work done by a depraved monster ('Eric Gill's crimes were unforgivable, but his statue is blameless'[5]; 'Eric Gill: can we separate the artist from the abuser?'[6]) and, if it is, whether such work should not be shown in a more discreet setting, perhaps adorned with some sort of explanatory text. There seems to be little disagreement over whether or not Gill can be characterised as a 'paedophile'—'a man who committed horrific sexual crimes'.[7]

1 Kate Feehan, 'Man scales BBC Broadcasting House and spends four hours destroying sculpture by paedophile artist Eric Gill' *Daily Mail* (12 January 2022) <https://www.dailymail.co.uk/news/article-10395493/Hammer-wielding-activist-scales-BBCs-Broadcasting-House-starts-destroying-Eric-Gill-sculpture.html>.

2 Katie Razzall,'The Artwork vs the artist' BBC (13 January 2022) <https://www.bbc.co.uk/news/uk-england-london-59972806>.

3 Trevor Stanski, 'Remove BBC Statue by Paedophile Eric Gill' (2021) <https://you.38degrees.org.uk/petitions/remove-bbc-statue-by-paedophile-eric-gill>.

4 ibid.

5 Andrew Doyle, 'Eric Gill's crimes were unforgivable, but his statue is blameless' *The Spectator* (16 January 2022) <https://www.spectator.co.uk/article/we-gain-nothing-by-destroying-eric-gill-s-beautiful-works-of-art>.

6 Rachel Cooke, 'Eric Gill: can we separate the artist from the abuser?' *The Observer* (9 April 2017) <https://www.theguardian.com/artanddesign/2017/apr/09/eric-gill-the-body-ditchling-exhibition-rachel-cooke>.

7 I should say that the use of the word 'paedophile' as a synonym for 'child molester' seems to me to be an abuse of language. To characterise someone who wants to rape children as a 'paedophile' is rather like characterising someone who wants to burn books as a 'bibliophile'.

I developed an interest in Gill through my interest in the French Cubist painter, Albert Gleizes. Both Gill and Gleizes were in correspondence with the Ceylonese metaphysician and writer on traditional art, Ananda Coomaraswamy. Both were fond of quoting Coomaraswamy's well-known dictum: 'An artist is not a special sort of man but every man is a special sort of artist'. Neither Gill nor Gleizes knew each other but Coomaraswamy grouped them together with himself and the American engraver (friend and correspondent of Gill) Arthur Graham Carey as people assumed to be 'medievalists', though of course that wasn't how he saw it himself. He preferred the term 'traditionalist.'[8]

I set about reading Gill and was impressed by his general philosophy on the nature of work and art, which could perhaps be summarised in the opening two paragraphs of his essay from 1918, *Slavery and Freedom*:

> That state is a state of Slavery in which a man does what he likes to do in his spare time and in his working time that which is required of him. This state can only exist when what a man likes to do is to please himself.
>
> That state is a state of Freedom in which a man does what he likes to do in his working time and in his spare time that which is required of him. This state can only exist when what a man likes to do is to please God.[9]

DH Lawrence, who disliked Gills prose in general ('Crass is the only word: maddening like a tiresome uneducated workman arguing in a pub—argufying would describe it better—and banging his fist'), nonetheless, and despite the mention of 'God', found 'more in those two paragraphs than in all Karl Marx or Professor Whitehead or a dozen other philosophers rolled together'.[10]

Gill's life and work was a long protest against everything that 'art' has become in our own time. He recognised and vigorously asserted the principle put forward by William Morris that 'art' is just another word for work well done; he successfully established the kind of rural community life which provides the best conditions for such work; he recognised that the function of his own art form—sculpture—was inseparable from religion and that indeed all art, which is to say all work, can only realise its highest value if it is done in a spirit of worship; he detested the business spirit and mechanised production, always asserting the importance of the human over the economic. All that brought him very close to the thinking of Albert Gleizes, who also distrusted 'art', emphasised the importance of craftsmanship, tried (with much less success than Gill) to establish a communal way of working and living, and believed that painting and sculpture had lost their way with the Renaissance and its imitation of the external appearances of nature. Both Gleizes and Gill liked to quote the dictum of Thomas Aquinas (also favoured by Coomaraswamy): 'Art imitates nature not in its effects but in its way of working'.

It seemed to me, reading Gill, that, like Gleizes, he was one of the necessary voices of the twentieth century. The *Autobiography*, in particular, struck me as one of the most delightful books I had ever read. I was therefore upset when, just at the moment that I was discovering him, his reputation as a moral thinker was trashed with the publication of Fiona MacCarthy's biography.[11]

The book was published in 1989 with a great deal of publicity, including a special TV programme on Gill and an article in *The Independent* colour supplement, all pursuing the theme that startling revelations were to be found in it concerning sexually aberrant behaviour with his daughters, at least one sister, maybe two, and even the family dog. It is a theme hammered home by the Introduction. Gill is presented as a 'tragic' figure riven by contradictions between his fine religious and social ideal and his disorderly life and passions:

> He was taken very seriously in his day. At his death, the obituaries suggested he was one of the most important figures of his period, not just as an artist and craftsman but as a social reformer, a man who had pushed out the boundaries of possibility of how we live and work; a man who set examples. But how convincing was he? One of his great slogans (for Gill was a prize sloganist) was 'It All Goes Together'. As I traced his long and extraordinary journeys around Britain in search of integration, the twentieth-century artistic pilgrim's progress, I started to discover aspects of Gill's life which do not go together in the least, a number of very basic contradictions between precept and practice, ambition and reality, which few people have questioned. There is an official and an unofficial Gill and the official, although much the least interesting, has been the version most generally accepted.[12]

She refers to 'the smokescreen Gill himself and others so determinedly erected' and affirms boldly: 'At least I can be confident that Gill was not what he said he was. The *Autobiography* is full of obfuscation'.[13]

And yet this is not at all the impression that is conveyed once we get into the substance of the book. Indeed, even the Introduction itself makes it plain that, whatever the details of his sexual activity, no-one who came into contact with him could be in any doubt that he regarded sex as a matter of immense importance, of endless wonder and delight and that he was, or seemed to be, completely lacking in any inhibitions on the subject, that he expected the same of all the others around him. I don't myself share that attitude and, for the sake of the ideas that he had in common with Gleizes, I regret that he had it. But I can't accuse him of 'obfuscation' on the matter.

Having made this accusation, the Introduction continues:

> In earlier years Eric Gill had alighted on and promulgated in his own version Ananda Coomaraswamy's Hindu doctrines of the erotic elements in art. Later on, at Ditchling, with the same conviction, he began propounding a complicated theory, or succession of theories, in which sexual activity is aligned to godliness,

8 I discuss Gleizes's relations with Coomaraswamy, with a glancing reference to Gill, in my essay 'Albert Gleizes, Ananda Coomaraswamy and "tradition"', accessible on my website at <http://www.peterbrooke.org/form-and-history/coomaraswamy/>. I am the author of the major study of Gleizes: Peter Brooke, *Albert Gleizes: For and Against the Twentieth Century* (Yale University Press 2001).

9 Eric Gill, 'Slavery and Freedom', in *Art Nonsense and other essays* (Cassel and Co Ltd & Francis Walterson, 1929) 1.

10 D.H. Lawrence, 'Eric Gill's Art Nonsense' *Book Collector's Quarterly* (no XII, Oct-Dec 1933) 1-7, quoted in Malcolm Yorke, *Eric Gill, Man of Flesh and Spirit* (Constable 2000) 48-9. Yorke goes on to quote Gill saying that *Lady Chatterly's Lover* 'states the Catholic view of sex and marriage more clearly and with more enthusiasm than most of our text books'.

11 Fiona MacCarthy, *Eric Gill* (Faber and Faber 1989). The book was republished in 2017.

12 ibid vii-viii.

13 ibid x.

> in which the sexual organs, far from their conventional depiction as the source of scandal, are 'redeemed' by Christ and 'made dear'. It is a very radical and interesting theory, where Gill challenges Christendom's traditional confrontation of matter and spirit, and indeed his theory is justified in part, at least for connoisseurs of art, by the wonderful erotic engravings of that period. But one senses something frantic in the zeal with which Gill exfoliated his passion, in contexts likely and unlikely, and in his evident enjoyment of the waves of consternation which followed, particularly from the monasteries.[14]

When she comes to discussing the *Autobiography* she herself quotes, with evident relish, the wonderful passage in which Gill recounts his first discovery of the joys of masturbation:[15]

> But how shall I ever forget the strange, inexplicable rapture of my first experience? What marvellous thing was this that suddenly transformed a mere water-tap into a pillar of fire, and water into an elixir of life? I lived henceforth in a strange world of contradiction: something was called filthy which was obviously clean; something was called ridiculous which was obviously solemn and momentous; something was called ugly which was obviously lovely. Strange days and nights of mystery and fear mixed with excitement and wonder—strange days and nights, strange months and years.[16]

Not much sign of 'obfuscation' there! Nor in the passage which she quotes with equal enthusiasm in which Gill describes the beauty of the flowers of the field as a magnificent display of sexual parts designed to entice for the purpose of procreation.[17] And accordingly invites us to see our own genitalia, male and female, as our most precious 'ornaments'.[18]

She makes the remarkable, almost perverse, observation that: 'Gill the patriarchal figure surrounded by what at times seems dozens of his children and his grandchildren, is also a scene of pathos, fertility run wild, the all-too-logical conclusion of his "let 'em all come" theories' .[19] She is referring to a passage, again in the *Autobiography*, when at the time of their marriage Gill and his wife, Mary (or Ethel as she was before her conversion to Catholicism) agreed not to bother with contraception: '"Always ready and willing" was our motto in respect to lovemaking and "let 'em all come" was our motto in respect of babies'.[20] But they only had three daughters as well as one adopted son. Gill came from a family of thirteen children and he and Mary may well have wanted more but after a series of miscarriages they knew it was not to be. The 'fertility run wild' was the fertility of their daughters. Is Gill to be blamed—assuming it is a bad thing—for that?

She says that she has 'come to see Gill as a rather tragic figure', because of the contradiction between his role as a model English Catholic 'paterfamilias' and his unruly sexual appetite.[21] What is astonishing about Gill, however, and this book confirms it, is the apparent absence of any such contradiction. Gill had sexual relations with his housekeepers, with female colleagues, the wives of his friends, his sisters (or at least one sister), and even his daughters. Yet the book gives little evidence of the ill-feeling, tension, and jealousy which such behaviour should normally have provoked. It is as if the normal rules don't apply, and at one point, MacCarthy (following one of Gill's Dominican friends) asks: 'Was Gill honestly entitled to the privilege of innocence? Had he really been unaffected by the Fall?'.[22]

The question is an interesting one, given that Gill believed in the Fall and Fiona MacCarthy, one assumes, does not. In fact, the whole prurient glee with which the media establishment has swooped on Gill's sexual misdeeds is interesting.

In theory, sexual innocence should be an easy matter for those who do not believe that the sinfulness of sexual passion has been revealed by God. Yet here is a man who is apparently incapable of feeling sexual guilt and whose sexual activities seem to have caused no lasting damage to anyone, and Fiona MacCarthy tries to persuade herself that he was unhappy, tragic, eaten up by contradictions, even though all the evidence she gives proclaims the contrary.

While MacCarthy thinks that there should have been a tension between Gill's sexual activity and his Catholicism, Gill maintains that the two were mutually complementary. She tells us about a visit Gill paid with his then protégé, the Welsh writer and artist, David Jones, to a certain 'big fat man with a taste for true pornography… The walls of his flat in Lincoln's Inn Fields were almost papered over with pornographic postcards. At the sight of these, Gill turned to David Jones, saying: "If I were not a Catholic, I should have been like this"'.[23]

Again, Gill complained about his brother whose marriage was breaking up that 'Brother Max is so virtuous by nature and so stupid and muddle-headed…that he prefers to cast M. adrift and break up the home (thus depriving his children of all that home implies) rather than have a love affair to go to confession about'.[24] The same attitude to acknowledging sin is found in the *Autobiography*, in which he proclaims it as a privilege, an assertion of one's pride in being a man and thus capable of sinning.[25] One has the feeling that having a good sin to confess was all part of the fun (one of his confessors, incidentally, was Fr John O'Connor, thought to have been the model for Chesterton's Father Brown. That must have made things easier).

He develops an argument that Catholics, confident in their membership of the True Church, can afford to take a lighter attitude to life than Protestants and agnostics, who continually have to prove themselves.[26] And, especially towards the end of his life, MacCarthy tells us, new visitors to Pigotts, the last of the rural artistic communities he founded, had to pass through a sort of initiation test in which Gill held forth to them about Christ's genitals which, given that He was the Perfect Man, could be assumed to have been of a goodly size. While he was receiving instruction to enter the Church in 1913, he was working on a life size marble replica of his own phallus. One feels a certain sympathy for MacCarthy. He ought to have been a neurotic and unhappy soul. It somehow seems unjust that he wasn't.

14 ibid xi.
15 ibid 20.
16 Eric Gill, *Autobiography* (The Right Book Club 1944) 53-4.
17 MacCarthy (n 11) 290.
18 Gill (n 16).
19 MacCarthy (n 11) xi-xii.
20 Gill (n 16) 132.
21 MacCarthy (n 11) x.
22 ibid 214.
23 ibid 212.
24 ibid 287.
25 At least that is how I interpret the passage in the *Autobiography*, 223-7.
26 Gill (n 16) 164.

MacCarthy argues in support of her view that he was a tragic figure, that 'a chain of destructiveness began at Ditchling, not long after his conversion to Catholicism. Perhaps a part of his tragedy is that he was both ahead of his times and behind them. His urge to experiment with social conventions, especially the prevailing sexual mores, became more obviously and more painfully at variance with the Gills' accepted role as the ideal Catholic family, the public demonstration of fidelity and cohesiveness'.[27]

In fact, Gill's life at Ditchling Common, at Capel-y-ffin, and at Pigotts (the three rural craft communities he founded or co-founded after his conversion to Catholicism) was astonishingly creative, not just for his own work but for his ability to attract and train loyal followers and apprentices, bringing out their own creative capacities. Of course there were immense problems, and it is quite believable that he was crushed by his workload, his financial responsibilities, and his despair at the direction in which political events were moving in the 1930s. But anyone who knows anything about the difficulties of maintaining his kind of life, and of holding such communities together, will be impressed by his achievement, especially remembering that, unlike Ruskin, Morris, Carpenter, or Ashbee, he had no inherited wealth. All his ventures were financed only by his own work.

The main evidence for Gill's 'destructiveness' is his quarrel with his former close friend, the printer, Hilary Pepler. But though MacCarthy discusses this at some length and tells us that there is a long correspondence on the subject, she doesn't in my view quite come to grips with it. Was it, as she hints in the Introduction, prompted by jealousy because his eldest daughter Elizabeth had fallen in love with Hilary's son, David (whom she eventually married, against her father's opposition)? Or did his opposition to this affair spring from an already established rift with Pepler, which he attributed to questions of finance and also (a major part of the account in the *Autobiography*) to his complaint that Ditchling was more and more taking on the character of a Catholic tourist resort. This would seem to be confirmed by his withdrawal to the—at the time—nearly inaccessible Capel-y-ffin. MacCarthy's account of the joyous arrival at Capel and the subsequent life there (and a couple of years later when the whole menagerie moved again to Pigotts, near High Wycombe in the Chilterns) hardly fits the idea that it was a 'chain of destructiveness'.

Gill, MacCarthy says, was both ahead of his times and behind them. Presumably it is as a sexual libertarian that he was ahead of the times, and as a Catholic family man, who loved being surrounded by children and grandchildren, that he was behind. But Gill's sexual libertarianism is utterly different from the unhappy obsessions of modern society. He lived in a different world from that of William Burroughs, Hubert Selby Jr, Peter Greenaway, or Tom Sharpe. What is so striking about post-war sexual permissiveness, chronically so in the case of pop music (David Bowie, Lou Reed, Ultravox, The Smiths, Prince), is the carefully cultivated atmosphere of misery and degradation that surrounds it. There is a feeling of the obsessive scratching of an itch, knowing that it will only make the wound deeper. Compare them with Gill, in a passage from the diaries which I have taken at random from MacCarthy's book:

> C.L. [the discretion is my own—P.B.] came in and I drew her portrait. We talked a lot about fucking and agreed how much we loved it. Afterwards we fondled one another a little and I put my penis between her legs. She then arranged herself so that when I pushed a little it went into her. I pushed it in about six times and then we kissed and went into lunch.[28]

Gill, incidentally, was a strong opponent of artificial contraception. It is a curious thing that, while he had three daughters by his wife, he does not seem to have had any children outside marriage. I think we can safely assume that he would have accepted responsibility for them if he had. MacCarthy gives what might be the answer in her account of his exchanges with Dr Helena Wright, well-known as an adviser on sexual matters and advocate of contraception. After telling her 'You are entitled to believe in and work for a matriarchal state. Men are equally entitled to resist it', he continues: 'I believe in birth control by the man by means of:– (1) Karetza. (2) Abstinence from intercourse. (3) Withdrawal before ejaculation. (4) French letters' but 'I don't think 3 and 4 are good. I don't think abstinence from orgasm is necessarily a bad thing. It depends on the state of mind and states of mind can be cultivated'.[29] 'Karetza' is a form of sexual activity without orgasm. Gill, as we know, did not practise abstinence from intercourse. Karetza may also explain the willingness of the most improbable women to have sex with him. They didn't take it very seriously.

But this brings us to the question of sexual relations with his daughters. Considering the impact her revelations have had on Gill's reputation, MacCarthy's attitude, expressed in the Introduction, is surprisingly casual:

> There is nothing so very unusual in Gill's succession of adulteries, some casual, some long-lasting, several pursued within the protective walls of his own household. Nor is there anything so absolutely shocking about his long record of incestuous relationships with sisters and with daughters: we are becoming conscious that incest was (and is) a great deal more common than was generally imagined. Even his preoccupations and his practical experiments [sic. She only mentions one – P.B.] with bestiality, though they may strike one as bizarre, are not in themselves especially horrifying or amazing. Stranger things have been recorded.[30]

Well, yes, certainly, stranger things have been recorded. But, she continues: 'It is the context which makes them so alarming, which gives one such a frisson. This degree of sexual anarchy within the ostentatiously well-regulated household astonishes'.[31]

But what is truly astonishing is the change of mood that occurs at the end of her introduction:

> No one who knew him well failed to like him, to respond to him. And his personality is still enormously arresting. In his agility, his social and sexual mobility, his professional expertise and purposefulness, the totally unpompous seriousness with which he looks anew at what he sees as the real issues, he seems extremely modern, almost of our own age.[32]

27 MacCarthy (n 11) xi.

28 MacCarthy (n 11) 262.
29 MacCarthy (n 11) 261.
30 MacCarthy (n 11) viii.
31 ibid.
32 ibid.

But maybe she is wrong about 'our own age' catching up with Gill's 'sexual mobility'. At least if the man chipping away at the BBC's *Prospero and Ariel* can be taken as representative of our age. Indeed, in an article written for *The Guardian* she suggests that 'Gill in 2006 would no doubt be in prison'.[33]

The only deeds she records that could have landed him in prison are of course his sexual relations with his two eldest daughters, Elizabeth and Petra. This takes up one paragraph in MacCarthy's book:

> For instance in July 1921, when Betty was sixteen, Gill records how one afternoon while Mary and Joan were in Chichester he made her 'come', and she him, to watch the effect on the anus: '(1) Why should it', he queries, 'contract during the orgasm, and (2) why should a woman's do the same as a man's?' This is characteristic of Gill's quasi-scientific curiosity: his urge to know and prove. It is very much a part of the Gill family inheritance. (His doctor brother Cecil, in his memoirs, incidentally shows a comparable fascination with the anus.) It can be related to Gill's persona of domestic potentate, the notion of owning all the females in his household. It can even perhaps be seen as an imaginative overriding of taboos: the three Gill daughters all grew up, so far as one can see, to be contented and well-adjusted married women. Happy family photographs, thronging with small children, bear out their later record of fertility. But the fact remains, and it is a contradiction which Gill, with his discipline of logic, his antipathy for nonsense, must in his heart of hearts have been aware of, that his private behaviour was at war with his public image – confused it, undermined it. Things did not go together. There is a clear anxiety in his diary description of visiting one of the younger daughter's bedrooms: "stayed ½ hour – put p. in her a/hole". He ends almost on a note of panic, "This must stop".[34]

The paragraph begins 'For instance…' and in the *Guardian* article I quoted earlier MacCarthy says that 'during those years at Ditchling, Gill was habitually abusing his two elder daughters' so we must assume that these are not the only examples. But, so far as I know, this paragraph is all there is in the public domain, the sole basis on which Gill has been characterised as a 'paedophile' (MacCarthy gives no examples of sexual relations with any others among the many young teenagers and children in Gill's circle). We're not told if these two incidents are typical, if similar things occurred frequently, if these are particularly bad cases, or if there is worse. Nor are we told, in the second case, if, when he says 'This must stop', it did stop, or if this is—or isn't—the only case of penetration occurring.

In 2017, the Ditchling Museum of Art and Craft, which has a very important collection of his work, put on the exhibition *Eric Gill—The Body*, designed to face up to this embarrassing part of its legacy. This might have been an opportunity to explore the Diaries further, but it does not appear to have been taken. Instead, the assumption was that all that needed to be known was known. To quote an account prepared by Index on Censorship: 'awareness of this aspect of his biography is widespread and has been fully discussed and debated'.[35] The approach was to invite visitors to the exhibition to respond to the works—many of them naked bodies, lovers embracing, detailed studies of male genitalia—in light of the knowledge that they were done by a man who abused his daughters. According to a statement by the Museum director, Nathaniel Hepburn:

> This exhibition is the result of two years of intense discussions both within the museum and beyond, including contributing to an article in *The Art Newspaper* in July 2015, hosting #museumhour twitter discussions on 22 February 2016 on 'tackling tricky subjects', a workshop day with colleagues from museums across the country hosted at the museum with Index on Censorship, and a panel discussion at 2016 Museums Association Conference in Glasgow. Through these discussions Ditchling Museum of Art + Craft feels compelled to confront an issue which is unpleasant, difficult and extremely sensitive. It has by no means been an easy process yet we feel confident that not turning a blind eye to this story is the right thing to do. This exhibition is just the beginning of the museum's process of taking a more open and honest position with the visitor and we already have legacy plans in place including ensuring there will continue to be public acknowledgement of the abuse within the museum's display.[36]

It was a delicate exercise. There were consultations with charities helping survivors of abuse, there were two writers in residence, helplines, and support literature for people who could have been adversely affected by the content of the show. The sculptor Cathie Pilkington was co-curator and had a little exhibition of her own, based around a wooden doll Gill had made for Petra when she was four years old. In its atmosphere of high seriousness, it was all a far cry from MacCarthy's summing up of the life at Ditchling, where the cases of misconduct she describes occurred—she says there's no record of them occurring later:

> It was not an unhappy childhood, far from it. All accounts, from the Gill and Pepler children, the children of the Cribbs and the other Ditchling families, so closely interrelated through the life of the workshops and the life around the chapel, verge on the idyllic. Simple pleasures, intense friendships, great events – like the annual Ditchling Flower Show and the sports on Ditchling Common, with Father Vincent, as timekeeper, stopwatch in hand; followed by a giant Ditchling children's tea party. There were profound advantages in growing up at Ditchling. But the children always felt—this was the price of self-containment—that it was other people who were odd.[37]

Among the 'frequently asked questions' prepared for the exhibition, there was this:

> Isn't it true that Gill's daughters did not regard themselves

33 Fiona MacCarthy, 'Written in stone' *The Guardian* (22 July 2006) <https://www.theguardian.com/artanddesign/2006/jul/22/art.art>.

34 MacCarthy (n 11) 155-156.

35 Julia Farrington, 'Case Study—Eric Gill/The Body' (15 May 2019) <https://www.indexoncensorship.org/2019/05/eric-gill-the-body-case-study/>.

36 Nathaniel Hepburn, 'Eric Gill / The Body: Statement from the Director' *Index On Censorship* (7 May 2019) <https://www.indexoncensorship.org/2019/05/eric-gill-the-body-statement-from-the-director/>.

37 MacCarthy (n 11) 154.

> as 'abused'? They are reported as having normal happy and fulfilled lives and Petra at almost 90 commented that she wasn't embarrassed by revelations about her family life and that they just 'took it for granted'. Aren't we all perhaps making more of this than the people affected?[38]

The quote comes from an obituary of the weaver, Petra Tegetmeier, which appeared in *the Guardian*:

> A remarkable aspect of those liaisons with Petra is that she seems not only to have been undamaged by the experience, but to have become the most calm, reflective and straightforward wife and mother. When I asked her about it shortly before her 90th birthday, she assured me that she was not at all embarrassed—'We just took it for granted'. She agreed that had she gone to school she might have learned how unconventional her father's behaviour was. He had, she explained, 'endless curiosity about sex'. His bed companions were not only family but domestic helpers and even (to my astonishment when I heard about it) the teacher who ran the school at Pigotts.[39]

The Museum's reply to the question was as follows:

> Elizabeth was no longer alive when Fiona McCarthy's book was published, and those who met Petra certainly record a calm woman who managed to come to terms with her past abuse, and still greatly admired her father as an artist. I don't think that we should try to imagine her process to reaching this acceptance as we know too little about her own experiences.

So, although we are told that 'we know too little about her own experiences' the idea is reaffirmed that 'her past abuse' was a problem she had to come to terms with, despite her own statement that it wasn't. A certain disquiet about the position of Petra in all this is expressed by some of the people involved in the project. One of the writers in residence, Bethan Roberts, wrote a short story about her called 'Gospels', which was posted on the Ditchling Museum website but now seems to have disappeared. The other, Alison Macleod, commented: 'Yes, the biography is upsetting disturbing in part and there was clearly a history of abuse that is without question. But it is made slightly more complex by the fact that the two daughters [who] were abused said they were unembarrassed about it, not angry about it, loved their father, and didn't give the response that perhaps I'm imagining, or some people expected them to give – to be angry about it and condemn their father's behaviour. They didn't. So maybe they have internalised their trauma, but you could say that that response is almost patronising to the two women, the elderly women who were very clear about what they felt, so it goes into a loop of paradoxes of riddles that you cannot really ever solve'.[40]

The resident artist, Cathie Pilkington, carved a series of heads based on the doll Gill had made for Petra and labelled them 'Petra'. Steph Fuller, an artistic director of the Museum who said that she had been on the outside of the project but 'recruited while the show was on' felt uneasy about this:

> The real legacy issue, which I am grappling with at the moment, is that the voice that was not in the room, was Petra's. She was very front and centre as far as Cathie's commission was concerned, but there is something about how the work conflated Petra with the doll and being a child victim, that I'm a bit uncomfortable about actually. There is lots of evidence of Petra's views about her experiences, and how she internalised them, that was not present at all anywhere. It is easy to project things on to someone being just a victim and Petra would have completely rejected that.
>
> In terms of legacy how we continue to talk about Gill and his child sexual abuse and other sexual activities which were fairly well outside the mainstream, I think—yes acknowledge it, but also—how? I am feeling my way round it at the moment. There are plenty of living people, her children and grandchildren who are protective of her, quite reasonably. I need to feel satisfied that when we speak about Petra, we represent her side of it and we don't just tell it from the point of view of the abuser, to put it bluntly. If it is about Petra, how do we do it in a way that respects her views and her family's views?[41]

According to Rachel Cooke, who was brought in as a sort of resident journalist, Pilkington had commented on the doll: 'This is a very potent object. It looks to me just like a penis'. She continues:

> Her installation, central to which are five scaled-up versions of the head of Petra's doll (one decorated by her 11-year-old daughter, Chloe), will explore different aspects of Gill's practice, and the way we are inclined to project his life on to his work, sometimes in contradiction of the facts: "The tendency—if there is a picture of a figure—is to chuck all this interpretation on it… it can't just be a beautiful drawing or a taut piece of carving. But sometimes it is. Where, I'm asking, is Petra in all this? There are aspects to her life apart from the fact that her father had sex with her".[42]

Exactly. Though I for one was left wondering how exactly her installation—a sort of doll's house full of little knicknacks including the doll's heads—contributed to our understanding that Petra and Elizabeth were something other than just victims of sex abuse, and that there was more, much more, to their relation with their father than the sex.

A catalogue was produced.[43] Apart from Cathie Pilkington's installation it consisted largely of highly representational life drawings, including some of his studies of his friends' (male) genitalia. Material that will appeal to the 'art connoisseur' for whom Gill expressed such lofty contempt. It leaves me wishing

38 'Eric Gill / The Body: Q&A for visitor services' *Index On Censorship* (7 May 2019) <https://www.indexoncensorship.org/2019/05/eric-gill-the-body-qa-for-visitor-services/>.

39 Patrick Nuttgens, 'Unorthodox liaisons' *The Guardian* (6 January 1999) <https://www.theguardian.com/news/1999/jan/06/guardianobituaries>.

40 Julia Farrington, Case Study (n 35).

41 ibid.

42 Rachel Cooke, 'Eric Gill: can we separate the artist from the abuser?' *The Guardian* (9 April 2017) <https://www.theguardian.com/artanddesign/2017/apr/09/eric-gill-the-body-ditchling-exhibition-rachel-cooke>.

43 Nathaniel Hepburn and Catherine Pilkington, *Eric Gill: the body,* with Catherine Pilkington, *Doll for Petra* Ditchling Museum of Art and Craft, Exhibition catalogue (29 April-3 September 2017).

that he had taken Thomas Aquinas's instruction to imitate nature in its way of working not in its effects—the renunciation of post-Renaissance representational art—more seriously, as Gleizes did when he advanced into non-representational art, an art that Gleizes claimed might eventually be worthy of comparison with the non-representational art of the oriental carpet.[44]

Rachel Cooke quotes Fiona MacCarthy saying:

> She has watched in "dismay" as the fact of Gill's abuse of his daughters has grown to become the thing that defines him. "My book was never a book about incest, which is what one would imagine from many hysterical contemporary responses," she says. "It was a book about the multifaceted life of a multi-talented artist and an absorbingly interesting man." As people demand the demolition of his sculpture in public places—the Stations of the Cross in Westminster Cathedral, Prospero and Ariel at Broadcasting House—she asks where this will end: "Get rid of Gill, but who chooses the artist with morals so impeccable that they could take his place? ... I would not deny that Gill's sex drive was unusually strong and in some cases aberrant," she says, "but to reduce the motivation of a richly complicated human being to such simplification is ludicrous." Reducing art to a matter of the sexual irregularities of the artist, she believes, "can only in the end seriously damage our appreciation of the rich possibilities of art in general".[45]

MacCarthy's book is impressive and enjoyable and does indeed give a good account of the 'multifaceted life of a multi-talented artist and an absorbingly interesting man'. I have no problems with the mention of sexual relations with Elizabeth and Petra, which are unquestionably part of the story. But the book was sold vigorously and no doubt successfully on the basis of the scandals it revealed. That may have been the responsibility of the publisher, but MacCarthy played this element up in her Introduction, which has an atmosphere all its own and may well have been the only part most of the reviewers bothered to read. The result is that, as she says, 'the fact of Gill's abuse of his daughters has grown to become the thing that defines him'.[46] I have no idea why the man who attacked Gill's statue or the people who have signed the 38 degrees petition have felt so strongly on the matter. It may well be that they themselves suffered some sort of abuse in their childhood, and I can hardly blame them for their feelings confronted with the work of a man whom they know, simply and exclusively, as an abuser. The more so when the BBC's own 'culture editor' characterises him as 'a monster, a depraved paedophile who ... committed horrific sexual crimes'. But it also needs to be understood that different kinds of sexual activity can cover a wide variety of feelings and reactions on the part of both 'perpetrator' and 'victim', and that a blanket categorisation that would throw Eric Gill and his relations with his daughters (unquestionably very loving independently of the sexual side) into the same category as Jimmy Savile and his relations with his victims doesn't contribute very much to our understanding of what it is to be human.

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44 Unpublished ms note in the Gleizes archive formerly kept at Aubard.

45 Cooke (n 42).

46 MacCarthy (n 11).

Political Messianism, Redemption of the Past, and Historical Time

Max Klein

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Introduction

It would be pointless to list all the issues driving so much of society to take on a pessimistic view of our near future and view us as living through an age of crisis. Even if one attempts to muster the statistics to show how, despite appearances, the world is getting better overall, the very fact that everybody thinks and acts as if we are in the middle of or heading towards a catastrophe is in itself emblematic of the volatility of the current age. If the pandemic and the charged geopolitical situation triggered by Russia's invasion of Ukraine were not enough to put to bed the idea that we were living in a utopia back in 2019, the statistics constantly cited by neoliberal optimists like Nicholas Kristof and Steven Pinker to paint the present as the pinnacle of all humanity have been thoroughly debunked as data manipulation by a host of economists and anthropologists.[1] What is less clear, however, are the reasons why we ended up in such a predicament. The centre, left, and right, while occasionally coinciding on certain particular solutions, have markedly different explanations. The left will blame either the inherent structures of an economy structured around the profit motive, American imperialism, or the neoliberal order as instituted beginning in the 70s and 80s; the right laments the breakdown of traditional social hierarchies, immigration, and the erosion of national sovereignty in favour of trans-national trade agreements and rootless global finance; and the centre chastises everyone for losing trust in the 'rational' technocratic structures and norms of the international world-system governing the age of American total hegemony after the collapse of the Berlin wall. Depending on whether they are more left or right-leaning, centrists will also either blame white supremacy and unrealistic demands by the 'far left,' or the Trumpian takeover of the 'Grand Old Party' and the left's excesses of political correctness and identity politics.

While any one of these individual explanations indicates certain real problems that cannot be merely dismissed due to political disagreements about their causes and solutions, these explanations are not all mutually exclusive and none by themselves can fully describe our current predicament. Although, because nothing exists outside of bias or ideology, I will admit my personal sympathies to lie with the first view that our situation can be elucidated by examining the fundamentally crisis-prone nature of the capitalist mode of production, saying this by itself without context would not be productive. Capitalism as the dominant mode of production has existed for at least two centuries and a more in-depth analysis of economic and state structures would be required to show exactly why it is manifesting in the specific form of crisis we see today. Therefore, rather than examining exact policy and system-change proposals or giving a comprehensive economic analysis of why we are here today (which already produces many hot debates), this article will attempt to examine modes of thought necessary to begin thinking about what redemptive social transformation in a time of crisis would mean. For given the vast power of our technology, high levels of technical and scientific expertise, and over a century of struggles and proposals on how to move to a freer, more sustainable, and less economically precarious society, if it were merely a matter of the right technical fixes and not also of people's consciousness, we would have already been able to construct a better world by now.

The Marxist tradition has traditionally framed the relationship between the consciousness required to change the world and the concrete actions by civil society, political parties, and the state to implement these changes as the dialectic between theory and praxis. While the two are viewed as impotent when taken in isolation, Marx's famous thesis 11 on Feuerbach, that 'the philosophers have only *interpreted* the world in different ways; it is necessary to *change* it', states the primacy of praxis, as theory and philosophy have no actuality outside of the way they inform action in the world.[2] When one can accurately theorise a situation with the goal of intervening in it in mind, effective strategy combined with proper subjective

1 Cf. Jason Hickel, *The Divide: A Brief Guide to Global Inequality and its Solutions* (William Heinemann 2017).

2 Karl Marx, 'Thesen über Feuerbach' in Volker Gerhardt (ed), *Eine angeschlagene These* (Akademie Verlag 1996) 298. Translation the author's.

'fidelity to the Event' (to use Alain Badiou's terms) then brings about a new reality, meaning that we will then dispense with old ways of thought.[3]

However, the ability of one's understanding of the world to influence the course of events is dependent on the existence of a political agent or agents who contest the direction of society as a whole. If the battling of competing theories and truth-claims by different organisations and layers of society to model the world after themselves is politics, our recent history before Covid and the Russian intervention was therefore apolitical, marked by political stasis, even with dangerous figures like Trump sticking mostly to standard conservative neoliberal policies. The emergence of issues related to the global commons, such as climate change, Covid, and the war in Ukraine, have caught us completely off-guard. Despite decades of warnings from scientists about pandemics and the consistent build-up of tensions between Russia and the West since the end of the Cold War, few predicted the breakout of these two events. Some would say that this is because we live in a post-truth era, where people ignore facts when making theories about the world, thereby informing bad policy. However, we live in a post-truth era not simply because the facts promulgated by 'experts' are being ignored by the masses, but because no truths with the meaningful power to change and shape the world, rather than merely manage it, arise out of the facts. Following Badiou's conception, truths are not only the correspondence of a statement to facts in the world, but primarily to the struggle of subjects to affirm them and reorganise reality around them.[4] Therefore, we live in a post-truth world not because nobody recognises facts anymore, but because there are no longer subjects and institutions to push through the repressed truths that should emerge from these facts.

Likewise, as I will explore with reference to the notion of the end of history, we have been living in a post-history era not because there are no events, but because these events have not been the site for the creation of new worlds, subjects, and the implementation of repressed truths. Although it is clear that this era is coming to a close, the events that have brought about this end of the end of history (Covid, the Ukraine war, climate change, and economic instability) have merely politicised people as individuals without bringing back the classical realm of politics proper as the collective fight for the implementation of different theories of society based on differing interpretations of society.

In light of us moving to a new era yet finding ourselves able to neither theorise nor act upon it, it is worth bringing up Hegel's more pessimistic take on the relationship between theory and praxis. 'When philosophy paints its grey in grey, a form of life has grown old, and it cannot be rejuvenated with grey and grey, but only be recognised; the owl of Minerva begins its flight only with the breaking of dusk'.[5] It has been in fashion since post-structuralist thinkers such as Gilles Deleuze to think of Hegel as a 'totalizing' optimist, who merely justifies the status quo by declaring it to be a fully rational system that overcomes all antagonism. However, the previous quote rather exemplifies that Hegel's attempts to rescue and integrate the newly won idea of freedom into a philosophical system, as social conditions of the early 19th century and the rise of industrial capitalism were threatening it. Therefore, the recognition that his ability to systematise the world, 'when philosophy paints its grey in grey,' coincides with the coming of a newly contested reality, meaning that one must therefore constantly be reconceiving the concept of freedom and the actions and institutions that implement and guarantee it. As Russia's invasion of Ukraine (just as Covid nears the possibility of becoming endemic) definitively marks the owl of Minerva's taking flight from the end-of-history era, this article will attempt to paint the grey and grey that defined our recent political situation and some of its effects in culture. I will rely heavily on concepts from the recently published *The End of the End of History* (2021),[6] as well as Anton Jäger's notion of 'hyper-politics'[7] to examine how we came to such a desperate position, lacking both in redemptive ideas, subjects, and organisations. Without offering a definitive solution, I will propose a concept of Messianism that can combine both the Marxian and Hegelian conceptions of the relationship between philosophy and its effects on action in the world and balances anchoring in the past and present necessity for upheaval. For Messianism is not only a desperate plea for the Other to intervene in our existence and does not merely entail waiting about idly for rescue, but is also predicated upon the active use of human intellect to theorise the positive potentials of the current age and put them into practice.

Politics ex nihilo?

To understand why everything appears to be politically contentious nowadays, yet nobody seems able to change anything and we lack competent and inspiring leaders, we should reflect on our recent history of political stasis to note the continuities and differences with the current moment. We should start with the end of the Cold War, as that marked the last period in living memory for many people where there seemed to be an apparent clash of visions for the future and ways of organising society. Francis Fukuyama proclaimed in his essay 'The End of History?' that the fall of the Soviet Union marked not the end of events, social conflicts, or suffering in general, but rather that there would be no more competing paradigms for world hegemony beyond minor flare-ups in areas of the global periphery.[8]

The regime of politics that dominated the immediately post-Cold-War period, exemplified by Fukuyama's triumphalist announcement of the end of real ideological struggle, is designated by Alex Hochuli, George Hoare, and Philip Cunliffe in *The End of the End of History* as 'post-politics'. They define the term as 'a form of government that tries to foreclose political contestation by emphasising consensus, "eradicating" ideology and ruling by recourse to evidence and expertise rather than interests or ideals'.[9] Despite being premised on the official coronation of liberal democracy and its associated rights and freedoms as synonymous with scientific and technocratic governance, post-politics also coincides with massive popular demobilisation, a foreclosure of the public sphere to administrators and technocrats, as well as the consignment of politics to the level of personal interest, where being interested in politics is at the same level of Marvel fandom or following football. All of this is profoundly anti-democratic, undermining the role that popular will can play in shaping collective decision making.

3 Cf. Alain Badiou, *L'être et l'événement* (Édition du Seuil 1988).

4 Cf. Alain Badiou, *The Immanence of Truths* (Bloomsbury 2022).

5 Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (first published 1820, Akademie Verlag 1981) 28. Translation the author's.

6 Philip Cunliffe, George Hoare, and Alex Hochuli, *The End of the End of History: Politics in the Twenty-First Century* (Zero Books 2021).

7 Anton Jäger, 'How the World Went from Post-Politics to Hyper-Politics' (*Tribune*, January 3 2022) <https://tribunemag.co.uk/2022/01/from-post-politics-to-hyper-politics> accessed 10 June 2022.

8 Francis Fukuyama, 'The End of History?' (1989) 16 The National Interest 3-18.

9 Cunliffe, Hoare, and Hochuli (n 6) 4.

With mass movements and struggles that put the whole of society in question consigned to the dustbin of history, post-politics emphasises the private individual as the focus of all policy making. Though stated a few years before the post-political period proper, Margaret Thatcher's famous declaration that 'there is no such thing [as society]; there are individual men and women and there are families' exemplifies the individualist maxim of this era.[10] This new post-political order was declared as being no more constructed and determined by humans than the natural world, with Tony Blair proclaiming that 'globalisation is a force of nature', no more debatable than the fact that 'autumn should follow summer'.[11] With neither talk of political orders nor reference to anything but the disconnected pursuit of private interests by private persons, with no responsibilities to individuals beyond their most immediate kin, even naming the system we lived in became impossible. 'Shorn of a systemic alternative, even the notion that we lived in a system called "capitalism" receded from view'.[12]

The 90s and 00s were not completely without polarising issues: we might name rising partisanship under the Clinton presidency, the threat of global terrorism after 9/11 and the accompanying attacks on civil liberties, and the wars in the Middle East as examples. All-out rejection of society at large was, however, either completely absent, channelled into silent resignation, or expressed in subcultural scenes (e.g. grunge, rave culture, or bands like Rage against the Machine), which were always caught between the tensions of their radical image and seemingly inevitable corporate co-option. However, once the 2008 crisis showed the unsustainability of 'debt-fuelled consumption' to '[assuage] anxieties', post-politics lead to anti-politics, where antagonism and struggle against power structures were back on the table, yet lacking any program or affirmative proposals.[13] Anti-politics can be described as the response to the collapse of post-politics after the global financial crash. The most notable political actor of this period was populism, ranging from Occupy, Syriza, and Podemos to Trump, Brexit, and a renewed Front National in France. Anti-politics, rather than aiming at new forms of politicisation around an idea of a new politics, is merely a reaction against what it perceives as the professionalised and sectioned-off world of officially sanctioned politics' corrupted existence. Rather than creating powerful organisations to challenge big capital, the anti-political stance bemoans the mismanagement of the situation by technocratic elites, who forced politicisation upon people by severing their material conditions and introducing market disorder to the post-political space, which was billed as being free of conflict.

One could take the Occupy Wall Street movement as an example of a movement, which spurned all forms of institution and organisation-building that could take on the economic regime as a whole. Instead, it blamed a particular group of specific figures (the 1%), overlooking class differences amongst the 99% themselves, and praising a version of horizontalist organising based on fetishizing immediate relations between normal people outside of the sanctioned political space of the 1% and economic institutions. The failure of Occupy to effect change epitomised the era which Mark Fisher famously called 'capitalist realism'.[14] People are mad and disgruntled and the system has been shocked to its core, yet nothing changes and people cannot even think of actually creating a new social order, choosing instead to take a simply negative stance of consternation against the troubled reality thrown upon them as if from outside. The left in anti-politics, still reeling from the post-politics era, shirked from the task of coming to power at a national level. While internationalism and a critique of the viability of nation states as the site of liberation has been and should be a cornerstone of left-wing analysis, this failure to face up to the reality that the global order is structured on national lines is a manifestation of its internalised defeat. To avoid truly contesting national politics, the authors of *The End of the End of History* note that the left has both made vain attempts at trans-national politics, such as the DiEM-25 movement, and retreated to local participatory structures and support in certain urban municipalities, such as Berlin, Barcelona, or Seattle's Capitol Hill.[15] Yet this has only served to confirm the retreat of the left from the task of societal transformation to the comfortable place of revelling in minor localised successes.

Taking its incipient form in the Trump era, with an anti-political figure taking power and bringing about polarisation in all parts of lie, and coming into full bloom during our hyper-online forced confinement during Covid, post-politics has now given way to what Anton Jäger has called 'hyper-politics':

> A new form of 'politics' is present on the football pitch, in the most popular Netflix shows, in the ways people describe themselves on their social media pages…Yet instead of a re-emergence of the politics of the twentieth century—complete with a revival of mass parties, unions, and workplace militancy—it is almost as if a step has been skipped…Today, everything is politics. And yet, despite people being intensely politicised in all of these dimensions, very few are involved in the kind of organised conflict of interests that we might once have described as politics in the classical, twentieth-century sense.[16]

Now, the various divisions of the left, right, and centre's visions of how the world should be are becoming clearer and permeate every single fact of life. Yet, despite this, nothing seems to change, with the technocratic centre reasserting its power with Covid and the election of Joe Biden. Another hallmark of our current moment is the tendency to view all political issues through the lens of 'culture wars' and to make various aspects of personal morality and cultural history the site of political contestation, where we are meant to prove our own individual virtue rather than organising around shared material interests. Given the constant political scrutiny and evaluation of everything from hairstyles to cartoons and comedy shows, it seems the public sphere is everywhere. There are no real civil society organisations to back it up or mobilise people to a positive goal, with religious groups, in-person cultural scenes, and unions that are not mere state or party management of interests having failed to regain their previous levels of participation and militancy. This is made even worse by Covid and social media siloing us both literally and figuratively into our personal bubbles. As Jäger notes, even with politicisation of every facet of life, political parties have not regained their previous levels of membership, which has declined by an average of 69% for the major parties of Belgium, Germany, and the Netherlands.

10 Douglas Keay, 'AIDS, Education, and the Year 2000: An Interview with Margaret Thatcher' (*Woman's Own*, 31 October 1987) 8-10.

11 'Tony Blair's Conference Speech 2005' *The Guardian* (London, 27 September 2005) <https://www.theguardian.com/uk/2005/sep/27/labourconference.speeches> accessed 10 June 2022.

12 Cunliffe, Hoare, and Hochuli (n 6) 5.

13 ibid 36.

14 Mark Fisher, *Capitalist Realism: Is There No Alternative?* (Zero Books 2010).

15 Cunliffe, Hoare, and Hochuli (n 6) 148-9.

16 Jäger (n 7).

Despite making everything political, hyper-politics has not overcome the post-political erosion of the public sphere. It has rather promoted a public sphere whose every part is merely a reflection of private desires and conflicts. One can invoke here the classic 'ship of Theseus' thought experiment, where a museum ship's parts are slowly replaced over a period of time to the point that the ship's form stays the same, but not a single physical component of the original remains, begging the question of whether the same ship remains. We could say that, through the various political forms of the end-of-history era, what used to be the public sphere has been slowly replaced with pieces of entertainment, personal spats on social media, and culture war issues. In face of this, it is questionable whether we are still even dealing with a public sphere at all. Instead, mass expression of individual virtues is passed off as politics and interaction with the public sphere takes place only through atomised engagement with social media in the interests of personal entertainment.

People form their political opinions today through scrolling past various punchy headlines as they appear in their feeds and then sharing them without reading through the articles themselves. Far from being a place of meaningful public communication by people around the world to create networks that would bring about social change, the great hope during and after the Arab Spring, the use of social media to share news and engage politically has degenerated into mere feedback loops of outrage, sneering, and mockery. These serve mainly to entertain us in a feed of content, flattening the significance of the various individual articles, posts, and discussions we come across. Covid accelerated this tendency exponentially; during periods of lockdown and semi-normality, certain people accessed the world only through social media. Phenomena such as Neuralink, Metaverse, NFT's, or Google Glass represent attempts at totalising this type of digital engagement even more completely to all facets of waking life—a dream for those in power who want to prevent our hyper-charged reality from spilling over into real social unrest. Whether or not they are practicable, the fact that our tech oligarchs are moving in such a direction is indicative of the role current virtual online spaces play in our political sphere.

Cultural defence mechanisms against the return of politics

Hyper-politics shows itself to be a synthesis of the globalised political stasis of post-politics, which forecloses thought about any new society, bringing along a hyper-charged environment of extreme polarisation and pseudo-politics without concrete programmatic visions for the future. All of this, in combination with the various cultural pathologies of social media, leads to some very peculiar overlaps between the public sphere, personal entertainment, cultural mores, and political contestation. Though reverence for charisma and for the politician and business figure as a 'personality' has existed for a long time, the active celebrification of public figures has reached new heights. This is clearly the case for figures like Trump or Zelenskyy, who built their careers in media and whose rises can be partially attributed to personal charisma and having already been a household name for years. Elon Musk, similarly, has taken advantage of the neuroses of online popular culture to build a falsified image of his 'genius'. However, this trend is even more notable when mainstream figures are elevated to celebrity status, such as Andrew Cuomo (a classic New York machine politician) and Anthony Fauci (a career bureaucrat) for giving the air of competence in contrast to Trump, while relying on the liberal media's pandering to their role in the culture war to shroud their own indiscretions. Even a figure like Jeremy Corbyn was memeified, with his name chanted at football stadiums and declared as the 'absolute boy': this despite him being personally rather uncharismatic and unable to build a robust counter-image of himself against smears by the mainstream press beyond the insipid slogan of 'a kinder, gentler politics'.

In the broad realm of what gets called 'identity politics'—a vague term, which nonetheless refers to a large set of generally recognised phenomena—one can see how a hyper-political landscape is used to gloss over the bread and butter issues pertinent to the mostly working class members of historically marginalised groups. A classic manifestation of this, which has reached its peak since the hyper-political MeToo movement, is the 'girl-bossification' of vapid, corrupt, and uninspiring political leaders and corporate executives, taking shape with Sheryl Sandberg's 'Lean In' and reaching its apex with Hillary Clinton's presidential campaign. Criticism of their records, class status, or elite-friendly policy proposals, even from a feminist standpoint, could easily reduced to mere sexism. In racial politics, a similar framing of all sociological categories through hyper-mediatised exposures of individual racism has been called 'race reductionism' by political scientist Adolph Reed.[17] Unlike when racial struggles were more directly connected with socialist movements, trade unions, or basic material demands and universalist messages, social justice movements increasingly focus on diversifying elite positions in business, media, and politics, closing the wealth gap (which exists primarily between the upper classes of various races) as well as attempting to restrict cultural exchange to fight 'cultural appropriation.' This coincides with the rise of what Haitian-American writer Pascal Robert calls 'the Black Political Class': a minority of black people in positions of power within their own community, who proclaim their own interests, i.e. as members of the middle and upper classes, as the interests of black people at large and 'who work as a "race management" elite that metaphorically corrals Black electoral choices into a politically contained vessel'.[18] What Robert is identifying is a generalised phenomenon not specific only to African-Americans, whereby the struggle against various particular racial, religious, or gender-based oppressions is conceived not in universalistic terms, but rather through the concept of 'representation.' This serves more to benefit those already in a privileged position to speak for their marginalised group than to remedy the less glamorous problems shared by poor and working class people of all identities. Furthermore, identity reductionism also serves as tool of the ruling class at large to portray anything that opposes either their self-serving cultural policies or elite technocratic rule at large as rooted in racism, sexism, or other forms of intolerance, the accusation of which can (justifiably) discredit someone's political ideas. An example of this was the painting of the Canadian trucker protest against vaccine mandates and the biomedical security state as 'conspiracy theorists' and 'white supremacists' by the Liberal government to justify invoking war-time security measures: or the labelling of Bernie Sanders' male supporters as 'Bernie bros' to falsely conflate critique of Hillary Clinton and support for social democracy as sexist.

17 Adolph Reed, 'Socialism and the Argument against Race Reductionism' (2020) 29(2) New Labor Forum 36–43.

18 Pascal Robert, 'A Black Political Elite Serving Corporate Interests Is Misrepresenting Our Community' (*Newsweek*, 23 November 2021) <https://www.newsweek.com/black-political-elite-serving-corporate-interests-misrepresenting-our-community-opinion-1652384> accessed 10 June 2022.

Parallel to the use of identity politics is the generalised tendency of modern hyper-politics to reduce every conflict to one between the forces of good and the forces of evil. This was present to a degree in George Bush's famous identification of an 'axis of evil.' A contemporary example of this is the coverage regarding Ukraine. Although Putin's war of aggression bears as little justification as Bush's invasion of Iraq, almost the entirety of the media has framed the conflict as one of pure innocent freedom-loving Europeans against 'Eastern despotic hordes,' rather than a more nuanced examination of the different factions within both countries. Instead, we are throwing our own cultural quarrels onto a regional conflict and framing Ukraine, another impoverished post-Soviet oligarchy with moderately stronger liberal civil liberties than Russia, as the bastion of everything free and civilised about the West. In doing so, we end up infantilising Ukrainians and whitewashing their leaders, such as Zelenskyy himself, who, as honourable as his decision to stay in Kyiv was, is himself supported by oligarchs,[19] holds wealth in offshore accounts,[20] and recently banned all independent media and 11 political parties in order to stop 'pro-Russian disinformation', even though some on the list have condemned Russian aggression and are non-aligned socialist parties.[21] By praising Ukraine as the upholder of *our* free liberal democratic order, despite recognising for years our system's decay to a point where freedom is becoming merely formal, we are being morally blackmailed to accept our own state of unfreedom and our societies' giving up on their avowed liberal principles as the pinnacle of human freedom. We can thereby see a clear attempt to restore the post-history consensus in light of the shocks of both Covid and the Russian invasion of Ukraine.

Pop culture and culture war metaphors of goodies and baddies were used in similar ways to justify curtailments of our freedoms and collective well-being during Covid lockdowns. As discussed, calls for censorship and 'content moderation' on tech platforms were justified by painting anybody who questioned the conclusions of officially sanctioned experts as right-wingers, conspiracy theorists, and racists. This was used to suppress important and potentially politically influential stories such as evidence for the lab-leak theory and the Hunter Biden emails. With the re-fetishisation of technocracy in the aftermath of the 'populist decade', in which experts started to appear discredited, management and technocracy have reasserted their cultural cachet while simultaneously feeling constantly like the embattled underdogs in a fight against the evil forces of 'disinformation' and 'Russian meddling'. The authors of *The End of the End of History* call this phenomenon 'Neoliberal Order Breakdown Syndrome':

> This section of society assumes their views and predilections are common sense, while at the same time feeling constantly embattled…While "the liberal package" (combining elements such as cosmopolitanism, respect for expertise, individualism, an emphasis on personal ethics) is culturally hegemonic, liberals refuse to acknowledge their own hegemony. The liberal always has her back to the wall. While their views find home in the newspapers of record, they feel submerged under a tsunami of tabloid content. They flaunt their commitment to tolerance and diversity, but balk at the expression of non-liberal views from their fellow citizens.[22]

This explains how the naturalisation of the ruling technocracy of the post-political period, with its emphasis on neutral expertise, can at the same time coincide with an emphasis on personal morality and individual common sense in the polarised world of hyper-politics.

Many have attempted to explain the Left's lack of resistance to, and even outright support of illiberal and technocratic policies on the basis of moral victimhood, by blaming its capture on the Professional Managerial Class (PMC). However, the socialist movement has always relied on being able to take certain sections of the radicalised middle and upper-middle-classes to bring their intellectual and professional skills to mass organising—from radicalised middle-class progressive liberals like (arguably) Marx himself, to high bourgeois and aristocratic figures who commit 'class suicide' like György Lukács. Nonetheless, the fact that this 'professionalisation' of the Left has taken place in the post-political era has largely foreclosed the events that would previously have pushed this social stratum towards a working-class politics. Instead, there remains a petty managerialism that serves only to counteract the unfulfilled promises of social mobility through education and credentialization. The political gap caused by the absence of a radical Left has been filled by the tech industry's promise to release us from all previous scarcity and social hierarchy. We consigned the thought of the new to marketing wizards like Steve Jobs, to sell us on surrendering every aspect of our social sphere to algorithms. However, the novelty these produce is merely quantitative, regenerating infinite new variations upon a static underlying logic. By adjusting our human behaviour to the impersonal forces of the algorithm, we end up producing things with the sleek presentation of novelty, whilst being progressively deteriorating variations on the same underlying model. Marxist technologist Dwayne Monroe notes, for example, how the term 'artificial intelligence', designating mere pattern matching algorithms combined with vast storage, works to diminish the value and dignity of human labour and ingenuity.[23] In the cultural sphere, the tech-driven explosion of the hours of music available has similarly resulted in a drop in the consumption and production of new music; the 200 most popular new songs account for less than 5% of streaming.[24]

We can see hyper-politics as a correlative to this hyper-charged, yet somehow indifferent domination of all our lives by technology. For, likewise, without a subject borne out by parties and institutions with the power of transforming the state, we cannot turn the quantitatively rising polarisation of every aspect of reality into qualitative political change. Quoting Jäger again:

19 David Clark, 'Will Zelenskyy Target All Ukrainian Oligarchs Equally?' (*Atlantic Council*, 10 July 2021) <https://www.atlanticcouncil.org/blogs/ukrainealert/will-zelenskyy-target-all-ukrainian-oligarchs-equally/> accessed 10 June 2022.

20 Aubrey Belford, Luke Harding, and Elena Loginova, 'Revealed: 'anti-oligarch' Ukrainian president's offshore connections' *The Guardian* (London, 3 October 2021) <https://www.theguardian.com/news/2021/oct/03/revealed-anti-oligarch-ukrainian-president-offshore-connections-volodymyr-zelenskiy> accessed 10 June 2022.

21 Grayson Quay, 'Zelensky Nationalizes TV News and Restricts Opposition Parties' (*The Week*, 20 March 2022) <https://theweek.com/russo-ukrainian-war/1011528/zelensky-nationalizes-tv-news-and-restricts-opposition-parties> accessed 10 June 2022.

22 Cunliffe, Hoare, and Hochuli (n 6) 62.

23 Dwayne Monroe, 'Attack Mannequins: AI as Propaganda' (*Computational Impacts*, 19 September 2021) <https://monroelab.net/attack-mannequins-ai-as-propaganda> accessed 10 June 2022.

24 Ted Gioia, 'Is Old Music Killing New Music?' *The Atlantic* (Washington DC, 23 January 2022) <https://www.theatlantic.com/ideas/archive/2022/01/old-music-killing-new-music/621339/> accessed 10 June 2022.

> In many ways it seems that the lesson which has truly been learned from the 'post-political' era is that politics must be reintroduced into the public sphere. But without the re-emergence of mass organisation, this can only occur at a discursive level or within the prism of mediatic politics: every major event is scrutinised for its ideological character, this produces controversies which play out among increasingly clearly delineated camps on social media platforms, and are then rebounded through each side's preferred media outlets. Through this process much is politicised, but little is achieved.[25]

At the same time, as shown in Hegel's 'owl of Minerva' quote, although the ability to theorise the totality of an era corresponds to its passing, it also coincides with the recognition and preservation of an original idea of freedom that has been lost and must be recovered. As much as I have criticised in this article the current state of liberal democracy, scientific management, and technology, at various points these have brought with them the promise of liberation from earlier forms of domination and rigid positions within a social caste. It is once these had wholly swept aside older forms of unfreedom that the contradiction of free labour itself showed itself in its full form and brought about the demand for it to be overcome. In order to break out of our continuing death spiral, we must relearn how to think about the unrealised potentials of the past, so as to make them actual in a radically new form.

How can we think this freedom in an age of rising unfreedom? Hegel attempted to preserve the notion of liberty sparked by the French Revolution by systematising it into the Absolute in his *Elements of the Philosophy of Right* (1820). Theodor Adorno, in *Negative Dialectics* (1966), takes an inverse approach by introducing the notion of the 'non-identity' of any concept raised to the level of the Absolute:

> By immersing itself in what confronts it a priori, the concept [*Begriff*], and becoming cognisant of its immanently antinomic character, thought dwells on the idea of something beyond contradiction. The antagonism of thought to its heterogenous object is reproduced in thought itself as its own immanent contradiction. Reciprocal critique of universality and particularity, identifying acts that judge whether the concept does justice to what it is concerns itself with and whether particularity fulfils even its own concept, this is the medium of thinking the non-identity of concept and particularity.[26]

Adorno is essentially arguing that the non-identity of any positive content with the material reality it engenders points to the possibility of moving beyond a certain contradiction. Thus, to recover lost ideas of freedom, we must—Adorno suggests—focus on the non-identity of the world as it is with the ideals and structuring principles it is built upon. This is the task of figuring out how to build the new out of the ideas and materials currently at hand.

However, unlike Adorno, we must not stay forever at the level of critique by non-identity. To do so would bring about criticism that is either unable to change anything (it is hard to affirm a concept if we retain the compulsion to deconstruct everything), self-reproducing for the sake of mere theoretical activity, or easily co-optable by the status quo (like tendencies of so-called 'post-modernism'). If we are to think about non-identity, we must not merely think of it in its empty critique as an abstract concept structuring all political theoretical engagement; this would be taking non-identity outside of its intensity and vivacity. Or, as Friedrich Nietzsche would say, this would be a taming of the concept's real effectivity and vitality in the world, in favour of a purely theoretical exercise that degrades concrete experiences of this non-identity.[27]

While not dispensing with the notions of totality or identity, using them rather as operators whose unreality still structures the immediacy of non-identity to reality, we must learn to consider the absolute totality of non-identity in order to tackle its vicissitudes in a historical era like ours. More simply put, we must learn to experience the discontinuity of the past and the future as colouring the tensions of the present situation. This process is immanent, but not exclusively a critique. To overcome both the pitfalls of a systemic justification of the world as it is (such as that undertaken by Right Hegelianism) and the deflationary practice of incessant critique, it strives for renewed self-conscious engagement with the Absolute, i.e. the whole of society as self-consciously shaping its future, at the hinge-points of history where we are faced with either total tragedy or coming redemption: Messianism. In the next section, I will suggest a conception of Messianic thought, based particularly on Walter Benjamin's late works on history, to formulate a generic concept, universalizable throughout particular spiritual, political, and secular contexts, that can engender renewed engagement with the ideas of freedom and redemption of the past so as to break out of the hyper-charged yet languid space brought about by the end-of-history era.

The proposition of Messianism

At first glance, the Messianic longing that there be sent a figure from beyond all conceivable present horizons of possibility seems to have nothing to do with politics. Politics is ultimately about the management and allocation of, and conflict over decision making power, distribution of resources, and mobilisation of labour. On the one hand, then, the notion of a redeeming force coming from outside of all currently imaginable horizons to save us from our own impotence seems to contradict the active engagement and concrete strategising required by politics. On the other hand, we have seen supposedly transformational political movements contenting themselves merely with the technical management of state political affairs. For there to be true politics, there is also the need for a Messianic idea of something outside of what is currently conceivable in state politics to be actively pushed through by partisan political subjects. The task of Messianism is to figure out how the current range of possibilities can be transformed into something that appears impossible in our current horizon.

Rather than being apolitical, the experience of working towards a Messianic or even utopian future and seeking to transform the whole of society responds to the demands of all three of the contemporary regimes of politics discussed in this essay. Firstly, Messianism, in the post-political landscape of the end of history, seeks to bring about a culmination of all previous events as leading to a single point in the present. Rather than being the mere transition between fleeting moments, the present then becomes a monad containing all the congealed influence of the past and its respective potential futures in decisive suspension. This conception of the historical temporality

25 Jäger (n 7).

26 Theodor Adorno, *Negative Dialektik* (first published 1966, Suhrkamp 1999), 149. Translation the author's.

27 Cf. Friedrich Nietzsche, *The Antichrist* (first published 1888) in *The Portable Nietzsche* (Walter Kaufmann ed, Penguin Classics 2008).

of the present is intended to lead away from what Walter Benjamin calls the 'empty homogenous time' of liberal progressivism in his essay 'On the Concept of History'.[28] This was seen clearly in the Third Way politicians of the nineties, who viewed any progress to come out of indifferent cycles of global markets managed by neutral technocrats in a system which seemed to stand outside of the twists and turns of history. While completing a sort of end of history, or rather 'consummation' (*Vollendung*) of history, Messianism differs from post-politics in that it reintroduces politics by bringing all of its conflicts to a decisive hinge point, which, by opening the opportunity for redemption at any moment, does not so much end history as rather transforming it so radically that its concept must be rethought.[29] The kingdom of God on earth brought about by the Messiah is thereby not the ultimate destination of fate, but rather marks the end of a certain period of existence, marking that 'a form of life has grown old' as Hegel said.[30]

Secondly, political Messianism, like populist discontent, contains an antipolitical moment of rejection of the precarious conditions of the present and its institutionally sanctioned ideology. It is in this sense that Messianic thought relates to a sense of crisis and impending catastrophe, rooted in a plea to a force that can save us and let us no longer have to deal with the dreadful present. However, in rejecting the anti-political impulse to sweep away evil actors causing disorder in order to preserve a previous order, it is necessary to concretely introduce new goals and models of social organisation to avoid an impotent sense of nihilistic resentment, which can only push towards the far right. For one must always remember not to reduce political problems to being a matter of an intact social organism, 'the people,' that is undermined by an outside group or factor of essentially different character. Rather, a Messianic view seeks out the contradictions of society in itself and considers redemption not to be the removal of a particular enemy, entity, or institution, but rather the redirection of the past that brought about the current disorder towards a new future: and hence a new past and present.

Finally, the hyper-political moment we are in, with its polarisation of every aspect of politics and social life, while so far merely confused due to the inability to see positive changes, sets the preconditions for actively determining society as a whole. Whereas the incessant debates about every cultural and historical institution and the heated accusations flying on every side are tedious due to their apparent lack of resolution, this is at least an indicator that our current ways of existence socially, economically, civically, and with nature cannot continue sustainably. Hyper-politics, nonetheless, tends to amount to a frantic quibbling over the precarity of the present. It is neither an attempt to redeem the potential of the past nor yet to implement concretely different conditions for the near future. One potential positive of the tendencies for nostalgia shown by culture and art is an at least unconscious memory of the past's lost potentials. Though nostalgia is often a conservative force when engaged in modern phantasmatic reconstructions (as it is neither possible, nor desirable, to resuscitate the past 'as it actually was'), the focus on the absolute difference of the past to the present, as showing the possibility of social reproduction along almost unrecognisable logics, also creates the theoretical space for thought of the new and the redemption of lost futures. Messianic thought is meant to fill the conceptual gap that hyper-politics is currently stuck in, by attempting to think about the redemption of past history through the immediate possibility of a future that overcomes the extreme tension and emergency of the present point in time.

This sense of 'dialectics at a standstill' ('Dialektik im Stilstand'[31]) that Benjamin uses in his inversion of Marxist dialectics, which usually emphasises history's constant movement rather than stasis, helps us to think of how the present, beyond its mere fleeting into the past, can hold all of the contradictions of the past and the potentials of the future at a point, where the subjective factor of history can play a determinate role in shaping the future. Benjamin thereby conceives the Messianic moment not as something flashing up for no reason to our help to bring about an unconditionally good world, but rather as when the whole material and causal nexus that determines our present is halted due to internal breakdown, and can be redirected towards and present the image of a new future.

> History deals with connections and with arbitrarily elaborated causal chains. But since history affords an idea of the fundamental citability of its object, this object must present itself, in its ultimate form, as a moment of humanity. In this moment, time must be brought to a standstill. The dialectical image is an occurrence of ball lightning that runs across the whole horizon of the past. Articulating the past historically means recognizing those elements of the past which come together in the constellation of a single moment…The dialectical image can be defined as the involuntary memory of redeemed humanity.[32]

This uniquely charged moment cannot come about randomly at any time in history. Rather, it has a tragic dimension and is occasioned by desperation and potential catastrophe. The revolutions that make new forms of politics and social life do notcome about as seamless transitions from one progressive age to the next in times of prosperity, but arise when the material and intellectual foundations of a state showthemselves to be in crisis. To quote Benjamin: 'Marx says that revolutions are the locomotiveof world history. But perhaps it is quite otherwise. Perhaps revolutions are an attempt by the passengers on this train—namely, the human race—to activate the emergency brake'.[33] Furthermore, the scholar of Jewish mysticism Gerschom Scholem noted that every instantiation of Messianiam in the Jewish tradition entails not only a utopian dimension, but also the restoration of an ideal original condition. This restorative element likewise also contains utopian implications, because, given change in conditions, what is intended to be reinstated is actually novel and differentiates from both the present and the past. Here is Scholem, in his essay 'Toward an Understanding of the Messianic Idea in Judaism' (1963):

> The restorative forces are directed to the return and recreation of a past condition which comes to be felt as ideal. More precisely, they are directed to a condition pictured by the historical fantasy and the memory of the nation as circumstances of an ideal past. Here hope is turned backwards to the re-establishment of an original

28 Walter Benjamin, 'Über den Begriff der Geschichte' in Walter Benjamin, *Gesammelte Schriften I-2* (first published 1940, Suhrkamp 1980) 704. Translation the author's.

29 Walter Benjamin, 'Theologisch-Politisches Fragment' in Walter Benjamin, *Illuminationen: Ausgewählte Schriften I.* (first published 1921, Suhrkamp 1977) 203-4. Translation the author's.

30 Hegel (n 5) 28.

31 Walter Benjamin, *Gesammelte Schriften V* (Suhrkamp 1982) 577.

32 Walter Benjamin, 'Paralipomena to "On the Concept of History"' in Walter Benjamin, *Selected Writings Volume 4: 1938-1940* (Belknap 2006) 403.

33 ibid 402.

> state of things and to a "life with the ancestors". But there are, in addition, forces which press forward and renew; they are nourished by a vision of the future and receive utopian inspiration. They aim at a state of things which has never yet existed…the Messianic idea crystallizes only out of the two of them together.[34]

What most defines the potentially tragic character of the Messianic moment is that redemption is ultimately not guaranteed. Complete destruction and death, collapse into barbarism, or even continued slow decline and increasingly whitewashed suffering, are all possible. The fact that both overcoming present despair and succumbing to it are absolutely possible is what gives Messianism a central place in intervention by people into history, because it confronts historical antagonism from a point that cannot be smoothed out and seamlessly integrated into the passage of time, shaping individuals out of this experience. It involves a use of political will which cannot be reduced through consensus or conflict mediation. The political actor who takes part in a Messianic project for the future identifies a space that is more originary than either the past individual's material determinacy or subjective will. Theologian Franz Rosenzweig calls this the 'metaethical' dimension of human life,[35] along with the metaphysical and metalogical, critiquing Hegel for attempting to reconcile the individual with the social whole and history through a smoothly integrated system of contradictions.[36] The metaethical aspect of personhood rather, which both extends beyond particular contemporary norms and is always linked to a determinate place in history, comes about at moments where the political subject must act and make decisions to reorient the past and its connection to the future. In conceiving the Messianic moment as one where the incessant movement of history is taken 'at a standstill', one connects with the metaethical dimension of humanity, where subjects intervene to self-consciously shape the rules and structures of social life and morality.

History at the moment of rupture and possible redemption or ruin therefore brings about a reflection on society's past and current potentials as a whole, beyond the apparent chaos of the crisis-ridden situation. For Messianism entails an encounter both with the positive and progressive elements of the past, such as capitalism's institution of free labour, liberal rights, and productive capacities, as well as the present situation of its missed potential, such as in climate change, rising inequality and poverty, and increasingly illiberal and repressive political systems. To self-consciously shape the future and implement a possible redemptive new idea of society, one therefore needs to think both the potentials of the concepts in the past and their non-identity, à la Adorno, with the present situation they have conditioned. The task is to spot the presence of the formerly redemptive ideas of the past as they appear when fleeting from the present. 'For it is an irretrievable image of the past, which threatens to disappear with every present that does not recognise itself as meant in it'.[37] Rather than being fixated on abstract lofty ideals, the Messianic promise of freedom is likewise predicated on having an idea of unfreedom and the threat of total subjugation (by fascism, climate austerity, economic breakdown, etc.). Therefore, instead of being beholden to the hopeful promise of a better future, one must actively fight the enemies of freedom to realise a Messianic future. 'For the Messiah does not only come as the redeemer; he comes as the conqueror of the anti-Christ'.[38] Because the idea of utopia only gains meaning when contrasted with its reflected dystopic potentials. 'Freedom can only be grasped in determinate negation, in proportion to the concrete form of unfreedom'.[39] A Messianic political movement therefore does not conceive of utopia through ahistorical figments of reified thought, but rather as arising out of the concrete potentials of the movement of history in its present moment.

The inversion of the movement of history into a politically charged Messianic moment, where both the concept of freedom and the reality of unfreedom are immanent to political action, puts our subjectivity and connection to the world, social structures, and ourselves into question at its zero-level. In opposition to pure historicism, which presents an invariant history in which human subjects are merely moving parts, the Messianic conception of material history takes this nexus of material contradictions discovered by the historian or political scientist as they matter immanently to historical subjects, who can affect society's direction. With the confusion of events taken in their absolute singularity qua crystallisation into a single moment, one is able to 'burst the continuum of history'.[40] This does not mean an end of history as such or the descent into pure degeneration, but rather the attempt to split the history of humanity into two parts. What Messianism introduces is a way to think about the centre between these two parts, where political agency can be expressed in the subject's engagement. The political-messianic subject therefore comes about by crystallising both its prior historical determination and the accelerating continuum of time into the full gravity of the present moment, in order to mark an absolute break between past and future.[41]

Conclusion

To conclude, it is worth reemphasizing the situation of political foreclosure that generates the need for its overcoming by Messianic thought and action. Recent history has shown both the flatness of the post-history era and the directionless impotence of anti-politics and hyper-politics, all premised on deemphasizing the role of collective affairs and of political order in shaping individuals' lives and creating transformative change. Although we cannot simply choose to think ourselves out of our predicament, we must again affirm the ability of current circumstances to generate ideas of new possibilities and state that any political order, even one declared to be post-history, will inevitably generate ruptures. Where Messianism enters is in thinking about how these breaks in history occur not merely as a seamless unnoticed transitions between systems, but are based around decisive moments, which manifest concretely, beyond both immanence and transcendence, to political actors in the present. This is not simply the imposition of a 'totalising' political idea on top of discrete individuals. By understanding historical events as monads containing past determination, future possibility, and present subjective engagement, Messianism applies universally, allowing anyone to consider the relationship between their own actions and the external arrival of world redemption at the crossroads of history. Combining what Scholem called the 'utopian' with the 'restorative',[42] Messianism is a paradigm that allows the individual to conceive better possible futures through a double reflection on the past: both

34 Gerschom Scholem, *The Messianic Idea in Judaism and Other Essays on Jewish Spirituality* (Schocken Books 1971) 3.

35 Franz Rosenzweig, *Der Stern der Erlösung* (first published 1921, Suhrkamp 1988) 12.

36 ibid 7-8.

37 Benjamin (n 28) 695.

38 ibid.

39 Adorno (n 26) 230.

40 Benjamin (n 28) 702.

41 ibid 702-3.

42 Scholem (n 34) 3.

as conditioning the ways that the future must distinguish itself from the past, and recalling the lost possibilities contained in our origins. For though Messianism is ultimately future-orientated, it rests upon the necessity to think about the Origin, both to understand the causal chains determining our current predicament and conceive of absolute novelty based on our original creative essence.

Rather than the unchanging continuum of the post-history era, Messianism situates the historical subject between the rooted mass of the past events and the idea of human redemption and a rupture in history. Without the notion of something external coming with to help us dig ourselves out of this tension, we are haunted by the past, rather than revering it by transforming the present. Rather than overcoming past failures by reviving their lost liberatory potentials, we pathologise them excessively in our politics. As Marx said, 'the tradition of all dead generations weighs like a nightmare on the brains of the living'.[43] Current hyper-politics sees past ideologies infecting us parasitically, as a neurotic defence mechanism against our own powerlessness. Without prospects for political agency, the left and right take pleasure in unseriously using political tension around every facet of life as an escape from the mundanity of every-day powerlessness. The concrete Messianic thought of redemption in the future, which remained unimaginable during the era of 'capitalist realism', rather views in the past 'a secret index, through which it is pointed towards redemption'.[44] This allows the past to always point to the possibility of its future redemption, and creates links between political subjects and truths across historical epochs: the Origin that constantly is renewed, transformed, and re-individuated.

Nothing about any of this is 'deterministic' or 'reductionist'. Any radical change in the world being pushed through by free and imperfect human subjects can fail based on a variety of unpredictable factors. The Messianic moment is an unconditioned encounter with the possibility of reconnection with the past through a utopian future, which Badiou calls the Event, the point at which the contradictions of the world crystallise and engender a new organising principle of society. This promise of a different future engendered by the Event requires a certain subjective 'fidelity' and a name—the Messiah—upon which its success is not guaranteed from the outset. The Messianic moment is only confirmed in retrospect, once it has already been completed and having initiated a new mode of existence requiring different forms of thought. This is why we are always ultimately in waiting for the Messiah, for whose arrival one is always working and rethinking the past. Whenever a crisis-ridden present and the potential for tragedy brings about what Scholem calls 'the plastic hours of history',[45] where political subjects have the leeway to establish new orders, a 'light messianic force'[46] persists, which bears the constant task of redeeming lost conceptions of freedom and investigating the historical structure of our desperate situation to see how it can give birth to new worlds.

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43 Karl Marx, 'Der achtzehnte Brumaire des Louis Bonaparte' in *Karl Marx / Friedrich Engels: Werke, Artikel, Entwürfe Juli 1851 bis Dezember 1852* (first published 1852, Dietz Verlag 1985) 97. Translation the author's.

44 Benjamin (n 28) 693.

45 David Biale and Gerschom Scholem, 'The Threat of Messianism: An Interview with Gershom Scholem' *The New York Review of Books* (New York, 14 August 1980) <https://www.nybooks.com/articles/1980/08/14/the-threat-of-messianism-an-interview-with-gershom> accessed 10 June 2022.

46 Benjamin (n 28) 694.

Arborescence

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Marcus did not know what to expect. The man with whom he had spoken on the phone made little sense. A number of names had been mentioned, people he had never heard of, and at times Marcus thought the voice on the other end of the line must have been speaking in a foreign language, unfamiliar noises which were sometimes guttural and heavy and sometimes airborne and breathy, and sometimes somewhere in the middle. All he had been able to make out was a time and address, which he scribbled down in his pocket notebook, a present from his mother. He mentioned the phone call to his colleagues at the firm afterwards and they had laughed and told him to ignore it. Marcus got the impression that they knew the precise identity of the caller; they cast each other and him a withering glance, one of exhaustion with acts of naïve moral charity.

This glance and all it contained failed to dissuade Marcus. It was his first year working as a tree surgeon, a job he had obtained thanks to no small hardship on the part of his mother. School had not been for him, and he had left glad to see the back of the place but with the impression of stepping out into a great black void, a world which held precious little for him. He enjoyed being at home with his mother, helping around the house, tending the allotment down the road. Whilst he worked the family's small plot, the world came alive and spoke to him in a voice he could understand. It radiated an energy which he greedily harvested, inhaling dirty gulps of wisdom. When rain fell, he lay there and felt dirt turn to mud underneath his skin, droplets pitter-pattering against one cheek as the other pressed down into the soil.

In the corner of the allotment stood the carapace of an old oak tree. From time to time, Marcus would crawl into its cyclopic orifice, mummified in a cocoon of bark, and summon thoughts of regrowth. After a while, the tree would be whole again, his twisted legs rooted deep and gorging themselves on water, his rigid torso elephantine and stark upright, his fractal of arms and digits craning outwards to a thousand ripe eyes enthralled by a feast of light. Each time, Marcus murdered this resplendence. He had no choice. When the hollow birthed him into the sunken night, he would feel a death within him and hear a groan of ancient mortality reverberate between his bones. He could sustain but one being at a time.

Marcus found himself winding his way along a country lane, towards the address he had been given on the phone. Bordering the lane was a ribbon of deep-set and seemingly impenetrable hedgerow, adorned with protuberant knuckles of red. Tarmac soon gave way to gravel, gravel to agitable dust, and a thatched cottage came into view. Densely packed behind strabismic windows Marcus could make out piles upon piles of books, blotchy embossed spines of deep burgundy and myrtle. Reading had always been a struggle for him; his aptitude for languages extended only to those of nature, of incremental growth and seasonal change. Words on the page seemed too deeply engraved, too inarguably fixed and unamenable to care.

In the instant between Marcus opening his van's door and stepping out onto the shoddy earth, the cottage's occupant had appeared outside and was waiting expectantly for him. This transition was noiseless. It was as if the occupant, a bald and elderly man of slender proportions but penetrating gaze, had intangibly passed through his wooden door. Marcus hollered an abrupt greeting and gestured to the logo glaringly emblazoned on the van behind, as if to assure him that the visit was legitimate and well-meant. The man, whose name he would later discover was Reginald, remained silent until Marcus had almost reached him. Then, softly, he spoke: 'Would you show me your hands?'

The request's ambivalent innocence captivated Marcus. Its tone was that of an infant, yet it lacked any hesitation. It was conscious of its own importance but would not deign to insist. Marcus's hands rose and presented themselves, palms up, to Reginald, who fixated upon them as on a ritual totem or unearthed relic. His mien was that of a primitivist artist stopped dead, undone in all pretensions by a deep-set nobility tantalizing close and yet utterly alien. Darting eyes inventoried their particularities, caressing each crease, mentally untangling the knot of palm lines. Each grope for understanding teetered on wonder's precipice. The older man's eyes widened, and his breathing deepened. After a time, Reginald took Marcus's hands in his. These were immaculate, as if smoothed to marble over decades by the desert's swirling sands. They were luxuriously, almost grotesquely unblemished. Conjoined with Marcus's torn and callused digits, they evoked a coupling of the sacred with the profane.

Suddenly, the old man broke off and, in a manner now sprightly and invigorated, pulling books from shelves, grandly gesticulating at framed images, almost dancing now upon his feet, indicated for Marcus to follow him inside. Marcus understood little of what was said, but he picked out names, names which evidently bore weight and yet floated, floated daintily through the room, weaving and darting between the stacks of books as if making for the exit, as if possessed of a life of their own, yet dragged inexorably back in by Reginald's orbit, by his intimate need for them and them for him. Names like Calvino, like Petrarch, like Havemann, Joyce, Gass, like Améry or Handke, Swinburne, Enzensberger, or De Quincey, names which meant nothing to Marcus, nothing at all, yet whose pace and structure and rhythm, whose atmosphere, entranced him. Behind this cosmos of names hung a painting, a painting of a large room, large and empty, devoid of furniture, chopped in half at the waist as if looked down upon, empty that is save for three men, prostrate on their knees with their arms extended before them, their heads bowed and tilted, their hands hard at work, for they are scraping the floor, hard at work scraping the floor, and the product of their labour is curled around them in ringlets like snakeskin.

Reginald finally halted and drew breath, but the atmosphere which now thronged throughout the room survived his voice. It seemed to take on mass and effervescent direction, carrying the two men out of the backdoor and into the garden. Here Marcus set about to work, unbidden, unable to hold himself back. His hands grew into tools, his fingers became sharp and incisive, tweaking and upending, his palms moulding and sifting through material. He held nothing, it was part of him, it was all part of him. And as he worked Reginald read, perched in a rocking chair which tumbled gently back and forth, his fingertips resting against the delicate gold lettering of the work's spine, his thumb and forefinger darting forward to turn each page, his voice—his voice breathing magic into every word, magic which poured into Marcus's ears as he worked. The young man bathed in these words, they supported him like a hammock tied between two trees, and though still he could make neither head nor tail of most sentences they upended him all the same. The saplings tilted their nascent trunks in hope of finding the voice, and the sun itself leaned back and listened as it sliced its way through the sky.

In this ecstasy, this synaesthetic rapture, Marcus laboured deeper into the garden. Beyond the saplings, the hedgerows, the beds of flowers, he emerged into a glade. At the centre of this clearing stood—and here his spine tingled with sublime excitement—the carapace of an old oak tree. It could not be the same as that in the allotment, but to Marcus it seemed a homecoming nonetheless. Down on hands and knees he went, pulling himself inside, the dead and dying wood coyly scratching his skin, until he was sealed within, his thoughts focused on one end: resurrection.

Spurred on by the undulation of Reginald's voice, its variant speed and rhythm, as if he were a shaman summoning up some forest sprite or more ancient chthonic brute, this came quickly. In what felt like a matter of instants, this symbiosis of word and plant and man was complete. From his sumptuous vantage point, Marcus surveyed the garden, the house, the small smooth figure of Reginald, a smile woven across his face, his hands still clasped around the book from which he was reading. The sun was setting by now, leaving him alone in the sky. When night fell, he saw the old man rise from his rocking chair and re-enter the cottage, which also settled into sleep. The idea of returning to his prior state, of slaughtering what he and Reginald had wrought, was a sin too great for Marcus to consider. The intermingling was too narrow, the metamorphosis irreversible. He was a stylite and this tree his pillar. It was with the contentment of radical and unremitting self-sacrifice that he finally rested.

The next morning, he awoke to music. Raindrops dabbled against his branches. Reginald's words rang loud and clear. Their harmony left nothing to be desired.

'Un noble décor': Modernity and Depictions of the Countryside in Colette's *La Maison de Claudine* and *Sido*

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Introduction

For the maverick French author Colette, writing about her childhood offered a chance to reflect on the past while keeping a firm grasp on the present. Though frequently avant-garde in their social philosophies, her memoir-adjacent novels also make evident a measured introspection. As she writes of her own attitudes towards novels and life in semi-autobiographical novel *La Maison de Claudine*: 'Je ne sais quelle froideur littéraire, saine à tout prendre, me garda du délire romanesque…'.[1] This statement speaks to her work's tension between the realist detachment of 'froideur littéraire' and the nineteenth-century romanticising visions of the pastoral evoked by 'délire romanesque'. Indeed, Colette's writing defied simple categorisation—particularly in regard to its subtly unconventional depictions of rural France.

As a close reading of *La Maison de Claudine* (hereafter *Maison*) and the similarly retrospective *Sido* show, Colette's writing on her pastoral origins is distinctive. She challenges ideas and values associated with the countryside in French realist novels and specifically pastoral novels, all while remaining distinct from the realist tradition. In this sense, though Colette's writing has an unmistakable nostalgia, it is remarkable in its divergence from traditional romantic countryside depictions. This divergence is especially apparent in her writing's feminist thematic focus and doubting, self-reflexive stylistic modernity; her books' treatment of memory is self-referencing and avant-garde. She does not take the supposed 'noble décor' in which she grew up at face value.[2]

In this essay, I argue that while *Maison* and *Sido* look back in time for inspiration, they are forward-looking and complex in their depictions of the countryside. Colette's illustration of country living challenges stereotypes of the rural France of her childhood, which was often either romanticised for its traditionalism, or understood as being politically, economically, and socially backwards in a more pejorative sense. Colette's work and characters, however, subvert this idea: the experiences she records and embellishes render the countryside a more modern and creative place than her urban French contemporaries believed it to be.

Through devices such as humour, absurdism, and self-interrogation, Colette's writing subverts more static depictions of nature reminiscent of the pastoral novel genre and its conservative origins in 'la vie mondaine [,] la conception de l'honnête homme, [et les] mœurs rustiques'.[3] As explored by Eugen Weber in *Peasants into Frenchmen*, despite the heterogeneity of cultures across rural France, Parisians living in the mid-late nineteenth century—the time of Colette's childhood—imagined peasants as 'vulgar, hardly civilised, their nature meek but wild'.[4] A 'fictional, tranquil countryside' became

1 Colette, *La Maison de Claudine* (first published 1922, Hachette 1961) 34. English translation: 'I know not what literary coldness, healthy all things considered, kept me from romantic delirium…'.

2 Colette (n 7) 43. English translation: 'noble decor'.

3 Maurice Magendie, *Le roman français au XVIIe siècle* (Slatkine Reprints 1970) 167. English translation: 'the worldly life [,] the concept of the honest man, [and] rustic mores'.

4 Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870-1914* (Stanford University Press 1976) 4.

the 'pastoral vision of the rural world' incorporated into primary school reading during the Third Republic, offering 'conservative peasants' as a counterpoint to France's urban turbulence.[5]

Though Colette was not a peasant, she lived among them; her books are notable for emphasising the heterogeneity and vivacity of the people populating her childhood. Diana Holmes argues Colette 'played to the tension in French culture between the nostalgic idealisation of a rural past [and the] urban, the intellectual'.[6] Holmes also notes that French consciousness of the era associated the urban with 'energy and adaptability' and the rural with 'conservatism and physicality'.[7] That Colette undermines this simplistic dichotomy, while also expressing a clear nostalgia for her choice recollections of pastoral France, renders her writing noteworthy.

Several authors prior to Colette are remembered for their subversive pastoral writing: consider George Sand and *La Petite Fadette* or Flaubert's *Madame Bovary*. Like much of Colette's writing, these novels question patriarchal norms and complicate narratives based around the domestic. Still, *Maison* and *Sido* differ from the above works through Colette's present-day self-insertion into her narratives and through her ongoing questioning of memoir writing, even as she records her own memories. Writing about her mother, for instance, Colette comments on how 'J'aurais volontiers illustré ces pages d'un portrait photographique', which entails her musing in-text on the impossibility of representing her mother on the page exactly as she was in life.[8] Moreover, Colette wrote about the nineteenth century largely while living in the twentieth, providing her with a retrospective view on how nineteenth-century ideas about rural France informed its literature. Her books blend fiction and memoir, rendering evident the subjectivity involved in remembering, and how recording memories is itself an act of creation as much as of re-creation.

There exists tension in these books' crafting and tone owing to how they interact with values from epochs half a century apart. Colette was born in 1873 and, at the time of her writing, had seen France grow more urban and industrialised, had moved from countryside to city, and had lived through the First World War.[9] She had also experienced an evolution of French social values running parallel to France's growing modernisation and changing social order, especially in relation to gender and sexual freedoms.[10]

This context means *Maison* and *Sido* hold a distinctive position in relation to France's literary tradition. Their depictions of the countryside are retrospective and nostalgic, and are also a response to the literature with which Colette grew up: her house was filled with books spanning early nineteenth-century romanticism as well as the realism and naturalism that emerged partly in reaction to romanticism's dominance.[11] Colette consequently became aware of conflicting schools of literary thought at an early age—or so she claims in 'Ma mère et les livres', a vignette from *Maison* highlighting these tensions that ran across the literary and real alike. In the vignette, Colette's childhood preference for fairy tales is contrasted with the graphic naturalism of Émile Zola, in whose work Colette 'ne reconnu[t] rien de [sa] tranquille compétence de jeune fille des champs'.[12] Reading Zola causes her to faint and leaves her 'pâle et chagrine' upon awakening.[13] Coupled with Colette's mother's dismissive comment on Zola's depiction of childbirth, declaring it 'beaucoup plus beau dans la réalité', Colette questioned the authority of naturalist literature's vision—and the realism of realism—as well as male writers' abilities to write women convincingly.[14]

In examining the feminism, humour, self-reflexivity, and unconventionality present in *Maison* and *Sido*, this essay analyses key preoccupations and motifs present in both texts: how different physical spaces in the countryside are depicted; the presence or lack thereof of backwardness in rural communities, whether political or social; and the role nostalgia and memory play in shaping these books' ideas. Through such analysis, I argue for a reappraisal of Colette's retrospective pastoral writing as being notably modern and subversive within a pastoral literary tradition that has historically depicted the rural world as a 'picture of peasant utopia,… characterised by wisdom, balance and a purity of sentiments'.[15]

Physical Spaces in the Countryside

At first glance, *Maison* and *Sido* might appear conventional in their enshrinement of the 'charme agreste' that a grown Colette associates with her childhood.[16] Vignettes like 'Printemps Passé'[17] are in some ways emblematic of Colette's country recollections, populated by wise peasants, innocent young lovers, and plants whose beauty and growth are described as 'divine'.[18] On closer inspection, however, it becomes clear that Colette's writing modernises these ideas.

From 1848 to 1914, a time of significant political change and industrialisation for France, primary constants were ongoing urbanisation and 'a clearly articulated and powerful ideology of separate spheres for men and women'.[19] This ideology typically relegated women to the domestic, indoor sphere and men to the public one. In rural contexts, however, the lines between these spheres had the potential to be blurred, particularly in relation to gardens.

A distinctive feature of Colette's books is that she transposes women from houses into gardens. Rather than emphasise the house as a woman's domain, Colette offers an alternative: gardens are unpoliced realms over which men hold little sway. They are associated almost entirely with women, even figuring as the locus of their social power. Sido, for instance, is shown to draw strength from her garden; she declares that to live in Paris, 'il m'y faudrait un beau jardin'.[20] This comment makes evident not only the importance she places on the garden, but also its nature as a distinguishing element of country life.

5 Alan R H Baker, *Fraternity Among the French Peasantry: Sociability and Voluntary Associations in the Loire Valley, 1815-1914* (Cambridge University Press 2004) 8.
6 Diana Holmes, *French Women's Writing 1848-1994* (The Athlone Press 1996) 133.
7 ibid 134.
8 Colette, *Sido* (first published 1930, Hachette 1961) 31. English translation: 'I would gladly have illustrated these pages with a photographic portrait'.
9 Brooke Allen, 'Colette: The Literary Marianne' (2000) 53(2) The Hudson Review 193-207, 196.
10 Angelique Richardson and Chris Willis, *The New Woman in Fiction and Fact Fin-de-Siècle Feminisms* (Palgrave Macmillan 2002).
11 Colette (n 1) 31-37.
12 ibid 36. English translation: 'recognised nothing of [her] quiet country girl competence'.
13 ibid 37. English translation: 'pale and sad'.
14 ibid. English translation: 'much more beautiful in reality'.
15 Baker (n 4) 8.
16 Colette (n 1) 151. English translation: 'rustic charm'.
17 English translation: 'Springtime of the Past', or 'Spring Past'.
18 Colette (n 1) 150.
19 Holmes (n 5) xvi.
20 Colette (n 7) 18. English translation: 'I would need a beautiful garden'.

Gardens can 'structure la diégèse' of a story through their possibilities of enclosure, entrapment, or infringement of boundaries.[21] As such, gardens merit special focus in close readings. Gardens are symbolically important: according to ecocritical theory, for instance, gardens in literary culture can be 'as much a moral as a physical space'[22] and can serve as a 'school for virtue',[23] representing female moral and sexual purity. Consequently, it makes sense to analyse how Colette portrays country gardens: her depictions offer insights into the morality or philosophy conveyed in her stories, as well as how she perceives the place of women with the rural society of her childhood.

In terms of female and moral purity, Colette does not radically reshape gardens' symbolism. Her garden-based interactions with her mother are largely safe and serene—a garden both offers physical protection from the 'danger [et] solitude' of the world beyond and acts as a place where children can encounter new ideas but remain safe from anything excessively threatening.[24] Sido gives her daughter books by Zola to read on the grass, for example—but she censors those she deems inappropriate. Nevertheless, Colette's incorporation of humour into her depiction of gardens is significant. Through depicting the private, often mischievous lives of her female characters, she suggests that gardens have an exploratory capacity and are not solely a place in which a woman preserves her innocence.

From *Maison* opening in a garden to both books' rhapsodic descriptions of the plants and beasts dwelling there, Colette's writing positions gardens as key features of country life. They are influential spaces that 'donnaient le ton au village'.[25] They are also both exposed and private: bridges of sorts between public and domestic spheres. Indeed, in Colette's work, gardens are figured as places of communication with the potential to transcend the domestic sphere's insularity. When Colette writes 'Nos jardins se disaient tout', she is referencing neighbours' tendencies to talk over fences as well as how the state of a garden can indicate the wellbeing of a house's inhabitants.[26] This notion that gardens can indicate the wellbeing of their caretakers is evidenced by the passage noting that Sido's garden is tended less once misfortunes strike the family.[27] In this sense, gardens in Colette's books are important socially, existing porously on the edge of the domestic and the public and thus offering an alternative to the rigid, gendered separation of spheres described by Holmes. They can also serve as a gauge of what is happening inside the house and consequently makes them especially valuable for anyone otherwise unable to communicate violence they may be experiencing behind closed doors. Gardens align with communication; houses, when threatening, with silence. Colette's depiction of country gardens as specifically female spaces is significant. As noted by Jerry Aline Flieger, Sido epitomises this tendency in Colette's work: she is ever standing in her garden and her very house is 'recalled as "a garden and a circle of animals"'.[28] In her garden, she possesses 'suzeraineté'.[29] She is also depicted as being in touch with nature, her powers ranging from 'infaillibilité' when predicting weather to an instinctual understanding of plants and animals.[30] As Sylvie Romanowski argues, this understanding comes not from any magical power, but rather 'from her instincts, her intuitive participation in nature'.[31] Such qualities cement Sido's natural place as being outdoors—a conclusion supported by Colette's own observation that her mother's 'glorieux visage de jardin [est] beaucoup plus beau que son soucieux visage de maison'.[32]

Colette's emphasis on gardens as valuable women's spaces is further demonstrated by her decision to depict men as being largely absent from them. When describing the network of gardens spread throughout her village, she places men 'sur les seuils', where they smoke and spit.[33] In this sense, she heightens gardens' symbolism: they represent women's domains as well as women's bodies and autonomy. The norm implied is that men do not—and certainly should not—enter gardens without invitation.

Colette also subverts notions of male power in the countryside through her juxtaposition of her father with Sido. Unlike his wife, Colette's father is ill at ease in the countryside. He lacks her authority over animals—'Jamais un chien ne lui a obéi'—and this causes him to feel 'secrètement humilié'.[34] He lacks intuition, speaking of potentially meeting his children on the road while Sido correctly assumes they will have cut through the fields.[35] Where Sido is described as growing more alive each time she touches country earth, meanwhile, Colette writes that the same earth and countryside 'éteignait mon père, qui s'y comporta en exilé'.[36] In her memory, he is forever 'fixé' in his 'grand fauteuil de repos', surrounded by books she sometimes perceives as being as dusty and irrelevant as he is.[37] This unfavourable contrast and disempowerment of the father—and man of the house—makes evident the importance of the garden in rural life, which occupies so much more of Colette's memories than does her father's study. This truth is epitomised when Colette writes about how she could paint from memory the garden—representative of her mother—but that her father's face 'reste indécise, intermittente'.[38]

By associating women so strongly with motifs of gardens, nature, and life, Colette's memories and writing leave little room for men and male authority. This omission is a distinctly modern lens through which to depict her childhood, especially given men's outsized social and economic power in France during her upbringing. Colette's emphasis on gardens and women in the countryside reveals that at least in her experience of rural France, power was not always distributed along the gendered lines stressed by other chroniclers of

21 Simone Bernard-Griffiths and Marie-Cécile Levet, 'George Sand sous le signe de Flore' in Simone Bernard-Griffiths and Marie-Cécile Levet (eds), *Fleurs et jardins dans l'œuvre de George Sand* (Presses Universitaires Blaise Pascal 2004) 18. English translation: 'structure the diegesis'.

22 Stephen Bending, '"Miserable Reflections on the Sorrows of My Life": Letters, Loneliness, and Gardening in the 1760s' (2006) 25(1) Tulsa Studies in Women's Literature 33.

23 Judith W Page and Elise L Smith, *Women, Literature, and the Domesticated Landscape* (Cambridge University Press 2011) 17.

24 Colette (n 1) 23.

25 Colette (n 7) 10. English translation: 'set the village's tone'.

26 ibid 11. English translation: 'Our gardens told each other everything'.

27 ibid 31.

28 Jerry Aline Flieger, *Colette and the Fantom Subject of Autobiography* (Cornell University Press 1992) 33.

29 Colette (n 7) 15. English translation: 'suzerainty'.

30 ibid 17. English translation: 'infallibility'.

31 Sylvie Romanowski, 'A Typology of Women in Colette's Novels' in Erica Mendelson Eisinger and Mari Ward McCarthy (eds), *Colette: The Woman, The Writer* (The Pennsylvania State University Press 1981) 72.

32 Colette (n 7) 15. English translation: 'glorious garden face [is] much more beautiful than her anxious house face'.

33 ibid 11. English translation: 'on the thresholds'.

34 ibid 45. English translations: 'Never had a dog obeyed him'; 'secretly humiliated'.

35 ibid 44.

36 ibid 42. English translation: 'extinguished my father, who behaved there as an exile'.

37 ibid 37. English translations: 'fixed' or 'set'; 'large rest chair'.

38 ibid. English translation: 'remains undecided, intermittent'.

the era. This reality is also evident in how she depicts the relationship between backwardness, freedom, and restraint in the countryside, as the following section explores.

Backwardness and Subversion

While many vignettes in *Maison* and *Sido* linger on idyllic natural landscapes and the archetypal peasant characters inhabiting them, the books are noteworthy in how they humanise these landscapes and figures. This humanisation is particularly evident in Colette's description of nature's oddities, human mischievousness, and the books' tension between freedom and restraint.

Nature in nineteenth-century French literature was often idealised. This tendency emerged in reaction to France's rapid modernisation following the Reformation: 'utopian fantasies of nature…can be found from Romanticism onwards'.[39] Idyllic pastoral visions in fiction were popular particularly during the Third Republic, for they 'served to inculcate the values of sobriety, thrift, diligence, and fraternity' that were 'vital to the republican order'.[40] Colette departs from convention when she depicts nature as sometimes being not only needlessly cruel, but also strange or bizarre.

The small, meaningless cruelties and sadness present in finer details of the country idyll emerge in several of Colette's tales involving animals and plants. For example, a pullet presumed lame from birth proves to be a casualty of one of Colette's stray strands of hair, which the family eventually discovers 'ligotait étroitement l'une de ses pattes et l'atrophiait'.[41] Colette's brothers, figured as 'deux sauvages' whose adolescent growing pains 'exige des holocaustes', pass through a violent stage as a natural part of their growth.[42] They bully others and find sport in cruelties presented as inconsequential, such as pinning butterflies to corkboards or trapping fish.[43] Colette herself, her curiosity about plants leading to her knowingly digging up and killing several, is described by her own mother as a 'petite meurtrière'.[44] Another vignette shows Colette's dismay upon recognising that her dog is capable of being both 'la plus douce des créatures' and a 'brute féroce'.[45] Through moments like these, Colette nuances her childhood's bucolic setting, suggesting that the countryside does not wholly offer an escape from the violence more typically associated with urban France.

That the duality of people's and animals' natures is presented as somewhat absurd—even darkly humorous—also complicates the existence of violence in Colette's countryside. Her writing indicates that violence does not always exist in a moralistic or meaningful way. This suggestion in turn subverts the more conventional, fable-like style in which she recounts certain memories.

Indeed, the absurdity and comedy of nature is an overlooked yet important theme in Colette's books. Toutouque the dog, for example, behaves as a mother to kittens and other dogs' puppies indiscriminately.[46] The vignette 'Ma mère et les bêtes'[47] also focuses specifically on animals behaving in unconventional ways. These include a 'chaîne de chattes s'allaitant l'une à l'autre', a cat that eats strawberries, and a spider that drinks hot chocolate.[48] For Colette, nature is not always sensical or a vehicle for moralism and clear answers: sometimes it is simply peculiar or amusing.

The mischievousness of certain characters in Colette's books echoes the humour and absurdity their author identifies in the natural world. Reminiscent of Toutouque mothering kittens and puppies indiscriminately, Sido and her friend Adrienne 'échangèrent un jour, par jeu, leurs nourissons'[49]—a playful act that Adrienne delights in and laughs about years later. This playfulness contradicts Romanowski's reading of Sido as 'irreverent perhaps, but only with regard to religious observances'.[50] Rather, while it is true that Sido is irreverent in church—she hides a collection of Corneille's plays in her Bible—her willingness to push boundaries and play goes well beyond this example.[51] She is not a sedulous housewife; Colette emphasises her 'humour, spontanéité' and 'malice' that gets the better of her.[52] An entire vignette, 'Le Rire', is dedicated to her unpredictable, undignified, joyful laughter, even in the face of tragedy.[53] She also allows her children free rein, supporting them in their adventures.

Colette's characters thus reflect less the two-dimensional figures populating conventional allegorical literature, and rather values promoted during the French Third Republic, particularly in the context of children's education. As historian Patricia Tilburg notes, from 1870, 'an active and rich imagination was seen as a crucial acquisition of the new secular soul'.[54] This attitude in Colette's novels is evidenced by the confidence with which, as a child, she climbs over the garden wall to freedom—with her mother's blessing—knowing she can return 'aux prodiges familiers' when she chooses.[55]

This link between the countryside and personal freedom is reflected in the passage where a young Colette walks alone into the woods, confident 'ce pays mal pensant était sans dangers'.[56] Colette writes how on that deserted way, at that exact moment, 'je prenais conscience de mon prix [et] d'un état de grâce'.[57] The fact that she records becoming self-aware as directly related to her being alone and in a half-wild country setting speaks to the value she places on solitude. In Colette's novels, the countryside—and in particular the reduced sense of being monitored that such space can afford—offers individuals an opportunity to cultivate a sense of self. Colette's depiction of the countryside is therefore one of freedom. This is notable given that rural, unpoliced spaces were and still are to some extent associated with threat, especially for women and children

39 Tim Farrant, *Introduction to Nineteenth-Century French Literature* (Bloomsbury 2007) 135.
40 Baker (n 4) 8.
41 Colette (n 1) 65. English translation: 'tied up one of its feet tightly and was atrophying it'.
42 Colette (n 7) 74. English translations 'two savages'; 'demand catastrophes' or 'demand disasters'.
43 ibid 71, 73.
44 ibid 20. English translation: 'little murderess'.
45 ibid 90. English translations: 'the gentlest of creatures'; 'ferocious beast'.
46 Colette (n 1) 88-9.
47 English translation: 'My mother and the beasts'.
48 Colette (n 1) 48-9. English translation: 'chain of cats suckling one another'.
49 Colette (n 7) 29. English translation: 'exchanged one day, as a game, their infants/nurselings'.
50 Romanowski (n 30) 72.
51 Colette (n 1) 106.
52 Colette (n 7) 37, 52. English translation: 'humour, spontaneity' and 'malice'.
53 Colette (n 1) 113-5. English translation: 'The Laugh'.
54 Patricia A Tilburg, *Colette's Republic: Work, Gender, and Popular Culture in France, 1870-1914* (Berghahn Books 2009) 61.
55 Colette (n 7) 15. English translation: 'to the familiar/domestic wonders'.
56 ibid 13. English translation: 'this ill-thinking country was without dangers'.
57 ibid 15. English translation: 'I became aware of my price/value [and] of a state of grace'.

('safe spaces', for example, are typically figured as being indoors). From an ecocritical perspective, too, the metaphor of 'land-as-woman'—a metaphor supported in Colette's work through Sido's alignment with the natural world—lies 'at the root of our aggressive and exploitative practices', many of which are evident in classic literature.[58] In her passage emphasising self-discovery, Colette thus subverts associations of wilderness with threat, offering both a modern interpretation of such spaces and a narrative in which women are less frequently positioned as victims.

Granted, the countryside in *Maison* and *Sido* is no feminist utopia. For all it offers some characters freedom, it also generates social and political restraints. Colette's narratives 'take place in a world that has a clear economic dimension'.[59] La petite Bouilloux, for example, is made aware of her exceptional looks—and this emphasis on her exceptionalism contributes to her gradual self-isolation as well as to her peers alienating her. Colette presents hers as a tragicomic moral tale: la petite Bouilloux 'attendait, touchée d'une foi orgueilleuse' that has her believe that, as a great beauty, her destiny lies beyond the village.[60] However, no handsome stranger arrives to spirit her away; she refuses marriage proposals and ultimately finds herself aged, alone, and embittered. Colette's recount, for all its perspicacity regarding human nature, lacks sympathy for the woman's situation. In another time or place, la petite Bouilloux could well have married into wealth. As it is, her personally tragedy is that of living in too small a village that she now disdains, with no great personal wealth or means of accessing a wider pool of suitors. As such, she is reminiscent of tragic figures like Emma Bovary: making poor decisions, but also a victim of romantic hopes combined with a too limited countryside reality.

Colette's father suffers similarly in the countryside. Politically ambitious and a 'citadin' at heart, his country existence is loving but constricting: the environment stifles him and he is described as '*réduit* à son village et à sa famille' (my emphasis).[61] He is an 'outsider' in both the countryside and his family, ever 'relegated to the sidelines' in Colette's memories and her retelling of them.[62] He never fulfils his dreams of becoming a writer, his unwritten works present in his imagination but intangible in reality, much like his phantom limb. This renders even more powerful the fact that Colette eventually takes her father's name as her pen name. Through signing her works thus, she effectively conveys upon her father the closest realisation he will ever achieve of literary immortality.

Nostalgia and Memory

For all Colette projected a self-assured persona in life, *Maison* and *Sido* reveal a self-conscious, even doubtful side to their author. The books are hyper-aware of their exploration of memory, and that memory can be subjective and incomplete and constantly evolving. As Colette explores in *Maison*, memory is fragile: she is aware that even in attempting to recreate memories with her own daughter, she risks the re-creation of that which is already 'à demi évaporé' appearing poor and void of enchantment.[63] Remembering and illustrating her childhood in the countryside thus becomes a fraught exercise, with nostalgia and interrogation of memory colouring the outcome. 'Tout s'élance, et je demeure', she reflects.[64] This sentiment encapsulates the wrench of recognising that memory can never be wholly re-created, or moments perfectly captured.

This awareness renders much of her writing bittersweet. By the end of vignettes, for example, characters often appear frozen in place. Colette leaves her mother in the garden on multiple occasions, literally and well as figuratively, writing about imagining her still being 'à cette même place'.[65] She also writes of her father being frozen in his library, where he resides in her memories 'à jamais', and laments not having known him better beyond this limited context.[66] Such moments make evident the limitations of Colette's ability to conjure up the past. When she appears confident in her ability to recreate scenes, these are typically of a more static variety revolving around the set dressing of her memories. She writes of her childhood garden being before her eyes, for example, and of being able to evoke the wind, 'si je le souhaite'.[67] However, other passages make painfully clear that she can only re-create what she already consciously remembers. When trying to recall the end of a conversation with her mother, for instance—one with great meaning for her adult self—she writes, dismayed, that 'La suite de cet entretien manque à ma mémoire'.[68] While she can recreate the past's scenery, those populating it can exist only within the scenes she remembers. Such is the limitation of memory and writing about it; for without the autonomy of their being alive, these characters and their depictions can never truly satisfy the adult writer.

This paradox inherent to recounting the past forms one of the most intriguing aspects of Colette's writing. As her descriptions of the countryside make clear, she is all too aware of her capacity—as well as that of her readers—to embellish the past. Her writing is modern in terms of her feminism and humour. Yet she appears comfortable exploiting the countryside as a subject matter to appeal to urban readers; her Claudine novels, after all, originated as a money-making venture.[69] She was likely influenced by pastoral literary conventions and their marketability, at least early in her career. However, the distance she creates between herself and her childhood through the insertion of her adult self into her books, reflecting on the scenes, makes clear her ultimate disbelief in her books' capacity to capture memories in a way that feels truly alive.

In this sense, the adult Colette and her depictions evoke above all her father's slightly desperate, performative love for the countryside: it fills him with enthusiasm, 'mais à la manière d'un noble décor'.[70] This phrase effectively emblematises a significant tension and subversive thread in Colette's novels: that they acknowledge that nostalgia and appreciation of the pastoral can be performative, and that professing love for something which is itself a construct can be absurd or even embarrassing. The young Colette and her siblings, who feel genuinely moved by the countryside, grow only more taciturn as their father speaks—'nous qui n'accordions déjà plus d'autre aveu,

58 Cheryll Glotfelty, 'Introduction' in Harold Fromm and Cheryll Glotfelty (eds), *The Ecocriticism Reader: Landmarks in Literary Ecology* (The University of Georgia Press 1996) xxix.
59 Diana Holmes, *Women Writers: Colette* (Macmillan Education 1991) 66.
60 Colette (n 1) 84. English translation: 'waited, touched by a proud faith'.
61 Colette (n 7) 41-2. English translations: 'townsman' or 'city dweller'; 'reduced to his village and to his family'.
62 Flieger (n 27) 67.
63 Colette (n 1) 151. English translation 'half-evaporated'.
64 ibid. English translation: 'Everything takes off, and I remain'.
65 Colette (n 7) 31. English translation: 'at/in this same place'.
66 ibid 37. English translation: 'forever'.
67 Colette (n 1) 51. English translation: 'if I wish' or 'if I wish it'.
68 ibid 58. English translation: 'The rest of this interview fails my memory'.
69 Françoise Mallet-Joris, 'A Womanly Vocation' in Erica Mendelson Eisinger and Mari Ward McCarthy (eds), *Colette: The Woman, The Writer* (The Pennsylvania State University Press 1981) 9.
70 Colette (n 7) 43. English translation: 'but in the manner of a noble décor'.

à notre culte bocager, que le silence'.[71] They are thus exactly like the characters populating Colette's retellings of her memories: ultimately silent, because they cannot exist beyond the limits of what they have already said and done. Moreover, Colette is restricted in the knowledge that they do not—and cannot—authentically exist if she fictionalises or ventriloquises them into performance. They no longer have the potential to evolve or surprise of their own accord.

Conclusion

In her depiction of the countryside, Colette seeks to record memory, perhaps even in a bid to know its subjects better. She is driven by 'le prurit de posséder les secrets d'un être à jamais dissous', all the while aware that her retrospective perspective and then-modern values render her depictions of the past a form of commentary and of re-creation, rather than of unselfconscious representation.[72] Recording memories is, for her, an inherently bittersweet act owing to her awareness of its limitations.

To some extent, her writing succeeds in its goal, enshrining people and places with a loving faithfulness that is, if not necessarily factually accurate, at least truthful in its depiction of adult Colette's nostalgia. Her writing conveys a distinctly modern subtext regarding the freedom and feminine empowerment linked to certain country spaces. This also subverts the more common depiction of rural spaces in literature of the time as being peaceful, morally simple counterparts to the turbulence of urban France. Colette's self-insertion in her books and commentary regarding the act of remembering also adds another layer to her depictions.

Ultimately, *Maison* and *Sido* are strikingly modern for texts so dedicated to commemorating the past. Their self-referential tendencies make them enduringly relevant and thought-provoking for readers and memoirists, as do their humour and frequent impiety. They also offer insights into how constructing images is much like reconstructing memories: deeply selective and subjective. Colette was aware that the countryside she wrote into being was itself a sort of ideal and a fantasy, even when she used it to puncture traditional imagery and conservative ideas. Analysing her writing—which contains her own thoughts on its creation—can therefore not only engender greater appreciation of its modern aspects, but also encourage further reflection and investigation into image formation, in particular in the context of French culture.

71 ibid. English translation: 'we who already granted no other admission, to our bocage cult, than silence'.

72 ibid 60. English translation: 'the pruritus of possessing the secrets of a being forever dissolved'.

HORTENSIUS or On the Cultivation of Subjects in Noman's Garden

Toward a Post-Foucauldian Account of Subjectification

Jojo Amoah

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> Then from out the cave the mighty Polyphemus answered them: 'My friends, it is Noman that is slaying me by guile and not by force.' And they made answer and addressed him with winged words: 'If, then, no man does violence to thee in thy loneliness, sickness which comes from great Zeus thou mayest in no wise escape.'
>
> - Homer, *The Odyssey, Book IX*

Introduction

> …for when man was first placed in the Garden of Eden, he was put there ut operaretur eum, that he might cultivate it; which shows that man was not born to be idle […] let us cultivate our garden.
>
> - Pangloss & Candide, *Candide*

The emergence of global digital surveillance and control heralds the advent of digital technologies as the nexus of social cohesion and political decision-making. The ominous image of representatives from Google, Apple, Facebook (Meta), and Amazon engaging in political discourse with representatives from the seven most economically advanced nations in the world at the G7 meeting in 2017 epitomises how this emergence has upset the balance of power. This new form of surveillance and control marks a paradigm shift within surveillance theory. Whereas Foucauldian panopticism had informed our understanding of the dynamic between surveillance and control, many recent publications are more likely to be informed by Deleuze's concept of the society of control, which reconceives the dynamic as existing between access and control. We are, then, beckoned to shift the locus of our analyses from subjectification to access control as the primary power mechanism to be analysed.

In this paper, I examine the contemporary discussion surrounding Foucauldian and Deleuzean methods of power analysis. While I will defend the Foucauldian focus on subjectification as a privileged power mechanism, I recognise that Foucault's analysis of subjectification as such is untenable. This paper seeks to uncover how a post-Foucauldian conception of subjectification can contribute to the discourse on power in the emerging societal landscape of global digital surveillance and control. In order to arrive at a post-Foucauldian conception of subjectification, I first elucidate what exactly Foucault means by subject. Then, informed by Heidegger's analysis of Dasein, I exposit how a subject arrives at their operating framework, ie, their framework of possible thought and action. Employing Deleuze's concept of territory, I then arrive at a conception of how the operating framework of subjects can be produced and reproduced. This exploration ultimately culminates in ten theses regarding a post-Foucauldian concept of power and subjectification. Finally, I conclude that a post-Foucauldian conception of subjectification can restore the focus on subjectification within power analysis, thereby providing us with an explanatory model that can account for the voluntary display of intentional socially desirable behaviour by subjects en masse.

I. Foucault and Deleuze

Before delving into the discussion surrounding Foucauldian and Deleuzean power analyses, I will first devote a few elucidatory remarks to the concept of power and the concealments that the English language entails in respect to it (§I.I.). Afterwards, I articulate the difference in focus between Foucault's and Deleuze's analyses. In §I.II., I defend Foucault's position, namely, the importance of a

focus on subjectification in power analysis. In §I.III., I problematise Foucault's account of subjectification and articulate the necessity of a post-Foucauldian conception of subjectification.

I.I. Power, Potestas, and Potentia

English blurs and conceals the important distinction both Foucault and Deleuze make between *puissance* and *pouvoir*. One way in which Deleuze describes *puissance* is as 'the capacity to effectuate'[1] and with such a description, it discloses itself as *potentia*. Pouvoir, ie, political power, can be rendered as *potestas* (Spinoza). Foucault's analysis of power, in his own words, focuses specifically on potestas (pouvoir).[2] Appropriately, in this paper I use the word power in the sense of potestas.

Foucault writes that power 'operates on the field of possibilities in which the behaviour of active subjects is able to inscribe itself'.[3] This can be interpreted as a conception of power as a complex network of relations between possible actions/actors, ie, a network of potentia. On this conception, power cannot be explicitly reduced to the exercise of coercion (the actualisation of potentia), nor can it be described as an attribute that can be ascribed to a particular actor, but rather describes relations between possible actors, who, when taken together as a given constellation, produce specific behaviour. Potestas is inextricably linked to potentia in this analysis; potestas is exercised by playing off the potentia of each actor against another, i.e, potestas operates as a network of potentia.

Foucault further notes of his own work that the aim of his research 'has not been to analyse the phenomena of power […] [but] has been to create a history of the different modes by which, in our culture, human beings are made subjects […] [he has] sought to study […] the way a human being turns him- or herself into a subject'.[4] I interpret this statement as Foucault's acknowledgement that research into power focuses primarily on the way in which potentia can be channelled by means of power internalisation, ie, how specific subjects arise who operate 'voluntarily' within a specific framework of possible actions. It is on this point, the centralisation of subjectification in the analysis of power, that Deleuze differs from Foucault.

Deleuze states in an interview that 'puissance [potentia] is always an obstacle in the effectuation of potentia'.[5] A concretisation of this statement can be found in Deleuze's analysis of the society of control. Deleuze writes in response to Foucault's analysis of power that 'in the societies of control, on the other hand, what matters is […] a code: the code is a password […], which marks access to information or rejects it'.[6] Here, Deleuze presents a conception of power as the framing of potentia through the raising of obstacles in the form of access control. The difference between Foucault and Deleuze in their power analysis is a difference in focus in which ways potentia is framed. Foucault emphasises a framing of potentia by means of subjectification in which power relations are internalised. In Deleuze, the emphasis shifts to a framing of potentia through access control, leaving the subject free to act as they please within a given delimited space.

I.II. A qualified defence of Foucault's insistence on subjectification against Deleuze

Before discussing Deleuze's critique of Foucault in his analysis of the societies of control,[7] I want to emphasise that I explicitly do not interpret this critique as a critique of the correctness of subjectification as an exercise of potestas. I take the Deleuzean critique as aimed at the central position that subjectification occupies in Foucault's analysis of power.

One of the most resonant arguments in this critique in the landscape of global digital surveillance and control is articulated by Galič et al, who maintain that it is 'no longer actual persons and their bodies that matter or are subject to discipline, it is about the representations of the individuals'.[8] Contemporary digital surveillance and control focuses on what Deleuze calls the dividual,[9] where the individual is split into digital representations. Since it is no longer the individual who is central to methods of surveillance and control, it seems logical that the subjectification of this individual should no longer play a central role in our analyses. As such, Matzner notes a certain distrust of the thematicization of subjectification in Deleuzean theory.[10] A general picture that emerges from many contemporary Deleuzean theories of power—where in addition to the society of control,[11] we also have, eg, algorithmic governmentality,[12] invigilator assemblies,[13] and data derivatives—[14]is a shift of focus from subjectification to access control: the automated management of spaces and potentialities. Rouvroy is particularly adamant about this when she states that 'algorithmic governmentality does not allow for subjectivation processes'.[15]

In response to this shift in focus, I would first of all like to note that denying subjects (in the sense of the subjected) access to specific spaces also concerns a regulation and framing of their capacity to act (potentia) and, therefore, also concerns a power structure (potestas). I will, appropriately, grant the Deleuzeans that an analysis of power which exclusively focuses on subjectification without notice to other obstacles in potentia is, then, underdetermined as such. This same critique of underdetermination, however, can be further extended to analyses of power that operate solely in terms of access control. Although digital surveillance focuses on the individual, access control (and in particular the refusal of access) is, indeed, exercised on the individual. In addition to the direct impediment

1 Gilles Deleuze and Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Bloomsbury Publishing 2013) xvi.
2 Peter Morriss, *Power: A Philosophical Analysis* (Manchester University Press 2012) xvii.
3 Michel Foucault, *Power: Essential Works of Foucault 1954–1984* (James D Faubion ed, Paul Rabinow tr, The New Press 2000) 341.
4 ibid 326-327.
5 Claire Parnet and Pierre-André Boutang, 'L'Abécédaire de Gilles Deleuze' (1996) <https://deleuze.cla.purdue.edu/sites/default/files/pdf/lectures/en/ABCMsRevised-NotesComplete051120_1.pdf> accessed 6 June 2022.
6 Gilles Deleuze, 'Postscript on the Societies of Control' (1992) 59 October 5.
7 ibid.
8 Maša Galič, Tjerk Timan, and Bert-Jaap Koops, 'Bentham, Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation' (2016) 30 Philosophy & Technology 20.
9 Deleuze (n 6) 5.
10 Tobias Matzner, 'Opening Black Boxes Is Not Enough – Data-Based Surveillance in Discipline and Punish and Today' (2017) 23 Foucault Studies 31.
11 Deleuze (n 6).
12 Antoinette Rouvroy, 'The End(s) of Critique: Data Behaviourism versus Due Process' in Mireille Hildebrandt and Katja de Vries (eds) *Privacy, Due Process and the Computational Turn* (Routledge 2018).
13 Kevin Haggerty and Richard Ericson, 'The Surveillant Assemblage' (2000) 51 British Journal of Sociology.
14 Louise Amoore, 'Data Derivatives' (2011) 28 Theory, Culture & Society.
15 Rouvroy (n 12) 144.

it causes, it also has a subjectivising effect, as described by Matzner in the sense that it ensures that subjects anticipate the control and adjust their behaviour themselves in order to gain access.[16] Even if access is not refused, in such cases, potentia is still framed by means of subjectification. Thus, a power structure forms that escapes our notice when the analysis of power renounces its attention to subjectification.

The main defect with the Deleuzean position, however, is that it cannot explain how subjects continue to exhibit desirable socially intended behaviour en masse. Without a focus on subjectification, it remains unclear how the social consensus about acceptable behaviour is produced and reproduced, a process that ensures that denial of access remains the exception and not the rule, and that subjects normally already exhibit intended behaviour on their own. Deleuze speaks with amazement of young people who 'strangely boast of their "motivation"'.[17] By maintaining a Foucauldian focus on subjectification, it becomes clear how this 'motivation' is a produced subjectivity. It is the effect of a power structure that shapes subjects and thus ensures the maintenance of a stable society, in which refusal of access remains the exception.

I.III. Problematising the Panopticon: Against Foucault's account of subjectification

Although the Foucauldian focus on subjectification can thus be defended, it remains problematic to directly apply Foucault's concrete analyses to analyses of contemporary society. The genealogical and archaeological methods of Foucault, who was primarily an historian, focused mainly on the exercise of power in the nineteenth and twentieth centuries. Therefore, it should come as no surprise that the conceptualisation of disciplining power which emerges from his analysis tells us little about the rhythmic flows of power we experience in an increasingly digital age, even if it does inform the historical conditions of their possibility. Panopticism is emblematic of disciplinary society, of which Foucault writes that 'the major effect of the Panopticon [is] to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power'.[18] Central to disciplining power is, then, the subjectivising effect that emanates from the panoptic view.

Attempting to employ the model of this power mechanism to contemporary society shows itself to be less than adequate, partly because contemporary digital surveillance thrives by pretending that it is not there at all. Contemporary methods such as tracking cookies, Wi-Fi, IP- and photo-tracking, hidden cameras and microphones, discreet laptop- and mobile camera activation, etc., function inconspicuously in the background, hidden from the subject. It is, therefore, completely unclear how traditional panopticist methods make the subject aware of its permanent visibility, or how a subjectifying effect should follow from this in another way. Didier Bigo attempts to salvage the panopticist model for contemporary ends in the form of ban-opticism, but here Bigo writes precisely that the Ban-opticon no longer depends on immobilising bodies under the analytic gaze of the beholder.[19] The explanation of subjectification so intuitive to understand by means of a compelling gaze, which induces a framing of potentia in the subject[20] is here no longer compelling or useful for our ends. This brings us to a more fundamental problem in the Foucauldian conception of subjectification. What remains in terms of explanations that Foucault gives for the mechanisms of subjectification are 'modes of objectification that transform human beings into subjects'.[21] How objectification as such is to lead to transformation in subjects remains unclear, and Mohanty does not unjustly describe this aspect of Foucault's work as a 'muddle.'[22] If we now want a power analysis of post-panopticist society, while acknowledging the central focus on subjectification and recognising the limitations of Foucault's conception of subjectification through objectification, then the need arises for a post-Foucauldian conception of subjectification.

II. The Subject

In order to arrive at a productive post-Foucauldian conception of subjectification, we must first establish what a Foucauldian conception of subject actually entails. Consequently, in §II.I., I will articulate the ambiguities in the meaning of the word 'subject' and then analyse a number of statements by and about Foucault in order to elucidate what Foucault means, but more importantly, what Foucault does not mean, by 'subject'.

II.I. The Foucauldian Subject

Subject, in the grammarian sense, relates directly to power exercised in the verb 'to subject', ie, to place someone under oneself. Within philosophy, at least since Descartes, subject does not refer only to the grammarian subject, but predominantly to (self) consciousness, an 'I', which—at least with Descartes—is in a subject-object relationship vis-à-vis its extension in the external world. This last meaning of 'subject', nevertheless, still possesses an odious degree of ambiguity. For example, in the context of consciousness, subject does not necessarily refer to an individual, as evidenced by, eg, the 'transindividual subject'.[23] Nor is the subject-object relationship generally seen as a relationship of opposites. For Lukács, among others, it is not a matter of denying the object or subject, but of denying their contradiction.[24]

In the context of making individuals subjects, Foucault writes that '[t]here are two meanings of the word "subject"': subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power that subjugates and makes subject to.[25] Foucault, then, includes an aspect of submission and the exercise of power into the sense of the word 'subject'. Of particular interest is the second meaning that Foucault gives to subject. In this second sense, a link between subject as subjected and subject as consciousness with self-knowledge is identified. It is also this meaning, the framing of potentia by an attachment to an identity, that can explain how subjects en masse continue to display desired behaviour, even in the absence of direct control or dependencies.

16 Matzner (n 10) 32.

17 Deleuze (n 6) 7.

18 Michel Foucault, *Discipline and Punish: The Birth of the Prison.* (Alan Sheridan tr, Random House Inc 1991) 201.

19 Didier Bigo, 'Globalized (In)Security: The Field and the Ban-Opticon' in Didier Bigo and Anastassia Tsoukala (eds) *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes After 9/11* (Routledge 2014) 44.

20 Jean-Paul Sartre, *Being and Nothingness: A Phenomenology Essay on Ontology* (Washington Square Press 1992) 351.

21 Foucault (n 3) 326.

22 Jitendranath N Mohanty, *Phenomenology: Between Essentialism and Transcendental Philosophy* (Northwestern University Press 1998) 86.

23 Lucien Goldmann, *Lukács and Heidegger: Towards a New Philosophy* (Routledge 2009) 8.

24 ibid 68.

25 Foucault (n 3) 331.

Dreyfus notes a commonality between Heidegger and Foucault in their criticism of the Cartesian idea of a self-transparent subject and the related Kantian ideal of autonomous actorship.[26] If a subject is not self-transparent, then the question is to what extent the awareness or self-knowledge that creates an attachment to one's own identity can be completely immanent. Moreover, rejecting the Kantian ideal of autonomous actorship implies that conditions of the possibility of action cannot, or at least, cannot only arise from an autonomous immanent sphere. Thus, it seems unlikely that on a strong reading, a Foucauldian conception of subject refers to some immanent sphere, or on a weaker one, that subject is determined by such immanence and thus can possibly correspond to just such a sphere.

Foucault further states that 'power is exercised only over free subjects, and only insofar as they are "free." By this we mean individual or collective subjects who are faced with a field of possibilities in which several modes of conduct, reaction, and behaviour are available'.[27] Attributing a certain degree of freedom to subjects presupposes they can exhibit intentional behaviour. After all, without the possibility of an intentional choice in the manner of directed behaviour with regard to a field of possibilities, one cannot reasonably speak of freedom. I interpret the quotation marks that Foucault places around 'free' as the framing/regulation of the field of possibilities to which the subject, subject to potestas, has access to—the regulation of the subject's potentia. Although the subject can make an intentional choice in its field of possibilities, my sense is that the options are limited by either control and dependence, or by an attachment to one's own (imposed) identity.

Furthermore, it is remarkable that Foucault here speaks of 'collective subjects'.[28] Although individuals can be made subject, subject does not—at least not necessarily—refer back to an individual or an 'I'. I interpret this as the recognition that the attachment of an individual to an identity can be a matter of an attachment to a collective identity, to which several individuals are collectively bound.

We have, now, arrived at a Foucauldian conception of subject which maintains the following premises:

a. The subject is attached to its own identity
b. The subject can exhibit intentional behaviour
c. The subject does not correspond to an immanent sphere
d. The subject does not (necessarily) refer to an individual 'I'

II.II. Excursus: moving beyond Foucault through Being and Time

Dreyfus articulates a range of parallels between Foucault's thinking and Heidegger's.[29] Foucault himself states in an interview that his 'entire philosophical development was determined by [his] reading of Heidegger'.[30] In this same interview, however, Foucault also admits to knowing nothing about *Being and Time.*[31] From this, I contend that it is not trivial for a post-Foucauldian conception of subjectification to draw inspiration from precisely this blind spot in the determination of Foucault's philosophical development: *Being and Time* and Dasein's analysis.

It can be argued against any application of Heidegger to subjectification that Heidegger precisely rejects the concept of subject as such. Therefore, Heidegger's analysis of Dasein can never be taken as formative of a subject. In making such an untimely repudiation, however, it is important to take into account the ambiguity of the meaning of subject and to examine which conception of subject Heidegger is rejecting. Heidegger states that '[b]ecause the usual separation between a subject with its immanent sphere and an object with its transcendent sphere-because, in general, the distinction between inner and an outer is constructive and continually gives occasion for further constructions, we shall in the future no longer speak of a subject, of a subjective sphere, but shall understand the being to whom intentional comportments belong as Dasein'.[32] This shows that by rejecting subject, Heidegger opposes the idea of an *immanent* subjective sphere as well as the opposition between subject and object. We have, however, just come to the conclusion that the Foucauldian conception of subject does not correspond at all to some immanent sphere. This seems to remove the sting from the objection. Although Heidegger rejects the Cartesian and Kantian conceptions of subject, this rejection is grounded in conceptions of subject that do not correspond to Foucault. This does not, however, in any way entail that Dasein and a Foucauldian subject can or should be readily equated with each other. The possibility, nevertheless, remains, as Goldmann does in his comparison between Lukács and Heidegger, 'to translate the developments of each thinker into the terminology of the other'.[33]

Another possible obstacle to the applicability of Heidegger's analysis of Dasein to the conceptualisation of subjectification is that Heidegger writes of Dasein that '[t]hat Being which is an issue for this entity in its very Being, is in each case mine [...] [b]ecause Dasein has in each case mineness [Jemeinigkeit], one must always use a personal pronoun when one addresses it: 'I am', 'you are'.[34] When Foucault speaks of collective subjects, however, it seems appropriate to address them as 'we are', 'you are'. Although also personal pronouns, it is doubtful to what extent Dasein can be interpreted as plural (at least with respect to Heidegger's formulation of it in *Being and Time*). What this illustrates, however, is only that Dasein cannot simply be equated with a Foucauldian subject. It does not prevent us from using Heidegger's analysis of Dasein to explore how an individual (who is indeed addressed in the singular) can be made a subject. The task now before us is to examine critically how Dasein's constitution can serve as inspiration for a conceptualisation of subjectification.

II.III. Hybridisation: Cross-pollinating Subject with Dasein

If we compare Dasein with the four premises elaborated above about the Foucauldian subject, two similarities can be noted. Firstly, we can say that Dasein also possesses intentionality, which is explicitly affirmed in Dasein's description as 'the being to whom intentional comportments belong'.[35] Secondly, it also applies to Dasein that it does not correspond to some immanent sphere, the presence of which led Heidegger to repudiate the concept of subject.

26 Hubert Dreyfus, 'Heidegger and Foucault on the Subject, Agency and Practices' (Regents of University of California 2002) <https://web.archive.org/web/20170310010443/http://socrates.berkeley.edu/~hdreyfus/html/paper_heidandfoucault.html> accessed 6 June 2022.

27 Foucault (n 3) 342.

28 ibid.

29 Hubert Dreyfus, 'Being and Power: Heidegger and Foucault' (1996) 4 International Journal of Philosophical Studies 1; Dreyfus (n 26).

30 Gilles Barbedette and André Scala, 'Le Retour de La Morale' (1984) 2937 Les Nouvelles littéraires.

31 ibid.

32 Martin Heidegger, *The Basic Problems of Phenomenology* (Albert Hofstadter tr, Indiana University Press 1988) 64.

33 Goldmann (n 23) 11.

34 Martin Heidegger, *Being and Time* (John Macquarrie and Edward Robinson trs, Blackwell Publisher Ltd 1962) 67-68.

35 ibid 64.

What remains, and this is exactly where Heidegger's analysis of Dasein promises to be particularly fruitful, are: 1) the question of an attachment to identity that frames the possibilities for action, and 2) the explanation of a possible plurality of subject.

Heidegger writes: 'as thrown, Dasein is thrown into the kind of Being which we call "projecting"'.[36] In more Foucauldian terminology, I take this statement as the acknowledgment that an individual is situated at every moment in a field of possibility from which his 'world understanding' comes into being. It should be noted that in *On Humanism* Heidegger returns to attributing projection to Dasein. Here he says that 'what throws in projection is not man but Being itself, which sends man into the ek-sistence of Da-sein that is his essence'.[37] Philipse interprets this turn as a denial of man's fundamental contingency and calls this later position of Heidegger 'flatly contradictory to *Sein* und *Zeit*'.[38] For the sake of coherence, I am committing myself here to the position of early Heidegger of *Being and Time*. In my post-Foucauldian interpretation this means that the individual's 'world understanding' is determined by both the individual and his a priori field of possibilities. In so doing, I explicitly do not want to reduce the creation of a 'world understanding' to an intentional act or thought, nor to an expression of will. Suffice it for now to say that I take Dasein's projection as the recognition that, formally speaking, from any situation the individual finds themselves in, there are several possible 'world understandings' accessible to the individual.

But what do these possible 'world understandings' imply? And what is the relation of 'world understanding' to our question concerning the attachment to identity and the plurality of subject? Heidegger states that 'projection is constitutive for Being-in-the-world with regard to the disclosedness of its existentially constitutive state-of Being by which the factical potentiality-for-Being gets its leeway [Spielraum]'.[39] I read this as a conception of 'world understanding' as the scope of thought and action possibilities of the individual from his given a priori field of possibilities. While this does not elucidate anything about a plurality of subject, it does reveal a first insight into the process by which subjects are attached to identities. What brings about the attachment to identity, and why it is relevant for the maintenance of power structures, is the framing, ie, the regulation of possible actions. Further, with 'world understanding' interpreted as such, we describe the framework from which all thought and action possibilities arise. Could it be that an attachment to identity goes hand in hand with a certain 'world understanding'?

Before I continue to explore the question at hand, I would first like to address the possible repudiation that an identification of the notion of 'projection' with a framework for thought and action may elicit. Indeed, such an identification does neither justice to the depth and complexity of Heidegger's conception of projection, nor to that of his conception of possibility. Heidegger himself states that '[t]he Being-possible which Dasein is existentially in every case, is to be sharply distinguished both from empty logical possibility and from the contingency of something present-at-hand, so far as with the present-at-hand this or that can 'come to pass'.[40] Here, I understand Heidegger to be referring with the notion of 'projection' to possible modes of being and not to concrete capacities for thought and action. Does this not contradict my earlier reading? To this I first say that I am not interested in providing a one-to-one equivocation of Heidegger with Foucault, but only to draw inspiration from Heidegger's work to arrive at a post-Foucauldian conception of subjectification. On these grounds, I maintain that some degree of flexibility in interpretation is permitted. Moreover, here, my liberal use of Heidegger does not really encounter any contradictions. Concrete behaviours, thoughts and possibilities for action arise from the kind of being Dasein is. As such, projection is perhaps a more fundamental and complex concept than a framework of possible thought and action, but every concrete framework of possible thought and action is fully determined by projection. While I grant that my interpretation is, then, a movement from a fundament to its derivative, it is here not problematic to do so.

We have, now, arrived at the individual who is situated at every moment in an a priori field of possibility from which his 'world understanding' comes into being and in which this realisation has a direct power-law distribution because it frames the individual's options for action. In order to find out to what extent this power-law distribution corresponds or can be compared to the attachment to one's own identity by the consciousness or self-knowledge that Foucault describes,[41] we have to examine how a 'world understanding' emerges. Heidegger writes the following about this:

> The Self of everyday Dasein is the they-self, which we distinguish from the authentic Self-that is, from the Self which has been taken hold of in its own way [eigens ergriffenen]. As they-self, the particular Dasein has been dispersed into the "they", and must first find itself. This dispersal characterizes the 'subject' of that kind of Being which we know as concernful absorption in the world we encounter as closest to us. If Dasein is familiar with itself as they-self, this means at the same time that the "they" itself prescribes that way of interpreting the world and Being-in the-world which lies closest.[42]

Would it be meritorious to read a correspondence between this 'they-self' and the 'own identity' that Foucault spoke of? Such a correspondence would mean that the last sentence of the above quotation translates to something very similar to Foucault's definition of subject, ie, if the individual is familiar with himself as his own identity, then his 'world understanding' is dictated by the 'they' and the they would determine his operating framework. It would also provide a starting point for an explanation of the possible plurality of subject in the plural of 'they'. If this is so, if 'they-self' is translated into 'own identity', then the difference between Dasein and indifferent everyday Dasein seems to correspond to the difference between individual and subject.

Before we get to that point, however, it pays to elucidate how something like 'own identity', with all its connotations of personality and singularity, can correspond to the plurality of the 'they-self'. Is there not a contradiction in identifying the private with something that belongs to the common 'they'? Who or what is this 'they' even supposed to be? Heidegger writes that 'Dasein's facticity is such that as long as it is what it is, Dasein remains in the throw, and is sucked into the turbulence of the "they's" inauthenticity'.[43] Heidegger is talking about 'the turbulence of the inauthenticity of the they' arising

36 ibid 185.

37 Martin Heidegger, *Basic Writings: From Being and Time (1927) to the Task of Thinking (1964)* (David F Krell ed, Routledge 1977) 217.

38 Herman Philipse, *Heidegger's Philosophy of Being: A Critical Interpretation* (Princeton University Press 1998) 220.

39 Heidegger (n 34) 192.

40 ibid 183.

41 Foucault (n 3) 331.

42 Heidegger (n 34) 167.

43 ibid 232-233.

directly from the condition of being thrown. When self-knowledge as 'they-self' flows directly from this 'turbulence', it means that the 'they-self' also flows from the condition of being thrown. Dreyfus describes the condition of thrownness as 'culture bound'.[44] When an identity arises from being bound by culture, we speak of a cultural identity. Can the 'they-self' then be characterised as cultural identity? I will not deny that the reduction of thrownness to culture-boundness on which this equivocation rests is problematic.

Philipse offers us a less problematic insight when he writes that: '[t]he cultural matrix into which we have been 'thrown' […] is partly constitutive of our personal identity, of our 'self''.[45] This can be taken to denote the own identity that is partly constituted by the a priori field of the culturally situated individual. This gives one's own identity a constitution in plurality in the non-trivial sense that there is no such thing as the culture of the individual. The question remains as to what extent this constitution is determinative. Philipse here further provides that '[t]he dictatorship of Everyman [the They] might be seen as a conservative, unimaginative, narrow-minded, and conformist way of endorsing a common cultural background, in which one identifies oneself entirely with traditional stereotyped roles'.[46] We can extrapolate from this exegesis that the 'they-self' corresponds to one's own identity, if and only if the common cultural background is endorsed in a specific uninspired way. This specifically uninspired way of endorsing follows from everyday inauthenticity and will be revisited in §4.

We have, now, arrived at the individual who becomes subject when his 'world understanding', and thus his operating framework, is dictated by identifying his own identity with stereotyped roles. This transformation from individual to subject occurs in the everyday inauthenticity. Everyday inauthenticity, thus, shows itself to be a reproduction mechanism for subjectification. The everyday inauthenticity, taken only in itself, does not yet give a concrete interpretation to the 'world understanding', but dictates an a priori given 'world understanding', holds the individual, so to speak, in the grip of a specific subjectivity. For our question concerning subjectification, there remains, on the one hand, the elaboration of exactly what this everyday inauthenticity entails and, on the other hand, the question of how the framework of possible action is given shape or can be controlled, ie, how a 'world understanding' comes to its concrete form.

II.IV. After Heidegger: From thrownness to territory

We are now faced with two questions: on the one hand, a question concerning the production of subjects, and on the other, a question concerning the reproduction of subjects, ie, subjectivities. We have seen how an individual becomes a subject by understanding himself as 'they-self', but we have not yet given a clear answer to the question of who or what this 'they' is. Heidegger is reluctant to offer a positive exposition of the 'they' and says: 'The "who" is not this one, not that one, not oneself [man selbst], not some people [einige], and not the sum of them all. The 'who' is the neuter, the "they" [das Man]'.[47] Yet a more positive determination can be extrapolated from a statement by Heidegger about Being-with-Others: 'But if fateful Dasein, as Being-in-the-world, exists essentially in Being-with-Others, its historizing is a co-historizing and is determinative for it as destiny [Geschick]. This is how we designate the historizing of the community, of a people'.[48] If we assume that the 'who' of the 'they' corresponds to the 'who' of 'Being-with-Others', then the 'they' is defined here as the community.

At this point it becomes a strenuous undertaking to extend Heidegger to our current affairs. Quite apart from the dubious political connotations of 'people', if we want to maintain that the 'they' dictates a 'world understanding', we must presuppose a coherent 'world understanding' maintained by the 'they'. Such a coherence is a presupposition that is left wholly undetermined by Heidegger. Let us consider the following two stereotyped roles, the programmer and the gamer, and their pre-ontological understanding of a computer. Both roles can co-exist in one nation, and, indeed, one individual (the nexus of the stereotype's inherent contradiction). For the stereotyped programmer, however, the primary purpose of a computer is programming, while for the stereotyped gamer, this is gaming. Even in everyday inauthenticity, when both remain completely in the turbulence of the throw, both have been dictated by a different primary explanation of the world—or at least of the computer as part of the world.

In Heidegger's defence, this does not mean that the programmer and the gamer have a fundamentally different understanding of the world. They speak the same language, understand a hammer as something to hammer, 'take pleasure; [they] read, see, and judge about literature and art as *they* [das Man] see and judge,[49] etc. Yet there are role-specific areas of their 'world understanding' that do differ fundamentally from each other. It should be noted that the different roles correspond to different communities; there is a community of programmers, a community of gamers, etc. A possible solution is, then, not to speak of one 'they' dictating one 'world understanding', but a plurality of 'theys', each dictating a strata or sub-strata of a 'world understanding'.

Such a division of the 'they', however, contradicts Heidegger's unambiguous statement that the 'they' are 'not some people [einige]'.[50] If we are talking about the community of programmers, then these are indeed 'some people [einige]' and not the entire population or a neuter thereof. From this point on we can really only take *Being and Time* as a point of departure, and I will try to reconceptualise the proposed salvaging of the plurality of the 'they' through another avenue. We had already arrived at the individual who becomes a subject when his 'world understanding', and with it his operating framework, was dictated by identifying his own identity with stereotyped roles. We have also come to the conclusion that the concrete interpretation of a 'world understanding' consists of a plurality of sub-stratas.

A path to reconceptualise these 'strata and sub-stratas' from which a 'world understanding' is constructed, in such a way that this reconceptualisation is sufficiently compatible with the Heideggerian ideas on which it rests, but without lapsing into Heideggerian terminology or a commitment to notions of 'people' or to imply an unambiguous 'they', avails itself in the Deleuzean concept of the territory. On this question, Petr Kouba states that '[h]owever incompatible with Heidegger's inquiry into being the notions of territory and deterritorialization may seem, their adequacy becomes apparent if we realise that territory is, in *Qu'est-ce que la philosophie?*, tied together with home, with what is familiar, whereas deterritorialization belongs to what is unheimlich'.[51]

44 Dreyfus (n 26).
45 Philipse (n 38) 26.
46 ibid 27.
47 Heidegger (n 34) 164.
48 ibid 436.
49 ibid 170.
50 ibid 164.
51 Petr Kouba, 'The Phenomenon of Mental Disorder: Perspectives of

Deleuze and Guattari write about territories and deterritorialization in various contexts.[52] In line with the argument I have put forward, a territory may be understood as a specific structure and interpretation of thoughts and possible actions, a delimited scope of thought and extension. I interpret deterritorialization as the process through which an individual thinks or acts on a specific territory in ways that exceed the boundaries of that territory. As such, deterritorialization follows a line of flight. I interpret reterritorialization as the process in which thinking or acting along a line of flight is placed back into a territory. On such a reading, the concept of territory shows some parallels to Heidegger's notions of thrownness and 'the turbulence of the throw', while de- and reterritorialization are analogous to authenticity and fallenness, respectively.

III. Subjectification: Reproduction

We have arrived at the individual who is situated at all times in designated a priori territories, on which every thought and action is grounded. The individual becomes subject when he understands himself within the framework of these territories. For the reproduction of subjectification, it is then important to keep the individual within these frameworks, ie, to prevent de- and reterritorialization. In order to examine how de- and reterritorialization can be prevented, ie, what power structures can be employed to reproduce subjectification, it is first necessary to examine what the conditions and possibilities are for de- and reterritorialization, respectively. We will then gain insight as to how any given power structure can be employed such that it can deprive the conditions and possibilities of deterritorialization of their genetic potencies. In §III.I., I will elaborate on the conditions for the actualisation of deterritorialization as well as indicate where methods to prevent this can be developed. In §III.II., I will retrace the above process for reterritorialization in order to reconstruct the process of the reproduction of subjectification.

III.I. Death and Time

III.I.I. Anticipating Death

If we are going to consider a possible correspondence between deterritorialization and authenticity, it is worth examining what Heidegger has to say about this case in his discussion of death:

> 'We may now summarize our characterization of authentic Being-towards-death as we have projected it existentially: anticipation reveals to Dasein its lostness in the they-self, and brings it face to face with the possibility of being itself […]'.[53]

This coming face to face with the possibility of being oneself is a coming face to face with a line of flight, allowing a deterritorialization from the 'they-self'. Foucault, too, notices an element of authenticity in anticipating death when he discusses the meletē thanatou, the meditation on, ie, training for death, where he says that to partake in it is to 'judge the proper value of every action one is performing'.[54] I also interpret this assessment of the actual value of an action as following a line of flight; one's own action is no longer assessed within the framework of an a priori designated territory. This can open up new possibilities for action that would normally have been internally judged as impossible, inappropriate or performatively wrong. Without wishing to delve deeper into analyses of anticipating death, it suffices to conclude, here, that anticipating death opens up possibilities for deterritorialization.

However, the fact that 'anticipating death' opens up possibilities for deterritorialization can come across as bewildering and under-determined. Peone speaks of a 'Heideggerian fixation on death'[55] and defends Cassirer's criticism of the Heideggerian position of 'anticipating death' as 'the sine qua non of actual life'.[56] However, Cassirer's critique is not relevant in this case. It is not important whether or not anticipating death is the only way to achieve deterritorialization. It only matters that it is a way. How can this 'anticipation of death' be prevented? What is the necessary condition for this possibility of deterritorialization? One aspect of death meditation that can bridge the gap between Foucault's meletē thanatou and Heidegger's 'Being-towards-death' is that death meditation 'changes our temporal experience'.[57] Of such a temporal experience, Dahlstrom says in his reading of Heidegger that '"[a]uthentic temporality" stands for the ecstases-and-horizons without which there is no authentic existence or, equivalently, no authentic care'.[58] Thus, in view of the relationship between authenticity and deterritorialization, a necessary condition for deterritorialization seems to have been found in something like 'authentic temporality', a temporality that—if we maintain the bridge between Heidegger and Foucault—corresponds to the altered temporal experience that meditation produces.

III.I.II. Authenticating Time

In order to better grasp the necessary condition found in this way of 'authentic temporality', a short exploration of Heidegger's account of time is warranted. In *Being and Time*, Heidegger describes three kinds of time: primordial time, world-time, and ordinary time, where both world-time and ordinary time can be traced back to primordial time. Primordial time, or temporality as such, is a threefold transcendental condition of Dasein that discloses the world. Primordial time is the horizon in which Dasein understands the world and in which the thrownness of the past, the contemplation of the present, and the projection of the future converge. This is in stark contrast to the ordinary understanding of time as an infinite linear series of successive now-times. How this ordinary understanding of time came to be can be explained on the basis of world-time, which arises from Dasein's everyday being-in-the world. World-time is an ordering of temporality on ground of the practical operation of the world: the setting of the sun is the time to stop working (or switch on the light), an early arrival at the station allows just the time for a sandwich before the lecture starts, the beeping of the mobile phone marks lunchtime, etc. 'The everyday concern which gives itself time, finds "the time" in those entities within-the-world which are encountered '"in time"'.[59] In the

Heidegger's Thought in Psychopathology' (2014) 40 Human Studies, 60.

52 Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Bloomsbury Publishing 2013) 68, 106, 317; Gilles Deleuze and Felix Guattari, *What Is Philosophy?* (Columbia University Press 1994); Deleuze and Guattari (n 1).

53 Heidegger (n 34) 311.

54 Michel Foucault, *The Hermeneutics of the Subject: Lectures at the Collège de France, 1981-1982* (Frédéric Gros ed, St Martin's Press 2005) 504.

55 Dustin Peone, 'Ernst Cassirer's Essential Critique of Heidegger and *Verfallenheit*' (2012) 42 Idealistic Studies 125.

56 ibid 127.

57 Joseph Glicksohn, 'Temporal Cognition and the Phenomenology of Time: A Multiplicative Function for Apparent Duration' (2001) 10 Consciousness and Cognition 8.

58 Daniel O Dahlstrom, 'Heidegger's Concept of Temporality: Reflections of a Recent Criticism' (1995) 49 The Review of Metaphysics, 114.

59 Heidegger (n 34) 472.

everyday use of the clock, 'time shows itself as a sequence of "nows" which are constantly 'present-at-hand', simultaneously passing away and coming along…'.[60]

Heidegger further describes the mode of being that aligns with the temporal experience of time as the succession of now-moments as 'the Being which falls as it makes present'.[61] I take this as the nexus conjoining temporal experience and inauthenticity. A necessary condition for deterritorialization, which is analogous to Heidegger's 'authentic temporality', is, then, the escape from this temporal experience—escaping the everyday grind of now-moments. Now we have moved from a somewhat ambiguous 'anticipation of death' to a more concrete necessary condition for deterritorialization. If we want to step outside the box of everyday thinking and deterritorialize ourselves, we must break with everyday temporal experience and not let ourselves be carried away in the rut of now-moments. Conversely, if we want to reproduce subjectification, we must, then, be diligent in our perpetuation of the grind of infinite now-moments and prevent any other temporal experiences than the ones encountered in our average everydayness.

III.II. Concerning the genesis of new territories and their destabilising effects on power structures

So far, I have discussed the reproduction of subjectification in terms of preventing deterritorialization. Now suppose that deterritorialization cannot be prevented, is all hope lost for the reproduction of subjectification? Or, even when deterritorialization has occurred, are there still avenues through which power structures can arise such that the subject can be replanted? To answer this question, it is necessary to examine where deterritorialization is heading and what this means for existing power relations.

The 'whither' of deterritorialization is the direction of a line of flight, an 'away from'. But away from what exactly? Goodchild states that completely deterritorialised concepts 'have no meaning, and only express a kind of nonsense'.[62] A deterritorialization is, therefore, an abandonment of a common framework for thought and action, and with it also an abandonment of a common conceptual framework. 'Having crossed a threshold of absolute deterritorialization, concepts no longer refer back to their primordial significations',[63] when a line of flight leaves any territory, then any thought and action that follows this line of flight is doomed or fortunate to be relegated to nonsense, to common misunderstanding. The individual, in following a line of flight, thus, moves from subject to madman (irrespective of what it does, as madman the individual can still be subsumed under a power structure through coercive institutionalisation).

In the context of power relations, however, it is hardly plausible that a move towards nonsense poses a threat. The real danger deterritorialization poses towards power structures and the reproduction of subjectification lies, therefore, not only in deterritorialization, but more so in deterritorialization followed by reterritorialization. Earlier I have referred to reterritorialization as related to Heidegger's concept of fallenness. Where Heidegger's 'Fall' describes a movement towards the 'they', a falling into communality, reterritorialization can also be grasped as a movement towards communality, ie, a movement towards a territory. What distinguishes reterritorialization from fallenness is that the territory to which reterritorialization is moving does not consist of the thought and action framework of a singular 'they'. I take reterritorialization as a movement of a line of flight back to a community, back to a territory that is part of a large plurality of communities or territories. The reterritorializing movement of the individual can thereby 1) return to the territory from which the deterritorialization originated and adapt this territory in its movement, 2) return to another already existing territory, or 3) form the basso continuo of an entirely new territory. The claim to communality that is found in reterritorialization from a line of flight is the constitutive movement for an adjustment or new emergence of a thought and action framework.

What we see arising in this way in reterritorialization is the adaptation or the new emergence of potentia of subjects. And precisely therein lies the tedious threat de- and reterritorialization pose to the stability of power structures, to potestas: the cycle of de- and reterritorialization creates new kinds of subjects, with new operating frameworks, which may be incompatible with the old. It is, then, in the interest of the reproduction of subjectification to take due care to prevent not only deterritorialization, but also—in case deterritorialization does occur—of reterritorialization.

The necessary conditions for reterritorialization are, on the one hand, deterritorialization. The conditions of this and an impetus for methods to prevent deterritorialization have already been discussed above. On the other hand, reterritorialization also presupposes a claim to communality from the line of flight. Methods for the reproduction of subjectification must, then, be diligent in preventing a claim to new communality, rendering the old communality insensitive to the movement from a line of flight.

IV. Subjectification: Production

In the above section, I have exposited the various loci power structures one must be wary of if they are to retain subjects within certain thought, and action frameworks that operate within a specific territory. What remains is the question as to what kind of methods should be used to give a positive interpretation to this territory. In other words, how can an individual's designated a priori territory on which it thinks, and acts be constructed in such a way that as subject, it exhibits specific desired behaviour?

When we talk about constructing an individual's given territory, we are talking about either modifying an individual's current designated territory or establishing a new territory. In the previous section I have already explained how these two options arise from a movement of reterritorialization. I have also already described how reterritorialization coincides with a movement towards communality. What is important for the maintenance of power structures is how to construct a specific behavioural framework for this community. In order to discover how individuals behave within a community, it is worth asking how individuals behave in general as they do within a community. And how do individuals behave within a community? Generally, they behave normally. The question, then, becomes how to interpret what is normal within a community. This point can be disputed on two levels: on the one hand it must be recognised that individuals sometimes behave abnormally, on the other hand it also happens that the communal framework, ie, the 'they' behaves abnormally. Is giving substance to what is normal sufficient? Where an individual does not behave normally within a certain community, when his behaviour is misunderstood from

60 ibid 474.
61 ibid.
62 Philip Goodchild, *Deleuze and Guattari: An Introduction to the Politics of Desire* (Sage 1996) 56.
63 ibid 57.

the point of view of the community, this behaviour follows a line of flight, and we can identify a deterritorialization. In the previous discussion of the reproduction of subjectification, it has already been indicated what power structures must focus on to prevent this. This occurrence is sufficient to avoid having to take into account individuals who do not behave normally in order nevertheless to direct the behaviour of the community through the construction of a normality. When one speaks of the 'they' as behaving abnormally, this 'they' always describes a different community than the one from which the behaviour is considered abnormal. The abnormality of the other 'they' is only abnormal because it contrasts with the normality of one's own 'they'. This does not diminish the possibility of influencing behaviour by directing the normality of one's own 'they'.

With regard to the question of how normality can be managed within a community, we can refer to the work of Foucault, who elaborates on processes of normalisation. Foucault writes that 'a whole range of degrees of normality [indicates] membership of a homogeneous social body […] In a sense, the power of normalisation imposes homogeneity…'.[64] I take this 'membership of a homogeneous social body' to equate to an attachment to a common territory. A subject who is completely bound to such a territory will, therefore, exhibit the highest degree of normality, that is, from the point of view of the community and according to the common framework of thought and action, it will behave perfectly normal: normality manifests itself as an 'imperative measure'.[65] Foucault describes the processes of normalisation maintained in disciplinary power as a normalising sanction, ie, 'a micro-penal' system,[66] or a 'micro-economy of privileges and impositions'.[67] These methods consist of 'a double system: gratification-punishment. And it is this system that operates in the process of training and correction'.[68] A meticulous system of subtle punishments and encouragements is installed in 'the web of everyday existence',[69] with the result that the subjects not only start to display socially intended desired behaviour, but also that they all start to resemble one another.[70]

Should we now understand normalisation as a collective internalisation of imposed rules? Is the goal of normalisation for subjects to follow the rules in their behaviour? Does the conscious following of rules not all too easily open up the line of flight which unveils the possibility to consciously and deliberately not follow the same rules, legal or conventional? In order to explain how the systematic imposition of an extensive constellation of rules leads to a framework for thought and action in which deterritorialization cannot simply be reduced to a conscious choice, I want to make a comparison with the phenomenon of the acquisition of skills. Dreyfus notes in a discussion about rule-following in response to Searle with respect to the act of teaching left-handed driving in Britain that 'the rule one originally followed expresses a social norm, is irrelevant so far as the causal explanation of the behaviour is concerned'.[71] But if a social norm does not provide a causal explanation for behaviour, how can we explain 'the power of the norm'?[72] Dreyfus may once again aid us here when he writes that '[i]f the driver in Britain, for example, just does in each situation what experience has shown works in that type of situation, and all the situations have in common that they require that to avoid accidents he must drive on the left, then he would be *acting according* to that rule but not *following* it'.[73] The functioning of the normalising sanction can, then, be explained not as the imposition of rules that are followed and internalised, but as the construction of experiences that show that specific behaviour works in certain situations. Processes of normalisation, the production of subjectification, should, then, focus on the construction of an everydayness of a community, in which specific desired behaviour operates.

64 Foucault (n 18) 184.
65 ibid.
66 ibid 178
67 ibid 180.
68 ibid.
69 ibid 183.
70 ibid 182.
71 Hubert Dreyfus, 'Phenomenological Description versus Rational Reconstruction' (2001) 216 Revue internationale de philosophie 182.
72 Foucault (n 18) 184.
73 Dreyfus (n 71) 183.

V. Ten Theses on Power and Subjectification

In summary, we have arrived at the following theses regarding a post-Foucauldian conception of power and subjectification:

I.
Power, in the sense of potestas, consists of the orchestrated framing and regulation of potentia.

II.
Potestas' object, the individual's potentia, is framed and regulated by raising obstacles (access control) as well as by the individual's own operating framework.

III.
In order to explain the automatic operation of potestas, power analysis must primarily concern itself with the subject's own operating framework.

IV.
In every situation in which it finds itself, the individual possesses a designated a priori territory on which it thinks and acts.

V.
The individual becomes a subject when it is bound by the operating framework of its territory and when it is deprived the possibility of deterritorialization.

VI.
Subjectification includes, on the one hand, a binding to territory (reproduction), and on the other hand, the interpretation of territory (production).

VII.
If we want to reproduce subjectification, we must prevent the de- and reterritorialization of subjects.

VIII.
If we want to prevent deterritorialization, we must maintain the grind of infinite now-moments and prevent the experience of temporal experiences other than the ordinary time of average everydayness.

IX.
If we want to prevent reterritorialization, we must curtail the subject's potential of latching itself to a new communality.

X.
If we want to produce subjectification, we must cultivate the everydayness of a communality, in which specific desired behaviour flourishes.

Conclusion

This paper has uncovered that the suspicion towards subjectification in Deleuzean theory is grounded in a Foucauldian conception of subjectification, which it rightly finds to be untenable. A restoration in the form of a post-Foucauldian conception of subjectification, where the locus is not on a coercive gaze or the internalisation of norms, but where subjectification is produced by the construction of an everydayness in which specific desired behaviour operates, undermines the ground of this suspicion. Indeed, the shift in focus to access control, the automated management of spaces and possibilities, implies a shift in focus to precisely that subjectifying construction of an everydayness in which specific desired behaviour operates.

If we endorse the subjectifying effect of access control, it also becomes clear why subjects continue to exhibit desired behaviour en masse, even in the absence of control, even when they are not controlled and do not experience any access barriers. With access control, the everyday experience has already been created in which this behaviour operates. The subject is, thus, already in a territory on which an operating framework is planted that encourages its behaviour. The subject is, then, already in a situation in which this behaviour is normal, even if this normality has never been articulated as such as a norm.

What this paper has left underdetermined, and merits further thought, is the way in which intentional behaviour arises from a given territory, this is to say, to what extent and in what way our conceptual framework is grounded in everyday experiences and what the implications are for the possibilities of intentional action. The overlap and stratification of territories also merit further engagement. It is clear that in our emerging climate, one can no longer speak of an homogeneous 'person', but how being part of different communities, with different territories, leads to a territory from which an individual can think and act has not yet been sufficiently determined.

> I see men like trees, walking.
>
> - A blind Bethsaidan: Mark 8:24

This paper, nevertheless, offers a first insight into a post-Foucauldian conception of subjectification that can, on the one hand, further be expanded, and which can, on the other hand, serve as an instrument for further power and concrete case analyses. With this instrument, research focused on access control can be deepened and it is possible to investigate what experiences access control brings about in subjects. This makes it possible to reveal what kinds of territories and normalities are being constructed, even when there is no explicit norm. This may explain why subjects continue to display desired behaviour even in the absence of interventions and, thus, inform what constitutes the substrate of a stable society.

The contribution that a post-Foucauldian conception of subjectification offers to the discourse surrounding power in the current and emerging social landscape of global digital surveillance and control is, then, that it provides an explanatory model for the way in which access control ensures the maintenance of a stable society, where the denial of access remains the exception and not the rule.

Notre-Dame de Paris: Pyrolysis Hypothesis and Fire Safety in Historical Buildings

Rémi Desalbres

Rémi Desalbres is heritage architect, founder and CEO of Arc&Sites Patrimoine & Création. He is also Honory President of the Heritage Architects Association in France (Association des Architectes du Patrimoine) since the end of his term as President from 2014 to 2020.

On Monday 15 April, a fire broke out in the Notre-Dame de Paris. Believers and tourists were invited to leave the cathedral immediately. A race against time was launched which would last more than fifteen hours, defying all human bravery to save the Notre-Dame. Thousands of people gathered around the cathedral this evening to reflect, pray, and witness this catastrophe which none had thought possible to an eight-century old lady that had accompanied people in their joys and sorrows and had survived wars, plagues, revolutions, and occupations. The emotion was felt worldwide and donations for the reconstruction arrived quickly. The fire destroyed the spire, the timber roof structure, and part of the vault, at the level of the transept crossing. Three years later, the investigation to find the cause of this fire is still ongoing.

This article does not claim to be an exhaustive account of the issues associated with the reconstruction of Notre-Dame, nor does it claim definitive answers to an ongoing investigation. It rather seeks to put forward a scientific hypothesis on the causes of this fire, not only for the pure satisfaction of knowledge, but also in the hope to raise awareness about the widespread but relatively unknown phenomenon of pyrolysis during works on monuments.[1] It is crucial that architects and companies working on listed buildings are aware of the phenomenon of pyrolysis so that they can adapt their working protocols, be more vigilant, and request more efficient fire detection instruments to avoid future similar disasters. In recent years, other major French monuments undergoing restoration works had been destroyed without the causes being identified: the seventeenth-century Hôtel Lambert in the centre of Paris in 2013 and the flamboyant gothic townhall of La Rochelle in 2013 are just two examples. In the 1990s, a fire outbreak was discovered just in time at the Beauvais Cathedral the day following some hot-spot work using a blowtorch. It is worth reminding the reader that the vast majority of fires happening during work are caused by hot-spot works.[2]

The phenomenon of pyrolysis and, more generally, of slow combustion are still little known to those working on historic monuments, whether they are architects or craftsmen. The case of Notre-Dame de Paris deserves to be studied in greater depth because this hypothesis remains the most likely, given the conditions that existed during the restoration of the spire in the days preceding the fire.

The current investigation has only shown that the fire started at the foot of the spire. Samples of charred wood have made it possible to locate the fire's starting point in the area of 'the wall plate of the choir at the south-east corner of the transept crossing'.[3]

The blueprints Eugène Viollet-le-Duc published in his *Dictionnaire raisonné d'architecture* give us interesting information on the ancient layout of the spire's framework built in 1859.[4] At the intersection of the roofs in line with the transept crossing, there were wooden posts directly linked to the timber roof structure on which rested sixteen statues representing the twelve Apostles and the symbols of the four Evangelists. The latter, placed at the bottom, were directly connected to the wall plate of the timber roof structure. The hollow statues are made of hammered and

1 Mikaël Faujour, interview with Rémi Desalbres, 'Notre-Dame : un an après l'incendie, la combustion lente 'reste l'hypothèse la plus vraisemblable' (*Marianne*, 15 April 2020)
< https://www.marianne.net/culture/notre-dame-un-apres-l-incendie-la-combustion-lente-reste-l-hypothese-la-plus-vraisemblable> accessed 22 May 2022.

2 ibid.

3 'la sablière du mur gouttereau du chœur à l'angle sud-est de la croisée du transept' Information from a judicial source, Agence France Presse (AFP), April 2022.

4 Eugène Viollet-le-Duc, 'Article flèches de charpenterie' in *Dictionnaire raisonné de l'architecture française du XIe au XVIe siècle* (Édition Bance-Morel 1854-1868) 444-472.

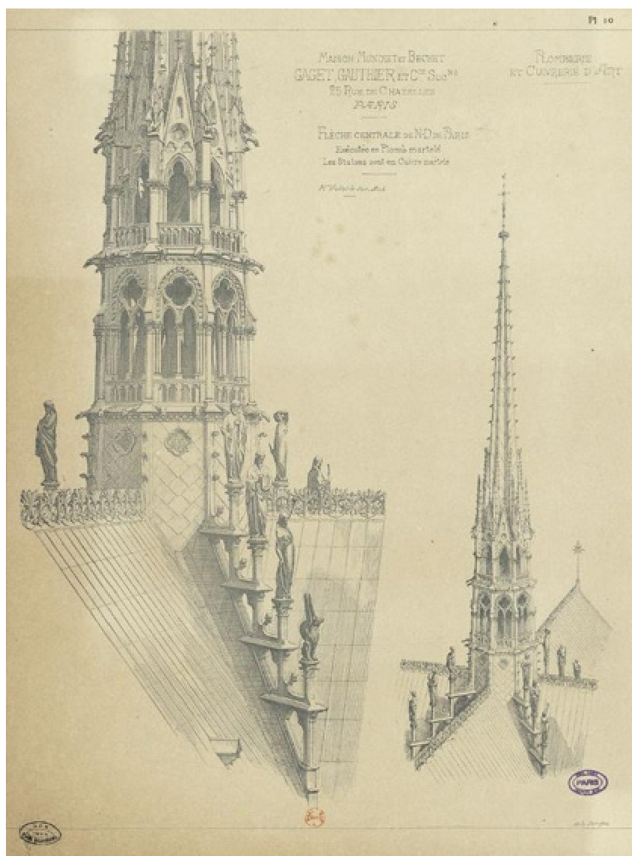

***Fig 1**. Flèche centrale de N-D de Paris*
©Ville de Paris / Bibliothèque historique de la Ville de Paris (BHVP)
The spire, built by Eugène Viollet-le-Duc at the transept crossing, was embellished with sixteen statues, that of the twelve Apostles in the higher parts and the symbols of the four Evangelists at the bottom.

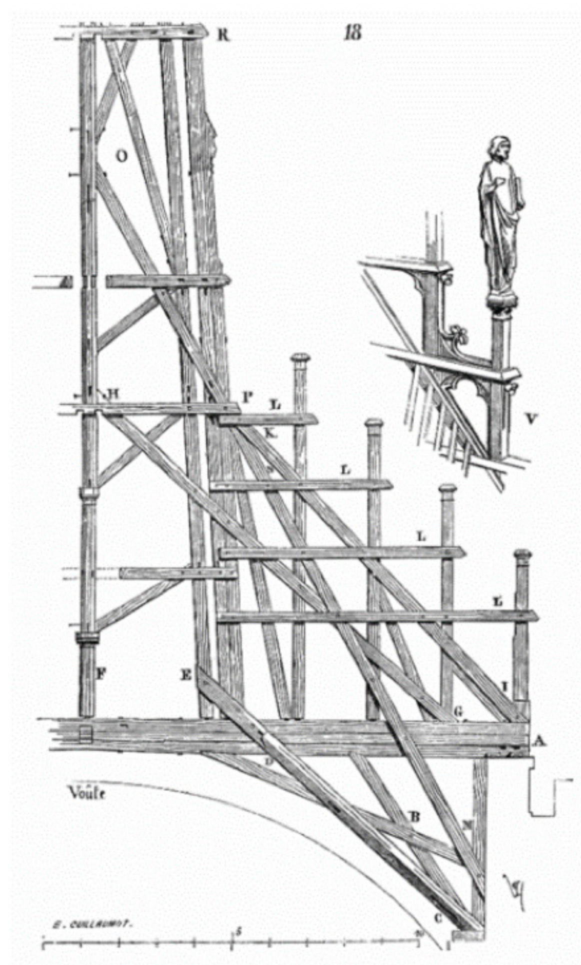

***Fig 2**. Eugène Viollet-le-Duc, Dictionnaire raisonné de l'architecture française du XIe au XVIe siècle (1854-1868)*
The statues rested on wooden posts directly connected to the roof timber structure. At the South-East of the crossing, the lowest post supported the Eagle of St John the Evangelist. It was at its base that the fire broke out on 15 April 2019.

assembled copper sheets, reinforced by an iron frame. Bolts at the base of the statues were used to secure them to the plinths.

The statues were removed on 11 April, using a blowtorch to cut off the heads of the Apostles according to a renovation protocol established by the architect, who was in charge of the site. In addition, it is highly likely that a torch or a grinder was used to unbolt and remove the screws, which were tightened more than 150 years ago at the foot of each statue. Would the advanced oxidation of the internal iron structure have necessitated cutting the head of a screw with a disc, causing slow combustion or pyrolysis? This is what the investigation should be able to determine.

A chemical reaction of the pyrolysis type occurs in a confined environment, in the absence of dioxygen. At temperatures of around 300°C, the pyrolysis of wood releases flammable gases, especially carbon monoxide. The wooden supports of the statues were wrapped in lead foil to protect them from the weather. The conditions here (hot spot and dry wood in a confined environment) were therefore favourable to such a reaction. The slow degradation of wood at low temperatures ranging from 300 to 800°C can take several days and is difficult to notice in the absence of appropriate instruments of temperature detection.[5]

In contact with the wall plate, the wooden post supporting the statue of St John's eagle was no longer covered in lead, thus providing the reaction with a large supply of oxygen, a condition favourable to rapid combustion. The photograph taken in the attic by the security guard who discovered the fire confirms the very vigorous nature of the combustion at the foot of the timber roof structure, at the south-east corner of the transept crossing.[6]

Laboratory tests provide information on the speed of propagation of the pyrolysis during which the wood starts to carbonise.[7] The speed varies from around 0.7 to 0.8 mm per minute.[8] It takes about a hundred hours for a pyrolysis to complete a four-metre-long pole, which is the length of the pole that supported the statue of the eagle of Saint John. This is precisely the time that elapsed between the removal of the statues on Thursday 11 April and the start of the fire

5 The self-ignition temperature varies depending on the wood species, its water content and its density.

6 Picture taken by the Cathedral steward first published one year after the fire, on 13 April 2020, by BFMTV.

7 Terrei Lucas, 'Comportement au feu du matériau bois : auto-inflammation, dégradation et auto-extinction. Thermique [physics. class-ph]' (PhD thesis, Université de Lorraine 2020).

8 Faujour (n 1).

***Fig 3**. © Joséphine Desalbres*
The statues were made of copper leaf after a model by the sculptor Geoffroy-Dechaume. At the foot of the composition, the eagle statue of St John the Evangelist is two metres high.
The Eagle of St John the Evangelist was held at its base by bolts. The support was sealed with shaped lead sheets.

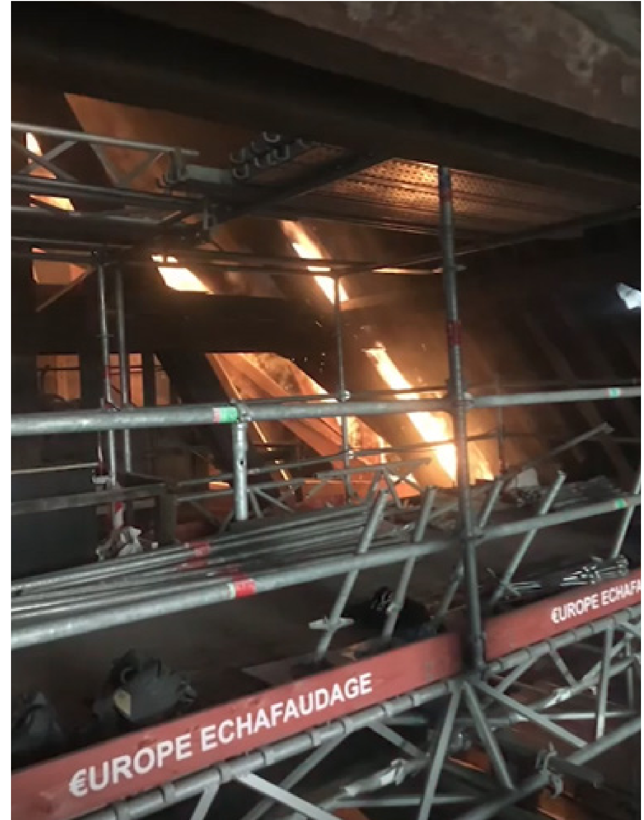

***Fig 4**. Unique figure of the fire outbreak taken in the attic, at the bottom of the spire. Credit BFMTV.*

on Monday 15 April at around 6 pm.

The piece of wood affected by the pyrolysis phenomenon would have been completely degraded. The Notre-Dame de Paris fire is today the best documented case in the history of historical monuments in France and abroad. For example, the thousands of burnt pieces of the timber roof structure are inventoried, collected and stored for later analysis.[9] The investigation should therefore be able to identify the missing pieces of wood in the area where the fire started. If the post supporting the eagle of St John is missing from the pieces of wood identified and taken by the judicial police, then the origin of the fire linked to the removal of the statues would be obvious.

9 Louise Mussat, 'Notre-Dame: enquête au milieu des décombres' (CNRS News, 1 October 2019) <https://lejournal.cnrs.fr/articles/notre-dame-enquete-au-milieu-des-decombres> accessed 22 May 2022.

The Task of the Curator **in the Era of Reconciliation**

Caroline DeFrias

Caroline DeFrias (CDF) is an artist-academic, currently operating in Mi'kma'ki territory in Kjipuktuk (so called Halifax, Canada). Their work, through a variety of mediums and disciplines, seeks to explore the construction of gallery space and the encounter of the art object, notions of inheritance and identity in relation to immigration and (re)settlement, as well as the ethics and pathos of the archive. They hold a Combined Honours with distinction Bachelor of Arts from the University of King's College in Social Anthropology and the Historiography of Science, with a certificate in Art History and Visual Culture, and are pursuing a Masters of Fine Art in Art History from Concordia University.

Acknowledgements

I would like to begin by acknowledging that the land upon which I wrote this research paper is Mi'Kma'ki, the ancestral and unceded territory of the Mi'kmaq people. This territory is covered by the 'Treaties of Peace and Friendship' which the Mi'kmaq Wəlastəkwiyik (Maliseet) and Passamaquoddy Peoples first signed with the British Crown in 1726. These treaties sought to establish the rules for an ongoing relationship between nations based on respect, not to deal in the surrender of land and resources but in fact to recognize Mi'kmaq Wəlastəkwiyik (Maliseet) title and guarantee their right to livelihood on their land. In the ensuing and continuing years of colonial violence, oppression, and genocide, settlers have actively failed to recognize these treaties and their responsibilities to the peoples whose land they now inhabit as well as to the land itself. Acknowledging territory and Indigenous communities must take place within the larger context of genuine and ongoing work to forge real understanding and cooperation to challenge the ongoing legacies of colonialism. We are all Treaty People.

It is important to understand that I am a settler, and therefore my positionality in this research is not from an Indigenous perspective and neither is my interlocutor. While there is much to learn from a critical examination of settler movements within reconciliatory efforts, we must always ensure that we are empowering and centring Indigenous voices in these conversations.

A Note on Language

The work of reconciliation asks of us to engage our own language for vestiges of colonial ideology. Anthropology teaches us that our linguistic practices frame the ways in which we think about the world. Research and scholarship, therefore, must account for the implicit and explicit assumptions nascent in the words we use.

To begin, the term 'Indigenous' is frequently utilized to refer to the original inhabitants of colonized lands, whereby Indigenous peoples are marginalized, exploited, and/or oppressed by the politically dominant population.[1] In this article, I use the term 'Indigenous' to refer to the First Peoples living within what are now Canadian borders, who are distinguished from the settlers who arrived in the last five centuries. Although this term is slightly ambiguous and controversial, as it is an umbrella term for a large group of sovereign and unique nations, it is nonetheless useful for identifying patterns that affect the way gallery spaces treat the heritage of colonized peoples. As such, in this paper I utilize 'Indigenous' to address Indigenous groups as a collective, and wherever possible use Nation-specific terms.

My research deals with considerations of gallery practices—specifically the politics of the display of objects. Much research within museology and gallery studies utilizes the language of *artifact* when referring to those objects of display. I will not do so. Within gallery spaces, *artifact* is a term that often denotes an object observed: something that is likely found, studied, and ultimately displayed. It makes the object into the things observed by the actor of that encounter. To utilize this language—the term artifact—in my opinion, aligns the collected object with certain rhetorics and curation which are often at odds with the object itself. Therefore, I will be employing the term 'object' to denote their 'ontological resist[ance to] the curatorial and its apparatus'.[2] Although the language of objects directly objectifies, it does so in an explicit and direct manner that I appreciate. The process of objectification is present in the term itself, and so this process should be foremost in our thoughts when we speak of these displayed objects. With both reference and reverence to their resistance and the processes they have likely undergone, my research speaks of objects—though the term *artifact* will still be seen in quotations or reference to literature, though I italicize this term to emphasize the distance between the

1 *United Nations Declaration on the Rights of Indigenous Peoples* (2008).
2 André Lepecki, 'Decolonizing the Curatorial' (2017) 47(1) Theater 102.

subject in question and the ways one intuits its meaning through the language of *artifact*. My analysis and findings take up and further explore the language of artifacts and objects.

Introduction

Anthropological and art historical galleries are critical pedagogical sites. They are symbolic depositories of cultural memory: the autobiography of dominant culture. Galleries, in this way, function as societal institutions of the validation and dissemination of knowledge and human experience as it manifests in art, as well as cultural and natural history objects.[3] The valuation of the gallery or museum space, its praise as one of if not the most trustworthy arbiters and sources of truth, brings urgency to the question of *what* it says and *how* it says it.[4] The examination of gallery practices is an especially pertinent concern as galleries have entered an era of reconciliation with Indigenous communities—a time in which the gallery and those who operate within it are asked to challenge their tacit modes of encounter with objects, as well as the ideas and people from which the objects originate, in an attempt to decolonize the space. I make reference here specifically to Canada's Truth and Reconciliation Commission, which calls for a review of museum policies and practices with the intention of shoring up the continued legacies of colonial violence which insulate themselves within gallery walls.[5] In other words, anthropologist James Clifford diagnosed the gallery space as a 'contact zone' in colonial encounters—a crucial stage upon which the dialogue of reconciliation must be done.[6] Critically, this location possesses its own social criterion: tacit modes of encounter that historically excluded and superseded both the needs and the desires of Indigenous communities. The requirement of this era, as well as the focus of my research, is to locate systems and structures which uphold colonialism or otherwise impede decolonization efforts in our institutions in particular—the gallery space in specific—and our social relations in general.

The reconciliatory effort my research examines are collaborative exhibitions, where settler curators and Indigenous knowledge keepers cohabitate the gallery space and create together the exhibition and display of objects. My research investigates the hegemonic perspective within the gallery encounter, which is challenged by this new collaborative way of 'doing' within the gallery. Reconciliatory practices ask of the non-indigenous, settler actors, who historically dominated the gallery space and the objects within, to make room for another voice to speak, and further to challenge their tacit assumptions and practices within the gallery space. In my research, I interrogate this dynamic by asking: what are the implications of tacit curatorial practices? How do non-indigenous or settler curators change their visual practices when handling and exhibiting Indigenous objects? Further, what are the systemic barriers that they encounter when attempting to decolonize their role in the gallery?

Through a critical discussion of a variety of collaborative exhibition case studies, and gallery didactic label analysis, in conversation with a semi-structured interview with a settler curator of a Canadian museum engaged in collaborative exhibitions with Indigenous knowledge keepers, my research seeks to investigate the dynamics of decolonization and repatriation within the gallery on the part of the hegemon, seeking to illuminate the intricacies of these interactive encounters.

Theoretical Framework, or, Get your Bearings

The Task of the Gallery

A necessary question to begin with is, of course, what was and is happening in the gallery that needs to be challenged and decolonized? What precisely are these tacit modes of encounter that are so problematic? Here, Brian O'Doherty's analysis of the gallery proves useful. In his 1976 work *Inside the White Cube: The Ideology of the Gallery Space*, O'Doherty analyzes the relationship between aesthetics, economy, and social context to understand what he describes to be the confrontational nature of the gallery encounter. Specifically, O'Doherty examines the influence that these spaces—or 'the white cube'—produce over both an artist's work and the viewer of said work, identifying overtones of control and patronization at the centre of the gallery encounter. He likens the gallery to a church—an institution of power that speaks with great authority—subsuming all those who enter into its grammar, or its 'way of seeing'. O'Doherty writes: '[w]e give up our humanness and become the cardboard spectator with the disembodied eye. For the sake of the intensity of the separate and autonomous activity of the Eye, we accept a reduced level of life and self'.[7] This reduction is the crux of the gallery encounter. Indeed, to display an object is frequently to supplant its *original* context, utility, and relationality for cold, steely walls with the occasional small textual blurb or video presenting an idea of what was lost. As a sacred space, the gallery removes objects from any aesthetic or historical context. The *meaning* of the object is then primarily directed by its curation, by the autonomous eye of the gallery, in this disembodied reduction that O'Doherty speaks of. As a contact zone, it is vital that the gallery facilitate, or hold, multiple voices and perspectives instead of favouring one and silencing the other(s). Decolonization efforts within the gallery space can and should be understood, in part, as attempts to mitigate this power dynamic, or monolingual communication where the only voice heard is the curatorial and the rhetoric of power for which it stands, or speaks.

The Task of the Curator

Within the dynamic of the gallery, the responsibility of the exhibition ultimately falls to the curator. As Alexandra Sauvage contends, the role of curator is akin to that of a collector. Historically, galleries find their roots in cabinets of curiosities or wonder chambers from the Renaissance, where frequently 'a meaning [of the collection] had nothing to do with the primary functions of the objects collected. Science, nature, aesthetics and mysticism were all intertwined in a logic *dependent only on that of the collector*'.[8] Later, taxonomic or

3 J Parker, 'Beyond Learning: Exploring Visitors' Perceptions of the Value and Benefits of Museum Experiences' (2008) 51(1) Curator: The Museum Journal.

4 Ray Rosenzweig and David Thelen, *The Presence of the Past: Popular Uses of History in American Life* (Columbia University Press 2000).

5 'We call upon the federal government to provide funding to the Canadian Museums Association to undertake, in collaboration with Aboriginal peoples, a national review of museum policies and best practices to determine the level of compliance with the United Nations Declaration on the Rights of Indigenous Peoples and to make recommendations'. TRC Call 67 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf> accessed 6 June 2022.

6 James Clifford, *Routes: Travel And Transformation In The Late Twentieth Century* (Harvard University Press 1997) 188-219.

7 Brian O'Doherty, *Inside the White Cube: the Ideology of the Gallery Space* (University of California Press 1976) 10.

8 Alexandra Sauvage, 'To Be or Not to Be Colonial: Museums Facing

classificatory ordering would take hold of gallery spaces, but their collection and organization still ultimately relied on the curator's particular system of reason, or cultural, epistemic biases. As analyzed by philosopher Walter Benjamin, collecting is an inherently political action; curation is a practice of organizing the world into a coherent whole. Benjamin writes that the collector's relation to objects is one:

> which does not emphasize their functional, utilitarian value—that is, their usefulness—but studies and loves them as the scene, the stage, of their fate. The most profound enchantment for the collector is the locking of individual items within a magic circle in which they are fixed as the final thrill, the thrill of acquisition, passes over them.[9]

We can align the collecting process with rhetorical functions because the collection depends upon discursive practices; and so, we find it necessary to ideologically interrogate the curator within decolonization practices, as their positionality and role within the gallery are not only inherently political but also saturated with the politics of the one who inhabits this role. Indeed, this 'magic circle' within which acquisition affixes the object resonates with O'Doherty reduction theory of the gallery space, the boundaries of which the curator draws. André Lepecki identifies the role of the curator as 'the management of the modes of visibility, valuation, and discursive life of objects', controlling or mediating even those more meandering or diffused relations gallery attendees will have with the objects.[10]

Yet, let us not forget to address the history of curation in our treatment of its contemporary expression. Since the 18th century, Western curating has been a function of the creation and management of colonial collections. The gallery space was a treasure house and the curator was the guardian of colonial plunder. Indeed, galleries are a medium of colonialism:

> the[ir] collections were built on conquest (the Napoleonic expeditions, the Benin Bronzes…) and on assumptions of 'salvage'—the necessity and the right (guaranteed by a linear, progressive History) to collect vanishing or endangered artifacts, as well as written and oral records. Colonial collecting, which reached something like a fever pitch in the late 19th century, conceived of museums and archives as ultimate resting places, repositories for a precious legacy, kept in trust for science, for the nation, for Civilization, or for Humanity.[11]

Curatorial practices uphold an evolutionary sequence of history which assumed a vantage point at the end, a prized location reserved for Western colonial powers, which enforced 'a stable hierarchy of places and times'.[12] Broadly speaking, the gallery space historically operated as a tool of colonialism and imperialism.

Modern curatorial practices are attempting a kind of critical intervention, to dislodge both itself and the gallery space from its origins and their legacies. The legacy of the gallery stands as 'the collections of valuable things, and the job of the curator [is] to keep them safe—carefully displayed for public edification, or preserved in storage for research purposes'.[13] The curator stands as a possessor of an authoritative knowledge, which results in the arrangement of objects as vehicles for a unilateral transmission of a particular history. Contemporary curatorial work, in the times of decolonization and reconciliation, is attempting to engage with and articulate new histories and perspectives. Yet what would it mean to collaborate, or cohabit the gallery space, when the milieu and historical criterion of curation was for so long exclusionary and colonial?

The Task of Collaboration

Recent trends in galleries and gallery studies, both anthropological and art historical, are rethinking the existing theories and methodologies associated with the treatment of Indigenous collections. These spaces are attempting to open themselves up to collaborative practices, with the aim of maintaining the gallery while imbuing it with the perspectives and needs of the Indigenous communities from which the exhibited objects originate. Ostensibly, this undertaking is a heteroglossic gallery practice—an attempt to present multiple embodied and cultural perspectives, instead of the typical, unilateral directive which O'Doherty describes. Collaborative exhibitions do not ask one actant within its network to absolutely vacate their positionality to make room for the other, even if this perspective is that of the settler who historically took precedence—this would only replicate, though role reverse, the problematic, ubiquitous dynamic of domination O'Doherty identifies. Rather, the two voices and perspectives attempt to speak *to* and *with* one another. To put it simply, collaborative exhibitions are a practice against assimilation and towards equitable cohabitation.

Anthropologist Charlie Gere, reflecting on Clifford's description of the museum as a contact zone, argues that the gallery 'need not be thought of just as a storehouse of colonial plunder, nor a one-way medium, but as a place of interactive communication'.[14] Gere utilizes Clifford's museal contact zone as a medium to rethink Western colonial curatorial norms, with the intention of challenging and reworking gallery relationships which he argues operate through one-sided imperialist appropriation. Here, we again understand the importance of the endeavour of collaborative exhibitions—their attempt to rethink and rework the encounter between Indigenous communities and settler curators within the gallery space. As Clifford writes: '[w]hen museums are seen as contact zones, their organizing structure as a collection becomes an ongoing historical, political, moral relationship—a power-charged set of exchanges, of push and pull'.[15] What the gallery space communicates, through its curatorial practices, possesses a dynamic relationship to the political sphere—both influencing and being influenced by larger cultural relationships and ideologies. The decolonization of the gallery space, as this vital zone of colonial contact, then engages more urgently with broader political moves of reconciliation.

The Task of Decolonizing Translation

Collaborative exhibitions rely on encounters between Indigenous knowledge keepers and settler curators, where both groups attempt

Their Exhibitions' (2010) 6(12) Culturales 104.

9 Walter Benjamin, 'Unpacking my Library: A Talk about Book Collecting' in Hannah Arendt (ed), *Illuminations* (HarperCollins 2019) 61.

10 Lepecki (n 2) 102.

11 Clifford, 'The Times of the Curator' (2011) 7(4) Collections 400.

12 ibid.

13 ibid 402.

14 Charlie Gere, 'Museums, Contact Zones and the Internet' in David Bearman and Jennifer Trant (eds) *Museum Interactive Multimedia 1997: Cultural Heritage Systems Design and Interfaces: selected papers from ICHIM 97, the Fourth International Conference on Hypermedia and Interactivity in Museums, Paris, France* (Archives & Museum Informatics 1997) 59.

15 Clifford (n 6) 192.

both to speak and be heard to create the conceptual (as much as the physical) ground upon which the exhibition will stand. Collaborative work is ostensibly a process of translation, yet it is one which challenges conventional notions of translation as the rendering of a symbol expressed in one language or media into another—faithfully preserving or conveying the *original*, or pure, essence of the symbol. Rather, the sort of translation at stake in the gallery is a temporal and open-ended practice. This can be understood with reference to works of feminist scholar Donna Haraway as an alignment towards resonance, or a fluid creation of middle ground between two perspectives instead of a concrete exchange of static symbols and signers. Haraway writes that in decolonizing our language and encounters we have the task of 'recoding communication and intelligence to subvert command and control'—of moving away from the tacit practices and dynamics of the gallery space that O'Doherty describes.[16] To construct the interactive gallery practice Gere calls for, we can utilize Haraway's argument that we 'dream not of a common language, but of a powerful infidel heteroglossia'—that we create such a space where the perspectives of both Indigenous knowledge keepers and settler curators can co-exist in *dynamic* relation with one another.[17]

Yet, this endeavour is not so simple, and often within Indigenous-settler relations we find that settler perspectives often take precedence.[18] To illuminate this trouble, it is useful to turn to anthropologist Brian Noble. His work examines inter-cultural collaborative endeavours between settler and Indigenous communities, interrogating the inequity of these relations which often favour and replicate coloniality. These mechanisms of encounter 'work by translating one socially embedded form of transaction into the terms or practices of another'.[19] In a 2015 work, Noble argues that there is an inherent coloniality to the middle ground of encounter, writing that settlers in inter-cultural collaborative efforts 'move within a typically colonial middle ground between Indigenous politics and state policies'.[20] There is a dominance of settler definitions and perspectives within these dialogues, and so the resolve and practices the encounters produce tend to favour and replicate colonialism.

However, that different worldviews tend to cancel each other out is a problem not of knowledge, but of certainty. Feminist scholar and political theorist Linda Zerilli argues that 'certain epistemic commitments have come to define discussions', which is to say that our ways of seeing overrides that which exists, or that which we attempt to undertake.[21] As an example, when I walk, the knowledge that I have two legs does not enter into the act of walking. In Zerilli's account, we are often certain about things without taking them up as objects of knowledge, instead engaging with them more immediately, as a form not of thought, but of *action.* Zerilli contends that one does not experience one's hinge propositions—those truths one takes for granted reflexivity, such as tacit gallery functions—as an object of cognition, but rather one acts them out: in daily habits and practices. It is on the level of the routine or the everyday that we uphold colonialism, and so too it must be at this level that we dismantle it.

We must not, however, confuse this task as a prelapsarian undertaking, whereby we might return to the garden of ideas, encounters, and gallery spaces unmarred by colonialism and imperialism. Indeed, Haraway asserts that there is no site of unmediated knowledge, no location free from politics, and that the task of decolonization is 'not about the false vision promising transcendence of all limits and responsibility' but rather 'turns out to be about particular and specific embodiment.'[22] For Haraway, politics is an embodied instinct; and similarly, for Zerilli, politics takes place at the register of everyday action. Zerilli takes up Haraway's 'specific embodiment' as the conscious practice of *acknowledgement*—the passionate commitment to admitting another's worldview into your own without the assimilation or subsumption of either party. She writes that principally, on the level of interpersonal translation, this posture of acknowledgement is the recognition that 'to make a claim is to speak for someone and to someone'—that we must recognize both ourselves and the other as constituents in the political encounter.[23]

In the story told by my literature, the decolonization of the gallery space emerges as a complex and relational task, whereby settlers must challenge and overcome ingrained structures of colonialism to move towards more inclusive and just practices. Within collaborative exhibitions in particular, as an enduring relationship of mutual obligation, settler curators seek to facilitate the equitable cohabitation of the gallery space through dismantling the old hierarchies of reductive and exclusionary social criterion. However, in the attempt to convert decolonial theory into praxis in the gallery space, we often find an impasse of translation between settler curators and Indigenous knowledge keepers: the terms they use, even in the same language, have discontinuities in what they mean to each—and settler, colonial definitions often invade this gap. Taking acknowledgement to be the principal motion of both revealing and dismantling the harmful structures of the gallery space, the focus of my research was to locate the barriers and aids to this endeavour within collaborative exhibitions.

Methods & Methodology

My research explored the experience and interpretations of settler curators working with Indigenous knowledge keepers within collaborative exhibitions. As my objective was to examine the condition of reconciliatory movements in the gallery space as they interact with and operate under the institutional expectations and functions of the gallery space, my research gives attention to the

16 Donna Haraway, 'A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century' in *Simians, Cyborgs and Women: The Reinvention of Nature* (Routledge 1991) 22.

17 ibid 28.

18 We need look no further than the current lobster lawsuit between the Mi'kmaq and non-Indigenous fishers with centers on the questions of the definition of 'moderate livelihood'. The Peace and Friendship treaties states that Mi'kmaq have the right to hunt, fish and gather for the purposes of earning a moderate livelihood—a term left ambiguous and without definition from the Canadian state to this day. In ensuing configurations, the settler state dominates the meaning of this term and so regulates Indigenous fishing. Cf. Katie Dangerfield, 'Why the term 'moderate livelihood' is at the centre of N.S'.s fishery dispute' (*Global News*, 23 October 2020) <https://globalnews.ca/news/7405129/nova-scotia-fishery-dispute-moderate-livelihood> accessed 6 June 2022.

19 Brian Noble, 'Niitooii—'The Same That Is Real': Parallel Practice, Museums, and the Repatriation of Piikani Customary Authority' (2007) 44(1) Anthropologica 338.

20 Noble, 'Tripped up by Coloniality: Anthropologists as Instruments or Agents in Indigenous—Settler Political Relations? (2015) 57(2) Anthropologica 428.

21 Linda Zerilli, 'Doing without Knowing: Feminism's Politics of the Ordinary' in Cressida Heyes (ed) *The Grammar of Politics* (Cornell University Press 2003) 131.

22 Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1998) 14(3) Feminist Studies 583.

23 Zerilli (n 21) 148.

shifting conceptions settler curators engaged in this work possess as they relate to their work, themselves, and the objects under their care. The qualitative method of semi-structure granted me access to the nuances of these decolonial efforts, with an emphasis on the lived and felt aspects of this work. Further, the semi-structure interview style allowed me to introduce several topics of consideration but still granted space for my interviewee to engage collaboratively in the direction of our interview—to reflect the participatory nature of my data, I henceforth refer to my interviewee as my interlocutor. Indeed, I must note that my interlocutor frequently anticipated my questions, charging into the ideological weight and history of his actions while describing his experiences as a curator working within a collaboration exhibition. The inclusion criteria for my research required my interlocutor to self-identify as a settler and to have worked or be working with Indigenous knowledge keepers in gallery spaces. I recruited via email. We conducted the interview via zoom which lasted approximately one hour, focusing on my interlocutor's participation within collaborative exhibitions. With my interlocutor's consent, our interview was audio-recorded and transcribed. His data was anonymized. All references to specific exhibitions were omitted to protect the privacy of my interlocutor and his collaborators.

The COVID-19 pandemic, and its ensuing disruption of not only the gallery but the global community, necessitated that I supplement the scarcity of available curators with case studies and examinations of gallery didactic labels. My data therefore consists of one in-depth, semi-structured, qualitative interview with a Canadian settler curator whose work currently centers on collaborative exhibitions with Indigenous knowledge keepers. I utilized our interview to illuminate and further explore the findings of the following case studies: The Portland Museum & Tlingit Elders, The Glenbow Museum & Blackfoot Elders, and The Kwagiulth Museum. The scarcity of my data, as well as my qualitative approach, impairs my research's claim to representability. Under ideal research conditions, a series of interactive interviews in person and in gallery spaces would provide an embodied consideration into the settler curators' evolving relation to the gallery space. Further, with more time, a longitudinal study of gallery spaces throughout the process of a collaborative exhibition would shed further light on the nuances of this decolonization effort. However, the scope of an undergraduate thesis limits my ability to conduct extensive or long-term research. My research is a brief, reflective look into the particular experiences of settler curators as they attempt to decolonize the gallery space through their participation in collaborative exhibitions with Indigenous knowledge keepers.

Analysis, or, What's in a Name

My research uncovered that the tacit 'postcolonial' structure of the gallery space is frequently at odds with the task of decolonization. I found that the gallery maintains an economy of accessibility of the object, or display, where the very language proper the gallery space frequently precludes Indigenous agency and meaningful collaboration. My interlocutor often found the implications of certain terms to impede his decolonization efforts and so it became necessary for him to change the label he used to describe both himself and his work. The tacit process of curating an exhibition frequently undermined my interlocutor's practice of acknowledgement—disrupting his posture of attentiveness to the implications of his presence, language, and routine practices. In our interview, I found a puzzling maze of discrepancies which divided the role of the curator from the task of collaboration. My interlocutor attempted to hold together these disparate modes of being in an unresolved inner dialogue. The endeavour of decolonization therefore inevitably *tripped him up* as he tried to unify these two realms.[24] Due to this harsh polarization, I found it best to take a dialectical approach to uncover the task of the curator in this era of reconciliation and to illuminate the corollaries between the ostensibly contrasted ways of being. The principal areas of concern of my research were the role of curator, their approach to the collection, and how they situate and showcase the collection to the public. I labeled these categories curator/keeper, artifact/object, and past/present to reflect my dialectical approach—whereby I juxtapose previous and novel conceptions to illuminate and isolate the trouble of these gallery practices.

Curator / Keeper

> 'I use 'keeper' sometimes. To me, it makes a little more sense. It maybe has a different nuance than curator…'

At the start of our interview, I asked my interlocutor to describe his current role. In answering this first (and ostensibly basic) question, my interlocutor revealed the bifurcated nature of collaborative practices for settler curators. He described himself as both a curator and a keeper—the former when he spoke of his official title, and its designated responsibilities, and the later when discussing decolonizing work, principally through reference to collaborative exhibitions. This is the first discrepancy—the definition of custody—and so the question became what stood on either side of this divide? And further, why was it there to begin with?

To curate is to collect, research, and study *artifacts*. My informant reflected a fidelity or obligation to the gallery space when he spoke of curating: all instances referred to a duty to preserve and uphold his institution's discourse. He spoke of collecting *artifacts* under the purview of the gallery space's facilities. This definition of curation reveals undertones of its heritage in the colonial history of the gallery space, where the curator was the guardian of imperial plunder and ideology.[25] As will become increasingly clearer, my interlocutor is keenly aware of the colonial traps precarious through curatorial practices. My interlocutor described traditional curating as 'bringing together a bunch of materials in a new way to tell a story in three-dimensional space'. Here, we see the gallery position curator as the authority over the collection, bringing together disparate objects to tell or maintain a story of their own choosing. Curating leaves little room for meaningful or equal collaboration. Further, the collected objects appear to belong to the gallery, affixed by the curator absolutely into this 'magic circle' of the collection which divorces the objects from their living relations.[26] My interlocutor noted this problematic dynamic of curation when he later remarked that the etymological history of the term curator initially referred to 'a keeper of souls'. This reflects O'Doherty's description of the gallery as a space of confrontation and not of collaboration. The primary characteristic of this role is the maintenance of ownership, putting forth an allegiance to the gallery space before the objects and cultures it houses. Within collaborative exhibitions, this dominant posture estranges the curator from the task of collaborating with Indigenous knowledge keepers.

By contrast, to *keep* is to steward, care for, and share objects. My informant spoke of keeping when he described his role within

24 Noble (n 20).
25 Clifford (n 11).
26 Benjamin (n 9).

collaborative exhibitions and his responsibility to both his collaborators and to the collection. For my interlocutor, this term denotes 'caring for not just the objects, but the communities from which they come. You're helping preserve things that are important to *them* that are in our storage [emphasis added]'. With this claim, my interlocutor highlights how the usage of the term keeper—and ultimately, the embodiment of this role—works to decenter the object's placement in the gallery space and focalize its living history. This new function is not simply the keeping of souls, but the recognition of the complex political bodies from which they originate. Further, the recognition of the object's living relations and social life reflects the temporality of keeping, against the curator's more absolute ownership. In identifying with the role of keeper, my interlocutor sought to distance himself and delineate his practice from the colonial heritage of curation and work towards engaging the perspective and needs of his collaborators.

The most urgent reason why my interlocutor used the label keeper was to equate his work to his collaborators. He discussed intentionally utilizing this term when working in collaboration with Indigenous knowledge keepers to forge a 'connection between both of us using that term'—to show that '*we are all keepers of tradition*'. In identifying with the label of keeper, my interlocutor sought to equate his position, responsibilities, and authority *with* that of his Indigenous collaborators. The process of identifying with the label of keeper works towards the dissolution of semantic distinctions and barriers between settler curators and Indigenous knowledge keepers within the gallery space.

Case Study: The Portland Museum & Tlingit Elders

In 1989, the Portland Art Museum collected a diverse group to discuss its Rasmussen Collection of Northwest Coast Native American Art. Museum staff, art historians, and Tlingit Elders accompanied by translators came together to discuss the re-installment of the collection's exhibition. The curators presented objects from the collection to the Elders for comment one at a time, with the expectation that they disclose the objects' histories—how each object was made, by whom, and for what purpose. The museum staff assumed the Elders would provide the origins and context of the objects. This was not the case. Instead, the Tlingit Elders 'referred to the regalia with appreciation and respect, but they seemed only to them as *aides-memoires*, occasions for the telling of stories and the singing of songs'.[27] The objects in the Rasmussen Collection, the focus of the consultation, were left at the margin: '[f] or long periods no one paid any attention to them'.[28] The session brought forth voices, songs, dances, living stories and experiences. Unfortunately, no staff members at the time understood how to reconcile the ceremony they had witnessed with the gallery's practices, and the session was archived—suspending not only the insights but the desires the Tlingit Elders articulated.

We can see the dynamics of curation play out in the structure of this meeting, and how ultimately this structure precludes Indigenous agency. At the basement meeting, *curators presented* objects from the collection *to the Elders for comment one at a time*. Immediately, we can understand that though this gathering was meant to be an act of collaboration, the curators maintained ownership over the objects—presenting them in their own order, not sharing or allowing the Tlingit Elders to come to their own objects on their own terms. The curators presented the objects with the expectation that they reveal their histories, with the intention of up-keeping and maintaining their ownership of the objects. While collaboration was intended, the curators stood between the objects, their living relations and originating community. In this way, curating speaks of artifacts, absolutely belonging to the museal space while keeping speaks of objects, with living relationships that extend beyond the gallery walls in which they are temporarily housed.

Artifact / Object

> 'I'm struggling with those terms and that's a good thing. It's an active thing. I don't have it figured out. Objects and artifacts. I think I use them for reasons similar to why I use curator and keeper...'

From an anthropological standpoint, an artifact is a human-made item which discloses vital information about the culture and society of the humans from whom it originated. Within the gallery space, however, 'artifact' denotes a process of discovery and examination which then arrives at the eventual presentation of the object. The curator rearticulates the relations of the object, subsuming the particular to speak to the general public. My interlocutor was keenly aware of the implications of an object's placement in the gallery space, and purposely spoke of his collection as such—as objects—over and against the language of artifacts. This is the second discrepancy: the tension of one's approach to the collection. Throughout our interview, my interlocutor spoke of consciously utilizing the term 'object' to dislodge his approach from the gallery's system of abstraction.

For my interlocutor, the term artifact reflects a process of embalming. He described it as the petrification of the object into a 'final, unconnected thing' that is 'divorced and stripped of all the context processes around it which gives it a false impression of what you'd call objectivity'. The term artifact speaks of objects displaced, removed from their original context to be supplanted and suspended in the gallery space. This motion simultaneously centralizes the gallery's presentation of the object and mystifies its construction, which enables the misappropriation of objects into false and otherwise biased histories. The term 'artifact' is homogenous precisely in its opposition to the heterogeneity identified as locality—the richness of an object's particularity. My interlocutor discussed the deterritorialization of the object: the manner in which its ideological and physical location in the gallery space effectively abstracts the object from its context, utility, and relationality. What my interlocutor called the 'false objectivity' of the gallery, and it is precisely the control and patronization of the object O'Doherty speaks of. My interlocutor also described this as the process of 'artifact-ification' where the gallery suspends the object without relative time, place, or space. Instead, O'Doherty's white cube surrounds the object with typically stark white walls and concrete floors which present the idea of objectivity and universality through its lack of specificity—presenting a view from nowhere which emboldens the object to a silence *par excellence*.

To resist this atrophy of the object or its 'artifact-ification', my interlocutor described consciously reconstituting his language, speaking of objects rather than artifacts. This term, for him, acknowledges the various perspectives each object contains and the multiple and on-going relationships in orbit around it. He simply stated that 'there is something about [the term] 'object' which is a little more open'. It contrasts and brings to the fore the gallery's language of *artifact* as speaking to a static notion of the past. My

27 Clifford (n 6) 189.

28 ibid.

interlocutor utilizes the term *object* to acknowledge the legacy of colonial violence and domination in the gallery space, claiming succinctly that 'it brings out some of our biases in the Western perspective that we turn objects into unconnected things'. In employing the term 'object', my interlocutor decentralizes the gallery's ideological determination on the object, as an artifact of a fixed past, and turns towards the object itself, as a living being enmeshed in multiple living histories.

The term object, however, is not without its own set of issues. My interlocutor describes continually re-evaluating his linguistic practices as he continues to work with and learn from his Indigenous partners. Indeed, the term object is often deeply problematic, as it isolates the object in its immediacy and divorces it from the rich particularity of its context. My interlocutor described an interaction he had with an Indigenous artist who resisted this term as '[their] work is a process and the actual thing [the artwork] is just part of that process'. The term object for this Indigenous artist put the focus on their piece as a final product and not as an ongoing set of relationships. My interlocutor reflected a need to be flexible with his grammar, and recognize that the language of the gallery must come from the communities from which the objects originate. His use of the term object is an active practice which reflects his effort to recognize that the gallery's way of interacting with objects is often irreconcilable with the originating communities' needs and desires.

The power of the curator as an individual, however, has real-world limitations. This 'artifact-ification' which my interlocutor described comes from many essential and inconspicuous aspects of curation—of putting together a show. The act of working in the gallery under the purview of his curatorial responsibilities often disoriented my interlocutor's attentive posture of acknowledgement towards certainty—of curatorial doing without knowing or of acting without necessarily engaging the implications of his actions. Indeed, my interlocutor identified the bureaucracy, or tacit functions of his vocation, to debase the object and convert it into an artifact. Namely, he identified the process of acquisition and the creation of exhibitions as a task which muddles his attempts at mental decolonization.

The Trouble of Acquisition

> 'We have to use FedEx. We have to ship it here. We have to go to the conservation; and I wonder will that practice alone reinforce things that might not really fit with the community we're working with?'

The ways in which galleries 'acquire' their collections, or have objects brought to the gallery is an act often alienated from reconciliatory efforts. My interlocutor described how these frequently unceremonious acts, which appear to be of little consequence, are in fact ideologically loaded and posture the curator towards the gallery and away from the object and its community. He cited specifically how many objects enter the gallery through FedEx and other commercial couriers, which complicates his decolonization efforts as the object's living relations and dynamic value are reduced when he fills out insurance papers. He stated that the process of FedExing an object 'reinforces things that go against what we want to do, a lot of invisible processes that we do that maybe shape our conceptions and actually might create problems'. Quantifying cultural history is a reductive and colonial act. My interlocutor described it as an 'invisible practice' or part of curation which reinforces the gallery's grammar of encounter, reconditioning him to move towards the object as an artifact. The task of acquisition flustered my interlocutor's posture of acknowledgement, as he was torn between his curatorial duties to acquire new objects for collection and his reconciliatory responsibility to respect and acknowledge the object's living histories. To put it simply, what can it mean to receive a sacred object in much the same way one acquires a box of pens?

The Trouble of the Exhibition

> 'Sometimes we just need an object. On some level we know that this object is part of a community and of a knowledge system that isn't necessarily material, but at the same time, when you're working within a set of expectations of a show…'

The structure of exhibitions, as hubs of materialism, by virtue of their aesthetic structure frequently subsume the object into an ethos of indiscriminate utility. My interlocutor discussed how the very process of putting together an exhibition often distorted his relationship to the object. He instanced specifically how the aesthetic needs of a show—organizing a pleasing and dynamic space—would occasionally take precedence over the *meaning* of the object. My interlocutor ascribed this problem to the innate materialism of the gallery space, which frequently dominates the immaterial aspects of objects in service of the celebration of the visual. He contended that the current practice of exhibiting the object is frequently an issue, as it cloaks the interconnected and often intangible relations of the object with its ability to fill empty space. My interlocutor described this as 'operationalizing' the object, a process which produces immense mental strain in the bifurcation of the presence of the settler curator in the gallery—at once responsible to manufacture an exhibition and also to consider the delicate *meaning* and relations of the object. The problem, for him, is how this locality conditions him away from the object as 'just material relationships and processes' instead of as 'part of an interconnected web of knowledge' which frequently occurs during the exhibition process. Contemporary collaborative exhibition operations sever the task of collaboration from the work of curation. Indeed, equal treatment does not decolonize the gallery space *per se*—my interlocutor stressed that there must be equity, or respect for the particular meanings and relations the object possesses. To put it simply, what is left of the meaningfulness of particular objects if we can replace them on the gallery wall?

Case Study: The Glenbow Museum & Blackfoot Elders[29]

In the 1990s, The Glenbow Museum and Blackfoot Elders came together to create the collaborative exhibition *Nitsitapiisinni: Our Way of Life*. The Blackfoot Elders agreed to share their cultural knowledge and objects under the caveat that the museum staff participate in Blackfoot ceremonies. They 'reasoned that if the Blackfoot invited museum staff to ceremonies, staff members would witness firsthand the important role of bundles [of objects] in the community, and would appreciate the need for the bundles to be

29 The term 'Blackfoot" was not an Indigenous term used by this group to identify themselves. They recognized themselves by their tribal names: the Peigan, which includes the Amsskaapipikani or Blackfeet in Montana and the Apatohsipikani or Pikani in Alberta; the Kainai, or Blood, in Alberta; and Siksika, also in Alberta. Each group is distinct, with its own customs and political leaders. They share cultural practices such as the *ookaan* and speak dialects of the same language. More recently, they have joined as a political body, adopting the Western term 'The Blackfoot Confederacy'. Cf. Cara Krmpotich and David Anderson, 'Collaborative Exhibitions and Visitor Reactions: The Case of Nitsitapiisinni: Our Way of Life' (2005) 48(4) Curator: The Museum Journal.

returned'.[30] The Glenbow settler curators spent significant time in Blackfoot communities at local events and ceremonies to ensure that every 'element—design, conservation, scripting of text—embodied Blackfoot perspectives and respected cultural protocol'.[31] The settler curators participated in Blackfoot ceremonies to transfer the bundles in gift exchanges between the two parties. The Glenbow Museum repatriated the Blackfoot objects it had housed, but to my knowledge the Blackfoot community continues to loan their objects for display through ceremonial exchange.

This process of ceremony challenges the 'artifact-ification' which often plagues acquisition through sustaining the living relations of the object. The bundles persist as occasions of social exchange and not as static units of history. The middle ground of this exhibition is the radical decision on the part of the Blackfoot community to include settler curators in their ceremony. This important caveat to the ordinary economy of acquisition forces settler curators to acknowledge and reckon with the object's living relationships. The Blackfoot extension of community reterritorializes the object—proclaiming the object as a deeply rooted and connected thing. Such a cultural and political achievement decentralizes the object's placement in the gallery and highlights the transient nature of stewardship. This act of acknowledgement recreates and continues the object's connection to its community and its embodied position in the present.

Past / Present

> 'It's not just a repackaging of old things. It's actually the relationships, the discussions, the exchanges, the tensions, the confrontation with different worldviews that's knowledge generating. So I think in the process itself we're all learning new things...'

The disorienting pull of both the gallery curating and collaborative keeping of artifacts and objects unfolds in how a settler curator displays the collection. In the dizzying grammatical cleave of collaborative curation, what becomes of the language of the exhibition? My interlocutor outlined two principal and conflicting articulations of the collection: text-based and collections-based exhibitions. The former comes from established literature and historical narratives, operationalizing objects to present or enforce pre-existing ideas about a particular culture or period of time—the tacit curatorial way of organizing an exhibition. The latter comes from the collection itself, engaging and centering the living histories inherent to the object(s)—which is the call of collaborative exhibitions. My interlocutor described the tension within exhibition assembly as acknowledging the object's placement in historical narratives without erasing its presence in the present. This is the final discrepancy—the question of how to speak of objects, or where to locate them in time. The curator stands enmeshed in multiple, overlapping and often contradictory histories and is tasked with translating the rich life of the object to the audience. Throughout our interview, my interlocutor reflected a tension of attempting to situate objects in the present, which is to speak of them actively as a means of opening them to both the audience and his collaborators, against the gallery textual milieu.

Text-based exhibitions stand in the past—the objects firmly sealed in an untouchable history. My interlocutor described this process of exhibition generation as 'going through old catalogues and books and then turning it into a three-dimensional [show]'. The meaning and social life of the object are then external—coming from discourses of which the object is not an active constituent. This lack of agency extends also to both the Indigenous knowledge keepers as well as the settler curators as the gallery space treats history as sacred, sealed and untouchable—the relics of which the gallery displays.[32] My interlocutor succulently critiqued this type of exhibition as 'just a repacking of old things'—where both the objects, the curators, and collaborators are unable to truly touch or impact the homogenous narrative the gallery space perpetuates.

Collections-based exhibitions stand in the present—the objects themselves and their active relationships generate the content of the exhibit. The internal life of the object as it relates to its creator, the curator and collaborators, and the viewer is the principal focus of these shows. The principal actants within the gallery space—namely the curator (and their associates), the viewer, and the object—are all acknowledged within this exhibition process. Here, the gallery assumes nothing of their particular way of seeing, neither does the thesis of the exhibition subsume the idiosyncrasies of their experience, but rather illuminates and celebrates the dynamic perspectives of all involved actors. My interlocutor described collections-based exhibitions as a process rather than as a product—the work is what he described as 'knowledge-generating' through centering the present and active encounter with the object.

The introduction of collections based exhibitions calls forth the problematics of text-based exhibitions. The ability of the object to sit and speak in the present goes against the tacit functions of the gallery space which prefers to seal the object in the past. My interlocutor identified this as a major concern of contemporary curating, and the struggle he faced most often. This is a major concern of contemporary curating, and much of this battle exists in the didactic labels of the exhibition.

The Task of Labels

> '[Instead of] going through an exhibit as data, this false objectivity of third-person and false neutrality of a museum voice, I think I would enjoy it if someone was just speaking to me…'

My interlocutor identified a major breakthrough in his current exhibition when one Indigenous collaborator suggested that they write the didactic labels in first person perspective—written as if someone was speaking directly to the viewer. Didactic labels in the gallery typically disclose the history of an object—how it was made, by whom, with what materials, and for what purpose (Figure 1). Curators place them alongside objects to help guide viewers through an exhibition—labels function to frame the object, focusing attention on certain aspects and histories. Historically, didactic labels deal in the materialism of the object, which aligns it with certain colonial rhetorics in the gallery space. The new first-person labels my interlocutor described sought to counteract this by utilizing active language which is descriptive to the emotional or intangible relations of the object. To illuminate this, I constructed two templates for these types of didactic labels to showcase their structure and priorities.

Figure 1 presents a static object. The abstract, or externally focused third-person or omniscient label speaks of a textual history rooted in

30 Krmpotich and Anderson (n 29) 380.

31 ibid 381.

32 O'Doherty (n 7).

Artifact title

(Occasionally, a brief anecdote in plain language which firmly situates the object in the past, speaking only of its historical *use and significance.)*

Object name: *translated name or moniker given by dominant culture given priority. translated or other names might be mentioned*

Artist(s)/Maker(s): *name of individual or group to whom the artifact is attributed*

Category:

Date:

Medium:

*Exclusively written in the official language(s) of the country or region within which the gallery sits.

***Fig 1**. Third-person didactic labels.*

Object name(s)

Vivid quotes from individuals who are connected to the object and descriptions of the object and its historical and contemporary significance and use.

Object name(s): *various names of objects, with priority to the names given by the object's culture and language. translations listed after if necessary*

Artist/makers: *individuals involved with the object, as well as their roles and processes*

Category:

Date:

Medium:

Label authors:

*Often these labels will present their information in multiple languages, that of the dominant dialect(s) of the region of the gallery space, as well as the language(s) of the object's originating culture.

***Fig 2**. First-person didactic labels.*

materialism. Its structure is prosaic, a list of facts occasionally aided by a brief anecdote which supports this reductive reading. This method notes the artist or maker as well as the medium as matters of fact, not storied processes of labour and care. This didactic label positions itself as objective through its abstract description—it presents what my interlocutor describes as a 'final, unconnected thing', or an artifact. Figure 2 welcomes readers to engage a living object. The prioritization of narrative centres the object's relationships. This welcomes readers to the social life of this object, as the evocative language and accounts bring the object to life. Further, the first person perspective highlights that the label is but one story told about the object, creating space for other accounts. First-person labels seek to speak-with and not speak-of an object's history. My interlocutor described them as 'authentic' and 'genuine' opposed to the 'false neutrality of a museum voice'.

The decision of what to write and how to write it informs what a viewer takes away from an exhibition and what meaning they glean from an object. For my interlocutor, the new practice of first-person labels works towards breaking down the gallery's authorial domination, as it firmly situates the object in the present. Viewers moving the gallery no longer interact with objects as data upholding the thesis of the gallery, but rather as sites of meaningful encounter. This fundamentally stripped down the distinctions and authorial dominance.

Case Study: The Kwagiulth Museum

The Kwagiulth Museum and Cultural Centre at Cape Mudge (Wei Wai Kai Nation) opened in 1979. The collection—the Kwagiulth's objects—were not merely to be indiscriminately seen or leered at in showcases, but to be respected and understood as 'embod[ying] the ineffable [and] re-actualizing the ancestors'.[33] For the Kwagiulth community individual objects embodied specific names and stories, crests and privileges, which could only be transmitted and inherited through Potlatch, particularly through those ceremonies marking the institution of marriage. Kwagiulth Elders warned against dividing the collection into exhibitions, as they left it would 'stir up the part and lead to as much resentment as the confiscation itself had done'.[34] The division was however unavoidable within the constraints of the gallery space, and it therefore became imperative to articulate the object's social life—'account for what the objects were, to whom they belong and who their putative 'heirs' were to be'.[35] Ultimately, the gallery displayed the objects in strategies found in typical gallery exhibitions—enclosed in glass cases and mounted on walls. The Kwagiulth exhibition however, attempted to subordinate its own aesthetic as a repository of family owned properties through label text written in the present tense and bearing the names of each item's current owners.

The visceral and direct tense of the Kwagiulth Museum triggers overlapping and often disputed histories of its objects. The personal perspective shifts our thoughts to the impact of this inequality on the lives of ordinary people. In calling attention to the present, living, and continuing relations the objects have outside of the gallery, this exhibition zeroes in on problematic assumptions typical exhibition language perpetuate. The power of situating the gallery in the present is that the object then displays an inventive process of fluid knowledge. Although, crucially, the Kwagiulth Elders were uncomfortable with the processes of exhibition as the false capitulation of objects, the use of first person language and situating the collection in the present seeks to retrieve the social life of the object.

The introduction of collections based exhibitions calls forth the problematics of text-based exhibitions. The ability of the object to sit and speak in the present goes against the tacit functions of the gallery space. It is the curator's role is to arrange an authoritative message for the public through exhibiting objects in a manner calculated to render that message visible. The usage of first person perspective illuminates this process of construction, and reconstitutes the gallery space as one storyteller of many.

Conclusion, or, Is is Possible to Negotiate the Constitutive Limits of the Gallery Space?

At the start of our interview, my informant discussed the notion of 'airwaves', or the space one takes up in talking, especially in popular media and discourse. He described being attentive to the priority

33 Barbara Saunders, 'Kwakwaka'Wakw Museology' (1995) 7(1) Cultural Dynamics 44.

34 ibid.

35 ibid 45.

his voice, as a settler, often receives in discussions of collaborative exhibitions and decolonizing gallery spaces practices. It occurs to me that one may perceive my research as an attempt to discover if there was a way for settler curators, or for the gallery itself to be constructed in such a way that they could be impervious to perpetuating colonial violence. Indeed, much literature on decolonizing the gallery space participates in a discourse of 'redemption'—attempting to salvage from the histories of violence relations of democratic, non-hierarchical exchange that are to govern contemporary gallery spaces as free and equal contact zones.[36]

The essential take away I found from my research is that this kind of redemption is not possible—and that thinking this way, thinking there is or could be an absolute and monolithic solution, is part of the problem. We cannot construct the proper or perfect posture for this makes us artifacts of our present which will soon be the past as we continue to learn and live with others. Keeping objects in the present currently works for my interlocutor as a practice of acknowledgement which illuminates the colonial vestiges of curating artifacts in the past, but even now these ways of being do not always meet the challenges of decolonizing the gallery space and succeed. Keeping antagonizes the implications of absolute and dominant ownership nascent in curating, yet still finds itself tripped up when it performs bureaucratic tasks. To use the language of objects illuminates the embalmed nature of artifacts, but this language still falters when assembling exhibitions. The position of the present in the gallery space seeks to salvage the internal life of the object, yet its mere presence in the gallery is an abstraction.

Reconciliation in the gallery is an active process, something that we must continually work at together for there can be no personal reckoning. To shore up the violence of the inherited body or institution—of which the gallery space is but one of many—we must be in dialogue with others, specifically those communities against which these institutions continue to perpetrate harm. To reconcile, from the Latin 're-' meaning back and 'conciliare' to bring together, expresses an ardent force towards another. This is not to dismiss the vital work and reflection that settlers, and others in privileged communities must undertake, but to recognize that the true meaning and value of our actions are found in community, in being-with and being-towards others.

If we posit that the purpose and function of the gallery space is to disseminate knowledge, entertain, and preserve objects related to the human story, then the essential question we must ask of ourselves is: who is this for? As we locate vestiges of colonialism intrinsic in the ways our galleries function, we must critically engage how current practices are in fact antithetical to their intended practice, namely of education and empowerment, and investigate the ways in which they uphold, often invisibly, structures and ideologies which continue to alienate and harm racialized and marginalized communities.

36 Ben Dibley, 'The museum's redemption: Contact zones, government and the limits of reform' (2005) 8(1) International Journal of Cultural Studies.

Belief in a Myth and Myth as Fact: Towards a More Compassionate Sociology and Society

Niamh Hodges

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There exists a fine line that sociologists—and all social scientists—must tread as they try to knit together empirical, objective[1] evidence and participants' subjective realities. It is not an either/or situation. It is not a very easy path to walk down. But it must be done—not only by sociologists, but by all of us. I argue that working out how to value both objective and subjective realities is a central step we must take if we are to move towards a more compassionate society. And a step that we must not leave to junior researchers or postgraduate students to take, but which must be emphasised to undergraduates as they begin their research. To illustrate how I came to this understanding, I think it is instructive to consider one of my own research experiences.

When interviewing a research participant on Zoom a few weeks ago, I found myself particularly struck by something this participant said. Whilst I cannot say exactly what this comment was (the research project is ongoing), I was bewildered at the way a young woman, whose candour and generosity I admired and appreciated, seemed to be denying an aspect of the inequalities prevalent in university life. She denied something I believed I knew to be true. I found myself thinking 'but that's a myth' so 'you're wrong', 'you've been duped', 'you're misinformed'. I even fleetingly considered that my interviewee was under a form of 'false consciousness', the sociological equivalent to 'you're wrong and I'm right— but you can't see it'. It is in order to avoid instances like this in the future, instances where the power dynamics between interviewee and interviewer are at risk of sullying the integrity of the research, that I propose a route towards a more compassionate sociology, one that remains both critical and empowering.

Fortunately, however, I recalled that the growing refrain within the discipline of sociology is 'reflexivity, reflexivity, reflexivity'. Reflexivity means being alert to and examining your own assumptions, views, and social location within structures and relations of power; it is central to good sociological research. This incident raised the question of how I should represent this participant's views in my work. I considered the option of turning to the corpus of sociological work demonstrating why she is wrong and, in the process, taking away her autonomy and devaluing her views. Or, I could take her own perspective at face value, ignoring the empirical evidence to the contrary. The truth is that neither option is adequate. Instead, we must *all* seek to value objective and subjective realities *simultaneously*. Only then can we completely fulfil the requirement to be reflexive and, in turn, become more compassionate sociologists and, beyond that, citizens.

Unable to detail this specific incident, I want to illustrate what I mean by applying this idea—of valuing both the objective and subjective *simultaneously*—to the mythological status of meritocracy. Meritocracy refers to the idea that intelligence and effort, rather than ascriptive traits, determine individuals' social position and trajectory. I had previously believed meritocracy to be a 'myth' in the UK. Drawing on David Bidney's definition of myth,[2] when referring to meritocracy as a myth, I mean that meritocracy is an idea or concept that is frequently discussed and often believed but, in reality, it is false because it has been shown to be incompatible with scientific and empirical evidence.

Thinking about whether meritocracy is a myth is particularly pertinent in the context of COVID-19. With murmurs of 'life after COVID-19' and 'a return to normal', forms of government relief like eviction moratoriums and furlough schemes have been wound down or withdrawn completely. As these expanded safety nets are dismantled, it is likely that we will return to a government discourse of 'meritocracy' that positions the privileged as deserving of their

1 It is implicit throughout this essay that completely 'objective' evidence is impossible to achieve given the influence of the researcher on research outcomes, but the term is used here as objective knowledge remains the ideal across large swathes of the social science community.

2 David Bidney, 'The Concept of Myth and the Problem of Psychocultural Evolution' (1950) 52(1) American Anthropologist 16.

dominance and wealth on the basis of 'merit', whilst the dominated and marginalised are rendered responsible for their own hardship because they are neither sufficiently talented nor conscientious. However, given that the fatal impacts of COVID-19 have exposed the persisting fault lines of structural inequality, with mounting death tolls, lockdown restrictions, and concomitant economic shocks disproportionately affecting the marginalised and dominated in society, particularly the working class and people of colour (many of whom are working-class), it raises the question of whether meritocracy was and is a myth.

The meritocratic discourse: level playing fields and worthy winners

Meritocracy, as popularised by Michael Young in 1958,[3] refers to the idea that 'IQ+effort', rather than ascriptive traits (such as class, race, gender, sexuality, or nationality), determine individuals' social position and trajectory. The term has transformed from being a negative slur, as argued by Michael Young and Alan Fox, to a positive axiom of modern life.[4] Jo Littler argues this positive evaluation characterises contemporary *neoliberal* inflections of meritocracy that justify inequalities (conferring meritocratic legitimation) and which are underpinned by individualism and the linear, hierarchical 'ladder of opportunity'.[5]

The current prime minister's narrative of 'Levelling Up' shows meritocratic discourse in action. It is largely a continuation of the rhetoric Boris Johnson deployed as Mayor of London, when he famously 'hailed the Olympics for embodying the "Conservative lesson of life" that hard work leads to reward'—the effort part of the 'IQ+effort' meritocratic formula.[6] Perhaps most revealing of this meritocratic discourse is Johnson's effusive article titled: 'We should be humbly thanking the super-rich, not bashing them'.[7] In this article, he argued the super-rich *deserve* their wealth (meritocratic legitimation) on the basis of their 'merit', that is, their exceptional levels of intelligence, talent, and effort. Thus, he adopts a trope of meritocratic legitimation to justify the gross inequalities between the super-rich and the poor. The implication is that those at the bottom of the social ladder are to blame for their own position.

Fellow Etonian, David Cameron, matches Johnson's meritocratic rhetoric. Cameron's 'Aspiration Nation' discourse similarly assumes all progressive movement must happen upwards, thereby positioning working-class culture as 'abject zones and lives to flee from'.[8] This is epitomised by Cameron's moralised binary opposition of 'skiver' / 'striver'. The rhetorical construction of these social types denies structural (dis)advantage by 'responsibilising' solutions to inequality as an individual's '*moral* meritocratic task'.[9] Thus, meritocracy assumes a 'level playing-field' or 'equality of opportunity', whilst presenting a moralising discourse that blames or applauds *individuals* for their social position and erases the persistence of structural inequality.

Meritocracy as myth: the following wind of privilege makes for an uneven playing field

If meritocracy was regularly being touted by politicians, why, then, did I consider it to be a myth? To answer this question, we must consider how past and recent scholarship places meritocracy firmly in the realm of myth by showing it to be incompatible with scientific and empirical evidence.

I limit my analysis here to class, despite literature on intersectionality showing that class does not exist apart from other axes of oppression. This focus reflects the long-standing British political obsession with class mobility and that literature on meritocracy has traditionally centred on class inequalities, whereby meritocracy is framed as achievement irrespective of *material* circumstances, for which class is perhaps the most pertinent lens.

My sociological training at undergraduate level has instilled in me that meritocracy as an operational social system—where 'IQ+effort' is the basis of reward and resource allocation in society—is a myth. In traditional class analyses, such as that by Richard Breen and John Goldthorpe,[10] meritocracy is operationalised in terms of employment relations, analysing the relationship between class origins and destinations—coded by occupation—as illustrative of social mobility. Breen and Goldthorpe found that, in Britain, 'merit'—measured as ability, effort, and/or educational attainment—does little to mediate the association between class origin and destination.[11] In other words, in order to enter similarly desirable class positions, children of less-advantaged origins need to show substantially more 'merit' than their privileged-origin counterparts.

Meanwhile, the culturalist approach to class analysis, which emerged in direct response to the deficiencies of traditional class analysis, tells a similar story. A new generation of class theorists, notably Mike Savage and colleagues[12] alongside Sam Friedman and Daniel Laurison,[13] criticised traditional class analysis' narrow focus on occupational divisions in class reproduction to the exclusion of cultural processes and markers of inequality. The culturalist approach operationalises a Bourdieusian framework for understanding inequalities. As economic capital was seen as just one aspect of class reproduction, focus shifted to social capital and, especially, cultural capital which exists in three forms:

3 Michael Young, *The Rise of the Meritocracy 1870-2033: An essay on education and society* (Thames and Hudson 1958).

4 ibid; Alan Fox, 'Class and Equality' (May 1956) Socialist Commentary 11; Richard Herrnstein, *IQ in the Meritocracy* (Little, Brown 1971) and Daniel Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting* (Basic Books 1973). Also see Jo Littler, *Against Meritocracy: culture, power and myths of mobility* (Routledge 2018).

5 Littler (n 4) 8.

6 Geri Peev, 'Games Embody the Tory Ethic of Hard Work that Leads to Reward, Says Boris', *Daily Mail* (London, 6 August 2012) <www.dailymail.co.uk/news/ article-2184687/Boris-Johnson-London-2012-Olympics-embody-Tory-ethic-hardwork-leads-reward.html#ixzz2QG4E5oVC>.

7 Boris Johnson, 'We should be humbly thanking the super-rich, not bashing them', *The Telegraph* (London, 17 November 2013) <https://www.telegraph.co.uk/politics/0/should-humbly-thanking-super-rich-not-bashing/>.

8 Littler (n 4) 7.

9 ibid 89–90.

10 Richard Breen and John Goldthorpe, 'Class Inequality and Meritocracy: A Critique of Saunders and an Alternative Analysis' (1999) 50(1) British Journal of Sociology 1; Richard Breen and John Goldthorpe, 'Class, Mobility and Merit: The Experience of Two British Birth Cohorts' (2001) 17(2) European Sociological Review 81; Erzsébet Bukodi, John Goldthorpe, Lorraine Waller, and Jouni Kuha, 'The mobility problem in Britain: New findings from the analysis of birth cohort data' (2015) 66(1) British Journal of Sociology 93.

11 Breen and Goldthorpe, 'Class, Mobility and Merit' (n 10).

12 Mike Savage, Niall Cunningham, Fiona Devine, Sam Friedman, Daniel Laurison, Lisa McKenzie, Andrew Miles, Helene Snee, and Paul Wakeling, *Social Class in the 21st Century* (Pelican Books 2015).

13 Sam Friedman and Daniel Laurison, *The Class Ceiling: Why It Pays To Be Privileged* (Bristol University Press 2019).

1. objectified (cultural products, such as book or works of art);
2. institutionalised (educational credentials), and
3. embodied (enduring dispositions of mind and body, such as mannerisms, preferences, language).

In particular, embodied cultural capital can illuminate how often 'IQ+effort' is not recognised as 'merit'. Rather, 'merit' is read off the body through the ways individuals '*perform* merit': for instance, in mannerisms, language, accent, dress, and tastes. Possession of embodied cultural capital is structured by what Bourdieu refers to as the 'habitus': the set of pre-reflexive, pre-discursive dispositions an individual embodies, conditioned by their social position or 'conditions of existence' (proximity to material necessity). In this way, one's habitus is classed. The 'structure' of the habitus generates 'structuring' dispositions, relating to a particular mode of perceiving, inhabiting, and knowing the social world, rooted 'in' the body, including posture, gesture, and taste – embodied cultural capital.[14]

Sam Friedman and Daniel Laurison, following this culturalist approach, move beyond the traditional class analysis assumption that mobility finishes at the point of occupational entry. Instead, they view equitable access to the highest echelons of elite professions (such as law, medicine, engineering, journalism, and TV-broadcasting) as crucial to the actualisation of meritocracy: it is not just about who gets in, but who gets to the top. They interrogate inequalities in elite professions, finding that the probability of someone from upper-middle-class origins landing an elite job to be 6.5 times that of their counterpart from working-class origins.[15] They argue that differences in educational credentials cannot fully explain the stubborn links between class origins and destinations. Whilst there are class disparities in levels of education, the percentage of people with a degree or higher obtaining 'top' jobs is 27% for people of working-class origin and 39% for people of privileged origin.[16] These disparities reveal that even if people from working-class origins possess the credentials meritocratic discourse presents as necessary ('IQ+effort'), class hierarchy within elite professions persists.

Friedman and Laurison contend that cultural processes are the cause of these inequalities, thereby exposing the limits of Goldthorpe's more economics-based approach. They argue that what is routinely categorised and recognised as 'merit' in elite occupations is 'actually impossible to separate from the "following wind of privilege"'.[17] Rather than ensuring a level playing field, the assessment of 'merit' is based on arbitrary, classed criteria. For example, recognition of 'merit' depends on 'polish' in accountancy and 'studied informality' in television, both of which 'pivot on a package of expectations—relating to dress, accent, taste, language and etiquette—that are strongly associated with or cultivated via a privileged upbringing'.[18] That is to say, in Bourdieu's terms, performance of 'merit' requires a certain privileged habitus. This enables the already privileged to 'cash in' their 'merit' in a way that is unavailable to the working-class who, due to their class origins, do not possess the requisite cultural repertoire – embodied cultural capital, possession of which is structured by the habitus. The existence and differentiation of an inflexible and durable habitus thus means any universal, objective set of criteria that constitutes 'merit' is an impossibility as is the notion that *anyone* can possess this 'merit.'

Moreover, a privileged habitus is favoured through a process of 'cultural-matching' whereby a 'fit' between employer and employee is sought.[19] 'Fit' is based on relationships forged on cultural affinity which, due to the habitus, usually map onto shared class origins. Since those in senior positions are overwhelmingly from privileged backgrounds, cultural-matching enables the upper-middle classes to advance at the expense of the working-class. The process of cultural-matching becomes self-perpetuating. Yet, as it is couched in veiled meritocratic management jargon, such as 'talent-mapping', cultural-matching operates under the radar.[20] These homophilic bonds enable the privileged to 'cash in' their 'merit' in a way that is unavailable to the working-class who possess a habitus inscribed by proximity to necessity and thus lacking the required embodied cultural capital, producing experiences of 'lack of fit'.[21] Whilst Friedman and Laurison do not explicitly make this connection, I follow Vandebroeck in seeing this 'lack of fit' as the corollary of how every habitus 'seeks to create the conditions of its fulfilment', meaning 'that every habitus will seek to avoid those conditions in which it systematically finds itself questioned, problematised, stigmatised and devalued'.[22] For those of working-class origin, the resultant poor 'fit' leads to an ostensibly *elective* 'self-elimination' from elite occupations.[23] This ensures limited mobility between origins and destinations and suggests that something other than the meritocratic formula 'IQ+effort' is operating as the selection mechanism in elite professions . In other words, there is no point talking about a level playing-field when the wind is blowing so strongly in one direction. Meritocracy thus appears as a myth on the level of empirical, structural reality.

Whilst academic research thus evidences the mythical status of meritocracy as an empirical reality, the state of affairs in politics and the media also encourage similar conclusions. Whilst only 6.5% of the general population attends fee-paying schools, 54% of Johnson's cabinet were privately educated (as of July 2019). The equivalent number for May's 2016 cabinet was 30%; Cameron's 2015 cabinet was 50%; the coalition 2010 cabinet was 62%. Even in Labour cabinets the privately educated were overrepresented: 32% in both Brown's 2007 and Blair's 1997 cabinet.[24] Similarly, a 2019 Ofcom report found that television workers were twice as likely than the average Briton to have attended private schools.[25] The *Panic!* 2015 survey also found that, of those in film, television, and radio, only 12.4% have working-class origins, compared to 38% of the general population.[26] All of this evidence seems to point to an undeniable status of meritocracy as myth.

14 Dieter Vandebroeck, *Distinctions in the Flesh* (Routledge 2017).
15 Friedman and Laurison (n 13) 13.
16 ibid.
17 ibid 27.
18 ibid 213.
19 ibid.
20 Friedman and Laurison (n 13) 211.
21 ibid 218.
22 Vandebroeck (n 14) 220.
23 Friedman and Laurison (n 13).
24 BBC News, 'Prime Minister Boris Johnson: Does his cabinet reflect "modern Britain"?' (25 July 2019) <https://www.bbc.co.uk/news/uk-politics-49034735>.
25 Ofcom (2019) *Breaking the class ceiling—social make-up of the TV industry revealed.*
26 Dave O'Brien, Orian Brook, and Mark Taylor, 'Panic! Social class, Taste and Inequalities in the Creative Industries' (2018) <https://www.research.ed.ac.uk/portal/en/publications/panic-social-class-taste-and-inequalities-in-the-creative-industries(0994f056-af25-4615-b97c-d8adc190d5b4).html>; Ofcom (n 26).

A belief in a myth?: 'the playing-field looks fine to me'

These academic findings and research statistics, published in peer-reviewed journals and fact-checked news outlets, are considered reliable, valid, and largely unambiguous. Yet significant swathes of the population continue to believe in meritocracy. Only 14% of respondents to the 2009 British Social Attitudes survey regarded family wealth as important to getting ahead and only 8% saw ethnicity as a decisive factor—a fall from 21% and 16% in 1987. Meanwhile, 84% and 71% believed 'hard work' and 'ambition' were important to getting ahead. This high level of belief in meritocracy may have even increased in recent years. In 2018, Jonathan Mijs found that the recent rise of income inequality has been accompanied by an increase in popular belief in meritocracy internationally.[27] If meritocracy is believed on a significant scale, how can such beliefs be sustained despite contradictory evidence?

It is especially important to ask the question of why those who appear to lose out, precisely because meritocracy is nothing more than a guise for persisting class prejudices, are persuaded by the idea that meritocracy is a true functioning system of reward and resource allocation in our society. Elites have obvious stakes in believing and perpetuating belief in meritocracy if it works to justify their power as deserved and legitimate on the basis of intelligence, talent, and effort. Therefore, I will focus on the so-called losers of meritocracy, or 'skivers' in Cameron's classist parlance.

In order to move towards a more compassionate sociology, it is insufficient simply to look at whether or not meritocracy exists, or how far ingrained prejudices prevent it from being realised. Rather, we also need to take into account the subjective responses to meritocracy of those we study. Failing to consider simultaneously the objective *and* subjective realities of meritocracy means we risk seeing those who believe in it as cultural dupes in a state of ignorance and delusion. Whilst this kind of disempowering analysis can be seen in some sociological writings,[28] there is nevertheless a body of scholars whose work actively seeks to contest and move beyond this. The work of Wendy Bottero on social inequalities and of Lauren Berlant on her concepts of 'cruel optimism' has shaped my thinking on this and both are discussed briefly below.[29] Robbie Duschinsky and colleagues also provide a way through these thorny issues when discussing the psychiatric concept of 'flat affect'. They argue against the totalising resistance/compliance binary in the social sciences and humanities that is 'too quick to divide actions into compliance with or resistance to power'.[30] They contend that this binary obscures the many strategies individuals engage in to negotiate 'compromised, valuable freedom' in conditions not of their own choosing. Whilst this scholarship is crucial, students—particularly undergraduates—have to seek out this work as it is not part of most compulsory syllabi. Even in optional modules and papers, it is often only touched on briefly and indirectly in discussions of researcher reflexivity. Meanwhile, the objective and 'scientific' nature of social sciences seem to be a crucial lynchpin around which all undergraduate learning turns. Alternatively, the student has to be lucky enough to have a supervisor that will guide them in this direction. I believe research would become not only more nuanced, but more compassionate, if scholarship like that of Bottero, Berlant, and Duschinsky, and the notion of valuing objective *and* subjective realities simultaneously, became a staple of undergraduate sociology courses. More than this, it would help us become more compassionate people outside of the classroom and lecture hall too.

Favouring objective, empirical evidence, which points to the nonexistence of meritocracy, over subjective feeling and meaning-making means failing to consider the seduction and benefit of meritocratic belief in providing meaning and order to one's life. Christopher Paul overcomes this problem, recognising that meritocratic belief is 'understood as a great liberator, freeing citizens from an aristocratic past based on inheritance and lineage'.[31] Given this historical reference point, meritocracy is consented to as it seems 'fair' and 'just'. However, because meritocracy structurally disadvantages the dominated (working-classes), such belief can be characterised as a 'cruel optimism'. Lauren Berlant conceptualises 'cruel optimism' as the affective state produced under neoliberalism which encourages optimistic attachments to a brighter, better future, whilst these same attachments and beliefs are simultaneously 'an obstacle to our flourishing'.[32] In other words, meritocratic belief can provide a sense of hope which is difficult to argue with.[33] Berlant recognises this process of meaning-making through belief, arguing that hope can bind together a chaotic neoliberal world 'into a space made liveable…even if that hope never materialises,'[34] just as hope for meritocracy as a structural reality may never materialise.

A myth as fact?

On the one hand, we have seen that empirical evidence suggests that the recognition and categorisation of 'merit' is based more on possession of classed embodied cultural capital than on 'IQ+effort'; meritocracy as an objective social system is a myth. On the other hand, belief in the meritocratic formula at a subjective level is clearly not mythical, but a strong ideological force in British society. The existence of belief in the meritocratic formula at a subjective level means we cannot label meritocracy 'just a myth' and proceed with our analysis heedlessly. As David Bidney recognised as early as 1950, 'the very fact of belief implies that subjectively, that is, for the believer, the object of belief is not mythological', but 'an effective element of culture.'[35] Ultimately, if people find meaning and sense in a meritocratic idiom, acting on the basis of meritocratic belief, sociologists must be cautious in imposing alternative categorisations and identifications in the teeth of lay peoples' denials. This is exactly what almost occurred when I was interviewing a research participant a few weeks ago.

27 Jonathan Mijs, 'Visualising Belief in Meritocracy, 1930–2010' (2018) 4 Socius 1.

28 I contend that such analysis is seen in Littler (n 4) and that many Bourdieusian analyses edge very close to falling into this trap as well, such as Friedman and Laurison (n 13).

29 Wendy Bottero, 'Class Identities and the Identity of Class' (2004) 38(5) Sociology 985, and *A Sense of Inequality* (Rowman and Littlefield International 2018); Lauren Berlant, *Cruel Optimism* (Duke University Press 2011).

30 Robbie Duschinsky, Daniel Reisel, and Morten Nissen, 'Compromised, Valuable Freedom: Flat Affect and Reserve as Psychosocial Strategies' (2018) 11(1) Journal of Psychosocial Studies 68.

31 Christopher Paul, *The Toxic Meritocracy of Video Games: Why Gaming Culture is the Worst.* (University of Minnesota Press 2018) 44–45.

32 Berlant (n 30) 1.

33 Naa Oyo A Kwate and Ilhan H Meyer, 'The Myth of Meritocracy and African American Health' (2010) 100(10) American Journal of Public Health 1831.

34 Chase Dimock, ''Cruel Optimism' by Lauren Berlant' *Lambda Literary* (30 July 2012) <https://www.lambdaliterary.org/2012/07/cruel-optimism-by-lauren-berlant/>.

35 Bidney (n 2) 22.

Thus, meritocracy is a myth at an objective level, but also exists as ideology, meaning subjective belief in this ideology is far from a myth in British society. Because it is believed true, meritocracy is not a myth to those who believe it, but a myth *only* to those who know and believe it to be false. This brings us to the problem of why, so long as some people *believe* in meritocracy, it is impossible to unproblematically label it as a myth despite research suggesting meritocracy has no empirical reality.

I draw here on conceptualisations of ideology. Since meritocracy comprises a system of beliefs constituting a general worldview that works to uphold particular power dynamics between the dominant (presented as the deserving 'winners' of meritocracy) and the dominated (presented as unmeritocratic and undeserving), it operates as an ideology.[36] Michael Freeden extends this view, defining ideology as 'particular patterned clusters and configurations' of decontested 'political concepts' not external to but existing *within* the world.[37] This is helpful for two reasons.

Firstly, the notion that ideology exists *within* the world highlights how ideologies have material effects: if believed, they influence how we act and behave, as seen in processes of 'self-elimination' (whereby individuals from marginalised or dominated backgrounds do not enter elite jobs, not because they lack ambition or aspiration, but as a reaction to or an anticipation of the kinds of barriers they will face there).[38] Moreover, belief in meritocracy—that we had lost our meritocratic way and *needed* to recapture it—is, David Goodhart argues, at the heart of the contemporary anti-elitist, populist challenge.[39] This belief in meritocracy was an underlying part of both Trump and Brexit's appeal, political changes that re-organised and shaped the world in which all must participate. Therefore, even if meritocracy is a structural mirage, belief in it as ideology still has material, real-world effects. Sociologists, then, seem to have an additional task. It can no longer suffice to evidence the absence of meritocracy as a functioning social system in society. That is to dismiss it as a myth and to overlook these real-world effects. Instead, sociologists need to grapple with the more complex and less neatly categorised implications of the persistent belief in meritocracy, even by those it disadvantages. I agree with Stuart Hall, one of the founding figures of British Cultural Studies, that ideology 'concerns the ways in which ideas of different kinds grip the minds of the masses and thereby become "a material force"'[40] and I suggest that scholars who dismiss meritocracy as myth fall prey to the mistaken traditional philosophical distinction between thought and action, isolating them in separate, impermeable spheres with potentially deleterious consequences.

Secondly, in Freeden's theory of ideology, we are presented with the notion that there is no 'absolute truth' since all concepts are 'essentially contestable', with as many potential meanings of concepts and ideas as there are human minds.[41] Whilst this is a rather extreme and destabilising stance, it highlights how belief is subjective, contextualised, and personalised, meaning meritocracy cannot be completely and unequivocally tarred with the brush of mythology.

These two points—that meritocratic belief has real-world effects and meritocratic belief as subjective reality—highlight why, so long as *some* people believe in it, meritocracy cannot *merely* be a myth. Bottero argues that 'the asymmetrical distribution of resources tends to worry sociologists more than it worries lay actors', suggesting that 'discussion of such issues must draw on the language of perceived injustice and conflict which emerges from people themselves.'[42] However, the language of injustice and conflict does not always and for everyone refer to meritocracy. Rather, meritocracy is instead often spoken of in terms of legitimate inequality.

Towards a more compassionate sociology – and beyond?

We cannot deny that sociology (and social sciences more broadly) is and should remain an empirical discipline, but nor can we deny that an approach which puts greater emphasis on lay actors' own beliefs and consequent action is *also* within sociology's remit. Indeed, an important tenet of sociological training is the 'Thomas Theorem'*:* 'If [people] define their situations as real, they are real in their consequences'.[43] This is a tenet that seems to be offered to students and young researchers only *after* their undergraduate studies, and even then it is not always followed. Instead, this tenet should become crucial to any undergraduate sociological training. Sociologists and other social scientists must continue to analyse and expose how power is operating and so cannot take people's own perspectives at face value since they may potentially 'misrecognise' the power inequalities experienced. Yet social scientists must also avoid, as Berlant puts it, 'shit[ting] on people who hold to a dream'.[44] What I have been arguing for here is a sociology that avoids this by making the distinction between the objective, empirical myth of meritocracy as a social structural system (based on the 'IQ+effort' formula), and belief in meritocracy as a subjective reality which is not a myth because it has real-world effects on and meanings for people's lives. Consequently, meritocratic belief becomes a material force that can only be confined to the mythological sphere at the price of a limited understanding of the real-world effects it has. That is, meritocracy may be a myth to some, including many sociologists, but it is an integral cultural element for many.

This two-pronged argument that calls for encompassing objective *and* subjective realities simultaneously extends beyond the issue of meritocracy. For example, it can help us understand why women—not just men—believe that gender equality has been achieved. It can help us understand why people hold onto conspiracy theories. It can help us understand why people in urban, developed cities practice witchcraft or spend hours logging sightings of UFOs, to name just a few. Reflecting on this conclusion is crucial given social sciences' (like sociology, law, and politics) tendency to focus on empirical reality, rather than subjective belief. Without the latter, simple conclusions that meritocracy is *merely* a myth or that my research participant was *merely* suffering from 'false consciousness' risk alienating and dismissing the existence of many whose lives take meaning and action from such beliefs. What this essay ultimately aims to do, therefore, is to caution social scientists, particularly

36 Jo Littler, 'Ideology' in Jonathan Gray and Laurie Oullette (eds), *Keywords for Media Studies* (New York University Press 2017) 98.

37 Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach* (Oxford University Press 1996).

38 Friedman and Laurison (n 13).

39 David Goodhart (2017) cited in David Civil and Joseph J Himsworth, 'Introduction: Meritocracy in Perspective. *The Rise of the Meritocracy* 60 Years On' (2020) 91(2) The Political Quarterly 373, 376.

40 Stuart Hall, 'The Problem of Ideology: Marxism without Guarantees' in David Morley and Kuan-Hsing Chen (eds), *Stuart Hall: Critical Dialogues in Cultural Studies* (Routledge 1996) 26.

41 Freeden (n 38) 53.

42 Bottero, 'Class Identities' (n 30) 995.

43 WI Thomas and DS Thomas, *The Child in America: Behaviour Problems and Programs* (Knopf 1928) 572.

44 Berlant (n 30) 123.

undergraduate students, in their analysis and exposure of objective reality, to not dismiss point-blank individuals' subjective reality. Whilst researchers must always be awake to power dynamics that may go unnoticed by the individuals they study, this essay suggests sociology (and other social sciences) perhaps needs to be more reflexive, aware that its claims to *inclusivity* and *criticalness* may be undermined as its empirically focussed, objectivity-driven approach risks ostracising the very people who, in its aim to bring inequalities to the forefront, it intends to empower.

This idea, that we must avoid shitting on those who believe in a dream, despite empirical evidence of its nonexistence, should not just be taken up by sociologists, but by all of us. As this essay has outlined, it can help us—academics and students in elite institutions especially—understand why people voted for Trump or Brexit, for instance. It will stop us from dismissing and even dehumanising others point-blank and instead open up channels of empathy, compassion, and communication, something which I hope will be present in all my future research interviews and which I fear was not present in the interview that sparked this essay.

Karl Heinz Bohrer's *A Little Pleasure in Decline. Essays on Britain*[1]

Giles MacDonogh

Giles MacDonogh FRHistS is a historian of Germany and author of fifteen books. These include biographies of Frederick the Great and Kaiser William II and histories of Prussia and Berlin. He is known for his best selling history of post-war Germany After the Reich *(John Murray 2007). His latest book is* On Germany *(Hurst 2018).*

My friend Karl Heinz Bohrer died on 4 August 2021. He was seen as Germany's leading literary critic, a man both brilliant in perception and prodigious in industry, whose 29 books examine the German classical tradition with reference to the ancient writers whom Karl Heinz had known from his humanist education in Germany. He had polished up a last book shortly before he died which has now been published posthumously.[2] Karl Heinz wrote in German and very little is available in English. Just one of his books has been translated: *Suddenness*, in 1994.[3]

But Karl Heinz lived a large part of his life *outside* Germany - it was almost as if his own country was 'too small a bound'. When he was Professor of Modern German Literature at Bielefeld, he lived in Paris with his second wife Undine Grünter and commuted to the Ruhr to deliver his lectures. For three separate periods of his life he indulged his passion for Britain. The first was a short stay, but from 1968 onwards he returned again and again. After he stepped down as literary editor of the *Frankfurter Allgemeine Zeitung* or '*FAZ*' in 1974, he ended up being the paper's cultural correspondent in Britain for the rest of the decade. Finally, he was based in London for the last two decades of his life after marrying Angela Bielenberg, née Gräfin von der Schulenburg.

1 Karl Heinz Bohrer, *Ein bißchen Lust am Untergang. Englische Ansichten* (Carl Hanser Verlag 1979). The book consists of a number of newspaper articles written for the *Frankfurter Allgemeine Zeitung* and one taken from the journal *Merkur*. Subsequent footnotes will state also the title and date of the article being referenced.

2 Karl Heinz Bohrer, *Was alles so vorkommt. Dreizehn alltägliche Phantasiestücke* (Suhrkamp 2021).

3 Karl Heinz Bohrer, *Suddenness: On the Moment of Aesthetic Appearance* (Columbia University Press 1994).

That first short stay was in 1953 and is described in Karl Heinz's first volume of autobiography *Granatsplitter* ('Shrapnel')[4], as indeed is his immediate post-war fascination with all things British. He was born in Cologne on 26 September 1932 and was twelve when the war ended. On his mother's side he had Irish roots, which might have made him inclined to like the British soldiers who occupied the Rhineland. He developed a fondness for white bread and tinned sardines and, more importantly, his grandfather took him to see British films. Laurence Olivier's *Henry V* of 1944 made a big impression on him.

But another influence beckoned when he was sent from his humanist 'Gymnasium' or grammar school to a liberal boarding school in the Black Forest in the French Zone. There, he became aware of French cinema and existentialist philosophy. He was keen on drama at school, and even studied it briefly at University in Cologne before migrating to a more conventional study of German at Göttingen and Heidelberg, where he took his doctorate.

Karl Heinz taught German briefly in Sweden, but his early years were spent in cultural journalism rather than academic life, firstly on the cultural pages of *Die Welt* in Hamburg and later in Frankfurt am Main, where he took on the most important critical role in Germany as the Literary Editor of the *FAZ* in 1968.

In 1974, he handed over the reins to the redoubtable Marcel Reich-Ranicki. He submitted his second doctorate or 'Habilitation' on Ernst Jünger in 1977 and was appointed to the University of Bielefeld, where he was Professor of Modern German Literature from 1982 to 1987. This reversion to academic life had an ulterior motive: he had been promised the editorship of the intellectual monthly *Merkur*

4 Karl Heinz Bohrer, *Granatsplitter* (Carl Hanser Verlag 2012).

in succession to Hans Schwab-Felisch, but the editor needed to be a chair-holding professor. He was appointed to the post in 1984, standing down in 2011.[5]

Siren-like, England continued to beckon from across the North Sea. Karl Heinz's daughter Beatrice told me of arriving in Dover with her father, who informed her she was going to live in a 'great country'. The Bohrers descended at an important moment in British post-war history, and, as it so happens, it is one that I also remember well, as it represented the period between my leaving school and leaving university. Britain was still locked in its post-war insularity. We had joined the Common Market on 1 January 1973, but there was no noticeable change in the way we lived our lives. In 1975 we had our first ever national referendum when elements on the right and left attempted to reverse the decision taken by Edward Heath's government two years before. The word 'sovereignty' was on all lips. Europeans – foreigners – apparently didn't understand the joys of sovereignty.

Karl Heinz got to know a very different world to postwar West Germany. Middle and upper-class Britain was fiercely white, Anglican, and profoundly snobbish. Society was small and exclusive. I was related to no one and came from an obscure if independent school. In order to make sure little Johnny or Charlie was in safe hands, my Oxford friends' parents (like the friends themselves) would extract the following details within the first ten minutes of conversation: name of school, religion, father's occupation (and possibly how much he earned), and whether you were related to anyone grand or famous. As a Catholic from a single-parent household whose mother struggled as a painter and art-teacher I was not promising, but Catholics were nonetheless better than Baptists or Unitarians. Like Jews there were a few grand ones, although my Irish name meant there was little chance of associating me with the Brideshead set. Countless hapless undergraduates put on plummy accents or pretended to have gone to more famous schools than the ones they actually attended. In later life, they improved their CVs by saying they had gone to better-known colleges or universities.

This cosy, exclusive world was cracking up in the face of economic and social crisis. Most of the members of my still single-sex college were from state schools, but the public schoolboys, above all the 'top-ten' public schoolboys, were much louder, so that you could be forgiven for not noticing the others. Karl Heinz's love for Britain did not silence his critical voice. In 1975, the year I went up, he noted the 'decrepit factories, the shrinking industrial production, the irrational labour models, the archaic structure of the unions, the pitiful understanding of British managers for the needs of foreign markets, their tendency to invest abroad, but not at home'. He wasn't beating a drum, but Germans did better work, and on time. 'The words "efficiency" and "plan" are unknown to British ears… Rationalising is control and control is unacceptable. The more you know that you are swimming against the tide the more enjoyable it seems to push these new possibilities to one side'.[6] It was a decline that had started in the 1890s, when Britain had failed to keep up with Germany and the US. He quoted Arthur Koestler, who recognised this national suicide. It was the time when many British satirical films, from *I'm Alright Jack* to *Heavens Above*, sent up the malaise that affected so many areas of British life.

5 Karl Heinz Bohrer, *Jetzt. Geschichte meines Abenteuers mit der Phantasie* (Suhrkamp 2017) 225.

6 Bohrer (n 1) 13-14. 'Die englische Krankheit, Politische und psychologische Ursachen', 27 September 1975.

Not for nothing did many of these satires revolve around strikes. In October 1977, Karl Heinz focussed on *New Statesman* editor Paul Johnson's decision to leave the Labour Party after twenty-four years of membership. The cause was Tony Benn – then still mostly referred to as Anthony Wedgewood-Benn - who had fought British membership of the Common Market and was the unions' champion. This need to put trade union collectivism before all else had proved the last straw for Johnson: 'Johnson must now write letters to the workers saying that the health of a single apprentice is more important than the possibility of literary self-expression'.[7] For Karl Heinz, the English disease was 'alienation from the future'.[8]

He travelled to Manchester, a city redolent of 'Manchester economics', the 'Manchester' *Guardian*, Marx and Engels. The city had its attractions: 'Without style, yet stylish; without beauty, yet beautiful'.[9] The famous mills had been turned into shopping centres. In November 1971, he was in Yorkshire in the 'filthy triangle'[10] enclosed by Leeds, Pontefract and Normanton. The industrial landscape was dying. He found no job prospects for the young people at the local grammar school.

It wasn't only Manchester and Leeds. He visited Highgate Cemetery, pausing to pour scorn on the ugly, *kitschig* monument to Karl Marx. Marx's disciples had attached love letters to its plinth: 'The man is in no way dead. He lives. They speak to him constantly'.[11] Karl Heinz was more interested in the part of the cemetery that occupies the higher ground on the other side of the road. This part was closed to visitors (fifty years on it is only open for guided tours). It was overgrown and crumbling, reminding him of an exotic rainforest. The economic crisis meant that the cemetery could not afford gardeners or maintenance: 'Gothic horror is literally present everywhere, as under every cubic metre dead Victorians are rotting'.[12] In one spot he saw the skull of an MP in a broken coffin. Grave robbers had helped themselves to objects from the newspaper baron Julius Beer's grave. There was a plan to replace the western part of the cemetery by tower blocks, shrouding the imperial dead.

Karl Heinz had revelled in the romantic aspect of Highgate Cemetery. He was most at home writing about literature, theatre, and art. He was a fully signed-up aesthete possessing a collection of dashing hats. He celebrated the centenary of Liberty's in Regent Street in 1975, at the same time as Biba in Kensington High Street, a magnet for us teenagers in the early seventies, hit skid row. Liberty's had been the champion of 'arts & crafts' in the late nineteenth century; proper design was a central tenet of Ruskin's aesthetic teaching. In London, Karl Heinz discovered Blake and the Pre-Raphaelites only then becoming fashionable in Britain. He saw the symbolism of Blake as something that prefigured the writings of his beloved Baudelaire. In January 1971 (before he took up residence in London), Karl Heinz applied his German mind to the ramifications of Pre-Raphaelitism: the Nazarenes, Novalis, and Stefan George. The Pre-Raphaelites were reacting against Manchester. Inspired by Ruskin, the soul was 'the adversary of society'.[13] As champions of aestheticism, Beardsley

7 ibid 103. 'Das Gespenst des Kollektivismus', 8 October 1977. Johnson had stood down as editor in 1970.

8 ibid 117. 'Die Stummen und die Schreienden. In den Schächten des Untergrunds von London South East', 26 April 1975.

9 ibid 22. 'O Manchester', 8 January 1977.

10 ibid 32. 'Eine Begebenheit in Yorkshire. Fatalismus und Stolz. Englische Bergarbeiter am Rande Europas', 20 November 1971.

11 ibid 74. 'Der Totenwald von Highgate. Symbolismus und Horror. Die Victorianer und ihre vergesslichen Enkel', 22 November 1975.

12 ibid 75.

13 ibid 89. 'Die Präraffaeliten, oder Die Seele als Widersacher der

and Wilde were often invoked. Aestheticism was at the heart of the beauty of sudden ideas, which inspired Karl Heinz's literary study, *Suddenness* (published in English in 1994).[14]

Wilde lived a double-life. He also hankered after the demimonde, a seedy existence in anonymous hotel rooms. In this context, Karl Heinz invokes Theodor Fontane, who was a journalist for the *Vossische Zeitung* in London from 1856 to 1858, as he metamorphosed from pharmacist to Prussia's greatest novelist. Fontane learned what was to become the foundation stone of the gutter press in late nineteenth century Britain: that the population loved a good murder above all else, and that Victorian London served them well - people had a tendency to disappear, leaving only the odd limb to remember them by.

Certain institutions got the thumbs up. The theatre, for example, generally thrilled. The earliest article in the collection dates from November 1968 and was written in the course of his second ever visit to England. He saw the film *Blow Up* (1966), the very essence of 'Swinging London' and one of three David Hemmings films mentioned. Another was the *Charge of the Light Brigade*, with its debunking of empire and use of animation – another period piece. *Blow Up* caused him to reminisce about 1953, and seeing John Gielgud, Richard Burton, John Neville, and Michael Redgrave on stage at the Old Vic. It was another age: 'There was no John Osborne then, and why? Young men did not need to be angry yet because they could remember food rationing from the difficult time when Britain's fighter pilots had not yet become the legend about whom Churchill had said that it was rare for so many to have owed so much to so few'.[15]

In 1976, he saw Terry Hands' *Henry V* cycle at Stratford with Alan Howard as Hal. Karl Heinz remembered Olivier, whom he had met briefly at a party in Drayton Gardens in the autumn of 1953 and where he told the actor 'I like you very much', something which Olivier naturally appreciated.[16] He approved of this new, less nationalistic and propagandistic approach to Olivier's wartime performance. There was no longer a need for propaganda, but he recognised 'England's love-affair with itself' for all that.[17]

Oh What a Lovely War was another manifestation of the British obsession with war, which Karl Heinz contrasted with the rather more responsible approach adopted by middle-class Germans. Of course it was an anti-war play and later film, where the devil came on dressed in military uniform. History was popular in Britain and 'the present was always stamped with the past.'[18] The film once again showed the usual Britons, dominated by arts graduates from Oxford and Cambridge who were proud of their ignorance when it came to science. There were German plays to see too. Karl Heinz went to Manchester in 1976 to watch the first ever British production of Kleist's *Prince of Homburg*, with Tom Courtenay in the title role.[19]

Gesellschaft', 30 January 1971.

14 Karl Heinz Bohrer, *Plötzlichkeit. Zum Augenblick des ästhetischen Scheins* (Suhrkamp 1981).

15 Bohrer (n 1) 181. 'Manchmal Löwe, manchmal Einhorn'. 16 November 1968.

16 ibid 235. 'Rückkehr zum Heroismus. Heinrich V, verlorener Haufen als nationales Märchen', 5 June 1976; Bohrer (n 4) 315. I saw these productions. Karl Heinz doesn't mention Timothy West, who was a wonderful Falstaff.

17 Bohrer (n 1) 235.

18 ibid 166. 'Oh! What a lovely war, die Lust der Engländer an vergangenen Schlachten ist mehr als ein Tick', 7 June 1969.

19 A quarter of a century later there was a new version performed at the Lyric in Hammersmith.

Karl Heinz also had an eye for the BBC. In April 1977 he listed some of the series that were then popular: *The Avengers*, *The Forsyte Saga*, *The Six Wives of Henry VIII*, *Upstairs, Downstairs* (forerunner to *Downton Abbey*). The BBC had not declined like other British institutions over the past thirty years. 'The television drug can taste better nowhere else than England', and yet, like everyone else in the country, the BBC had an obsession with the Second World War.[20] He cited *Dad's Army* in particular. It is an obsession that Britain retains, even when few obsessives can actually remember why and when it occurred and who won it (besides Britain).

On the eve of the 1975 referendum, Karl Heinz had cause to write once more about British xenophobia. He was inspired by a television series about Colditz. Good-looking, aristocratic British officers ran rings around ugly Germans. Politicians like Hans-Dietrich Genscher, Helmut Kohl, and Franz-Josef Strauss supplied the image of the ridiculous German. The British depicted their own in a more flattering light: 'England is a narcissus who will never grow tired of looking at himself in the mirror'.[21]

On the other hand, German ugliness, philistinism, and provincialism would rouse Karl Heinz throughout his life. He took pot-shots at Germany from London and Paris. Heine is the obvious model. He was nonetheless passionate in his defence of the men of 20 July 1944, and his later marriage to one of the daughters of Fritz-Dietlof Graf von der Schulenburg can only have added new vim to this view. Films such as *Massacre in Rome* (1975), with its fictionalised focus on the killings in the Ardeatine Caves, were a mixed blessing. In Britain, where 'talking about Hitler was the same as talking about the Germans', the 20 July was dismissed as 'a false purge in the interests of a national cover-up'.[22] It is an attitude that has failed to go away, even now when we know so much more about the motives of the men and women from all walks of life who conspired to eliminate Hitler. Only three years ago both Karl Heinz and I reacted to a debunking book on Stauffenberg and a vilification of the same that appeared in the letters page of the *Spectator*.

The campaign to remain in the Common Market came to a head at the moment of the 1975 Cup Final when two London teams – West Ham and Fulham - faced one another on the pitch. Karl Heinz juxtaposes the two events. Edward Heath and Roy Jenkins were the champions of the remain lobby then, and held their final rally in Trafalgar Square. In the far corner were Tony Benn and Michael Foot. 'How can we compare our sovereignty with that of people who have never possessed any: we are English'.[23]

There were rumblings from hoi polloi much as there had been in the fifties, at the time of the Angry Young Men. Punk was 'the last stage of British nihilism, the decline into youth anarchy'.[24] He seized on the message of hatred embodied in the music of the Sex Pistols, the early works of Derek Jarman, the film of Anthony Burgess's *A Clockwork Orange*, and Nigel Williams' play *Class Enemy* at the Royal Court.

20 Bohrer (n 1) 68. 'BBC. Mythos und Wirklichkeit', 26-7 April 1977.

21 ibid 135. 'Wie fremdenfeindlich ist England? Am deutschen Beispiel geschildert', 5 June 1975.

22 ibid 150. 'Der deutsche Widerstand und die Briten. Eine Diskussion im Deutschen Historischen Institut London', 1 March 1977.

23 ibid 141. 'Cup Final oder: Die zweite Halbzeit des Kampfes um Europa hat erst begonnen', 10 May 1975.

24 ibid 197. 'Haß als Zeitbombe in einer Gesellschaft ohne Liebe. Punk-Kultur und Kulturkritik'. 13 April 1978.

Karl Heinz later wrote a literary study of Dionysus[25], and something of his interest in the Dionysiac must have fed his enthusiasm for the 1977 Notting Hill Carnival, where a small riot marred an otherwise admirable effusion of black culture; but it also provided him with a lead into the growing unease in Britain when it came to its black ghettos, and the dark roles played by Enoch Powell and the National Front leader John Tyndall.

Reading the book, you often feel Karl Heinz might have made an excellent playwright himself, or indeed a novelist. In a long essay on the Queen's Silver Jubilee, he writes with wry, funny observations about being a German caught up in all the forced jollity of a patriotic English street party.[26] I recall the occasion which I spent at a street party in Oxford. The snobbery and superciliousness of his neighbours is instantly recognisable.

Karl Heinz occasionally took up a political assignment when writing for *Merkur*. In 1976, using connections he had from the 'Preußen-Girls' – his name for the Schulenburg sisters – he went to Northern Ireland during the Troubles. He met Gerry Fitt and other 'luminaries' of the time and was horrified by Belfast: 'the dingiest backyard in Britain (sic)'.[27] The Europa Hotel in Belfast had been wrecked many times by bombs. Karl Heinz found its brutalist allures 'frightful'. He dismissed Heinrich Böll's romantic evocation of Ireland, something which I had eagerly purchased after I met the great man in Cologne in 1971.[28]

As a journalist, Karl Heinz watched the battle in 1977 that saw the end of the *Evening News* and the triumph of its rival the *Evening Standard*. The collection ends with an article from December 1978 on the closure of *The Times*, brought down by the unions that had dominated his time in Britain, and which were to be gelded by the new Conservative government of Mrs Thatcher. Mrs Thatcher is not explored in this book. Britain was to change very quickly under her rule. The small, incestuous world that was British society was soon to become less white, less Anglican, and less dominated by public schools, Oxford, and Cambridge. It was also (for a time at least) much more open to Europe.

Karl Heinz loved Britain and he had plenty of friends here. The last twenty years of his life is partly described by his second volume of autobiography *Jetzt* ('Now'), but formally Britain hardly acknowledged his existence.[29] When I tried to interest the *Guardian* in his obituary, they replied that the subject was 'not for their readership'. For much of the time in that last period he was here he taught a semester at Stanford on Hölderlin, but I am not aware of any similar interaction with any British university. It would be an understatement to say Karl Heinz was unhappy at the result of the second referendum on Europe. At the end of his life he lost his long standing faith in Britain and wanted to move to Berlin.

25 Karl Heinz Bohrer, *Das Erscheinen des Dionysos. Antike Mythologie und moderne Metapher* (Suhrkamp 2015).

26 Bohrer (n 1) 203-213. 'Die Fähigkeit zu jubilieren', 9 July 1977.

27 ibid 48. 'Der ewige Bürgerkrieg', originally published in *Merkur* 335, 1976.

28 Heinrich Böll, *Irisches Tagebuch* (Kiepenheuer & Witsch 1957).

29 Bohrer (n 5).

In Conversation with Professor Judith Butler

Teresa Turkheimer

A front-runner in the fight for equality and justice, Professor Judith Butler is one of the most influential philosophers of the past century whose work has transformed the field of queer and feminist scholarship. By redefining what gender means and how it is displayed, Butler has broken down societal and cultural barriers, and, most importantly, allowed others inspired by their work to finally understand their identity and their place in the world. Both an activist and a scholar at UC Berkeley, they have also worked to blur the lines between the academic and public spheres, redefining what it actually means to be an intellectual in the current era. In this interview, Professor Butler delves into the increasing censorship of gender studies, discusses the unjust treatment of war victims, and reflects on their career thus far.

This interview was conducted on 10 May 2022.

***CJLPA*: For the interest of our readers, could you tell us about your story and your professional trajectory, how you got to where you are now?**

Professor Judith Butler: I was trained in philosophy at Yale University and in Heidelberg in Germany and was meant to be a somewhat classical continental philosopher. I studied Hegel, Marx, Kant and I continue to love that work but I did enter the world of gender studies and gender politics in the late 1980s, in part because I suffered discrimination on the job market on the basis of my gender presentation and sexual orientation. I realised I couldn't get past those obstacles easily and so I thought that I should probably write about it, make it my theme. As a result, I produced scholarship that is a melange of continental philosophy and feminist theory. I've also been active in human rights organisations including a former organisation called the International Gay and Lesbian Human Rights Commission, but also the Center for Constitutional Rights in New York City—and I am involved in Jewish Voice for Peace and engage in activism for Palestinian rights of political self-determination. I also continue to consult with a wide number of countries, policymakers, and feminist, queer, and trans activists on gender politics, trying to fight the anti-gender ideology movement which has turned out to be quite influential and destructive. In fact, I'm writing a book on that topic now.

***CJLPA*: You mentioned your work in gender studies as well as your work with regard to feminist theory. Are the two inextricably linked or are they two separate entities, and should they be regarded as so?**

JB: They're interlinking projects. They're not the same but I do not think it is possible to do work in one area without connecting with the other. Both of them are important academic forms of inquiry, and they each need institutional support. Many scholars would not be able to distinguish between what is feminist studies and what is gender studies, since gender is at the heart of both forms of inquiry. Indeed, as academic fields, they are also related to social movements, often teaching literature generated within the context of social movements. And they both require institutional support. Even when one is doing scholarly work in feminist studies—let's say one is working on renaissance literature or psychoanalytic theory, or something that feels very academic and not particularly activist—one still needs to have an institutional space where that can happen. I need funding for my research, I need a job, or I need a fellowship—in other words that research has to be supported. It cannot be censored, it cannot be criminalised, and my programmes cannot shut down otherwise I can't do my academic work. So, we might say that even the most self-referential academic work is still dependent on institutional support of some kind: publishers willing to publish, or universities establishing programmes that are keeping them alive. Our academic work depends on institutional conditions that are of public concern, and under certain circumstances, we can be censored or criminalised or our programmes can be shut down, at which point we can't do that academic work. So, the politics of the problem are in some ways linked to the academic activities themselves. That said, I would say that not all feminist theory has to immediately say, 'Oh and here's the activist implication of what I just wrote'. I don't think so. Sometimes we are trying to understand the world, we're trying to reconfigure how we understand social relations or history or even the psyche, we're undertaking projects that are academic in nature that may change people's understanding and maybe even change their lives or their activism. But I don't believe we have to justify our academic work through its activist potential, nor do I think we always have to lay out what the activist potential is.

***CJLPA*: Is this a source of frustration for academia, and is there a way to change that?**

JB: There are two sorts of problems. On the one hand, we are fighting censorship across the world. In India, they closed down something like 40 gender studies programmes, in Hungary gender studies had to move to Vienna, along with the entire university: the Central European University. They were shutting down gender studies because gender is apparently this terribly frightening and destructive 'ideology' according to those who oppose it. And now we're seeing legislation that seeks to keep the word out of certain languages, or keep gender studies and critical race theory out of curricula—both of which have become caricatures, phantasms by those in the positions that criticise them or seek to censor them. So, we do have to be able to say, 'Look, what we do is open inquiry'. And that's what universities are supposed to be supporting. We're asking key questions. We are discussing and debating, we clearly don't all hold the same view. This is a field of study like other field of studies where there are methodologies that are contested and discussed and revised. There are norms of research and ways of proceeding that are academic in character, and that have as their aim an open-ended inquiry to know something better, to find out what is true or what is real. That is what we do as scholars. We need to defend the study against those who would caricature it, demean it, and substitute a frightening phantasm for the complex work that we actually do.

On the other hand, very often in the classroom these days young people want to know what one's own political position is or what political position they should take immediately on an issue. Sometimes, when you're asked to take a position, for instance, are you for or against gender studies?, it is important to take a step back and question whether gender studies is a monolithic thing that any of us could, or should, vote on in that way. Maybe the reduction of gender studies to a monolith to which we say yea or nay is precisely the problem. As somebody for whom critical thought requires a willingness to call a framework into question, I don't want to have to take a political position if I don't like the way it is framed, when it is the frame that is politically problematic. That's where a critical form or reflection becomes important and that's also part of pedagogy: we have to ask people to think through their positions, the way they are framed, what they imply, which is precisely not the same as prescribing a certain position or training them how to take them.

***CJLPA*: On the note of critical thinking, how can one be a gender conscious researcher, whatever the field may be?**

JB: Well it's interesting, you know I'm reminded of E. P. Thompson's very important work on the working class, and he did quite an impressive job in treating the working classes as a kind of subject, and what they underwent, and how this was produced in time and in history—a very textured and persuasive work that had, and continues to have, enormous influence in the field of social history. And my friend Joan W Scott came along and said, 'Oh I just love this work but he's missing something, which is that the world of work and the world of the public is already gendered'. It was not a factor or something added onto a class analysis, but it informed the very way in which we conceptualise the working class subject. Further, what Scott proposed was that gender operates through a wide number of fields as an active and consequential presupposition. Gender doesn't just describe gender identity, as many people now assume. An entire public world might be gendered in the sense that it's structured by certain masculine values or presumptions that are not always marked. What, for instance, is the gendering of the public sphere? Is the public sphere presumptively masculine and, if so, how we can read that?

Even now, with the war in Ukraine, we don't see much commentary on the gendering of the war, but it's very much there. There is a form of masculinism at stake for Putin, but also for Zelenskyy whose t-shirt and appearance re-enforced a form of heroic masculinity—the fighting man. How many women can assume that position? What does it mean that this heightened militarism and even the resistance some of us support, relies on certain ideas of embodiment: able-bodied, willing to fight, capable of fighting, of the age in which you could fight, and masculinised?—with an occasional woman with the shotgun looking like a Kurdish fighter who we're supposed to appreciate for the feminism she represents. The recent reports on sexual violence at the border or in family homes in Ukraine are just absolutely appalling, which is why the recognition of gender-based violence is so important for legal and public policy. I think we do need to think about gendered practices, gendered spheres of life and not just gendered persons.

***CJLPA*: On the topic of gender, you're most well-known for your ground-breaking theory of gender performativity which was introduced most famously in your book *Gender Trouble* in 1990. On the note of the Ukrainian war, as well as the gendered reporting of the war and the gendered war itself, if gender is performative, who or what dictates the script in the current era?**

JB: In general, you can try to dictate a script—people do try, and sometimes scripts seem to be pretty strongly dictated when strong directors are at work, and actors are willing to acquiesce to their will. In such cases, scripts are fixed in place—but I think in fact there's some contingency and unexpected turns in scripts that, if I follow your metaphor, are a bit more improvisational, sometimes departing from the script, or sometimes shredding the script. For me, there may be gender norms that prescribe what we should do, but even in the act of apparent compliance, we can be departing from the norm, even contesting its power.

Obviously, there is a hyper-gendering of issues going on right now, not only in the war, but in a wide range of political efforts to deny reproductive freedom, LGBTQI+ rights, and debunk gender studies. Obviously, Putin and his version of masculinity has been commented upon at length, but I would underscore the public and shameless form in which he displays his willingness to destroy and to subject the most vulnerable people to violence. This is a sign of the kind of masculinity he values, one measured by the shameless infliction of harm. It is important to remember that there is no one masculinity, no single norm that organises the appearance or operation of masculinity. With Putin, we see a lethal version of masculinity at work. For instance, Masha Gessen has written about Putin's masculinity in a way that I think is pretty interesting, and then of course in the *Boston Review*, just recently, there was an important statement by the Director of Gender Studies at Kharkiv National University, her name is Irina Zherebkina, and she's a translator who, in fact, translated some of my work and some of the major work of feminist theory from across the globe. She understands the attack on gender and feminism as a key component of this war. Putin himself named 'gender' as a potential threat to the spiritual values of Russia in his policy statement on national security in 2015.

***CJLPA*: Does performativity extend to other forms of identity? Whether that be race, disability, class, religious association, to what extent is identity in these instances on the other hand performative?**

JB: I said gender was performative over 30 years ago and I'm not sure I would hold to the exact same position I put forward then. It's interesting the positions you write about when you're unemployed. I did have a temporary position at the time, but I think that when we say gender is performative, we don't mean that it's only performative or that's the only thing we can say about gender. It just means that people generally have to establish their gender within a grid of legibility, or that gender is established through various means. Though the ways in which we do in a daily way unconsciously or consciously assert gender or establish it, suggests that it needs to be asserted or established, it could go another way. And it is never fully or exclusively in our power to do that establishing. There's no natural necessity about the ways in which gender becomes available to us, which is not to say that nature plays no role or that volition is all that matters. Gender is established and re-established through various powers, and always through processes articulated in time and space. Performativity doesn't mean it's all fake or false or artificial, and it surely doesn't mean that it's fully chosen in the sense that 'Oh, I can choose whatever I want to be today'. It means only that gender is negotiated for us before we have any agency, and we come to negotiate it in quotidian ways in time. It is not established once and for all through sex assignment, and even sex assignment cannot stabilise sex through time.

As I have moved through the world, there were times where I would walk into a bathroom or locker room, because I'm a swimmer, and be told that I'm in the wrong one and I'm pretty sure I'm in the right one. Once in China I was not able to speak the language, so I literally took my shirt off so that they could see, then they were, 'Ohhh ok, ok, ok, ok!' But like, what did I have to do? It wasn't immediately clear. I mean there's some ways in which cultural legibility works this way. Obviously not just about myself, but a range of people who deal with how they are perceived, what they have to make clear time and again in order to be known or recognised or even to pass into or out of regulated spaces. This happens differently with disability. Sometimes you have to let it be known. It doesn't mean that your disability is a performative effect in the sense that it has no substantial reality; on the contrary, the problem is that if you seek to make yourself known, legible, recognisable, or seek to evade forms of recognition that imply criminalisation or pathologisation, then a kind of orchestration of the body becomes important, a way of making plain or public one's bodily situation, quite regardless of whether or not one has a visible disability.

There are, of course, many misunderstandings about performativity because it draws on both linguistic and theatrical traditions. In my view, it cannot be reduced to either domain, but rather names their interconnection, the site of their overlapping. For those who take performativity to be a theatrical mask that you put it on and take it off at will, performativity is a bit of entertaining fakery. Although masks, as we know, can have much more important meanings in dance, religion, and rituals. The example of drag that I offered in *Gender Trouble* became inadvertently exemplary for some readers of what performativity means. A number of women do get up and 'put on their face' and 'fix their eyes' and 'do their hair'. These are just daily ways of crafting, inspired by both anxiety and, presumably, gender idealisations of various kinds. One might not describe such activities as a gendered kind of crafting, but it is a gendered kind of crafting, just as some sorts of activities seek to de-constitute those norms on purpose, or engage in another way of doing gender that doesn't really work with masculine and feminine, either exposing a gendered spectrum, or a position outside the spectrum as it has been established. At the same time, and equally importantly, we're *done* to *by* norms, *by* the unconscious, *by* others; we're undone and redone by norms that work on us in ways that we can neither track nor control. We're not just crafting ourselves in some radically agentic way; we are struggling with the ways in which we were treated and situated and formed over time, and that's why it's a struggle rather than an arbitrary expression of personal liberty.

On the issue of race people have thought, 'Oh well does Butler think that somebody could just say: 'Well I'm Black', when they're not Black, when they have no Black formation, they have no Black legacy, they don't come from Black parents or a Black world, they just have decided that they feel Black and they want to say they're Black. Or they want a fellowship, so they falsely claim they're Black, or they want to belong to a certain community and deceive people in order to achieve that sense of belonging. We've seen people who have lied, who have fraudulently appropriated racial or cultural identities, including indigenous ones, and these are all unethical actions. That is not performativity—that is lying. For me, performativity is actually a way of challenging restrictive and oppressive norms, but cultural appropriation is an example of racial oppression. Sometimes one has to make plain what one's background is, the community from which one comes, the sexuality that is one's own, or the gender that represents one's lived reality. In those cases, performativity does not create that history or sexuality or lived reality, but it does make it legible, and sometimes for the first time, or against a way of saying and naming that leaves one effaced and erased. Performativity seeks to break through that erasure, but cultural appropriation is a form of erasure. Obviously, we have to be able to understand the situations in which performativity is operating in order to evaluate its effects. We can, for instance, ask how racial norms consolidate racism through forms of performativity, in which case performativity is a way of analysing a social issue, but not, by itself, something to be celebrated or condemned. It helps us to see how reality is construed, how intelligibility is established and contested, and we might sometimes like that contestation, and sometimes not. Performativity is not its own frame of reference.

***CJLPA*: On the note of the changing terms of reality—and you also briefly mentioned your example of Drag queens—what role, if it plays a role at all, does art have to play in performativity?**

JB: At the time that I used the drag example, I wanted to show that what counts as feminine and masculine can change, and that some traits we take as natural or fixed are, in fact, constituted over time by virtue of practices and repeated styles. But the example was taken to be exemplary of performativity itself, and that produced some consequences I neither anticipated nor wanted. For instance, some drag performers do, in fact, clothe themselves and act in certain ways under very specific conditions, but then 'return' to their truer genders in everyday life. This is, of course, not the same as what happens with trans people who are living their gender reality in every aspect of their lives. The idea of a punctual, discrete, and transitory performance was reinforced by the example of drag, but, in fact, gender as lived is another matter. I did not clearly grasp the implications of that example when I wrote about it nearly 35 years ago, but I see it better now. For those who quite legitimately want the reality of their genders recognised, or who prefer to use the language of sex to describe their trans lives, it is important to underscore that sex can be reassigned, that genders can change, and that the sex or gender arrived at by trans people designated their reality. I believe that performativity can still describe that reality, since the language and recognition is achieved by various means.

I would now say that gender is the apparatus through which sex is assigned, established, and re-assigned and re-established. Gender is not the cultural form that natural sex assumed, but the process through which that assumption and establishment takes place. In this sense, it is not an identity, but the process through which identity is established. Similarly, performativity is not fluff or artifice, but rather the name for the very consequential process by which subjects are formed and come to identify themselves, establish their reality, and demand recognition.

Art is enormously important for me. It was what I missed most, aside from friends, during the pandemic. It has the power to embrace and fix my mind, claim my attention and transform me.

***CJLPA*: Is it a vessel for power or is it more a platform for self-expression?**

JB: If we are speaking about art or artistic practice, or art objects, we have approached a complex problem. Personally, I love going to museums even though I understand the critique of museums and love both public art and performance. I am also drawn to abstraction, even though I understand the critique of abstraction from several quarters. I'm very often interested in when a painting is finished, in what year, and seek to understand how history is refracted in non-representational modes. That doesn't mean I don't love realism, but I do wonder about the ways in which it has been written about. Lukacs interests me, for instance, but his writing also maddens me. Is it realistic to imagine that society gives itself to us as a totality? I suppose I am always somewhat ambivalent in museums. I might want to burrow myself within the frame in order to take in what that painting is asking of me, but it's very hard as I move around a museum structure not to be saturated with capitalism, with the hurting feet of the guards, the cost of membership, and, of course, the cost of the artworks themselves. One is, after all, roaming around a market. I remember one day I had fully enjoyed a day inside the Whitney in NYC only to exit and find people I knew protesting members of the museum's board, Warren Kanders, who eventually resigned because his company was selling tear gas used against protestors!

How do I allow myself that absorption in painting, that sense of renewal and reconfiguration, that can happen within a frame, or within a play, or even in a performance piece that is provisional without thinking about the infrastructure, who's paying, who's profiting? I suppose I am influenced by Brecht who cautioned not only against identification, but absorption as well.

I'm very interested in performance studies, and luckily taught in the field a couple of times at UC Berkeley with my colleague, Shannon Jackson, so seeing what happens when performance moves off the proscenium and into the street or various public spaces is important to me. Performance can become part of a strike against museums or other corporate entities, and that counterpoint is very powerful. In general, there is a performance dimension to strikes and protests that is very important for the articulation of political rage but also political sorrow. We see a lot of improvisational art and performance in the Movement for Black Lives, as Patrisse Cullors has shown. I am also aware of the power of plays that were written in classical Athens but have enormous power in contemporary life: Esperanza Spalding's rendition of *Iphigenia* is one. But *Antigone* remains ever-generative; *Antigone* was played under dictatorial Argentina and then post-dictatorial Argentina. *Antigone* was played in Colombia, in Ecuador. Colombians in exile performed the play in Mexico City; it was performed in Palestine on a rubble of rocks that used to be somebody's home, changed into a platform. The Jenin theatre project on which I served on the international board, was all about turning political rage and sorrow into art, especially photography and performance. I think for me, some of the most emotionally powerful and life-changing, but also conceptual-framework-changing events have happened through powerful, powerful performances and powerful art, including poetry. We could document, as well, the way photography has changed our experience of illness, of war, of science, of the virus in ways that have enormous social and political implications.

***CJLPA*: You say how walking through a museum and seeing certain frames, paintings, sculptures, whatever they may be, emotionally affects you, and that art has both positive and negative aspects. I can also see how that could be a source of anxiety for many people, not being able to, for example, walk through the museums and enjoy the art available without the knowledge of how it was retrieved—take, for example, the current scandal with the British Museum and how they retrieve certain historical items. How do we manage that anxiety?**

JB: I followed Christopher Hitchens' writings on the Elgin marbles scandal, and I thought it was among the better things he did, really instigating that campaign to return the marbles to Athens. I've seen the partial display of those marbles in Athens as well as in the UK, and I've deliberately gone between the two sites to see what was stolen and how it was presented by the British Museum. I won't *not* go see stolen art, but then part of looking involves seeing how the stealing is framed, and how the frame effaces the crime. Something similar happened in France after the opening of the musée du quai Branly and art stolen from Africa was identified. After being petitioned by Felwine Sarr from Senegal, Macron agreed to return the art to Africa. Reparations of this kind are crucial to exposing the continuing colonial legacies at work in the art world, including legacies of military destruction and pillage. The repatriation of artworks is a counter-imperialist move that we need to examine and continue to think about, including the way that those legacies have contoured the canon of art history itself, as Banu Karaca has demonstrated. The history of looting is also something we look away from when we become absorbed in the work of art, but maybe we can somehow have both. There are aspects of capitalism, imperialism, and colonialism that enter into my 'seeing' when I go to museums, but it does not fully preclude becoming claimed by a work of art. It is that seeing moves from one dimension to another, and that the one is always hovering in the background of the other. I think we can allow ourselves that absorption, but also try to figure out what the institutional and labour conditions for this beautiful encounter I'm having are. It doesn't destroy it for me, but it needs to be part of what I take in when I go.

***CJLPA*: I'm particularly interested in your notion of grievability and your work in the field of necropolitics more generally, and I wanted to ask you a more topical question on this basis. I was wondering whether grievability could be applied to describe the differences we see in the treatment of war victims. Are there differences in the grievability of war victims, for example, in Ukraine compared to Palestinian citizens, or Syrian refugees? And if there is, how do we minimise this?**

JB: I think there's no way to think about war without thinking about those who are fleeing war, and that means that we're thinking about borders and detention practices. Wars are often about contesting or claiming borders, as we know. They can be ways of moving borders or breaking borders. But the border, wherever it is, is the place for the gathering of refugees and the treatment of refugees, the negotiation of alterity, citizenship, and rights of mobility, even rights of existence. Some people, following Michael Walzer, make a distinction between just and unjust war and, according to that framework, an unjust war is obviously being waged against the Ukrainian people (as of June 2, 2022). But is it right to say that the Ukrainians are waging a just war? Or is it better to say that they are engaged in a fully legitimate resistance to military aggression? Those kinds of debates centre on established nations, but let's remember that nations get established through establishing territorial boundaries and regulating rights of passage. On the border with Poland, radical social inequality accompanies, and qualifies, the general admiration for Polish hospitality. Some refugees merit hospitality, but others clearly don't. I'm reminded of Mahmood Mamdani's book *Good Muslim Bad Muslim* where he argues that the Muslim who can assimilate well, the one who is well educated, who shares cultural or class behaviours and values with Europeans, including secular commitments, stands a chance of becoming the good one. But the one who holds out, affirming their community of belonging, participating in religious or cultural activities that deviate from dominant religious, cosmopolitan cultures, is usually deemed bad or suspect, not only because they adhere to certain religious practises, but because they are *seen* to adhere: they are publicly regarded as adhering to that community rather than assimilating to a national one, or they wear something that announces that they are in fact religious, or that they belong to a religious tradition and community.

I recall Mamdani's distinction because at the borders of Europe, we are witnessing mechanisms that distinguish between good and bad refugees. It's been the case for some time that wealthy people can buy their way into citizenship in places like Spain, and that other European nations demand to see bank and investment accounts in deciding who can come in and who can stay. Even as Angela Merkel invited Syrians to Germany—and that was a great thing that she did—she discriminated against a number of North Africans at the border and did not open that same door to them. These are all examples of social inequality, but also decisions about whose lives are worthy of supporting and whose can be abandoned. For those who make those decisions according to national policies, they are all the time distinguishing between those lives that are legible, intelligible, valuable, and those that are clearly not. Even if they never say it to themselves, they are deciding whose lives are dispensable, can be tossed, or can be left to die at the border or drown at sea. For instance, in Honduras, people are living in conditions at borders that not only put them at extreme risk for COVID, but also, now, other diseases. They are living in unsanitary conditions, or without basic medical or health provisions. They are a population that is left to become ill, made increasingly susceptible to illness and to death by the lack of infrastructure provided. Maybe nobody is shooting them or bombing them, but some powers are letting them die. This is a form of slow violence, as Rob Nixon has said. That letting the population die in a way that many countries do—and I think Europe does this as well in its maritime restrictions on immigration over the Mediterranean—constitutes the second form of death-dealing that Foucault describes in *Society Must Be Defended.* The first might be understood as the deliberate decision of sovereign powers to declare war or sentence someone to death. Putin is emulating that form of sovereign power as we speak.

But then there's this 'letting die', which usually happens through policy or through neglect and dispensability. Neglect can be unthinking or it can be deliberate policy, as when Malta turns back leaky vessels filled with migrants. I think that by letting them die, we can call it necropolitical as Achille Mbembe has, I have no problem with that and I use that term myself, but sometimes those forms of death dealing are intertwined and I think we do see that in war.

***CJLPA*: In light of that, should there be a criteria or international law in place so that countries, or specific countries, keep their borders open and welcome refugees with open arms?**

JB: I think there's clear racism at the border of Poland, and the Polish government was clearly happier with Ukrainian refugees than with refugees coming from Afghanistan or Syria or North Africa. At work is both racial and religious discrimination. It's also part of this assimilationist logic that says, 'Oh you can come to a European country, but you must assimilate to this culture, or be regarded in advance as capable of that assimilation'. Why does anyone make a demand of that sort? Why can't anyone come and actually change the country, change and enrich the culture of the country? Inviting migrants in implies agreeing to be transformed by new members of the society and, yes, becoming a different country. Yes! Allow the country to evolve into a more international, transnational region, that's actually enormously hopeful. Multilingualism, that's no less than fabulous, especially when educational and cultural institutions provide for that, and support that vision. So, although we surely need firmer anti-discrimination laws at the border, that only goes part of the way toward realising the new vision of society that is required. We also need to strengthen international covenants to stipulate that all stateless people have the right to belong somewhere, and that it is the obligation of every state to admit people from whatever origin or location for asylum procedures and to give their petitions fair, transparent, and comprehensive reviews on a non-discriminatory basis. Also, it will be imperative to rethink the state not just as a sovereign entity that defends its borders through military means and hyper surveillance but considers its borders as a portal and a threshold. The border should be rethought as portal and threshold, the site of translation, exchange, and movement, and the state should be rethought as a set of dynamic relations with other territories, regions, and states. It should be defined by that relationality rather than by its sovereign defensive position.

***CJLPA*: What advice would you give to aspiring researchers, students of inequality, or activists?**

JB: I would say that if you're a researcher in a university, make sure you do not stay fully enclosed within the university, that you don't treat the university walls as protection and enclosure. You actually need to insist that those walls become porous and that the communities around you, the broader world, enter the university and help to decide the purpose and plan of research. I think that academics can become very self-referential within the university, and I believe some of the anti-intellectualism on the right comes from not really understanding what we do in universities and why we do it. I think there's also anti-intellectualism on the left or on the part of those who believe that the internet provides more knowledge than any possible classroom. I don't know about this term, 'scholar/activist', I don't know if I am that or not: sometimes I'm just a scholar, sometimes I'm just an activist, and sometimes I'm blending, so I don't really know how to reflect upon that distinction. But I think learning how to go out into the world through other platforms and making

our knowledge known, and explaining its value, and handling the challenges to it in various kinds of venues, whether it's online or in person, is a really important thing for academics to do. If we work in public universities, and the public cannot understand the value of what we do, they will seek to defund us, especially during austerity. Besides, it sharpens our thinking and it connects us with people, so we don't become hermetically sealed within academic life and too neurotically self-referential. The academy is a place where neurosis can breed dangerously, so one needs to remember to stay connected to a larger world; it lifts one out of oneself and reminds us that we are not the centre of the world.

I do think academics at the start of a career should be afforded the chance to wake up in the morning and feel passionate about what they do. Don't pick the topic that you don't love because you think it'll get you somewhere professionally: No. Especially if you're writing a dissertation or a first book, you must want to see that page when you wake up. You must be eager to get back to where you left off. But that means you have to find your desire and stay with it, and trust that it will yield something that's valuable to you and to others.

***CJLPA*: At this moment in time what is your current research interest, what are you working on, and what was your motivation behind this interest?**

JB: Well, I'm writing a book called *Who's Afraid of Gender?* which is a critique of the anti-gender ideology movement. I'm trying to take apart their arguments while tracking the phantasms that haunt their thinking, which show the limits of argumentative discourse. Of course, it's hard to argue with somebody who won't read the work in question but nevertheless has a firm idea of what it is about. One is confronted with a highly phantasmatic side of anxiety and fear. One also has to think about how to address that. If you can't work at the level of argumentation and evidence, how do you proceed? How do you address somebody's massive anxiety and fear and hatred? So, that's my problem and I'm trying to confront that question.

And then I have a long-standing project on Kafka on the law—I guess we could have talked about that—where I am trying to understand, in general, how his writing relates to indefinite detention. Indefinite detention has become the most common carceral practice in the world, and Kafka had a developed premonition about how it works. In particular, he was interested in the status of legal systems when the sequence of a trial and punishment is reversed, that is to say, when one is found guilty first and then the trial and its deferment becomes an indefinitely extended form of punishment. So, I'm also interested in how Kafka thinks about the architecture of law because law is both a temporal and spatial problem in his work. When it takes architectural form, law comes to resemble prisons and their impasses. His literary writing collapses narrative into carceral space and its impasses.

***CJLPA*: What kind of course is feminist philosophy currently taking?**

JB: I think there are several things going on. I think Black feminism has enormous influence not only in the US and UK, but throughout Europe, Africa, and Latin America. There's a great deal of work being done by contemporary feminist philosophers on race and gender, but also prison abolition. We have to think about abolitionism as a form of Black feminist philosophy. There continues to be work being done in the philosophy of science relating to reproductive freedoms, personhood, the question of life, care, and the technologies of both reproduction and sex assignment. There is also a fair amount being done on feminist movement politics, especially the feminist strike, bringing forward the work of Rosa Luxemburg into contemporary feminist politics, and a great deal of reflection on both resistance and revolution. Many feminist philosophers are interested in how we think about desire and affect in politics. To answer that question, many feminist philosophers go back to Spinoza or bring Spinoza forward into the present to try to do that—I find those positions very interesting even though I cannot always go along. Decolonial feminism is important for philosophy and for several other fields, engaging feminist thinkers who have written extensively on colonisation such as Rita Segato and Françoise Vergès.

***CJLPA*: Do you have any career memories or regrets that you have as a philosopher or as an activist?**

JB: I think that *Gender Trouble* was written when I was trying to secure a permanent job, and I think it was kind of trapped in the French discourse of the time in the US. It was written in a more difficult style than it should have been. Despite its difficulty, it remains popular and people still read it. Perhaps I could have shown more clearly how I was influenced by social movements, especially AIDS activism and LGBTQI emergent movements, but also the history of feminist thought, including Black feminist thought and poetry. I wish that I could have written that book for a broader audience and perhaps with a broader citational base, but I somehow imagined that it would not have much of a life. Of course, I have many regrets in my career, and there were times when I responded to a plea from a friend that ended up putting me in a morally compromised position. I cannot undo that kind of mistake, but I can now live my life differently. One has to be humble in relation to one's errors, affirm the errancy, as it were, to become a more attentive and responsible person. On the other hand, I have been gifted by the connections that my work has made among readers and translators, the latter group being some of the most important intellectuals I have met. They have introduced my words, and me, to worlds that I would have never understood or known about. So, basically, I feel gratitude. So, I'm much more connected to different parts of the world by virtue of very brilliant translators who spent time with me and who ultimately became my intellectual colleagues and friends. Translation is difficult, frustrating, and transformative, like life.

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The Glitz and Glamour of the Metaverse

Danielle Jump

Danielle Jump is an undergraduate student of History of Art at the University of Cambridge. She is interested in the decorative arts, jewellery, and the ways in which these art forms are reflective of contemporary culture. She hopes to pursue a career within the art industry, specialising in contemporary jewellery.

At the heart of the metaverse stands the vision of an immersive Internet – a gigantic, unified, persistent, and shared realm.[1] To the jewellery industry, it remains to be seen as to whether this enormous virtual cyberspace is a blessing, or, in fact, as curse.

Since the expansion of the Internet in the 1990s, the cyberspace has kept evolving. We have created various computer-based environments including social networks, video conferencing, virtual 3D worlds (VR HoloLens), augmented reality applications (Pokémon Go), and Non-Fungible Token (NFT) Games (Upland). Such virtual environments have bought us various degrees of digital transformation and the term 'metaverse' has been coined to further reflect the digital transformation occurring in every aspect of our physical lives.

For some, there is a sense of vigilance in engaging with the metaverse and are wary of the disruption it could cause for the community.[2] In the virtual world there are many examples of altruism and Samaritanism, but these come with the constant presence of players bent on distraction, disruption (or even destruction) that the digital community has to deal with. Boellstorff describes this phenomenon as the dark side of the disinhibition that many people find in virtual worlds.[3] Another aspect in this fluid nature of going between real and a virtual life, is that some people reside in more than one virtual world, sometimes as similar personalities, sometimes different. Sometimes they give up on one world and migrate to another.[4] Developments in electronic communications are drastically changing what it means to be human, interacting with other humans, and for our idea of creation.[5] Others have considered this world to have

Fig 1. *Tiffany & Co. Iris Corsage Ornament. Wikimedia Commons: Walters Art Museum.*

1 Ashkan Yousefpour et al., 'All one needs to know about fog computing and related edge computing paradigms: A complete survey' (2019) 98 Journal of Systems Architecture.

2 Daniel Schackman, 'Review Article: Exploring the new frontiers of collaborative community' (2009) 11(5) New Media & Society.

3 ibid.

4 ibid.

5 Gianluca Mura (ed), *Metaplasticity in Virtual Worlds: Aesthetics and Semantic Concepts* (IGI Global 2011).

brought unprecedented opportunities for artists to blend every facet of our physical surroundings with digital creativity.[6] The value of recent technological developments for artists is more than being able to become more efficient and more productive. It is also the ability to 'highlight and elevate humanness in new ways through art, even by appearing to replace the real with the virtual'.[7] New tools don't simply replace humans, they allow human creators to shift into new realms of creation: creating dynamic systems and worlds instead of static products.[8] This piece will challenge such perspectives, showing that the digital and physical can simultaneously work together to maintain creative freedom in both spheres.

This article will consider three different types of interactions that emerge from these digital immersive platforms in relation to the jewellery industry and explore the remarkable types of novel creations in the expanded horizons of metaverse cyberspace. Firstly, I consider the ways we can interact and experiment within this digital world. The discussion will then turn to issues of digital privacy and safety for metaverse artists and companies, bringing to light the questions around ownership of digital artworks. Then, the piece will reflect upon the origin of the metaverse itself and the effects this has on the creative freedom of artists, drawing together the material and immaterial worlds we live in.

At the outset, we consider our world to be tactile, touchable, and have a physical presence. Yet is this actually the case today, and will this be so in the near future? After all, as of January 2021, there were more than 4.5 billion active internet users worldwide, and 92.6% of them accessed this digital world via mobile devices.[9] As such, there is an ever-growing overlap between our digital and physical lives, as we can socialise, create, and entertain ourselves through virtual reality (VR), augmented reality (AR), or simply through an alternate realm on-screen.

Whilst terms such as 'internet', 'online', and, perhaps, 'virtual reality' are widely disseminated through society, what about the word 'metaverse'? The term has become a buzzword within the last year, and, to put it simply, it is a shared three-dimensional state in virtual reality where people can interact. To enter this digital world, you have to put on a pair of augmented or virtual reality headsets, enabling you to interact and hang out with each other via avatars, just as you would in the real world.[10] What is so innovative in this computer-generated world, is that we are able to express and re-create ourselves with unparalleled creative freedom, not governed by the rules of reality. This is especially revolutionary in the jewellery space, which has already begun to intersect the physical world's real-time, spatially oriented content with this emerging and immersive digital environment.

In this context, let us first consider the ways artists can interact in this digital world. The metaverse offers the opportunity for the creation and virtual styling of digital jewellery across a variety of devices and platforms. This could be in gaming, for example, when the heritage Japanese pearl jeweller, Tasaki, collaborated with Animal Crossing to produce a collection for game avatars; to e-commerce, like Dress X's digital accessories designed by the 3D designer Alejandro Delgado. Indeed, the metaverse has become a new space for design, as creators, artists, and consumers are able to exchange and make use of different models and creations, without any restrictions, across platforms. In this immersive world, it seems that 2021 was the year for the breakthrough of non-fungible tokens (NFTs).[11] This NFT market has surged exponentially, as a new study by NonFungible and L'Atelier BNP Paribas recorded sales reaching $17.7 billion in 2021, up from $82.5 million in 2020 — a jump of more than 200 times.[12] Being able to sell NFTs within the metaverse acts as a massive incentive for digital jewellery to be produced. Some of the biggest releases of NFTs have stemmed from digital jewellery collaborations between celebrities, including Lil Pump's 'Esskeetit Diamond VVS' collection. Available to purchase through the platform 'Sweet' in March 2021, Pump minted a total of five NFTs, each retailed for $10,000, possible to buy securely on a first-come-first-served basis.[13] The jewellery-themed sale, also, featured more affordable NFT cards at $10 each. The digital drop intended to emulate the American rapper's physical jewellery, allowing fans and collectors to own a piece of his personal, multi-million-dollar jewellery collection in the digital world. According to Tom Mizzone, the CEO of NFT trading platform 'Sweet', 'the future of rare, collectible merchandise is in the digital arena', as evidenced by the growing interest in NFTs.[14] Some experts even consider NFTs could become the jeweller's best friend in the near future, as it allows them to earn money via selling NFTs for digital jewellery. Asprey's executive chairman, John Rigas, believes NFTs and jewellery are, 'a perfect match' as they 'capture everything about the product, forever, when the information is part of the blockchain', in turn bolstering the authenticity of these luxury goods.[15] As such, there are increasing deliberations across the sector regarding the technological benefits of the metaverse as designers can create captivating pieces of jewellery that draw inspiration from both the physical and digital realm. Thus, the digital world has opened the door to new types of interactions and considerations of what jewellery can be.

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6 Jeffrey M. Morris, 'Humanness Elevated Through its Disappearance' in Mura (n 5) 102.

7 ibid.

8 Microsoft Mesh (Preview) Overview' (Docs.microsoft.com, 2022) <https://docs.microsoft.com/en-us/mesh/overview> accessed 6 May 2022.

9 Joseph Johnson, 'Global Digital Population 2019' (Statista, 2021) <https://www.statista.com/statistics/617136/digital-population-worldwide/> accessed 4 May 2022.

10 John Herrman and Kellan Browning, 'Are We In A Metaverse Yet?' *The New York Times* (New York, 10 July 2021) <https://www.nytimes.com/2021/07/10/style/metaverse-virtual-worlds.html> accessed 4 May 2022.

11 A term still unfamiliar to many, the NFT is an interchangeable unit of data stored on a blockchain, a form of a digital database, that can be sold and traded. Types of NFT data units may be associated with digital files, including photos, videos, and audio. Each token is uniquely identifiable, which differs from other blockchain currencies, such as Bitcoin. These NFTs can then be 'minted', referring to the process of turning a digital file into a digital asset on the Ethereum cryptocurrency blockchain, and it is impossible to edit, modify, or delete it. It is similar to the way metal coins are minted and put into circulation, non-fungible tokens are also 'minted' after they are created to retain their value on the digital marketplace.

12 NonFungible, 'Yearly NFT Market Report 2021' (NonFungible, 2022) <https://nonfungible.com/reports/2021/en/yearly-nft-market-report-free> accessed 4 May 2022.

13 Minting is the process of turning a digital file into a crypto collectible or digital asset on the Ethereum Blockchain.

14 Sweet, 'Sweet Launches Broad-Scale NFT Solution For Leading Entertainment And Consumer Brands In Partnership With Bitcoin. Com' (2021) <https://markets.businessinsider.com/news/stocks/sweet-launches-broad-scale-nft-solution-for-leading-entertainment-and-consumer-brands-in-partnership-with-bitcoin-com-1030044246> accessed 4 May 2022.

15 Anna Tong, 'Can NFTs Work For Luxury Jewellery?' *Vogue Business* (21 June 2021) <https://www.voguebusiness.com/technology/can-nfts-work-for-luxury-jewellery-asprey-cartier> accessed 4 May 2022.

Market experimentation within the metaverse offers solutions to some of the biggest spectres haunting the world of jewellery. The digital space offers jewellery companies a solution to two issues: the safety of transactions and devaluation of real jewellery. The security of the digital transaction in the current financial market is enabled by blockchain technology that backs digital assets, in turn, providing a tamper-proof, digital ledger of all the information on any product. This is becoming an appealing method for securing transactions as we live in an age where hacking, spyware, and digital fraud are an ever-present threat. The second aspect that metaverse assists with is devaluation of jewellery and diamonds occurring due to fluctuation on the market. Shockingly, as soon as they leave the jeweller's shop, diamonds tend to lose value, depreciating by as much as 30-35% if they are re-sold.[16] The blockchain-based diamond marketplace, Icecap, offers a solution to this issue, developing a new way of online trading as it allows the trading of NFT tokens 'without friction' while the diamonds are vaulted and insured.[17] According to Icecap's CEO, Jacques Voorhees, unlike liquid assets of gold and silver, purchasing diamonds through the online platform protects these valuable assets from the long-term problem of devaluation faced in the diamond industry.[18] Astonishingly, trading diamonds virtually, through platforms such as Icecap, allows their value to be retained, with investments retaining much more value. Prices of rare pieces, also, are more likely to preserve their investment price, such as the one-hundred-carat diamond necklace 'Desert Wind' which featured as part of Icecap's inaugural line of collector-quality gems in the world's first NFT diamond and jewellery collection, in May 2021.[19] Even Christie's, the noted auction house, is paying close attention to the capabilities of digital assets in the metaverse. Their resident specialist Noah Davis has said, 'blockchain is on the cusp of being integrated into every single creative industry,' alluding to the strong commercial interest attached to the evolving sphere of digital jewellery.[20]

It must be recognised, however, that there are currently no laws that govern existing trademark registrations of physical goods in the metaverse. What does this all mean for traditional Intellectual Property (IP), such as trademarks and copyrights? There are some new instances, including the lawsuit that Hermès filed against the digital artist Mason Rothschild for creating, selling, and using 'MetaBirkin' in January 2022. The 'MetaBirkin' NFTs featured the Hermès Birkin handbag design, which was allegedly used without permission and in violation of its trademark rights. The luxury fashion retailer described Rothschild as 'a digital spectator who is seeking to get rich quick' by appropriating the brand 'MetaBirkins' for the exchange of digital assets NFTs.[21] Having said this, such cases have not yet been heard by courts. It may be that the disputed NFTs experience drastic fluctuations in value due to negative publicity and uncertainty over the courts' decisions, but it is highly improbable for these cases to trigger a collapse of the general NFT market.[22] A simple reason for this is that more big-name brands are taking their first steps into the digital realm, and for these companies, the risk of their NFTs becoming the subjects of legal actions is extremely low as they own all the IP rights related to the underlying works. No doubt, IP practitioners, legal analysts and NFT traders alike will be avidly anticipating the decisions from the U.S. courts as these judgments will help determine how these online creations will interact with long-standing intellectual property rights, such as copyrights and trademarks. Thus, if a company is thinking of expanding into the metaverse, it would be worth their while to consider filing for relevant trademarks in order to have legal protection.[23]

Still, there are great possibilities for the creative industries in the metaverse. Rather than a space for division, the metaverse will make jewellery appreciation and creation more accessible. Craftsmen, designers, and clients will be able to interact in a globally immersive world without the need to journey from gemmological mines, to workshops, and commercial stores. The metaverse will, also, make for better opportunities for self-expression: we will be able to communicate our individuality by designing and later re-designing jewellery to suit our current interests, interweaving inspiration from literature, art, and even our political beliefs. Indeed, for a considerable number of artists, the metaverse creates unending possibilities in the evolution of art and design.

That said, preserving this digital blossoming of creativity is not always as straightforward as it first seems, as it has also become a stage for the expansion of corporate domination. One such artist providing insight and campaigning for the protection of public ownership in the digital sphere is Sebastian ErraZuriz. Blurring the boundaries between contemporary culture, art and technology, ErraZuriz has previously reworked Jeff Koons' augmented reality (AR) sculpture in a political stance against the 'imminent augmented reality (AR) corporate invasion', which could ultimately fuel a version of the metaverse that is limited by corporate powers of intervention and business models. This piece was titled 'Vandalized Balloon Dog', intending to act as a direct criticism of Koons Partnership with Snapchat 'which saw digital 3D versions of the artist's best-known sculptures appear in international tourists hot-spots via augmented reality'.[24] His latest project, an NFT start-up, Digital Diamonds Co., similarly intends to foster open innovation, focusing on promoting a new kind of diamond company. Each Digital Diamond is valued at the price of a real diamond using the Ethereum currency and has accommodated for changing pricing for bidding purposes. What is most interesting about Digital Diamonds Co. is the parallel drawn between real diamonds and the NFT creation. After all, diamonds are neither scarce, nor intrinsically precious, with their value a product of societal perception. In foresight, should artificial, lab-grown diamonds be considered to be of greater or equal significance and originality, in comparison to digital, artistic creations online? The nature of the metaverse also means that digital jewellery can sidestep issues of gemmological sourcing and occurrences of blood

16 Preeti Kulkarni, 'What You Should Keep in Mind When Investing in Diamonds' *The Economic Times* (Mumbai, 12 October 2015) <https://economictimes.indiatimes.com/markets/commodities/what-you-should-keep-in-mind-when-investing-in-diamonds/articleshow/49297685.cms> accessed 8 May 2022.

17 'Non-Fungible Token Hard Asset Diamond Investment | NFT Marketplace | Icecap' (Icecap, 2022) <https://icecap.diamonds/> accessed 6 May 2022.

18 ibid.

19 Jacques Voorhees, 'The World's First NFT Diamond & Jewellery Collection' (Icecap, 2021) <https://storage.googleapis.com/icecap/CollectibleCerts/GD%20Icecap%20Catalogue%20April%202021.pdf> accessed 4 May 2022.

20 Tong (n 15).

21 Victor Danciu, 'Not For Trademarks? The Truth About NFTs And IP' (Dennemeyer, 2022) <https://www.dennemeyer.com/ip-blog/news/not-for-trademarks-the-truth-about-nfts-and-ip/> accessed 4 May 2022.

22 ibid.

23 Philip Nulud, 'Protecting Your Intellectual Property In The Metaverse And On NFTs' (Lexology, 2022) <https://www.lexology.com/library/detail.aspx?g=3458d650-8351-421f-a0ee-f1d5fbcb6094> accessed 4 May 2022.

24 Anna Codrea-Rado, 'Virtual Vandalism: Jeff Koons's 'Balloon Dog' Is Graffiti-Bombed' *The New York Times* (New York, 10 October 2017) <https://www.nytimes.com/2017/10/10/arts/design/augmented-reality-jeff-koons.html> accessed 4 May 2022.

diamond mining; a desirable feature as consumers' interest in ethically sourced diamonds is growing. In light of this, the evolving digital space offers a new-found freedom to artists from the complex gem authentication systems and control of the jewellery industry.

The adoption of these immersive technologies can offer great creative freedom, without the limitations which govern our physical reality. Designers can use an unlimited array of gemstones, no longer be confined to small scale production, and can challenge the concepts of jewellery itself. Some of the largest fashion brands have begun to define their own label within this kaleidoscopic metaverse, as they, too, seek to explore it. Even the fashion house Gucci has recognised the value of the metaverse, presenting a digital display of their *haute* jewellery collection, 'Hortus Deliciarum', in 2021. The 130-piece collection is divided into four chapters, taking inspiration from the hues of an ever-changing, natural sky. Waterfalls, shooting stars, and celestial phenomena launched the first chapter's designs, while the second section took inspiration from rose gardens. The colours of the sunset informed part three, with precious gemstones, such as opal, topaz, and garnets translating the rich twilight hues of the sky to one of nightfall. These pieces have a discordant symmetry as the jewels were placed mismatched to encapsulate the ephemerality of the sky as it passes from day to night. The fourth incorporated prides of lions, roaring their way around necklaces and earrings encrusted with gemstones. I believe that launching the jewellery collection in this way would simply not have been possible if it were in physical form: it feels as though Gucci chose to present the collection through a digital platform by also believing in the aptness of the metaverse. In a conventional display, the collection would not have had the same ambiance of enchantment, which captivated me and countless others.[25] And now, when the fine jewellery is worn for special events and red carpets, we can be reminded of its release in a digital format. As such, even the biggest names in commercial luxury are embracing the universe of possibilities that virtual jewellery creates.

Keeping this in mind, the large-scale fashion brands designing luxury jewellery have not been the only ones to benefit from our ever-increasing connection with the metaverse. Independent artists are also able to blossom and collaborate with the creative aficionados driving the campaigns of high fashion. This is facilitated by the deregulated finance ecosystem (DeFi), which allows digital creators to sell and authenticate their NFTs without a field of experts deciding what is valuable, precious, or appealing. This helps designers, such as the New York based artist, Carol Civre, as DeFi applications give users more control over their money through personal wallets and trading services that cater to individuals. Civre's digital creations can maintain space within the world of the big fashion brands, bridging the worlds of fashion, 3D art, and CGI to create an idealised 'exaggeration of reality'.[26] The artist aims to transform, elevate, and explore the possibilities of the human body that may not be possible to explore in our physical lives.[27] Carol's innovative ways of developing digital art were key to her success and have appealed to an extensive selection of brands, with her clientele including Chanel, Prada and Vivienne Westwood. Her work has even been described as promoting an 'E-Renaissance' in *Vogue Italia*.[28] This digital space has facilitated collaborations between individual and large-scale enterprises to create new forms of jewellery that transgress the digital and physical world to form a united multi-experience for the consumer. Experiences can thus start in the physical world, but then extend into an infinite realm of the digital metaverse.

It is surreal to think that we are already able to create and innovate in such an unhindered manner and in an alternative reality. It triggers a flurry of questions about what comes next in digital design. In the fashion industry, will there be a large-scale transformation with the new growth of opportunity for digital agencies, stylists, or collections, operating through the metaverse? While some companies will likely continue to operate only in the physical world, others that wish to can continue to exercise their duty in the creation of the new through digital design. With NFTs, blockchain gems, and the metaverse – jewellery is evolving beyond the physical bounds of reality, transitioning into a realm of pixels and colour. For these reasons, despite the continued process of jewellery designs serving both functions of being appreciated for its artistic qualities, as well as being an indicator of wealth, the industry is turning to digitisation to suit the future market and creative design. This is what sets the metaverse apart– the promise of infinite, artistic outcomes – and, in turn, the chance to transform the concept of jewellery in itself. On this premise, the fundamental concept of the metaverse is not to act as a way to supersede and out-do contemporary painterly, sculptural, or architectural practices so fundamental to our contemporary arti practises today. Rather, it seeks to enable the blossoming of creative practices through a digital platform, in turn, preserving and connecting these two inspirational worlds.

A thought to end this essay: this creative unity could, in fact, activate a radical shift as to how we can evaluate the notion of artistic freedom. Indeed, the interactions of the physical and digital world, in the jewellery, fashion, and broader cultural sphere could result in the transformative visualisations of our world around us.

25 Sarah Royce-Greensill, 'Gucci's New High Jewellery Collection Is Worthy Of A Fantastical Fairy Princess - Or Prince' *The Telegraph* (London, 21 June 2021) <https://www.telegraph.co.uk/luxury/jewellery/guccis-new-high-jewellery-collection-worthy-fantastical-fairy/> accessed 4 May 2022.

26 Claudia Luque, 'Review Of Carol Civre: An Extension Of Reality' *Metal Magazine* (2020) <https://metalmagazine.eu/en/post/interview/carol-civre> accessed 4 May 2022.

27 ibid.

28 Rujana Cantoni, 'RENAISSANC-E' *Vogue Italia* (Milian, 17 July 2021) <https://www.vogue.it/fotografia/article/renaissanc-e-by-rujana-cantoni-7-3d-artists> accessed 4 May 2022.

The Thin End of the Wedge: How Trans Rights Have Emerged as a Keystone in the Feminist Politics on Bodily Autonomy

Katherine Cross

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As of this writing, an Alabama law that would have made it a felony in the state to provide a teenager with gender-affirming healthcare, punishable by up to ten years in prison, is held up in the courts.[1] If it were allowed to go into effect, it would mean that even in consultation with medical professionals, operating on globally-accepted standards of care for transgender youth, a 17-year-old transgender girl cannot get access to puberty blockers or hormonal replacement therapy. Missouri lawmakers intend to extend this ban even to *adults*, banning care up until the age of 25. Meanwhile, Florida's Department of Health has issued non-binding guidance that would prohibit even 'social transition' for youths (i.e., a child referring to themselves by new pronouns, wearing clothes associated with a different gender, but with no medical interventions) which, if it were ever enforced, would amount to the state policing children's gender expression at an astonishing degree of invasiveness and detail.[2] But even non-binding guidance can grant authority and permission for laypeople to execute private acts of bigotry.

These are merely the marquee episodes of a nationwide assault on transgender children in the US; it is a striking culmination of years of building moral panic on both sides of the Atlantic that has finally burst into full-blown authoritarianism, entirely of a piece with the renewed assault against abortion rights and other reproductive freedoms from a far-right determined to exert ever tighter control over the bodily autonomy of the many, many groups it despises.[3]

The trans rights debate has become the thin end of a wedge being used by social conservatives to reverse decades of progress on a whole range of issues—from abortion, to contraception, to sexual liberation more broadly, to the rights of queer couples and families to marry, adopt, or even exist in public. At the heart of these issues are questions of bodily autonomy, gender politics, and civil liberties. They are also a front in the ongoing attack against democracy that has gripped many countries over the last two decades, from India to Turkey to Hungary to the United States. 'Democratic backsliding' often buries trans and gender-variant people first; the gender anxiety at the heart of fascism brings no tolerance for difference.[4]

1 The Associated Press, 'A judge blocks part of an Alabama law that criminalizes gender-affirming medication' (*NPR*, Montgomery USA, 14 May 2022) <https://www.npr.org/2022/05/14/1098947193/a-judge-blocks-part-of-an-alabama-law-that-criminalizes-gender-affirming-medicat> accessed 19 May 2022; Zoe Richards, 'Justice Department challenges Alabama law criminalizing transgender health care for minors' (*NBC News*, 30 April 2022) <https://www.npr.org/2022/05/14/1098947193/a-judge-blocks-part-of-an-alabama-law-that-criminalizes-gender-affirming-medicat> accessed 19 May 2022.

2 Romy Ellenbogen and Christopher O'Donnell, 'Florida advises no social, hormonal treatment of transgender children' *Tampa Bay Times* (St. Petersburg, Florida, 20 April 2022) <https://www.tampabay.com/news/florida-politics/2022/04/20/florida-advises-no-social-hormone-treatment-of-transgender-children-in-new-guidance/> accessed 19 May 2022.

3 Schuyler Mitchell, 'The Right's Creeping Pro-Natalist Rhetoric on Abortion and Trans Health Care' (*The Intercept*, 17 May 2022) <https://theintercept.com/2022/05/17/abortion-trans-health-care-pro-natalism-authoritarianism/> accessed 19 May 2022; Josh Gerstein and Alexander Ward, 'Supreme Court has voted to overturn abortion rights, draft opinion shows' (*Politico*, 5 February 2022) <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> accessed 19 May 2022.

4 Sarah Repucci and Amy Slipowitz, 'The Global Expansion of Authoritarian Rule' (*Freedom House*, February 2022) <https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule> accessed 19 May 2022. Of note is the United States, which has slipped in Freedom House's Democracy Index from a score of

Especially anything that might hint that the sex castes of male and female—with the patriarchal hierarchy between them taken for granted—are not, in fact, immutable.

That fact alone explains the otherwise strange alliance between the far-right, religious social conservatives, and trans-exclusionary radical feminists, united in fear of what trans people represent to them. To them, we seem a hydra of threats: an affront to nature, to God, to the social order, a threat to women and girls. We are all things to all people except ourselves.

Thus, I shall strive to be myself in these pages: a feminist scholar, first and foremost. It is worth taking a broad survey of what this assault on our human dignity has wrought, where it came from, and what the role of a renewed trans politics might be in the face of ongoing attacks against democracy itself. Along the way, I'll even answer the most popular question of the silly season: 'What is a woman?'.

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What had been, for years, a toy thought-experiment for many commentators in the British and American media—treating transgender people or 'gender ideology' as some kind of threat in an unending cavalcade of editorials, features, and online discourse—has now become a political programme.[5] Some centrist commentators who indulged in building this moral panic now appear surprised at how it has come to fruition, but it was always going to be impossible for discourse about the supposed 'threat' to children from the 'transgender lobby' to not, at some point, manifest as policy in a political climate so thoroughly despoiled by the so-called culture wars.[6] Florida's 'Don't Say Gay' bill, which bans primary school teachers from mentioning LGBT people in any positive context, has already led to the firing of queer teachers and started a nationwide slander campaign that casts all transgender people as 'groomers' of young children.[7] Indeed, the very *act* of suggesting it's okay to be trans is now being cast as 'grooming' by conservatives, an incredibly incendiary allegation that is bound to lead to violence and has already led to abuse in the streets—the harassment of Saoirse Gowan, a transgender woman living in Washington D.C., on the city's metro by a man filming her and calling her a groomer and paedophile is but one such incident.[8]

Transgender people were bound to become the next distracting target in an age of overlapping crises that demand concerted action. Instead of blocking climate change, they would come for puberty blockers; instead of building resilience against the next pandemic, they seek to create an epidemic of terror among trans children; instead of addressing ever-widening inequality and poverty, they seek to create conditions that make the trans minority's immiseration that much likelier.

We make an appealing target because pointless cultural debates are able to flood the media with unresolvable controversies that make for barbed, duelling editorials, stinging vox pops, and a blizzard of screaming social media posts that drown out other, less welcome discourse. Particularly for conservative politicians, we provide a welcome distraction from any serious questions about material issues.

It is very much worth noting that in a week where UK Prime Minister Boris Johnson struggled to respond to a journalist's question about a pensioner whose skyrocketing energy bills meant she had to cut back on food and ride a public bus all day to save on her heating bill,[9] we had been treated to Johnson's Health Secretary Sajid Javid promising to put trans women in government healthcare wards with men. While one woman literally starved herself to make ends meet, we were told imposing needless suffering on critically ill trans women was a great boon for feminism.

In the UK, it has been depressing to watch newspapers put anti-trans attacks on their front pages on days with other, considerably more pressing major news stories, whether in Ukraine, about climate change, or even local elections.[10] It crowds out both the reality of trans existence and the many other urgent issues of our time in a way that, even leaving aside its animating prejudice, verges on journalistic malpractice.

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89 in 2017 to a score of 83 in 2022.

5 The UK's *Telegraph* has a particular obsession with the spectre of 'gender ideology'. Cf. amongst many others Camilla Tominey, ''Niche' transgender ideology 'corrosive' to society, says report' *The Telegraph* (London, 30 June 2020) <https://www.telegraph.co.uk/news/2020/06/30/niche-transgender-ideology-corrosive-society-says-report/> accessed 24 June 2022; Debbie Hayton, 'Why the Government must exempt gender-critical views from hate crime laws' *The Telegraph* (London, 7 December 2021) <https://www.telegraph.co.uk/news/2021/12/07/government-must-now-exempt-gender-critical-views-hate-crime/> accessed 24 June 2022; Telegraph View, 'Reason should guide the gender identity debate' *The Telegraph* (London, 2 April 2022) <https://www.telegraph.co.uk/opinion/2022/04/02/reason-should-guide-gender-identity-debate/> accessed 24 June 2022.

6 See, for example, Anglo-American writer Andrew Sullivan, who expressed dismay that the moral panic he had helped to foment was spilling over to antagonise cisgender gay people like himself. Cf. Andrew Sullivan, 'This is a perfectly sane teacher responding to kids' questions. It seems increasingly clear that this campaign is now driven by vicious homophobia. Moderates take note', (*Twitter*, 4 April 2022) <https://twitter.com/sullydish/status/1511008960446410754> accessed 19 May 2022.

7 Ian Millhiser, 'The constitutional problem with Florida's 'Don't Say Gay' bill' (*Vox*, 15 March 2022) <https://www.vox.com/2022/3/15/22976868/dont-say-gay-florida-unconstitutional-ron-desantis-supreme-court-first-amendment-schools-parents> accessed 19 May 2022.

8 Amanda Michelle Gomez, 'Trans Woman's Harassment on Metro Is Latest in Growing Number of Incidents Targeting LGBTQ+ People' (*DCist*, 14 April 2022) <https://dcist.com/story/22/04/14/trans-womans-harassment-on-dc-metro-reflects-growing-number-of-incidents/> accessed 19 May 2022.

9 Jon Stone, 'Boris Johnson takes credit for free bus pass after being told cash-strapped pensioners make trips to keep warm' *The Independent* (3 May 2022) <https://www.independent.co.uk/news/uk/politics/boris-johnson-bus-pass-pensioners-warm-b2070395.html> accessed 19 May 2022.

10 Ella Braidwood, 'Daily Telegraph criticised for anti-trans NHS women's wards article' (*Pink News*, 11 January 2019) <https://www.pinknews.co.uk/2019/01/11/daily-telegraph-transphobic-headline/> accessed 19 May 2022; Emily Craig, 'NHS accused of prioritising trans people for breast surgery over women with medical needs' *Daily Mail* (London, 2 May 2022) <https://www.dailymail.co.uk/news/article-10774277/NHS-accused-prioritising-male-female-trans-people-breast-surgery-women.html> accessed 19 May 2022; Katie Feehan, 'NHS equality chiefs mutiny AGAINST 'transphobic' watchdog ruling that allows trans patients to be barred from single-sex wards if there is a legitimate reason' *Daily Mail* (London, 6 April 2022) <https://www.dailymail.co.uk/news/article-10690199/NHS-mutiny-AGAINST-watchdog-ruling-allows-trans-patients-barred-single-sex-wards.html> accessed 19 May 2022. Indeed, the *Daily Mail* has an entire subsection devoted to coverage of trans people, nearly all of it negative and sensationalist (see <https://www.dailymail.co.uk/news/transgender-issues/index.html>). Other newspapers in the UK are not far behind.

As a simple heuristic, one can assume any attack on trans people from a member of the political class is an attempt to avoid spending time on an issue of material substance.

But we are not simply an abstract culture; we, too, are real people harmed by the climate that is being created by unending headlines questioning our very right to exist in public space. When it comes to the new laws in the US, the risk to some of our most vulnerable is immense. Families are considering whether and how to leave states where they'd built their lives, to flee somewhere their children are not literally being criminalised. Youth suicides are at risk of rising again, as they did when the state of Arkansas mooted a similar bill in 2019 that was later blocked by a federal court.[11] The litigation is ongoing.[12] Meanwhile, an already dangerous climate for trans sex workers threatens to become deadlier still.

The harms of such legislation in the US are myriad and material. Texas' own bills literally make it a crime to raise a trans child, seeking to investigate parents of trans children as 'abusers'. Such realities make the anti-trans screeds of the British press—replete with silly tirades masquerading as thought exercises, like Rod Liddle's infamous *Times* column where he announced he was 'identifying as a young, black, trans chihuahua, and the truth can go whistle'—seem even crueller than they already are, kicking a much-maligned group while they're down.[13] As Jules Gill-Peterson put it in her recent essay about the legislative assault on trans people in the US, these are not simply cute word games to be played by the privileged: 'Collectively, these bills are not just attacks on what you can or can't 'say' in school. They are an existential threat to your life'.[14]

Gill-Peterson's perspective is useful to us for another reason, however. Throughout this essay I've listed a litany of recent attacks, recent harms, and implicitly engaged in a plea to recognise our humanity. Gill-Peterson demands we go further than simple moral appeals, however, as she draws on a tradition of trans activism dating back to the women of colour-led movements of the late 60s and early 70s:

> Allyship doesn't rely on evaluating trans people as morally deserving, but rather on recognizing everyone's right to the resources and public goods that raise our quality of life. Being an ally is about the common struggle for better living conditions. The trans politics of Black and brown women have been about mutual aid and abolition since the 1970s for a reason. They have proven to be the only people unafraid to consistently care for and love trans kids without using them as moral props.

This is the foundation of an intersectional perspective that understands 'trans issues' as intimately connected to a broader politics of equality and justice, from equal access to public education, to the availability and affordability of healthcare, to the reproductive rights required to have and raise your own children, access to social welfare and services, to equal access to public accommodations and public space. These issues implicate *all* of our democratic rights, resting as they do on our shared vulnerability to their erosion. What starts with trans people will not end there.

To better understand why, we need to turn to the concern-trolling question that has come to dominate recent debates about trans people's right to exist: 'What is a woman?'

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From the recent nomination hearings of Justice Ketanji Brown Jackson in America to an Australian leaders' debate amid the country's general election, the seemingly simple question of 'what is a woman?' has been used in bad faith to antagonise or belittle trans rights, or to cast any ally of trans people as delusional. Jackson's response was certainly effective: 'I know I am one', while the Australian Labor Party's leader Anthony Albanese simply said 'an adult female', a bland dictionary definition that was meant to avoid the trap set by the debate moderator's question.

The question should be treated with scepticism, if not outright contempt, because it is almost always asked in bad faith and never arises except in discussions about trans people's rights. This is partly because the category is coherent only through classic Wittgensteinian 'family resemblances', where no particular definition can meaningfully exhaust the concept—try to define a 'game', for instance. No single feature is common or essential to the whole. Republican politicians, when reporters turned the question around on them, stumbled; Senator Josh Hawley said he 'didn't know' if a woman who'd had a hysterectomy was still a woman, for instance[15]—an answer that is either silly or chilling depending on his intent.

But there is a way of answering the question honestly and accurately that also reminds us of the vast political and philosophical space offered by both the linguistic idea of family resemblances and the legal-political concept of intersectionality. Historian Susan Stryker, in an explanation of the relationship of performativity to gender, offered this summation:

> A woman, performatively speaking, is one who says she is—and who then does what woman means7373.[16]

Some will find this answer circular. 'Woman means what woman means', is what she's seemingly saying. But this is necessary in order for the definition to be both accurate and brief: it is meant to cover a wide range of possible gender expressions in every culture and subculture where 'woman' is a meaningful concept. Gender is 'an attempt to communicate…and is accomplished by 'doing' something rather than 'being' something'.[17] In other words, gender is the sum

11 Trudy Ring, 'Rash of Teen Suicide Attempts After Arkansas Adopts Trans Care Ban' (*The Advocate*, 19 April 2021) <https://www.advocate.com/transgender/2021/4/19/rash-teen-suicide-attempts-after-arkansas-adopts-trans-care-ban> accessed 19 May 2022.

12 Sabrina Imbler, 'In Arkansas, Trans Teens Await an Uncertain Future' *The New York Times* (New York, 18 January 2022) <https://www.nytimes.com/2022/01/18/health/transgender-adolescents-arkansas.html> accessed 19 May 2022.

13 Rod Liddle, 'I'm identifying as a young, black, trans chihuahua, and the truth can go whistle' *The Times* (London, 11 November 2018) <https://www.thetimes.co.uk/article/i-m-identifying-as-a-young-black-trans-chihuahua-and-the-truth-can-go-whistle-tq550nx5f> accessed 19 May 2022.

14 Jules Gill-Peterson, 'Anti-Trans Laws Aren't Symbolic. They Seek to Erase Us from Public Life' (*Them*, 18 April 2022) <https://www.them.us/story/anti-trans-laws-public-erasure-dont-say-gay> accessed 19 May 2022.

15 Monica Hesse, 'Republicans thought defining a 'woman' is easy. Then they tried' *The Washington Post* (6 April 2022) <https://www.washingtonpost.com/lifestyle/2022/04/06/republican-woman-definitions/> accessed 19 May 2022

16 Susan Stryker, '(De)Subjugated knowledges: An introduction to transgender studies' in Susan Stryker and Stephen Whittle (eds) *The Transgender Studies Reader* (Routledge, 2013) 10.

17 ibid.

of one's actions, an achievement—it contains both the assertion of the identity *and* the enactment of a socially legible instance of that identity. When you bear in mind that there are lots of ways to be a woman, or a man, or any other gender, across numerous cultures and communities, it encompasses a wide range of possibilities—rather than the stifling stereotypes that 'gender critical' activists accuse transgender people of perpetuating.

But that issue of 'social legibility' is the key here. It's part of what makes declarations of 'I identify as an attack helicopter'—one of approximately three jokes known to transphobes—so tedious and ridiculous. There is no collectively acknowledged and constructed social role or identity of 'attack helicopter', nor any meaningful attempt by the speaker to enact it. It's little more than an empty attempt at satire.

Still, it's not simply a matter of what clothes one wears, say. It's how you're treated by others as well. For all the cruel debates about whether or not I should be allowed to exist, or whether my existence is some kind of parodic affrontery to all other women, patriarchy has made very few mistakes about me—from street harassment to online harassment, my experiences have much more in common with my cisgender woman friends than with my male friends. It is that shared social location, and a shared experience of abuse and oppression, that creates a site for political action; a standard around which to rally. Women are divided by many vastly different experiences, shaped by geography, social class, race, religion, culture, and more; but we can come together on some shared terrain—the familial resemblance of our common gender—to address discrimination, inequality, and oppression.

Understanding womanhood with an expansive, contingent definition affords us liberatory possibilities. It's worth remembering that in all the recent debates about whether trans people should be able to use the bathrooms of their choice, many of these arguments are recycled versions of those that justified racially segregated bathrooms in the American South, where the options were 'Men', 'Women', and 'Colored'. Black women and other women of colour were excluded from the category of 'woman' when it suited the imperatives of the state. An inclusive definition of any gender category would refuse these imperial edicts, dissolving the use of such categories as weapons with which to oppress particular groups of people. An inclusive definition recognises that attacks on any minority's right to claim membership in a gender, therefore, has stark implications for other rights as well: rights to public accommodation, to public space, to public education, to voting (particularly if voter ID laws are implemented), to be gainfully employed. Fixation on trans people's genders makes such public participation difficult if not impossible for them.

When one sees the reactionary consequences of transphobia and how it connects to other forms of oppression—the similarity to the logics of racial segregation, for instance—it becomes clearer why this position is feminist in name only. This is why the 'gender critical' position makes so little sense: its adherents claim to seek gender's abolition on the grounds that it is a harmful idea, but they depend on gender for the very existence and intelligibility of their philosophy. Its arbitrary lines of identity make no sense *without* the thing they claim to be abolishing. Their certainty about who is and isn't 'really' a man or a woman depends on the very patriarchal norms and gender stereotypes they claim to oppose. In particular, they take for granted the idea that sex is an unchanging caste that you may never leave, an idea that is profoundly patriarchal as it undergirds the stability of men as a privileged class with a birthright to that very privilege. 'Gender critical' means little beyond *trans*gender critical.

Equally, 'sex-based rights' are meaningless as a concept except as a way of drawing segregationist lines around trans people's access to public space. Gender equity, as it has been advanced by legislation[18], and interpreted by courts in the US,[19] actually depends on a broad understanding of gender, rather than a narrow parcelling out of rights on that basis. Indeed, the term 'sex-based' was historically used to classify discriminatory practises, a nod to the obvious reality that prejudice is the thing 'based' on one's sex (or perceived sex) and our rights are meant to secure freedom *from* such discrimination.[20]

Liberty from rape or sexual harassment is not a 'sex-based right', but something people of all genders would share in, just as the right to vote is not 'sex based', but a shared human right to which women were denied access. It is profoundly reactionary to think of equity legislation as granting 'race-based rights', say, or 'sexuality-based rights'. Indeed, such wilful misunderstanding is at the heart of the common conservative charge that minorities seek 'special rights'—a deliberately inflammatory allegation—when in truth they seek access to the same liberty enjoyed by all their neighbours. So too is it the case with transgender people. The entire concept of a 'sex-based right' only emerged in opposition to trans people's claims to human rights, and represents an attempt at drawing a narrow and limiting definition of womanhood that has much more in common with regimes of the pre-democratic past.[21] It demands we imagine the continued existence of a women's restroom as the limited horizon of feminist politics, an ideological surrender to the myriad horrors that confront the democratic world.

18 Title VII of the Civil Rights Act of 1964 (USA). Note that the legislation does not attempt to define sex, only to include pregnancy and pregnancy-related discrimination (and, notably, to exclude most protection for abortion).

19 *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, US Supreme Court. Among other things, this landmark U.S. Supreme Court case held that discrimination on the basis of gender presentation (i.e., a woman wearing masculine clothing and refusing to wear makeup) was indistinguishable from discrimination on the basis of sex because it required the discriminating party to make judgments based on their perception of the target's sex. You cannot antagonise a trans woman for wearing high heels, say, without taking into account your belief that she is 'really' a man. The reality of this belief is irrelevant to the motivation for discrimination, and the Hopkins case has, therefore, been essential in providing a legal basis for transgender rights in the U.S.

20 U.S. Equal Employment Opportunities Commission, 'Sex-Based Discrimination' <https://www.eeoc.gov/sex-based-discrimination> accessed 19 May 2022.

21 Kath Murray, Lucy Hunter Blackburn, and Lisa Mackenzie, 'Reform 'under the radar'? Lessons for Scotland from the Development of Gender Self-Declaration Laws in Europe' (2020) 24(2) The Edinburgh Law Review 281–289; Callie H. Burt, 'Scrutinizing the U.S. Equality Act 2019: A Feminist Examination of Definitional Changes and Sociolegal Ramifications' (2020) 15(4) Feminist Criminology 363–409. These papers are among the first to turn up in academic database searches for 'sex-based rights'. Each of them offers an intervention against laws that would specifically protect trans people. Both pit the idea of 'sex-based rights' against transgender rights and represent novel constructions of women's rights that would have been unthinkable a generation ago. As I note in the main body of this essay, the awkwardness and counterproductive nature of 'sex-based rights' as a phrase is easy to see when one attempts to use a similar phrase about race or any other protected category.

To acknowledge that womanhood 'means' something broader, in the sense of Stryker's definition, is to acknowledge greater political possibility that can rejoin feminist politics to the material politics of equity in *all* areas. As a rallying standard, it can provide a united front on issues like reproductive justice, healthcare access, and the meeting of basic needs: food, shelter, and the dignity of work, combined with ample leisure in which to enjoy its fruits.

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As the United States confronts a gathering storm on reproductive healthcare, it is very much worth concluding by drawing what should be the obvious connection between abortion rights and everything discussed hitherto: bodily autonomy. What many generations of feminists have fought for is control over our own bodies, liberty from the dictates of powerful men about what our bodies are for, or what they mean. It's a cruel irony that a minority of people now calling themselves 'feminists' are insisting that the only way to define 'woman' is as a reproductive instrument—a perspective that is a neat fit with the far-right pro-lifers now on the march in America. Those same reactionaries *also* seek to erase transgender people from public life. The reasons are the same: emancipated women, cis and trans, as well as the mere existence of trans and nonbinary people, are an affront to their deeply conservative ideology of gender. We prove that alternatives to their sex castes are possible.

To ban abortion and to ban contraception—as some Republican politicians are continuing to do—is to seek to control women, to chain us to biology; similar goals are at work in their anti-trans crusade, to exile queer and trans people from public life and positions of public trust, to break up our families, and criminalise us. Beyond providing reproductive care, it's not a coincidence that many Planned Parenthood clinics are also places where trans people receive gender-affirming care, and where trans men and nonbinary people can go for sensitive treatment of their own pregnancies or uterine health. It is precisely that dignity and equality that is the target of so many right-wing extremists at this delicate moment in time. Bodily autonomy is a core capability that is at the foundation of so many other rights, all of which are under threat.

These shared threats are fertile ground on which to build movements, and expand on existing ones. If hope lies anywhere, it is there, in the blessedly vast country of the meaning of 'woman'.

'Private Vices, Publick Benefits' in Permissive Democracies: Mandeville's *The Fable of the Bees* in the Context of Transgressions by Western Political Classes

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Introduction

The work of many 17th-18th century thinkers on politics and society continues to shape modern discourse, with notable contributions including Thomas Hobbes's *Leviathan* (1651), John Locke's *A Letter Concerning Toleration* (1689) and Jean-Jacques Rousseau's *Discourse on the Arts and Sciences* (1750). The renown enjoyed by a small number of thinkers should not, however, divert us from more obscure but equally significant works from the period. The Anglo-Dutch critic and satirist Bernard Mandeville's *The Fable of the Bees* (1714, henceforth '*Fable*') is one such work. Through his central argument that the political class did not need to behave morally in order to establish a well-ordered society—hence the famous dictum 'Private Vices, Publick Benefits'—Mandeville became one of the most controversial figures of the period.

This piece will provide a brief account of Mandeville's thought and the fierce criticism it attracted, before looking at cases of political scandals in post-war Western democracies. The legal and philosophical scholar Edward L. Rubin has compellingly outlined how, in our contemporary era, a 'morality of self-fulfilment', in which citizens are primarily occupied with personal interests as opposed to wider ethical commitments, has replaced the forms of Christian piety seen in the 18th century.[1] Viewed alongside Rubin, Mandeville's thought appears almost prophetic. Though his viewpoints on the merits of capitalism and the cynicism of the political classes were radical to his contemporaries, they seem highly applicable to 21st-century society. Exploring instances of dubious moral conduct by members of the governing classes in modern morally permissive societies, the continuing relevance of Mandevillian thought becomes especially apparent.

Morality in a commercial society—Mandeville's thought

In the work of Mandeville, the lay view of 18th-century Britain as a society dictated by monolithic concepts of decency and piety is quickly problematised. Indeed, these concepts are his primary targets. Humans were not a unique species following a divinely-ordained path. On the contrary, in the *Fable* he argued that 'Providence should have no greater regard to our species, than it has to flies'.[2] His relegation of religion to the sidelines of discourse was an important aspect of his most prominent argument. Contrary to a movement of moralising writers who feared that commerce and social change would undermine ethics and values, the central thesis of the *Fable* was to connect these processes together in the

1 Edward Rubin, *Soul, Self, and Society – The New Morality and the Modern State* (Oxford University Press 2015) 43.

2 Bernard Mandeville, *The Fable of the Bees* (first published 1714, Penguin 1989) 71.

couplet 'Private Vices, Publick Benefits'.[3] He explained that 'the skilful management of wary politicians' regulated society. The hive of 'bees', a thinly-disguised metaphor for the vibrant, prosperous metropolis of London he had come to call home, were kept afloat by immorality as 'their crimes conspired to make them great'.[4] Mandeville argued that, contrary to Biblical notions of a benevolent soul influencing human action, 'Man centres everything in himself, and neither loves nor hates but for his own sake'.[5] He also reduced the good sense of polite society to a mere façade, as opposed to any form of innate morality, as 'all good manners consist in flattering the pride of others, and concealing our own'.[6]

Whilst his side-lining of matters relating to the Church reflected the secular character of Mandeville's thought, the few references to the place of religion in society reduced it to little more than a tool for cynical social control. At the beginning of Part 1 of the *Fable*, he outlined his aim to expose the 'unreasonableness and folly' of those always 'exclaiming against those vices', a clear attack on members of the clergy publishing moralising treatises.[7] Indeed, his lampooning of the established Church went even further, identifying as the most important factors for social stability 'envy and emulation', traits which had 'kept more men in bounds' than 'all the sermons that have been preached since the time of the apostles'.[8] In relativising Christian morality to little more than another social more and interpreting the calculating and cunning characteristics of the ruling class as necessary for wider harmony, Mandeville established himself as a highly original and controversial satirist.

Insofar as *Fable* offered a response to contemporary issues through the structure of a classical, moralising form of literature, Mandeville can be placed in a wider context of thinkers who charted how recent developments and upheavals had brought aspects of the human condition into sharper focus. Two of the most salient examples are John Locke's idea that recent political disagreements had highlighted the innate goodness of limited freedom of expression (*A letter concerning toleration*, 1689) and Adam Smith's notion that the expansion of trade had highlighted the instinct of self-interest (*The Wealth of Nations*, 1776). Mandeville argued that the new, commercial society was necessary for human flourishing. He was aware of how his ideas were challenging a near-consensus on morality as he explained that 'what we call evil in this world', i.e. materialism and self-aggrandisement, was in fact 'the grand principle that makes us sociable creatures'.

The conventions brought in by avaricious commerce were, therefore, not malign but necessary for the growth of a polite and well-functioning society. Mandeville railed against the cultures of shame and stigma which certain intellectual circles had disseminated in response to burgeoning materialism. He targeted the moralists themselves and labelled them as hypocrites, suggesting that particular individuals were constantly 'railing at what they are more or less guilty of themselves'. He posited that the models of morality and piety offered by religious writers were simply unattainable, as it was 'so very seldom' that 'many Virtues and good Qualities' were 'seen to meet in one Individual'. Whilst temptations and vices naturally affected a majority of citizens, as 'Love or Covetousness may divert' some and 'Drinking, Gaming may draw away many', this did not entirely scupper morality. In fact, morality existed because these vices equated to effective governance and social stability as 'moral Virtues' were defined as 'Political Offspring which Flattery begot upon Pride'.

Therefore, even though Mandeville's portrait of a society plagued by self-interest and vices was comparable to that offered by other writers, the conclusions he reached from it were markedly different. He did not believe that the avarice and materialism brought in by commerce and trade were injurious to morality. These qualities were preferable as wealth created human flourishing and pleasure. This allowed a superior and more realistic notion of morality, in which citizens and rulers were aware of their human flaws and fragilities and honest reflection created good government, to prosper.

'How monstrous it is'—Responses to Mandeville

The quotation above is taken from 'Remarks on the Fable of the Bees', a response to Mandeville's work written by the non-juring priest and moralist William Law in 1724.[9] Whilst modern audiences might simply dismiss his criticism as hyperbolic, it is in fact highly salient for understanding Mandeville's context and how his work created fierce controversy, highlighting also the sheer originality of his conception of society. The impulse of conservative and journalistic circles to condemn inappropriate behaviour by politicians in the 20th-21st centuries reflects that though the moralising and pious opposition experienced by Mandeville has somewhat abated, it remains an important part of discourse.

Law argued that Mandeville's tying of virtues to private corruption was libellous, pronouncing it was 'monstrous' to 'impute these fine moral virtues to the contrivance of politicians'.[10] Following the line of the Established Church, he similarly took issue with Mandeville's diminishing of human reason as a secondary quality to cunning and calculation, arguing that God-given 'reason' directed us to 'know… what is practical'.[11] Whilst the empiricist philosopher Francis Hutcheson did not write from such a confessionally-motivated standpoint, his belief in the benevolent strength of human reason made him another high-profile critic of Mandeville's work. This criticism informed a significant part of his public discourse: in 1724, he penned letters to the *London Journal* criticising the *Fable* which formed the basis of his lengthier study *Reflections upon laughter and Remarks upon the Fable of the Bees* (1725).

Whilst certain responses to Mandeville did veer into hyperbole—in volume 2 of his *History of English Thought in the Eighteenth Century* (1876), the Whig historian Leslie Stephen castigated him for 'jest' and 'grotesque…paradox'—they reflect the striking nature of his conclusions.[12] Responses to Mandeville are essential for comprehending his place in British thought and his connections to modern society. By acknowledging the imperfections of the human condition but concluding that these made it well-suited for public life, he placed himself apart from a generation of more moralistic, pious authors, the consequence of which has been his endurance and his relevance as a thinker.

3 ibid 55.
4 ibid 27.
5 ibid 40.
6 ibid.
7 ibid 5.
8 ibid 15.

9 William Law, *The Fable of the Bees* (first published 1724, Penguin 2013) 17.
10 ibid 5.
11 ibid 10.
12 Leslie Stephen, *History of English Thought in the Eighteenth Century: Volume Two* (first published 1876, Penguin 1991) 47.

Sleaze and unease—modern political scandals

Though it is of course unfeasible to know how Mandeville would have responded to more modern cases of corruption and intrigue, by adopting a 'Mandevillian stance' based on the central principle that private vices can and do enable public virtues, this section will highlight applicability of his social philosophy to modern society.

The argument that 'this House views with grave concern the continuing decline of moral standards' would not have been out of place in early modern evangelical circles. It was, however, a statement made in 1970 by the Conservative MP Peter Fry about Parliament's reflection of wider values.[13] Whilst the religious inclinations of Western society have shifted since the 18th century and fairer processes, such as the abolition of privileges and the expansion of the franchise, have altered the political landscape, issues of morality are still recurrent in political discourse. However, it is clear that shifting social values, more liberal legislation, and greater rights for minority groups mean that in Western democracies, conceptions of morality have significantly changed since the era of the Enlightenment. Whilst interpretations of 'declining values' continue to have currency in certain conservative circles, thinkers have generally reconciled themselves with a morally permissive society. Also in 1970, the Scottish theologian and Biblical commentator William Barclay penned *Ethics in a Permissive Society*, an attempt to reconcile Christ's doctrines with new social forces including sexual liberation and drug usage. The interpretation of Christian Adam, Christoph Knill and Steffen Hurka (2015) that despite 'a general trend towards more permissive approaches in moral regulation', the capacity of such issues to provoke controversy has persisted is salient.[14] It reflects how legally and morally permissive societies continue to struggle to account for the forces of cynicism and materialism brought into sharp focus by economic modernity.

In the next part of this article, I will offer concise summaries of three cases in morally permissive post-war democracies in which the actions of members of the governing class generated discussions on morality. To account for a range of circumstances, countries, and outcomes, I have chosen the 'Watergate' scandal in the US in the 1970s, the revelations of 'sleaze' which contradicted the British Conservative Party's 'back to basics' campaign in the 1990s and the charges of corruption which have altered the public image of former French President Nicolas Sarkozy. I will look at the questions of private morality raised by each and, in the final section, explain how Mandeville's thought responds to these questions and thus generates a new form of social criticism.

The core details of the 'Watergate' scandal are well-known. In June 1972, police at the headquarters of the Democratic National Convention at the Watergate hotel arrested five intruders who occupied positions on President Richard Nixon's re-election campaign. Further research by journalists indicated that, despite Nixon's attempts to distance himself from the events, underhand techniques and surveillance of opponents were part and parcel of his administration. The turning-point of the scandal came in October 1973 when it was found that tapes delivered to a key investigator had been significantly redacted and by August 1974, public pressure had grown so much that Nixon resigned. His full pardon in September of the same year by President Gerald Ford (Nixon's Vice President) only heightened the public perception of corruption. In this case, the most prominent question of morality was pithily summarised by Vice Chairman James Baker who asked 'What did the president know and when did he know it?'.[15] The point of contention was the extent to which the President was responsible for the illicit activities of a large number of officials answering to him, and how far he had given orders which had disrupted the democratic system to maintain his power. Interestingly, his victory in the 1972 presidential election indicates that early on, many sections of the public were not convulsed by these issues in the same way as sections of the media. In terms of morality, they believed that Nixon's seemingly effective responses to issues including a tanking economy and the Vietnam War justified the means. The fact that by August 1974, political and public pressure led him to resign indicates that wider perceptions reached a point where Nixon's personal impulses were seen to run contrary to the noble values of his office. A raft of revelations by the media regarding his personal conduct and direct involvement in underhand tactics had shattered his precarious position.

Morality was central to the outlook of Conservative PM John Major's administration and in a 1993 speech, he committed the party to 'the old values—neighbourliness, decency, courtesy' which were 'still alive' and continued to encapsulate 'the best of Britain'.[16] However, this vision was followed by a wave of revelations which indicated that leading Conservative ministers had been guilty of lapses in morality which contradicted Major's vision. These included a multitude of cases of marital infidelity, MPs being bribed by corporations to ask leading questions in Parliament, and a Conservative-run City Council distributing council houses according to who was most likely to vote for the party. These revelations led to a wave of resignations and firings, and it was no surprise when in the 1997 general election the Labour party won a majority of 146 seats. In this case, John Major and other ministers had set excessively high expectations for private morality, a naturally ambiguous area of life, and their blatant hypocrisy particularly appalled intellectual and political circles.

The final scandal I will be considering is the charges of corruption which have dominated the legacy of former French President Nicolas Sarkozy (served 2007-12). Shortly after he commenced his term in November 2007, a *Brookings Institution* piece pronounced him a 'hyper-president', due to his flagrant attitude regarding his personal wealth and his images of hard work and wide-scale reform, which initially won him high approval ratings of around 60%.[17] However, corruption charges relating to illegal payments to his campaign team soon blighted his presidency. The allegations continued and, in March 2021, Sarkozy was given a three-year suspended sentence for attempting to bribe a magistrate. In terms of morality, there had been prior criticisms over his approach to public life: his high-profile relationship with the actress Carla Bruni, shows of wealth, and flamboyant personality were perceived as licentious. Whilst the trail of evidence left by Sarkozy's misdeeds indicate that he was guilty of financial corruption, in the eyes of many commentators, he had been liable for years before the verdict was passed, as his attempts to cultivate a celebrity image went against the high moral standards applicable to a head of state.

13 *Hansard* (4 May 1970) 38 https://api.parliament.uk/historic-hansard/commons/1970/may/04/permissive-society accessed 25 April 2022.

14 C. Adam, C. Knill and S. Hurka, 'Introduction' in C. Adam, C. Knill and S. Hurka (eds.), *On the Road to Permissiveness? Change and Convergence of Moral Regulation in Europe* (Oxford University Press 2015) 2.

15 John Dean, *The Nixon Defence Deluxe – What He Knew and When He Knew It* (Viking Press USA 2014).

16 C. McCrystal, 'Back to basics: But how basic? In search of a golden age, Cal McCrystal climbs the Prime Minister's family tree', *The Independent* (London, 28 November 1993) 9.

17 P. Gordon, 'Nicolas Sarkozy: The Hyperpresident' *Brookings Institution* (New York, 10 November 2007) 6.

Private corruption, public apathy?—a new conception of politics

Even though popular discourse has moved away from the standards of Christian devotion and piety seen in the 18th century, the media still finds it easy and expedient to lambast the private antics of politicians. Whilst this article does not intend to exonerate Nixon, Conservative ministers, or Sarkozy, the fact that an under-studied 18th-century thinker offered a model of society which excused such private transgressions suggests that high moral expectations continue to be set for members of the political classes. This notion makes Mandeville's outlook all the more arresting because even in a morally permissive society, he seems to go further than many commentators.

In all three cases, injury to the image of the guilty parties preceded guilty verdicts. Many media outlets perceived Nixon as dishonest and lacking the warmth and human touch seen in other Presidents. On 21st October 1973, the front page of *The New York Times* interpreted Nixon's firing of investigators who had refused to follow his orders as aggressive and upsetting the democratic process. The hedonistic lifestyles pursued by the Conservative ministers were seen as out of touch with social reform and welfare concerns. On 8th November 1993, an article in *People Magazine* entitled 'Ministering to the Needs of the Nation—Yes, yes, yes, yes, yes, Minister!!!' crudely lampooned recent revelations relating to a minister's infidelity.[18] This indicated that, by falling short of the high moral standards it had set, the Conservative Party had trapped itself in an almost tragicomic situation. However, tragicomedy led to wide public anger; in his biography, tabloid newspaper editor Piers Morgan reflected that 'Major brought all these exposés on himself, with that ludicrous 'Back to Basics' speech at the last Tory conference'.[19] Sarkozy's standoffish attitude rankled many cultural and intellectual circles. In February 2008, little over half a year into his presidency, the French newspaper *Le Nouvel Observateur* published a chain of text messages which indicated that a few days into his new marriage, Sarkozy had considered committing adultery.[20] This reinforced the wider interpretation that, with his hedonistic lifestyle, he was out of touch with the morality of ordinary voters, and his popularity quickly slumped.

Mandeville's response to these accusations would be one of indifference. He was aware that the changes wrought by a developing, commercial society were bound to unleash unsavoury aspects of the human condition and even if these were unideal at best and humiliating at worst, he did not believe that rulers needed to be overly image-focused. Instead, Mandeville believed that moral imperfections were a natural part of any personality. As long as they did not directly and specifically undermine good government, they did not undermine the wider, more important version of morality which upheld society.

In the cases of Nixon and Sarkozy, subsequent evidence has indicated that their actions bypassed democratic processes and tarnished aspects of the American and French political systems. Whilst Mandeville can be read as a proto-theorist of morally permissive societies—which kindles appeal across the political spectrum, as his ideas seem to bolster leftist proponents of sexual freedoms and rightist libertarians—this does not mean he gave complete licence to rulers. Imperfections in the private sphere were only permissible if they did not have a malign impact on the public sphere. In his shorter work *Free thoughts on religion, the Church & national happiness* (1720), he defended democracy as the form 'of government' most effectively 'armed against knavery, treachery, deceit'.[21] Therefore, though he did not set as high standards for the leadership class as other Enlightenment-era thinkers including Hobbes and Montesquieu who delineated clear views of a virtuous absolute monarch (*Leviathan*, 1651) and a well-defined division of legislative powers (*The Spirit of the Laws*, 1748), the actions of Nixon and Sarkozy were too injurious to be permissive.

His response to the adultery and cover-ups by Conservative ministers might, however, have been more balanced, however. Outside of the *Fable*, one of Mandeville's most striking pieces of social criticism was *A Modest Defence of Publick-Stews* (1724) in which he argued for a rationalist approach to public brothels in which prostitutes were judged by 'their beauty, or other qualifications'.[22] Whilst many Christian commentators would have railed against the undermining of nuclear family values, it is unlikely that Mandeville would have been similarly critical towards infidelity. Finally, despite the clear hypocrisy of the Conservative ministers, an attribute also evident in the cases of Nixon and Sarkozy, Mandeville believed this cunning and unscrupulous management of public personas was immoral but entirely excusable, as the appropriate deployment of 'flattery' and 'self-love', two of mankind's primary instincts, could be done properly and sensibly for the sake of social stability.[23]

Conclusion

In conclusion, despite his lack of attachment to Christian morality or ethics, Mandeville did not explicitly reject morality. Instead, he had a more pragmatic approach which accounted for human imperfections and saw that, as these had been brought into focus by a commercially flourishing society, they were excusable and even necessary. Whilst he may well have criticised the actions of Nixon, the Conservative ministers, and Sarkozy for undermining political stability and encouraging 'treachery', he would not have had a sensationalist approach to their lapses in private morality as he believed in the careful division between public and private spheres. The primary implication of Mandeville's thought for modern society is that, even though it is imperfect and the behaviour of the political classes regularly disappoints a wide cross-section of citizens, the relative prosperity we enjoy to other historical societies means we should not be overly judgemental. Instead, a more optimistic interpretation of society must go hand-in-hand with an understanding of human fallibilities and even if political intrigue and scandal have the capacity to shock us, our shock must not devolve into reductive moralising.

18 Jane Newman, 'Ministering to the Needs of a Nation', *People Magazine* (London, 8 November 1993) 10.

19 Piers Morgan, *The Insider: The Private Diaries of a Scandalous Decade* (Ebury Press 2005) 38.

20 Charles Balmer, 'Sarkozy drops legal case over SMS story', *Reuters* (London, 19 March 2008) 15.

21 Bernard Mandeville, *Free thoughts on religion, the Church & national happiness* (first published 1720, Oxford University Press 1989) 17.

22 Bernard Mandeville, *A Modest Defence of Publick-Stews* (first published 1724, Oxford 1989) 39.

23 Mandeville (n 2) 41.

Djokovic, the Australian Open, Idiots and Cov-idiots: What would Nietzsche say?

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Had any of the players who competed for the inaugural tennis grand slam of 2022 in Melbourne been *complete* (i.e. sovereign, self-governing) individuals, they would have declared the 'AO' boycott before the tournament started.[2] Not only because of Djokovic, but also because of Renata Voráčová. Not only out of the camaraderie with the two fellow members of the travelling circus which professional tennis (along with all other professional 'spectator' sports) has become, courtesy of the 'contemptible money economy'.[3] Nor because of supporting Djokovic's undoubtedly hard and inevitably controversial choice not to get vaccinated. Not even because the famed AO had fallen easy prey to inconspicuous electioneering by the incumbent government. The *principled individuals* would have abandoned the tournament in light of what the cases of Djokovic and Voráčová inadvertently told us about what we have become.

The boycott, however, was unthinkable. It could never happen, not in a million years. The inverse vision emphatically unfolded as part of a history adorned with the narratives of the 'great success', 'uplifting finale' and reignited 'GOAT' debates. To borrow the self-righteous assertion of Victorian Premier Dan Andrews, echoed by many, 'the Australian Open was bigger than Djokovic, much bigger'.[4] No doubt they were right, although it is less clear whether any of them thought through the repercussions of their emotional and patriotic endorsement of the AO's hyperbole.

It is no secret that we have long since dispensed with the critical gift of unhurried and prolonged contemplation.[5] As a result, we tend to become too wrapped up in today's multitude of political whirlwinds, whether big or small, brief or protracted. Nietzsche warned us about the perils of foregoing the '*vita contemplativa*' and living, instead, 'as if one always 'might miss out on something'. When this happens, he argued, 'hours in which honesty is permitted' become rare, and even when they arrive, we have no energy left for them.[6]

Heeding Nietzsche's warning, we might stop to ponder 'why not?'. Why wouldn't the boycott happen, why couldn't it, should there have been one and, most importantly, what does the highly publicised scandal around Djokovic tell us about ourselves? Admittedly, it has always been a tall order to expect athletes to act as a barometer of collective conscience. It is, however, not without precedent. Sport often ends up caught in the crossfire of politics, which has in recent decades marred and brutalised the Olympic spirit, still vaguely synonymous with the few remaining pockets of uncommercialised athletic endeavour. Still, past athletes have, on occasion, shone an uncomfortable and uncompromising light on the perils of a situation the majority might passively sanction as 'normal'. Jesse Owens did just that in 1936.

1 The author is triple vaccinated, lost his beloved aunt to the virus, does not hold anti-vax views, and is not a Djokovic fan.

2 This article quotes extensively from Nietzsche's unpublished notes. These are assembled in the *Nachlass* and accessed from <http://www.nietzschesource.org>. Notes in the *Nachlass* are organised according to the year, number of the notebook, and number of the notebook entry, e.g. NF-1885(year): 2(notebook) [179] (note).

3 Friedrich Nietzsche, *Untimely Meditations* (first published 1873-76, Cambridge University Press 1997) 'Schopenhauer as Educator' §§4-6.

4 Crystal Wu, 'Dan Andrews says Australian Open is "much bigger than any one person" as Novak Djokovic faces wait over visa stoush' (*Sky News Australia*, 16 January 2022) <https://www.skynews.com.au/australia-news/dan-andrews-says-australian-open-is-much-bigger-than-any-one-person-as-novak-djokovic-faces-wait-over-visa-stoush/news-story/c2a4a0388fc026bf6c28dcfcf97d31f6> accessed 15 February 2022.

5 Cf. Nietzsche's discussion in Nietzsche (n 3) 'Schopenhauer as Educator' §4; 'David Strauss, the Confessor and the Writer' §8.

6 Friedrich Nietzsche, *The Gay Science* (first published 1882, Vintage Books 1974) §329.

Today, inside the fact that the boycott could never happen, hides a small but important secret. It binds us in a manner we prefer to pass over in silence even though we must speak about it. The secret is that we have firmly forgotten the original meaning of the word 'idiot'. These days, when we casually throw around the term 'Cov-idiot', we refer to someone dangerously (almost offensively) weak in their mental and ethical faculties, unable to recognise the blindingly obvious benefits of getting vaccinated. In so doing, we habitually misuse the term or, to be more precise, we utilise its *inverted meaning*.

An 'idiot' (from the Greek ἰδιώτης, or '*idiotes*'), however, is not at all a 'fool' or mentally incapacitated.[7] Neither Aristotle, nor Dostoyevsky, nor Nietzsche thought so.[8] The root adjective ἴδιος ('*idios*') denotes a state of affairs which is 'not shared' or an individual who, akin to a branch torn from the tree, is 'disconnected' from a larger whole, i.e. whose communitarian sensibility has been disabled. In other words, an 'idiot' is simply a '*private person*'.[9] That is, 'idiot' is a designation for an individual whose psychic cord—informing and enabling their sense of the 'communal' and the 'collective'—has been irreparably severed, turning such fragmented human beings into '*dividuums*'. These *dividuums* are those who can be reassembled as the meaningless (in and of themselves) and disposable (Marx would say 'commoditised') cogs of new socio-economic wholes—the vast religious, industrial, commercial, and ideological forms of repressive machinery.[10]

Much as in ancient Athens 'idiot' denoted a person positioned, by choice or fortune, outside of the *polis* (i.e. a form of disenfranchisement) and made weaker and more vulnerable on account of such externalisation, today the same term denotes the *basis* on which we are re-incorporated into society—ie, as idiots.[11] Put slightly differently, we are incorporated into society as subjects who have internalised our own disenfranchisement from the community and from the communal, and therefore as inevitably of lesser value than individuals. Nietzsche would remind us that two other forms of reactive power, namely religion (meaning Christianity) and slave morality, operate according to exactly the same principle, the 'reversal of the evaluating glance', in terms of creating obsequious subjectivity.[12]

Don't get me wrong, today's 'private persons' are invariably clever, educated, sophisticated and endowed with high morals. Yet, having been moulded into 'idiots', they have unwittingly become vulnerable and susceptible to being fooled and manipulated, without even realising this.[13] Private persons arranged into a 'society' serve as a powerful repellent of the few non-idiots from the new configuration of the *polis*.[14]

The behaviour and the decision-making of idiots is different from that of individuals.[15] Idiots are powered and informed by a fundamentally different algorithm: one of constantly chasing after and maximising (but never fulfilling) the elusive personal marginal utility, in the form of the abstract notion of happiness, a 'bubble' that requires continual inflation. So much so, that 'dividuums' come to internalise and normalize their idiocy in much the same way, Nietzsche explains, as we have internalised the *valuations of slave morality* which inhibit *individual autonomy* and privilege the *collective welfare of idiots* as the 'gold standard' of good citizenship.[16]

Tsitsipas, the Greek tennis ace, said that Djokovic made 'the majority' look like 'fools', and he was absolutely right.[17] 'Fools', however, in what sense? Did Tsitsipas inadvertently express the sentiment of the righteous idiotic majority that lacks an authentic collective identity which could extend beyond the mere slogans 'expanded into a political theory'?[18] Echoing him, Martina Navratilova, a fellow idiot, suggested that Djokovic 'should have taken one' (ie, the vaccine) 'for

7 Only in English and only by the late 14th-early 15th century does 'idiot' become a designation for the 'mentally deficient' (Oxford English Dictionary).

8 Cf. Aristotle, *The Politics and The Constitution of Athens* (Cambridge University Press 1996) 1253[a]. His two main claims are that man is by nature social (or political) and that 'the whole must necessarily be prior to the part; since when the whole body is destroyed, foot or hand will not exist except in an equivocal sense…'. Dostoyevsky presents a masterful exploration of this subject in *The Idiot* (1868-69). Nietzsche echoes Aristotle's logic, arguing that community is 'a body on which no limb is allowed to be sick' (NF-1888:15[1]) as well as exploring its permutations in modernity with recourse to Dostoyevsky's psychological insights. Cf. also Friedrich Nietzsche, *Human, All Too Human* (first published 1878-80, Cambridge University Press 1996) 'The Wanderer and His Shadow' §33; Friedrich Nietzsche, *The Antichrist* (first published 1888) in *The Portable Nietzsche* (Walter Kaufmann ed, Penguin Classics 2008) §16.

9 *Precisely this connotation* of 'idiot' is used *exclusively* throughout the article. Should you find the usage of 'idiot' distressing, simply replace the offending term with the placating 'private person' as you feel necessary. However, it is recommended to take the cue from Nietzsche's treatment of the similar *semiotic challenge* to modern sensibility as was posed by the discussion of the highly uncomfortable subject of 'slavery'. Nietzsche, who was well aware that the modern world anxiously avoided the word 'slave' (cf. his 1871 essay 'The Greek State'), nevertheless challenged our ability and willingness to do anything about the *substance* of 'slavery', when we cannot even handle the *sound* of the word (cf. NF-1871:10[1]). So, perhaps, see how much 'offence' you can take before boiling over with righteous indignation – one way or another, this exercise will tell you something about yourself.

10 Cf. Friedrich Nietzsche, *Human, All Too Human* (first published 1878-80, Cambridge University Press 1996) §57; NF-1885:2[179]; NF-1887:10[17]. Cf. also Richard Mulgan, 'Aristotle and the Value of Political Participation' (1990) 18(2) Political Theory 195-215; Julian Young, *Individual and Community in Nietzsche's Philosophy* (Cambridge University Press 2015) 5-10; Raymond Geuss, *A World Without Why* (Princeton University Press 2014) 231.

11 Cf. Nietzsche (n 10) §§472, 481, 'The Wanderer and His Shadow' §33.

12 Cf. Friedrich Nietzsche, *On the Genealogy of Morality* (first published 1887, Cambridge University Press 1994) I §10; NF-1881:11[73]; NF-1887:10[135]; NF-1888:14[9].

13 Cf. NF-1886:5[71]; NF-1888:15[42]. Cf. also the definition of 'idiot' in *Brockhaus and Efron Encyclopedic Dictionary* (Brockhaus-Efron 1890) <http://www.vehi.net/brokgauz/index.html> accessed 15 February 2022.

14 Cf. NF-1881:11[185]; NF-1888:14[91].

15 For the purposes of this discussion, we leave out the possibility highlighted by Aristotle that an 'idiot' could also be a 'god'; cf. Aristotle (n 8) 1253a 27–29. Nietzsche, likely echoing Dostoyevsky, strongly disagreed with this Aristotelian possibility when discussing Jesus; cf. NF-1888:14[38]. Dostoyevsky makes this point in *The Idiot* through the image of Prince Myshkin.

16 Cf. Nietzsche (n 10) §45, 'The Wanderer and His Shadow' §276; Nietzsche (n 12) I §§4-5. Nietzsche also suggests that 'wherever slave morality predominates, language shows a propensity for the words "good" and "stupid" to edge closer together'; Friedrich Nietzsche, *Beyond Good and Evil* (first published 1886, Cambridge University Press 2001) §260.

17 Harry Latham Coyle, '"It makes the majority look like fools" – Stefanos Tsitsipas slams Novak Djokovic for "playing by his own rules"' (*Eurosport*, 13 January 2022) <https://www.eurosport.co.uk/tennis/australian-open/2022/it-makes-the-majority-looks-like-fools-stefanos-tsitsipas-slams-novak-djokovic-for-playing-by-his-ow_sto8707032/story.shtml> accessed 15 February 2022.

18 Friedrich Nietzsche, *Nietzsche Contra Wagner* (first published 1888) in *The Portable Nietzsche* (Walter Kaufmann ed, Penguin Classics 2008) §7.

the team'.[19] The embattled Australian government, justifying their decision to deport Djokovic after a protracted theatrical performance that all but revitalised the notion of the 'kangaroo court' and ended up dramatically invoking the ghosts of 'civil unrest', stated with unwavering confidence that they acted in the 'public interest'.[20]

The curious thing is that all of Navratilova, Tsitsipas and the Australian ministers genuinely believed that they spoke on behalf of a community: the tennis community, the Australian nation, humankind even. Using Covid as the new universal leveller, they believed they spoke on behalf of the 'greater good' in the firmly Benthamite/Millean sense. The kind of 'good' that extends beyond the notion of mechanical compliance with the rules. The kind of 'good' that should appeal to our ethical core notwithstanding that the chief functionality of the latter has long since been replaced with the plight of the idiot, powered by the totalising drive for equalisation intolerant of difference and thirsting for unanimity at any cost. Incidentally, Adam Smith thought that agents acting to further self-interest, without either 'knowing it' or 'intending it', helped to advance the 'interest of society'.[21]

One thing Smith overlooked and Nietzsche problematised was how the nature of collective interest may evolve following the reconfiguration of individuals into idiots and their subsequent re-incorporation into society. Nietzsche was weary that such 'living for others in egoism'[22] would only 'conceal knavery and harshness'[23] in the same way that 'public opinions' only serve to hide 'private indolence'[24], and by so doing aid in weaponizing the vindictive drives of the idiotic multitude.[25] Reinforcement of such ghostly yet militant collective identity, stitched together by exasperation and *ressentiment*, was on full display in the 'no holds barred' approach by the Aussie government in the pre-election fight for their idiots' hearts and minds. Djokovic, in the wrong place at the wrong time, ended up being precisely the right person, offering a once in a lifetime gift to the politically fraught rhetoric of the 'democracy of concepts [that] rules in every head—many together are master: a single concept that wanted to be master has crystallised in an "idee fixe"'.[26]

Redolent though it may seem, even Smith would agree that 'idiot' does not necessarily designate someone of inferior intelligence.[27] Rather, it denotes someone who is (liable to be) manipulated on account of having been placed into and fully accepted the context (and the consequences) of acting only out of one's—presumed autonomous and enlightened—self-interest, albeit one that is no longer informed by the authentic sense of the 'communal' or the 'collective' and, for that reason, unable to find fulfilment. The 'collective' now connotes an entirely abstract construct, hollow and lacking substance. It no longer allows for the possibility of '1+1 > 2', where the 'collective' or 'communal' transcends the individual without trumping them. The present day 'collective' is a simple sum of private egoisms, each acting in their own self-interest. Crucially, however, each 'private person'—a dividuum, or idiot—is a vastly diminished version of the 'individual', and the sum of 'private persons' invariably represents a far lesser magnitude than the fellowship of individuals. The 'atomistic chaos' of modern society lacks the ethos and material necessary for building the 'new form of community'[28] ('*Gemeinschaft*') of truly 'free individuals'[29], which would be a 'fellowship rather than the flock'.[30] As a result, Nietzsche argues, the collection of 'atomistic individuals'[31] does not add up to a 'collective individual'.[32] When we become incorporated as private persons, we trade *individual autonomy* for the *collective welfare of idiots*. Though we may be adorned with the labels of equality, freedom, and dignity, we effectively surrender the right to make principled choices. The latter, Nietzsche tells us, is not at all a 'private matter'.[33]

The assemblage of private persons is far weaker, more vulnerable, and politically impotent beyond the periodic hysterical outpourings of *ressentiment*, the 'signs of the lowest and most absurd culture'.[34] The mass of 'private persons' will never win a war. It will never build anything worthwhile, let alone guarantee a stronger future. It will, however, happily submit itself to any coercion, just as long as this subjection is sublime enough and doesn't hurt too much, allowing private persons to bask in the oblivious trinketry of the present moment.[35] Having undergone this transformative journey 'at the freezing point of the will'[36], private persons lackadaisically dwell in the 'self-created world of opinions',[37] no longer able to detect 'the weight of the chains'.[38] Zarathustra forewarned that 'even a prison' of slave morality would 'seem like bliss' to the 'restless people', who can only 'enjoy their new security' in its inescapable nets.[39]

The trouble is that any form of 'mass idiocy', by amplifying collective 'moral effects', invariably creates fertile ground for and becomes the conduit for the development of fascism and tyranny, which leverage 'the power that lies in unity of popular sentiment, in the fact that everyone holds the same opinions'.[40] Nietzsche argues that the 'private lazinesses' hidden behind 'popular sentiment' come at an extremely high price: they turn the masses into the accomplices of the very crimes they think they help safeguard against.[41] The tyranny of words, idioms, ideas and opinions, once embraced by

19 Tom Parsons, 'Novak Djokovic told to "take one for the team" as Martina Navratilova weighs in on debacle' *Daily Express* (London, 10 January 2022) <https://www.express.co.uk/sport/tennis/1547560/Novak-Djokovic-visa-Martina-Navratilova-Australian-Open-Roger-Federer-Rafael-Nadal> accessed 15 February 2022.

20 Ben Doherty, 'Novak Djokovic visa: Australian minister Alex Hawke says risk of 'civil unrest' behind cancellation' *The Guardian* (London, 15 January 2022) <https://www.theguardian.com/sport/2022/jan/15/novak-djokovic-visa-australian-minister-alex-hawke-says-risk-of-civil-unrest-behind-cancellation> accessed 24 June 2022.

21 Adam Smith, *The Theory of Moral Sentiments* (first published 1759, Oxford University Press 1976) 183.

22 Nietzsche (n 10) §1.

23 ibid §443.

24 ibid §482.

25 Cf. ibid 'The Wanderer and His Shadow' §33; NF-1887:10[113].

26 ibid 'The Wanderer and His Shadow' §230.

27 Cf. Smith (n 20) Ch. 3, Section 3, 'Of Self-Command'.

28 NF-1883:16[50].

29 NF-1880:8[61].

30 NF-1882:4[48]. Cf. the excellent discussion on this point by Vanessa Lemm, *Homo Natura* (Edinburgh University Press 2020) 176-177.

31 NF-1882:4[83].

32 Nietzsche (n 10) §94.

33 Friedrich Nietzsche, *Daybreak* (first published 1881, Cambridge University Press 1997) §9; Nietzsche (n 3) 'Schopenhauer as Educator' §§1-2.

34 NF-1888:14[38].

35 Cf. Nietzsche's discussion in Nietzsche (n 3) 'Schopenhauer as Educator' §4; Nietzsche (n 10) 'The Wanderer and His Shadow' §286; Nietzsche (n 12) 'Preface' §6; Friedrich Nietzsche, *Ecce Homo* (first published 1888) in *Basic Writings of Nietzsche* (Walter Kaufmann ed, Modern Library 2000) 'Why I Am a Destiny' §5.

36 Nietzsche (n 10) §349.

37 NF-1887:11[341].

38 Nietzsche (n 10) 'The Wanderer and His Shadow' §10.

39 Friedrich Nietzsche, *Thus Spoke Zarathustra* (first published 1883-5, Random House 1954) IV 'The Shadow'.

40 Nietzsche (n 10) §472.

41 ibid §482.

the multitude of idiots, soon becomes transformed into a real and potent weapon of reactive power: tyranny by the people, of the people and for the people.[42] Except that these people—akin to the Homeric 'lotus eaters'—have lost, forgotten, or put to sleep their meaning as individuals.[43] They have traded their *right to choose* as autonomous individuals in exchange for the chimaera of private citizenry, for the illusion of a social construct 'in which everyone enjoys their own social 'contract'.[44] They have effectively agreed to subordinate themselves to totalising oppressive drives, having squandered their ability and credibility to resist them. These idiots may occasionally develop a faint sense that they are being fooled and yet they are powerless 'to not be fooled', thus only exacerbating their predicament.[45] They have become the 'fooled ones', and we know well the sort of things the fooled can end up sanctioning and even eagerly participating in, believing all along that they are playing their part in bringing about the greater good.[46]

Viewed in this context, Djokovic's visa cancellation and his subsequent deportation were acts by the government acting 'in the public interest' of idiots: ensuring that idiots remain just as they are, and the bliss of idiocy remains unperturbed, for its veneer, concealing myriads of 'subterranean demons and their knavery', tends to be thin and fragile.[47] That is where the contradiction lies, inverting reality and distorting valuations. This, Nietzsche—following in Aristotle's footsteps—suggests, is where we ought to start looking for answers.

Many may argue that comparisons between the AO of 2022 and the Berlin Olympics of 1936 are misplaced. For the most part, I would agree. But in one important respect, namely that of the perilous complacency which has rendered us mere spectators in face of the pervasive rise of the repressive social control systems, the parallels could hardly be more merited. Make no mistake, 'Let's turn the world into one hospital or penitentiary' (otherwise known as 'build back better') is a clever slogan. Unlike many others, it represents a realistic and achievable target.[48] It feeds on the energy we all, mostly unwittingly, lend it whilst we appear to be craving and beckoning it with nothing but the 'good intentions' of our hearts and minds. Alas, Nietzsche cautions that when individual sovereignty is made into a private affair 'an abundance of dragon's teeth are sown' at the same time.[49] The more we demand that general security be guaranteed, 'the more do new shoots of the ancient drives to domination assert themselves'.[50]

We are no longer dealing with an isolated case of the 'lunatics taking over the asylum'. Rather, the rapid and pervasive spread of idiotism resembles a situation in which the entire world, as though consumed by irredeemable guilt, has obsequiously agreed to place itself in the same woke asylum just so no idiot would any longer feel out of place. That is why the news of Djokovic's deportation has caused many an idiot to experience an uplifting, if fleeting, sense of exaltation. Not being discriminating enough in what we wish for, not daring to be individuals (i.e. un-idiots and anti-idiots), we may sooner or later have our wish granted, if only to prove right either the gloomy prophet Silenus[51] or Plato, who warned that the penalty idiots end up paying is none other than to find themselves ruled by evil.[52] This is important because – and in this we can be certain—the machine will not stop harvesting our freedom in the name of 'unanimity', as long as we continue to submit ourselves to it 'as material for heating':

> Mankind mercilessly employs every individual as material for heating its great machines: but what then is the purpose of the machines if all individuals (that is to say mankind) are of no other use than as material for maintaining them? Machines that are an end in themselves—is that the *umana commedia*?[53]

However, 'precisely because we are able to visualise this prospect, we are perhaps in a position to prevent it from occurring'.[54] For this reason, we need a Jesse Owens to emerge from the *cirque macabre* enveloping us. Not as a solution, not as an Übermensch, but as a flicker of light and an instant of 'counter-reckoning' informing the sense of our 'counter-action'—to 'put a stop to the injury by putting a stop to the machine'.[55]

42 Cf. Victor Klemperer, *The Language of the Third Reich* (first published 1947, Bloomsbury Academic 2013) 43-5. Cf. also Plato's discussion on the creation of 'the fiercest extremes of servitude' from 'the height of liberty'; Plato, *The Republic* (Penguin Books 1905) 563[a]-564[a].

43 The image of the 'Lotus eaters' is used by Plato in his discussion of the 'democratic man' – i.e. private person lacking in willpower and judgement – in Plato (n 41) 561[e]-562[d]. Plato's reference is to Book IX of Homer's *Odyssey*.

44 NF-1888:14[197].

45 NF-1886:5[71].

46 Cf. Adam Smith on the 'invisible hand' – a euphemism for the magic wand that transforms individuals into idiots; Smith (n 20) 183. Nietzsche's assertion that it is always 'the invisible hands that torment and bend us the worst' (Z: I, *Tree*) appears imminently more accurate; Nietzsche (n 38) I 'The Tree on the Hill'.

47 Nietzsche (n 10) §111; NF-1887:10[113].

48 Cf. the discussion in Nietzsche (n 6) §329; NF-1886:4[7]; NF-1888:14[182].

49 Nietzsche (n 10) §472.

50 Nietzsche (n 10) 'The Wanderer and His Shadow' §30.

51 Cf. Friedrich Nietzsche, *The Birth of Tragedy* (first published 1872, Vintage Books 1967) §§3-4. Leonard writes beautifully about this 'frightening wisdom' of Silenus in Miriam Leonard, *Tragic Modernities* (Harvard University Press 2015).

52 Plato (n 41) 347c.

53 Nietzsche (n 10) §585. Consider the latest cynical attempt to shame Djokovic into vaccination by the UK's Health Secretary, Mr. Sajid David, who suggested that it is only the millions of vaccinated spectators who make it possible for Djokovic to 'get back to play the sport in front of them and *earn millions again, it's ok for him to have them take the vaccine, but the vaccine is not OK for him*' (author's emphasis); Jennifer Meierhans, 'Novak Djokovic is urged by the UK health secretary to reflect on his Covid jab refusal' (*BBC News*, 15 February 2022) <https://www.bbc.co.uk/news/uk-60391876> accessed 21 February 2022.

54 Nietzsche (n 10) §247.

55 ibid 'The Wanderer and His Shadow' §33.

Notes on Counter-Archives: 'Recovering' Queer Memory in Contemporary Art

Sophia Dime

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Introduction

In Zoe Leonard's photograph of Fae Richards and June Walker, two women wrap their arms around each other and gaze lovingly into the other's eyes. The caption dates the photograph to 1955, Richards's forty-seventh birthday at their shared home. It reads, 'Fae and June met while Fae was singing at the Standard. June sat at a stageside table every night for months, always with a white rose for Fae. By 1947, they were living together, and they lived together until Fae's death'.[1] The photograph itself evinces its age through its weathered appearance: the bottom right-hand corner is ripped and the surface is lined with scratches. The scene is mundane, yet two Black lesbians living and loving happily together in the 1950s is extraordinary.

Fae Richards and June Walker never existed. They were fabricated by Cheryl Dunye to account for a history written out of the archives. If 2SLGBTQ+ people do appear in the dominant archive, it is only through a heteronormative gaze that either condemns or erases them.

The absent archive has always posed epistemological and political challenges. Marginalised communities—those that have been strategically erased from the dominant archive—are left with little history to draw on in the struggle of resistance. The archive, as both a theoretical and material locus of power, is troublesome for marginalised groups that are alienated from vectors of power. Saidiya Hartman's seminal essay, 'Venus in Two Acts', deals with these issues in relation to archives of slavery. Hartman illustrates how histories of erasure necessitate different archival methods. In the essay, Hartman introduces the notion of 'critical fabulation:' using archival research alongside fictional narratives to rewrite and give new life to voices that are absent from the dominant archive. Critical fabulation is the process of working *with* and *against* the archive in order to transgress and extend its borders, thereby destabilizing the imbued authority of the archive. More specifically, critical fabulation elucidates what, by virtue of the archive, has failed to survive. In this essay, I will extend critical fabulation to the realm of contemporary art in order to conceive of 2SLGBTQ+ contemporary artists as archivists of the queer community.[2]

I will interrogate the role of critical fabulation in creating what I will call a 'counter-archive', an archive that subverts authority and practices of power. I will question how practices of remembrance differ for a marginalised group from the practices of the traditional institutional archive. That is, as accounts of resistance, what modes of representation are taken up by queer counter archives? I will reveal how histories of erasure necessitate creative and imaginative archival methods, exhibiting how contemporary queer artists mine the archive in order to disrupt the authority granted to it as a speaker for History. I will situate my analysis in relation to the works of Zoe Leonard and Cheryl Dunye, Wu Tsang, and fierce pussy;[3] all of whom produce a counter-archive in their work through their use of experimental archival methods and critical fabulation.

1 Cheryl Dunye and Zoe Leonard, *The Fae Richards Photo Archive* (Artspace Books 1996).

2 Throughout this paper, I will use queer and 2SLGBTQ+ interchangeably. Although 'queer' is quite widely accepted as an umbrella term for the community (because it encompasses both gender and sexuality, as well as a deviation from heteronormative structure), it is important that we recognize the historical and ongoing harm that the term continues to cause. Many members of the 2SLGBTQ+ community are uncomfortable with the term because it has been historically weaponized against 2SLGBTQ+ people. It is important to be aware of how the reclamation of language is often highly contested and continues to be harmful.

3 Zoe Leonard is also a founding core member of fierce pussy.

In 1996, Zoe Leonard and Cheryl Dunye published *The Fae Richards Photo Archive* alongside Dunye's film, *Watermelon Woman*. Dunye's 'documentary' outlines her search into the history of an African American lesbian actress, Fae Richards; or, as she was billed in movies, the 'Watermelon Woman'. Richards, however, was entirely fabricated by Dunye in order to supplant a lost history. Leonard shot photographs in which Dunye's friends pose as Richards, as well as her friends, lovers, and family. In doing so, Leonard blurs the line between Dunye's personal archive and that of Richards. Leonard and Dunye, thus, use critical fabulation to give voice to erased and forgotten Black lesbians. In doing so, they reveal the extent to which fiction is a necessary tool when archiving queer culture, and propose a new understanding of truth, memory, and the purpose of the archive.

Tsang, as a transgender woman, similarly interrogates which histories are carried forward, and by whom. In this paper, I will focus on her work for the 2012 Whitney Biennial: an installation entitled *Green Room*. *Green Room* functioned as a dressing room for Biennial participants and was also opened to museum visitors when not in use. Inside, Tsang had constructed a two-channel video environment, with the two screens placed on perpendicular walls. She screened her documentary *Que Paso Con Los Martes?*, which recounts the story of a transgender woman who immigrated from Honduras to Los Angeles and found community in a local Latino gay bar, the Silver Platter. Tsang's installation takes inspiration from the Silver Platter in its decor to invite viewer participation in the three-dimensional environment. Tsang, then, explores ways of recording queer history through a documentary-like style while, equally, implicating her audience through the fabricated setting. She draws attention to the distinctions between private and public space, as well as the infiltration of queer safe spaces. I will argue that Tsang's dissolving and blurring of boundaries—the public and private; the fabricated and the real; two-dimensional and three-dimensional—is necessary to the production of a queer counter-archive.

The final group of artists I will be grounding my analysis in is fierce pussy: an artist collective formed by queer women in 1991. Their emergence in the midst of the AIDS crisis informs their project to advocate for 2SLGBTQ+ rights and visibility through their work. Their installations were often public and site-specific, using unconventional materials such as billboards, street signs, and toilet paper in order to integrate their message into various facets of everyday life. I am interested in how their work is suffused with activism, mourning, and memorialization. I will centre two of their projects: *For the Record* and *gutter*. Both engage in critical fabulation by different means: *For the Record* imagines a future for those who died from AIDS; *gutter* edits and rewrites lesbian pulp fiction novels from the 1940s to the 1970s. fierce pussy, therefore, throws into question the heteronormative lens through which the archive has been constructed.

To begin, it is necessary to outline what is at stake in this project. Archives are vital for ongoing queer survival and to our lives in the present.[4] A queer counter-archive provides the grounds for imagining queer futures and helps to situate queer identity—both past and present. Nayland Blake's article, 'Curating in a Different Light', reveals how queer people do not have access to a private history, and hence require a public one. Blake writes, 'Queer people are the only minority whose culture is not transmitted within the family'.[5] In that vein, the 2SLGBTQ+ community has needed to find new strategies to uncover and transmit our histories. Historical erasure and ongoing systemic oppression drastically impacts the ability for 2SLGBTQ+ people to accept and live our queer identities. The past has a continuous hold on, and shapes, our present. To live in the reverberations of this violence, as queer bodies, means to feel those effects and affects acutely. An artistic revisioning of histories of erasure, then, fosters precedence for the ongoing struggle to live one's queer identity. Thus, a counter-archival project reimagines the past in order to create a livable present, and is integral to both individual and collective processes of healing.

Memory, Mourning, and Marginalisation

The archive is the ground upon which knowledge is formed and hierarchized; it reveals choices of inclusion and exclusion that are linked to access to power. I will ground my definition of the archive, and its relationship to power, in Jacques Derrida and Michel Foucault's respective analyses. Derrida and Eric Prenowitz, in the seminal text, 'Archive Fever: A Freudian Impression', trace the Western archive back to Ancient Greece and the rule of law. The term *archive* derives from the Greek *arkheion*, about which Derrida writes, 'initially a house, a domicile, an address, the residence of the superior magistrates, the archons, those who commanded'.[6] The etymological root of the archive, then, has two meanings: first, as a structure that houses objects and documents, and second, as the residence of those who command and speak on behalf of the law. The law is the place where people are recognized as agents or not and where personhood is made legible. Therefore, the archive is the house of power and holds authority over memorial processes.

Foucault, in a similar way, locates power in the archive in his essay, 'The Historical *a priori* and the Archive'. Likewise, Foucault describes the archive as the constraints imposed on what is sayable, or as he calls it, 'enunciable'. That is, the archive governs the conditions of power that we inherit. The archive promises agency, and yet, at every turn, denies it. It suggests control over the ordering processes, but only so long as they adhere to historically contingent, pre-existing rules. Foucault states the following: 'The archive is first the law of what can be said, the system that governs the appearances of statements as unique events'.[7] Hence, the archive reveals the conditions of power in which we find ourselves. It is a site in which we can pose questions about how we inherit and perpetuate power. Moreover, the archive is both the system that exercises control over *what* can be said, as well as the processes surrounding *how* things are understood. The archive, therefore, is not merely an institution or a site, but rather it is the practice of power.

Accordingly, when I refer to a counter-archive, I mean processes that subvert the authority and the ordering processes of the traditional archive. It is necessary to leave this definition vague if we are to resist replicating the methods of the traditional archive. As elucidated by Foucault, the archive imposes a set of conditions upon the sayable in order to preserve discourse that aligns with dominant power structures, casting aside challenges to those structures. In this case, brevity and linearity factor into the reproduction of power because they help create a self-contained narrative and serve

4 To situate my own perspective, I want to call attention to my identity as a white, Jewish, non-binary lesbian. Throughout this paper, I will refer to the 2SLGBTQ+ community in relational language.

5 Nayland Blake, 'Curating in a Different Light' in David J Getsy (ed), *Queer: Documents of Contemporary Art* (MIT Press 2016) 120.

6 Jacques Derrida and Eric Prenowitz, 'Archive Fever: A Freudian Impression' (1995) 25(2) Diacritics 9.

7 Michel Foucault, *The Archaeology of Knowledge and the Discourse of Language* (Pantheon Books 1972) 129.

to separate the past from the present. Rather than utilising the archive's documentation processes—that inevitably efface certain histories—artists engage in creative projects that reconstitute our understanding of the archive. James E Young's essay, 'The Counter-Monument: Memory against Itself in Germany Today', is useful for understanding what I mean when I say 'counter-archive'. Young explores the role of counter-monuments in memorializing the Holocaust and the emergence of the memorial aesthetic in post-war Germany. Traditional monuments tend to memorialize victory, which brings Young to question the way in which Germany has memorialized state-enacted atrocities and mass murder. The traditional monument evades memory through its clear symbolism and lack of ambiguity, thereby doing the memory work for the viewer. The monument, then, becomes a figment of the past and immediately falls outside of our frame of perception.

The counter-monument, on the other hand, is concerned with the ongoing hold the past has on shaping our present. In relation to the long 'Sisyphean' debates about how best to commemorate loss of millions of Jewish lives during the Shoah, Young writes, '[T]he surest engagement with memory lies in its perpetual irresolution'.[8] That is, resistance to a fixed notion of memory creates new spaces of memorialization. The counter-archivist, then, is highly conscious of the challenges they are posing to our ways of knowing and of enshrining certain histories. Departing from the traditional archive's false claims to objectivity (that conceal its own self-interests in narratives of power), the counter-archive is self-aware of its inability to objectively capture said events.

Consequently, the counter-archive engages the viewer by fostering dialogue. In a similar fashion to Young's counter-monument, the counter-archive implores the viewer to engage in memory work through investment in its own ambiguity and rejection of totalizing narratives. It denies simple resolutions and plain conclusions. Its aim is not to provide answers, but rather to raise questions about how archives have been wielded as tools of selective remembrance and violent oppression. Writing about the counter-monument of the *Harburg Monument against Fascism*—which invites the public to violate the monument by writing on it their own names and committing to stand against fascism—Young elucidates:

> [I]ts aim is not to console but to provoke; not to remain fixed but to change; not to be everlasting but to disappear; not to be ignored by its passerby but to demand interaction; not to remain pristine but to invite its own violation and desecration; not to accept graciously the burden of memory but to throw it back at the town's feet.[9]

Counter-archives question the validity of the traditional archive and its omniscient power. They propose that it is not just *what* we remember that is significant, but equally *how* we go about remembering. Young argues that the traditional monument impedes memory precisely because the clarity and authority of the memorial does the work for the viewer, thereby absolving the public of their own responsibility to remember. They foster a view of history that is unambiguous and therefore not a site for negotiation or contestation. The traditional memorial, much like the traditional archive, promotes engagement within a rigid, normative structure. It rejects ambiguity, precisely because nuance inhibits its own project. Thus, the archive constructs narratives that adhere to and are vested in narratives of power.

Seeing that the counter-archive is concerned not solely with memory, but also with the act of remembering, questions of form are inseparable from the project of remembrance. Indeed, art facilitates questions about the relation between aesthetics and ethics. I will address, in this case, how the language of history and the language of art interact. The task of many contemporary artists is to challenge rather than to affirm cultural rules. Zoe Leonard, Cheryl Dunye, Wu Tsang, and fierce pussy, then, all produce counter-archives by throwing into stark relief the forms and practices of the archive. These artists open up new possibilities for thinking through our queer past, present, and future through their artwork. When art functions as an archival object, moreover, it suggests that artifacts collected and preserved in archives are not innocent but are, rather, charged objects. These artists all blur the boundaries between the artistic and the archival, history and imagination, and fabrication and fact.

Although critical fabulation necessitates invention within a narrative, we must be wary of covering up and erasing loss. When playing with the tools of the archive, one must be acutely aware of the risk of replicating its structures of power. The paradox of critical fabulation, then, is that of writing a narrative, while simultaneously indicating loss and silence. Hartman writes, 'Narrative restraint, the refusal to fill gaps and provide closure, is a requirement of this method'.[10] In this case, leaving space for loss reminds the viewer that critical fabulation cannot offer closure to the dead and to those who suffered in the past. A refusal to romanticise a violent history of oppression is also imperative. Although the project of critical fabulation is based on individual and community healing—'Loss gives rise to longing, and in these circumstances, it would not be far-fetched to consider stories as a form of compensation or even as reparations, perhaps the only kind we will ever receive'— absence is a reminder that this project cannot fundamentally undo an extensive history of violence and oppression.[11] Hartman's refusal to expound how to give voice to a profound silence suggests that there is no singular, or prescriptive way, to treat such contradictions. Indeed, the authority on how to write history and loss is central to the archive's own consolidation of power. Consequently, critical fabulation requires the nuance and ambiguity that the traditional archive refutes in its claim to objectivity.

The necessity of maintaining loss as loss, nonetheless, does not undo the reparative nature of this project. The paradox of reflecting a marginalised community back to itself, whilst presenting an abyss, fosters a complex and interesting interaction between the viewer and the artwork. Counter-archives, thus, resist being relegated to the past because they actively engage with and challenge our present. Contemporary artists who create a counter-archive disrupt our conventional relationship to the archive because they force critical engagement, and radically oppose passive acceptance. In promoting a non-linear view of history, counter-archives mimic the traumatic structure that resists a progressive and linear process of healing. Art in the public sphere encourages a stumbling upon it that simulates the experience of flashbacks and of shock that resists stability of meaning. Hence, counter-archives assert the ceaseless irresolution of our own engagement with memory. In doing so, they reckon with the ongoing hold that the archive has on our lived present.

8 James E Young, 'The Counter-Monument: Memory against Itself in Germany Today' (1992) 18(2) Critical Inquiry 270.

9 ibid 277.

10 Saidiya Hartman, 'Venus in Two Acts' (2008) 12(2) Small Axe 12.

11 ibid 4.

Ann Cvetkovich's text, *An Archive of Feelings: Trauma, Sexuality, and Lesbian Public Cultures*, explores the way that archives of trauma often resemble 2SLGBTQ+ archives. Both archives similarly rely on ephemerality and memory, which in their very transience and unreliability, challenge the concept of the archive:

> Trauma challenges common understandings of what constitutes an archive. Because trauma can be unspeakable and unrepresentable and because it is marked by forgetting and dissociation, it often leaves behind no records at all. Trauma puts pressure on conventional forms of documentation, representation, and commemoration, giving rise to new genres of expression, such as testimony, and new forms of monuments, rituals, and performances that can call into being collective witnesses and publics. It thus demands an unusual archive, whose materials, in pointing to trauma's ephemerality, are themselves frequently ephemeral.[12]

Cvetkovich notes that sites of grief and trauma are radical spaces, and she questions how we might begin to inhabit these spaces and reclaim agency through them. She begins by arguing for a wider view of trauma, one that moves beyond the extreme and those who experience trauma directly, and towards trauma's seemingly mundane reverberations and those on the border of trauma. fierce pussy—as lesbians on the edge of the AIDS crisis—encapsulate the experience of trauma through their positioning as both insiders and outsiders. Consequently, I will question how creative responses to trauma help us to grapple with immense pain.

To reiterate, Cvetkovich points to the affective power of a 2SLGBTQ+ archive. She illustrates how queer archives position themselves in opposition to the traditional archive because they do not solely document and yield knowledge but, equally and as importantly, feeling. Cvetkovich writes, 'Gay and lesbian archives address the traumatic loss of history that has accompanied sexual life and the formation of sexual publics, and they assert the role of memory and affect in compensating for institutional neglect'.[13] In this case, personal testimony is vital to the production of a queer counter-archive, precisely because it recentres feelings of love and loss that are integral to the queer experience. Thus, an emphasis on feelings and affects provides the grounds for fostering a queer public memory.

The Feigned Archive: Zoe Leonard and Cheryl Dunye's *The Fae Richards Photo Archive*

Leonard and Dunye's *The Fae Richards Photo Archive* is a record of Black lesbian absence from the archive. Dunye felt disillusioned with the missing presence of Black lesbians in the archive and *Watermelon Woman* chronicles her search for evidence of Fae Richards: the fictional persona that she created to fill this lack. Leonard staged archival material to create evidence of Richards's life for Dunye's film, thereby blurring the distinction between fact and fiction (a dichotomy that the dominant archive is heavily invested in). In the film, Dunye searches for evidence of Richards in the Centre for Lesbian Information and Technology (CLIT), a fictive archive based upon the Lesbian Herstory Archives in New York. The ordering processes of the archive, then, construct narratives and shape the way we make knowledge claims. In opposition to the dominant archive, however, a queer counter archive insists on different ordering processes.

In dialogue with Julia Bryan-Wilson, 'Imaginary Archives: A Dialogue', Dunye discusses *The Fae Richards Photo Archive* and *Watermelon Woman*. She states, 'the queerest things about archives are their silences—their telling blanks and perversely wilful holes'.[14] These 'holes', gaps, and silences that Dunye articulates resonate with Hartman. Hartman, in this case, questions how we can bring these impossible stories to the surface. Impossible in the sense that, as much as we might long for such histories, we can never know them. Giovanna Zapperi's essay, 'woman's reappearance: rethinking the archive in contemporary art—feminist perspectives', explores feminist reworkings of the past through contemporary art. Zapperi expresses the impossibility of Fae Richards: 'Fae Richards can only exist thanks to a present-lesbian gaze that is looking at her through the lenses of the liberation movements'.[15] That is, Richards—as a figure documented in the archive—can only exist because activism and political change allowed Dunye, as a lesbian and as an African-American, to be in a position where she could articulate a life for Richards. Hence, the film creates a Black lesbian counter-archive in two ways: in its documentation of Richards, and in its reputation as the first feature film to be directed by a Black lesbian. The importance of bringing Richards to life, however, cannot be understated. Richards acts as a stand-in for Black lesbians whose stories we can never know.

The overlapping of Richards's and Dunye's archive, likewise, is acted out in the photographs themselves. As Dunye's own friends, lovers, and community pose in the photographs, they seem to occupy an atemporal zone. Bryan-Wilson states, 'The fictional patina they had in relation to the film has been overlaid with a different, lived history—[Dunye's]'.[16] The past and present blend, thwarting the dominant archive's claims to linearity. The counter-archive's interactions with memory, history, and the archive, then, resist the distinct dichotomization of history from the present. Similarly, it blurs the line between fact and fiction. Despite the fact that the community depicted in the photographs might not necessarily have existed at that precise date, it nevertheless existed as a vibrant queer community. In several of Leonard's photos, we see depictions of the importance of queer community—alluding to the role the counter-archive's play in constructing queer public culture. In one, a group of five women sit around a table, drinking alcohol, and smiling at the camera. Fae sits on the left-hand side, perched on the lap of her lover and director, Martha Page. She leans in, smiling as her right hand rests on the side of the table, holding a cigarette. The three women to the right of Martha are unidentified, but a scribble in blue ink along the bottom of the image reads, 'Me and the girls at the 'Hotspot'.' The women in the photo are unabashedly identified as queer women based on coded signifiers that are recognizable to other queer women: men's clothing, short haircuts, and the way they occupy space in a forward and comfortable way that counteracts the male gaze.

Furthermore, Leonard's use of photography as a medium allows her to critically fabulate the past. Zapperi writes, 'Leonard has been

12 Ann Cvetkovich, *An Archive of Feelings: Trauma, Sexuality, and Lesbian Public Culture* (Duke University Press 2003) 7.

13 ibid 241.

14 Julia Bryan-Wilson and Cheryl Dunye, 'Imaginary Archives: A Dialogue' (2013) 72(2) Art Journal 83.

15 Giovanna Zapperi, 'woman's reappearance: rethinking the archive in contemporary art—feminist perspectives' (2013) 105 Feminist Review 33.

16 Bryan-Wilson and Dunye (n 14) 83.

interested in the photographic image's implication in the production of sexual difference, as well as in the way in which photography is concerned with the passing of time'.[17] Photography is entangled with history and imprecise memory. Like the archive, photography often lays false claims to objectivity and seeks to distance the photographer from their subject. Nevertheless, what is made visible—through the lens—and how we interpret images reflect systems of knowledge and power. Acts of seeing are products of tensions between external images and internal thought processes. How we see, then, is socially constructed. Leonard, thus, exposes the medium of photography as something that can be tacitly manipulated in order to convey particular narratives. She simulates a variety of photographic genres (photo booth, family snapshot, film still, press photograph, portrait) in order to appropriate and subvert the methods of the traditional archive and draw attention to its own methods of deceit. Photographs, by virtue of their nature, signify that their subject is important, and Leonard, in this case, asserts the importance of lesbian lives and intimate queer feelings. They also 'conjure up vulnerability, disappearance and melancholia. The images are often damaged, cut or stained, reinforcing their meaning as witnesses of past events'.[18] The wear and tear on the surface of the photographs is perhaps one of their most deceptive elements—their feigned age evokes a nostalgic and affective response from the viewer who is convinced that Fae Richards in fact lived.

Nevertheless, *The Fae Richards Photo Archive* nods to its own artifice. Although Leonard and Dunye play with the viewer's conceptions of fact and fiction by drawing us into the fictionality of Fae Richards as if it might be real, they often subtly gesture to their work as being fabricated. Constructing Richards as an actress allows Leonard to play around with photos of sets and cameras, alluding to processes that she is similarly engaging in and drawing attention to her own situatedness as a photographer. In one photograph, Martha stands with her hands on her hips before a camera. The caption reads, 'Martha Page at Newark Studios. Photographed for the story 'The Girl Director of 'Jersey Girl" in The Philadelphia Inquirer. October, 1931'.[19] The studio light on the right hand side of the photograph illuminates the image on a diagonal axis. Martha's face and upper torso are clearly visible, while the lower half of the photo slips into obscurity. In the darkness, we can make out the silhouette of a seated figure behind Martha. Their face appears to be covered by a dark piece of fabric, alluding, perhaps, to the individuals whose presences are purposefully obfuscated from the archive. The explicit presence of harsh studio lighting in the photograph, then, draws the viewer's attention to the way that technology is manipulated to control how and what we see. Moreover, the lighting works to cast shadows, creating a doubling of figures and objects in the scene: Martha's shadow and that of the camera are cast onto the brick wall. Indeed, this doubling produces a metapicture.[20]

Leonard creates a picture within a picture by drawing our attention to the fallibility of photography. She hints to the photographic process to make the viewer acutely aware of their own participation in the image through the act of seeing. As viewers, we are positioned behind the apparatus, which externalises the artistic standpoint. Put in the place of the photographer, the viewer is forced to consider the decisions that went into producing this image. The meta picture is self-referential: thinking about its own status as a picture, calling attention to its status as 'art', and referring to its own artifice. Leonard is thinking about the tradition of photography—particularly in its intimate relation with the archive—and her own relation to it. Her consciousness of the medium, therefore, necessarily subverts claims to objectivity.

The book itself is constructed in the *modus operandi* of the archive. Dunye and Leonard draw us into the artifice, only to let up their simulation at the end of the book to subvert the fallibility of the dominant archive. The end of the book includes a list of cast and crew, drawing attention to the project's deception. It is also in this list that we learn that Dunye herself appears in an image as 'Black Dyke on Roof #2'. The use of derogatory language in the cast list alerts us to the tendency of the dominant archive to weaponize such terms against queer people. Leonard and Dunye, then, reclaim this language in the same way that they reclaim the archive: drawing parallels between the way derogatory language and the archive are similarly wielded as tools of violence and oppression. Moreover, Dunye's presence creates a slippage between past and present that leads the viewer to question the readiness with which they often accept the claims of the dominant archive. Speaking to Bryan-Wilson, Dunye tells us that the feigned archive is 'a mixture of the truth and fictions in [her] life and how they coexist'.[21] *The Fae Richards Photo Archive*, thus, challenges our received ideas about temporality, truth, memory, and the purpose of the archive. This project is facilitated by desire and Zapperi writes, 'Desire here is what mediates the relationship between past, present, and future, positioning the artist's subjective voice in the process of constructing alternative forms of knowledge'.[22] Thus, layers of queer desire overlap in the relationships portrayed in the photographs themselves, and in the ever-present queer desire to unearth a lost history.

'[T]he site of this performance...is not necessarily a safe space for all the communities referenced in this work': Queer Memory and the Museum Space in Wu Tsang's *Green Room*

Tsang's 2012 installation, *Green Room*, creates a queer counter-archive by using critical fabulation to reproduce queer safe spaces within the museum—a historically unsafe space for the 2SLGBTQ+ community, because of its erasure and misrepresentation of queer identities. Unlike Leonard and Dunye, who produce a counter-archive of desire and intimacy, Tsang is interested in queer public culture. Her work plays with the binary of public and private spheres in order to call attention to how gender and sexuality operate within this dichotomy. At the 2012 Whitney Biennial, Tsang exhibited two pieces: *Green Room*, and a feature-length film, *Wildness*, that both centre around the gay bar Silver Platter. Tsang, therefore, archives queer community building practices. She problematizes the paradox of the public/private binary by revealing how queer safe spaces often straddle and deconstruct this binary.

Felix Gonzalez-Torres's essay, 'Public and Private: Spheres of Influence', questions how the binary of public and private is used to preserve heteronormativity and suppress queer identity. He argues that the interests of the public sphere are defended through the regulation of the private: '[T]he bed is a site where we are not only born, where we die, where we make love, but it is also a place where

17 Zapperi (n 15) 28-9.
18 ibid 33.
19 Dunye and Leonard (n 1).
20 For more on the meta picture and the way in which art theorises about itself, see William John Thomas Mitchell, 'Metapictures' in *Picture Theory: Essays on Verbal and Visual Representation* (University of Chicago Press 1994).
21 Bryan-Wilson and Dunye (n 14) 84.
22 Zapperi (n 15) 27.

the state has a pressing interest, a public interest'.[23] The separation of private and public life is therefore a delusion as it applies to marginalised communities. Gonzalez-Torres uses statistical evidence to support his argument that certain private spaces are more public than others—that is, more subject to state control. He writes, 'There is no private sphere in the modern state. We can only speak about private property. There is no private space, no private entity. At least not for certain groups when it is still legal and endorsed by the state to oppress and discriminate because of who we love in private and, yes, outdoors too'.[24] That is, both the public and private spheres have always been contentious for the 2SLGBTQ+ community. Queer private spaces are often highly regulated by state control, while the public sphere has always posed threats of both violence and erasure to queer people. Tsang's *Green Room*, to reiterate, operates as both a dressing room for Biennial performers and as an art piece, open to museum visitors when not in use as a dressing room. Tsang, then, creates an installation that places itself, simultaneously, within both the public and private sphere, thereby collapsing distinctions between the two.

Tsang subverts the assumption that art is inherently decorative by building a space that is both artwork, and functional (i.e. intended to support art). The space held custom designed furniture, mirrors, and carpet, inspired by the Silver Platter, but equally had to be designed to meet the architectural needs of the dressing room space: such as mirrors with vanity lighting, desks, chairs, and clothing racks.[25] As *Green Room* demands, and indeed was built for interaction, it gradually accumulates the battering of use and unsettles conceptions of art as being untouchable. Installations often disrupt the traditional museum-going experience by being both experiential and, frequently, ephemeral. Ephemerality—as it has been previously discussed in relation to Cvetkovich's theoretical work—is an oddity in the archive. If the archive relies on permanence, the volatility of ephemera throws archival practices into disarray. As Cvetkovich writes, 'The stock-in-trade of the gay and lesbian archive is ephemera', because they produce 'the unusual emotional archive necessary to record the often traumatic history of gay and lesbian culture'.[26] Tsang's work, as an installation, is temporary, which throws into question its capacity to act as an archive. Nevertheless, she plays with these ideas of impermanence and wear in *Green Room* in order to reference the mutability of queer culture.

The wear and tear of the space itself creates a physical archive of utility. As *Green Room* fluctuates between a functional lounge area and an art installation—which equally, and in their own right, demand engagement and use—it forces the viewer to be conscious of the way in which they occupy the space. Like Young's counter-monument, Tsang's counter-archive demands viewer participation. Memory work, that is, demands active engagement and labour on the part of the viewer, which is why I call it memory *work*. Tsang deconstructs the practices of the archive by allowing, and encouraging, the violation of her installation. Wear and tear make known the history of the space, thereby drawing attention to the history of the museum space as a whole, and its record of violence, erasure, and oppression—a history that parallels, and often intersects with, that of the archive.

Moreover, Tsang's nod to gay bars, and spaces of camaraderie (the green room) in her work highlights queer safe spaces that are, and have been historically, vital to the 2SLGBTQ+ community. These spaces provide the ground on which community can be built—returning to Blake's point that queer people do not have access to this in the home/private sphere—by providing a space where those who are forced to hide their identity (often, for their own safety) are able to comfortably inhabit their queerness. By inviting the public into a semi-closed space, Tsang highlights the potential danger posed by the infiltration of cisgendered heterosexual people into queer spaces.[27] Tsang questions the ingrained comfort that cis-het people often exhibit in 2SLGBTQ+ spaces without realizing that their presence is often threatening to the community whom that space was built for. Tsang therefore insists on centring queer voices.

In *Green Room*, Tsang screens *Que Paso Con Los Martes?* This two-channel video focuses on the Los Angeles queer community and is specifically centred on the experience of a trans woman who fled persecution in Honduras, finding a vibrant queer community at the Silver Platter. Tsang prioritizes her voice in the space and insists that gay bars provide a haven for queer people from the persecution they face in the external world. Her voice echoes through the room; viewer participation, in this case, hinges on the act of listening to and learning from queer testimony. Tsang thereby questions what voices get to be heard, both in terms of how the archive actively erases and neglects queer voices, as well as in relation to the voice as being culturally and politically constituted.[28]

Rita Gonzalez's essay, 'Speech Acts' explores how Tsang uses voice in her work in order to disrupt normative notions of gender and sexuality. Tsang is interested in the voice as a culturally and politically conditioned entity. She describes her own artistic practice as invested in exploring the voice as a tool for subverting cisnormativity and rebuking 'normative readings of a feminine or masculine voice, with consideration to the sensitivity around voice and 'passing' in trans communities. Voice can seem to exceed the body, and modes of recording and playback in music and filmic sound can be used to break down normative readings of gender and sexuality'.[29] That is, Tsang's use of testimony (and therefore voice) in her work necessarily questions notions of authenticity and the ways in which gender presentation and embodiment are highly regulated into pre-existing cis-normative and binary structures. Gonzalez writes, 'the voice can be used to disturb and contest, but also serves to conform and restrict identity'.[30]

Accordingly, in *Green Room*, Tsang is not only thinking about the voice as isolated, but rather as highly culturally and environmentally situated. Crafting a three-dimensional environment, while simultaneously screening a two-channel documentary film, allows Tsang to create a fully immersive experience. She states: 'My language is not about designing words or even visual symbols for people to interpret. It is about being in constant conversation with every aspect of my environment, reacting physically to all parts of my surroundings'.[31] The installation creates a conversation through its various aspects and shifting purposes. The video reflects back on itself through the dressing room mirror, creating the unsettling effect of doubling that which is already doubled through the presence

23 Felix Gonzalez-Torres, 'Public and Private: Spheres of Influence' in Getsy (n 5) 90.

24 ibid.

25 See image in Julia Bryan-Wilson and Shannon Jackson, 'Time Zones: Durational Art and Its Contexts' (2016) 136(11) Representations 11.

26 Cvetkovich (n 12) 243-4.

27 I will henceforth be referring to 'cisgendered heterosexual' as 'cis-het'.

28 Rita Gonzalez, 'Speech Acts' in Elodie Evers et al, *Wu Tsang: Not In My Language* (Walther König 2015) 23.

29 ibid 26.

30 ibid 23.

31 ibid 25.

of multiple display devices.[32] Moreover, the film itself shifts between interviews and atmospheric shots of the Silver Platter. Tsang foregrounds the relationship between voice and environment, suggesting that certain environments are more conducive to certain voices being heard. While the dominant archive silences queer voices, Tsang suggests that queer bars might produce their own counter-archive of queer experience.

Furthermore, being brought into the installation implicates the viewer. Tsang's reconstructed physical space of the Silver Platter evokes the highly political history of gay bars. Gay bars have always had strong ties to political activism and in 1969, the gay liberation movement began in retaliation against the police raids of Stonewall Inn in New York City. The viewer necessarily becomes enmeshed in this history upon entering *Green Room*. In 2011, Tsang made a blog post in advance of her performance of *full body quotation* at a New Museum Fundraiser. She reflects on the history of queer voices in the museum space; ideas that she continues to develop through her work in *Green Room*. I would like to end this section with Tsang's statement, because it contextualises acts of seeing in *Green Room*. Tsang forces the viewer to reflect on the social, political, and cultural situatedness of their own gaze and how it affects their engagement with the piece.

Tsang considers the place of queer performers in the museum environment, particularly at exclusive events: 'the role that performance artists often play in [museum fundraisers], as being complicit 'entertainment' jesters for elite patronage of museums'.[33] She considers how best to engage with such a complex issue: not performing, and risking further distancing queer people from museum spaces, or, perform and exposing herself and her larger community to further harm. Tsang, thus, drafts a statement to contextualise her work and force her audience to think critically about the way that they, and museum spaces as a whole, continue to perpetuate violence against the 2SLGBTQ+ community:

> Tonight's performance features all misappropriated material. We are channelling voices of people involved in the making of the film *Paris is Burning* twenty years ago. Originally I wanted to keep this source secret because I didn't want you to take these voices for granted as being 'authentic'. But the site of this performance (i.e. a party at the New Museum, Performa, downtown Manhattan, etc.) is not necessarily a safe space for all the communities referenced in this work. If you wanna witness this; please first recognize that we exist. In order to fall apart as complex beings, we need first to be able to live.[34]

Tsang prompts viewers to consider the way in which they carry forward such a violent history. She relies on behavioural conventions and norms that are at play in the museum space: that people be respectful of and quietly attentive to the art, for example. These conventions have historically made museums more accessible to certain groups of people: white, upper-class, and well educated. Tsang subverts these same norms by using them to encourage people to hear and listen to queer testimony, thereby building a queer counter-archive.

32 See image in Elodie Evers et al (n 28).

33 Wu Tsang, 'in order to fall apart as human beings, we need first to be able to live' in Getsy (n 1) 211.

34 ibid 212.

Rage as Grief in the Work of fierce pussy

fierce pussy formed at the crux of the AIDS crisis in 1991, and as such, their work is highly political and deeply concerned with the advocation of queer rights and visibility. Their work has often intersected with the archive, and they have worked in the past with the Lesbian Herstory Archives in New York City. In this section, I will be focusing on two of their projects: *gutter* (2009) and *For the Record* (2013), because these works best encapsulate the creation of a counter-archive through critical fabulation. fierce pussy's site-specific work, like Tsang, is deeply informed by the public/private binary. They use public space as a tool for their own activism. Although all the artists I have discussed respectively use their art to advocate for 2SLGBTQ+ rights and visibility, fierce pussy's message is more explicitly directed towards the cis-het outsider in response to the AIDS crisis. Cvetkovich writes, 'The AIDS crisis offered clear evidence that some deaths were more important than others and that homophobia and, significantly, racism could affect how trauma was publicly recognized'.[35] Their work, then, is informed by this period of national trauma and mourning for the 2SLGBTQ+ community. Additionally, Cvetkovich's work on trauma takes interest in those living in proximity to trauma, including lesbians on the edge of the AIDS crisis. She is interested in the roles lesbians played 'as caretakers and activists' and how this legacy is pervaded by 'the privilege of moving on because they have remained alive'.[36] fierce pussy's own work, in this case, must be analysed through the spectre of death from which they arose.

Cvetkovich traces the queer archival impulse to the reckoning with death and mortality in the wake of the AIDS crisis: 'This encounter [with mortality] produces the archival impulse, the desire to collect objects not just to protect against death but in order to create practices of mourning'.[37] Death thus provides the impetus for recording one's history. In the reverberations of loss, the desire to record a social and cultural history strengthens. All the artists I have discussed, in this sense, are grappling with profound loss; be it death or archival absence, they similarly signify the pressing need to create a queer counter-archive. Nevertheless, the AIDS crisis made apparent that this project is not solely concerned with documentation, but rather, and perhaps more pressingly, activism. Queer artists create a counter-archive precisely because the dominant archive lacks the means to capture the grief, trauma, and oppression that it inflicts: 'We knew deep down that we had to create our own rites and rituals if we were to truly honour and acknowledge our grief'.[38] This search for new modes of mourning is consistent with a counter-archival project, which seeks to create news processes of remembering that arise out of an effaced history.

Although fierce pussy's work is permeated by feelings and affects generated by the AIDS crisis, *For the Record* explicitly confronts the profound loss caused by the epidemic (and the government's failure to adequately respond). Produced in 2013, it is the more recent of the two projects that I will be touching on, but I want to begin here because of its direct link to the AIDS crisis. The project was centred around an exhibition at Printed Matter, but also featured a series of posters, stickers, postcards, and downloadable broadsides.[39]

35 Cvetkovich (n 12) 6.

36 ibid 160.

37 ibid 269.

38 ibid 266.

39 fierce pussy, 'projects' <https://fiercepussy.org/projects> accessed 10 March 2022.

fierce pussy's work relies on text, often using succinct, clear, and resonating language to convey their message. These tactics resemble practices traditionally associated with advertising, which is also consistent with their use of spaces designated for advertising (e.g. windows, alleys, and billboards, etc.). In *For the Record*, they repeat the tagline: 'if [he/she/they] were alive today'. fierce pussy's use of language, therefore, creates a counter-archive of loss, even as they refuse to name victims. While the refusal to name might first appear as a depersonalization of the trauma, I argue that it accentuates the widespread nature of the crisis. The loss of lives, then, is equally the loss of records, names, and a culture.

The generalising language, moreover, is undercut by the following statements; often intimate, they implicate the viewer. Phrases such as: 'you'd be texting her right now', 'you'd be so her type', 'he would have you on your knees', 'you'd still be arguing about that', and 'he'd have his arm around you' suggest familiar, unremarkable actions (texting, dating, sex, fights, touch). Nevertheless, along with the repetition of 'you', the statements suggest attachment. The viewer, then, feels the loss as if it was their own loved one and is forced to reckon with their own relation to the crisis. To return to Hartman, although the act of critical fabulation cannot possibly liberate the dead, its resonances are felt in the living that are finally given the opportunity to heal. *For the Record* mourns friends, families, lovers, artists, and activists through the language of lives cut short. The declarations imagine a possible present that the 'if' reminds us is impossible. The font is printed in a black, sans-serif typeface, apart from the word 'AIDS', which is printed in red. The posters state, 'if he were alive today he'd still be living with AIDS'. The emphasised 'AIDS' suggests the incoherency of living with a disease, so long considered a death sentence. Moreover, it serves to make AIDS, which is often invisible, visible. The lack of punctuation, moreover, implies a kind of urgency—that of a crisis improperly handled by the state, because of whose lives were being lost. fierce pussy, thus, draws attention not only to the act of dying of AIDS, but also to the ongoing struggle for those living with the disease in the present.

fierce pussy's work is suffused with rage and militancy as a response to trauma and frustration. Cvetkovich draws on Douglas Crimp, finding that trauma often elicits 'militancy as an emotional response and a possible mode of containment of irremediable psychic distress'.[40] Anger, in this case, saturates queer mourning rites in response to the AIDS crisis. The state's response to the AIDS crisis was informed by homophobia and racism; because marginalised communities were disproportionately affected by AIDS, the state felt no urgency to respond. The discourse surrounding the crisis, then, centred around bigotry. fierce pussy's public advocacy for queer rights asserts that visibility and perception matter. In an interview, they iterate their interest in public space, stating, 'We don't see public space as neutral or abstract'.[41] Similar to Gonzalez-Torres, fierce pussy is thinking about public space as paradoxical for the 2SLGBTQ+ community: 'Historically, public space has held a contradiction for queer people; on the one hand we have been invisible and on the other hand we are frequently the target of violence in public'.[42] They respond to this contradiction through their art, that inserts queer narratives into the public sphere. *Gutter*, like *For the Record*, relies on language and storytelling. By rewriting and editing lesbian pulp fiction novels from the 1940s through 70s, fierce pussy gives lesbians a chance at a happy ending.

40 Cvetkovich (n 12) 162-3.

41 fierce pussy, 'Interview' in Getsy (n 1) 223.

42 ibid 223.

Gutter arose out of fierce pussy's residency at the Lesbian Herstory Archives and was originally shown in 2009, at the exhibition 'Tainted Love' at La Mama Galleria. In the adjoining alleyway, Extra Place, they hung their posters along the brick wall to create a public mural. The novels, not necessarily written by lesbians, are consistent with mainstream media's tendency to 'leave lesbians sad, lonely, or dead'.[43] Cvetkovich argues that these representations have 'become part of the archive of lesbian culture'.[44] The literary trope, 'Bury your Gays' (also called 'Dead Lesbian Syndrome'), emerged as a way to write 2SLGBTQ+ characters, without breaking decency laws that forbade the promotion of 'perverse acts'.[45] 'Bury your Gays' alludes to the tendency to kill off queer characters as punishment for their homosexuality and/or gender deviance, presenting such traits as inherently immoral and undesirable.[46]

fierce pussy mines the archive of lesbian pulp novels, tainted with moral deprivation, condemnation, and misery. They redact and edit texts to reveal a counter-archive of language, one where lesbians are allowed to experience pleasure. fierce pussy states, 'From the position of the reader we become the writer; by crossing-out and underlining we re-edit these stories to more accurately reflect our experience and desire. In our version, women can have hot sex and 'happy endings'—in both senses of the word'.[47] I want to pause my analysis of *gutter* to problematize 'happiness' and 'happy endings'. To embark on an analysis of queer happiness, we must explore what the term implies outside of a heteronormative structure. Sarah Ahmed's 'Killing Joy: Feminism and the History of Happiness', problematizes who is allowed to be happy. Ahmed uses the example of one's wedding day, often described in advance as the 'happiest day of your life'. That is, happiness promises itself as a reward for following a set path, one that is inherently cisgendered and heterosexual. Ahmed writes, 'Affect aliens, those of us who are alienated by happiness, are creative: not only do we want the wrong things, not only do we embrace possibilities that we are asked to give up, but we can create lifeworlds around these wants'.[48] fierce pussy, then, subverts the expectations tied to happiness that often deny it to queer people. They suggest that happiness, like the language that they manipulate, is malleable and holds a multiplicity of meanings. In writing out negative emotions, they do not negate or dispel negative affects, but rather present lesbians with the possibility of happiness in a way that deviates from heteronormative standards.

In opposition to the happy endings it presents, *gutter* is saturated with rage. The blacked-out text implies frustration and anger. fierce pussy states, 'The way history is written often denies our existence. We go back into these texts to reinsert the lesbian experience: our *anger*, our desire, our impact, our lives'.[49] Hence, they disrupt the erasure of queer voices in the archive through their own erasure of text. Like Tsang, fierce pussy is concerned with *whose* voices get to be heard. They question notions of authorship by upturning the process of reading into one of writing. Reading, then, rather than being prescriptive, becomes innovative. In *gutter*, texts that have historically worked to suppress queer identity, become liberatory as they open up spaces of exploring queer desire.

43 Cvetkovich (n 12) 253.

44 ibid 253.

45 Hailey Hulan, 'Bury Your Gays: History, Usage, Context' (2017) 21(1) McNair Scholars Journal 18.

46 In contemporary media, queer characters are still killed off at inordinate rates. Cf. ibid.

47 fierce pussy (n 39) 223.

48 Sara Ahmed, 'Killing Joy: Feminism and the History of Happiness' (2010) 35(3) Signs 593.

49 fierce pussy (n 39) 224. Emphasis added.

Furthermore, the act of opening up new spaces is mirrored through fierce pussy's use of the public sphere. They locate queer sex acts—'Drop your skirt. Now step out of it'—in the public sphere, thereby questioning the erasure of queer identity from public space. 2SLGBTQ+ people are often either required to suppress their own queerness in public settings, or on the other hand, it is actively erased through normative presumptions of sexuality. fierce pussy takes private acts and transforms them into a public, shared experience. About their own work, they write, 'It is often through the act of reading that young people first find possible reflections of their identity. From the first time one looks up the word 'lesbian' in the dictionary, the pages of books provide a safe and secret space to explore one's fantasies, desire and identity'.[50] In *gutter*, they move this hidden act into view by building a queer counter-archive for future generations of lesbians, who will hopefully not have to live in such a hetero-saturated world. fierce pussy makes space for queer visibility, which they define in opposition to gay visibility: 'Today, 'gay visibility', which is more about assimilation and gay marriage, has replaced queer visibility and a vision of radical social change'.[51] This vision that fierce pussy articulates in their work is akin to the counter-archival project that denounces normative archival practices in order to make new spaces for queer identity. Fostering a queer public memory is more important than being palatable to the dominant culture.

Conclusion

The artists discussed in this essay delineate a counter-archive through their use of critical fabulation to 'recover' an unrecoverable past. They question the imbued authority of the archive to give voice to certain histories, and inevitably, to silence others: 'The archive is, in this case, a death sentence, a tomb'.[52] The archive, therefore, is problematic for 2SLGBTQ+ people who find ourselves actively erased and persecuted in dominant discourse. Leonard, Dunye, Tsang, and fierce pussy create new narratives of queer memory through contemporary art. In doing so, they fabricate an atemporal zone in which queer voices can be heard. Their art is situated outside and between the past, present, and future of queer identities. From a space of trauma, they use their art to reclaim agency and unveil power relations in the archive.

Leonard and Dunye's *The Fae Richards Photo Archive* fabricates the archive of Fae Richards to produce unstable images that are as much tied up with our present as they are with the past. By bringing to bear the methods of the archive, they expose its very precarity and artifice. They give life to Fae Richards in the present—as a stand-in for the many Black lesbians that have been denied a presence in the archive—and yet disclose her fictionality to indicate loss and reveal the impossibility of redeeming the lives of the dead. In Tsang's *Green Room*, she creates a fabricated setting rather than a fabricated persona. Tsang displaces the politics of the gay bar into the museum space, in order to reveal the intimate ties between 2SLGBTQ+ oppression and artistic representation. She centres queer testimony in order to question associations between voice and authenticity. Displacement, then, also exposes certain environments as houses of power, namely the museum and the archive. Tsang's interest in the public/private binary and how it has been historically contentious for queer people is also a factor in fierce pussy's work. They exhibit site-specific work to implicate cis-het outsiders in queer trauma. By moving private queer experiences into the public sphere, fierce pussy creates new spaces for queer visibility. Like Tsang, they problematize the paradox between safe and unsafe spaces. Safe spaces, that is, are always under attack and risk infiltration and gentrification if they belong to a marginalised group. In this case, there is no way to guarantee safety without radical social change.

These artists play with memory in order to create stories that trouble received ideas of truth and objectivity that are rooted in the archive. Artistic practices allow the past to be written anew by virtue of the conditions in which we now find ourselves, in the wake of the queer liberation movements of the late twentieth-century. Creativity and imagination are thus necessary in the production of a counter-archive. Leonard, Dunye, Tsang, and fierce pussy respectively produce counter-archives of queer genealogy. Critical fabulation is a restorative practice for the living, providing the means for individual and collective healing. Through the act of fabricating new narratives, we are able to facilitate new ways of mourning lost memories.

50 ibid 223.
51 ibid 224.
52 Hartman (n 10) 2.

'We're All Mad As Hell Now'
How *Network* (1976) Captures the Anti-Politics of Social Media

Katherine Cross

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'I'm mad as hell and I'm not going to take this anymore!' is a phrase that has been raptured up into the popular English lexicon, cited, quoted, parodied, remixed, and dissolved into an ironic confirmation of the satire that produced it. It was the most iconic line from *Network* (1976), a now-classic film that told the dark tale of a fictional American network news anchor, Howard Beale (played by posthumous Academy Award-winner Peter Finch), whose blooming madness was exploited by his bosses for ratings bonanza. But in becoming a meme detached from its context, it rather proved the film's point: in the particle accelerator of mass media, even the most potent radicalism can be diffused into mere entertainment.

The line's endless citation[1], repeated without irony[2], obscures the fact that the line represented a grim low point in the movie. Shouting it into the camera, Beale commanded the American public to get out of their chairs and holler the memorable phrase out their windows, shouting to the heavens in pure outrage about 'the depression, and the inflation, and the Russians, and the crime in the street' (sound familiar?), leading to angry Americans shouting about their anger into the uncaring night.

It was not meant to be admired, much less imitated. It was a warning. And a particularly prescient one, at that. The film has many admirers--such as Aaron Sorkin, whose own smugly liberal style is but a dim echo of *Network* screenwriter Paddy Chayefsky's own preachy yet eloquently radical approach. Such fans suggested that the movie predicted the rise of reality TV; in 2000, Roger Ebert, in a reflection on the film, asked if even in his darkest nightmares Chayefsky could have foreseen how his film anticipated the World Wrestling Federation and Jerry Springer, which is almost quaint to consider now.[3] In truth, none of those things were what *Network* anticipated. The film was about something more abstract than a single TV show, or even a genre. It was about how mass media perverted popular will and commodified it.

And nothing embodies the realisation of its warning quite like social media. Indeed, to look at a platform like Twitter is to see millions of people yelling endlessly about their rage into the endless night of the internet, a vastly more efficient and perpetually running version of people yelling out their apartment windows. What results is a medium that is, despite all evidence to the contrary, anathema to politics.

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The best satires are often the least effective as warnings; the very things that make them popular—memorable, engaging speeches like Howard Beale's—can outshine the subtler points that make them incisive. While writing this article, I looked up the most popular YouTube clip of the 'mad as hell' speech.

'47 years old and this speech is more relevant today than it was in 1976' – by 'A Pickle for the Knowing Ones' was one of the most liked comments, with the longest thread of replies. And those replies?

1 '*Network* (1976 film)', *Wikipedia* <https://en.wikipedia.org/wiki/Network_(1976_film)#In_popular_culture> accessed 24 May 2022

2 Imran Rahman-Jones, "I'm as mad as hell, and I'm not going to take this any more!" (*Medium*, 17 February 2017) <https://medium.com/@IRahmanJones/im-as-mad-as-hell-and-i-m-not-going-to-take-this-any-more-18758ebbe55f> accessed 24 May 2022;
Clyde Haberman, 'A Great Line, Taken Badly Out of Context' *The New York Times* (New York, 21 October 2010) <https://www.nytimes.com/2010/10/22/nyregion/22nyc.html> accessed 24 May 2022.

3 The World Wrestling Federation staged colourful, theatrical wrestling matches on American cable television, while the Jerry Springer Show was a tabloid talk show that frequently hosted acrimonious arguments, sensationalist debates, and even physical violence between guests.

'Ain't that the damn truth, man'
'Amen to that 🙏'
'True so true'

On and on in that vein, with a few 'Let's Go Brandon's thrown in there to cement the comprehensive point-missing.[4] Beale's speech was not meant to be true. It was written as an example of omnidirectional outrage that felt vaguely plausible precisely because of how content-free it was. It wasn't meant to be taken seriously; it was a warning about the very behaviour Beale was embodying. The speech's generic, empty rage is applicable to many moments in modern history when we've all felt a sense of hopelessness and powerlessness at the world's myriad injustices, which we are all made ever more efficiently aware of courtesy of mass media.

The point was that this speech was paired with shots of the growing jubilation of network executive Diana Christensen who whooped – 'son of a bitch, we hit the motherlode!' – when she heard about the public reaction; she was looking for someone who could lead 'angry shows' that 'articulate the popular rage', and she found it in Beale and his speech. An inkblot test of a rant that all Americans could see themselves in. A notable line in the speech, rarely if ever quoted, is when Beale says 'I don't want you to protest, I don't want you to riot, I don't want you to write to your congressman because I don't know what to tell you to write…'. *That* is the point: the substitution of meaningful political action by the expression of incoherent, omnidirectional rage. Rage that'll make a network executive cheer about 'hitting the motherlode'.

What was truly prophetic about the movie was the way it captured the then-dawning aestheticisation of politics, the trading of substance for affect and postures. Think of the suffusion of terms that dominate English-language political discourse but mean whatever the speaker needs them to mean: cancel culture, groomer, political correctness, woke, the elite, triggered, or gaslighting. It's all too similar to the way that Beale's speech was essentially an inkblot, easily interpreted as a rallying cry for ethnonationalists and socialists alike. 'Things are bad, so get angry' is not a political programme, but it can unite us in *watching* a programme. Or participating in one.

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The 'mad as hell' speech was Chayefsky's mockery of vacant, easily-commodified rage. But if there was ever a moment he ventriloquised Beale it was in a later speech where the anchor—now helming a parodic carnival of a 'Nightly News Hour' that featured a soothsayer and a fiercely applauding live audience—gave a speech condemning television as an enterprise. This is Chayefsky at his most contemptuous and it verges on insufferable in its smug lecturing to the public—lamenting that so few read books and newspapers, for instance, and charging that they 'think like the tube, dress like the tube, raise their children like the tube', using an American slang word for TV. But it manages to stay just on the right side of the line by nestling those jibes within a fundamental point about television:

'You're beginning to think that the tube is reality and that your own lives are unreal! …In God's name, *you people* are the real thing! *We* are the illusion!'

What social media has done is made us *all* 'the illusion' to each other, Beale's travelling circus of entertainers.

It's a bit simplistic to suggest that television is a purely passive medium that requires no participation from the viewer: the very act of watching something and making meaning from it implies activity. But there should be no question that the average user of social media is more clearly engaged in *constituting* the very thing that people are on the platform to consume. They are creating content. In the process, we all end up, to one degree or another, on a digital pedestal dehumanised and at least slightly alienated from ourselves as we strive to be legibly interesting before our ever-changing audience.[5]

So many interpreters of *Network* looked to television for the fulfilment of the film's prophecies about the vulgarisation of mass media and missed the forest for the tubes. While it is indeed fair to say that the film was prescient about the rise of partisan cable news—about the likes of the American Fox News, MSNBC, Australia's Sky News, or British GBN, with their volcanically outraged presenters[6]—even those networks never came to look quite as absurd as Beale's 'Network News Hour', with its eccentric set (a single stained-glass window over rotating daisies) which also hosted other tawdry segments. It remains notable that even the most blatantly propagandistic enterprises, from Fox News to Russia Today, still cling to the authoritative image of a traditional news studio, with immaculately coiffed and dressed presenters.

It was the internet that allowed for a true redefinition of the format of news-delivery; opinion-making could flourish in a medium that seemed resistive and anti-establishment by its very nature, the inherent populism of someone in their living room talking to a webcam has an intimacy and authenticity that old television networks couldn't hope to buy. Indeed, content creators are playing an increasing role in shaping the information environment—for good and for ill.

But democracy doesn't thrive as a result of thousands of content creators and influencers each pursuing their self-interest. Democracy is not additive. It is, at its best, a multiplicative enterprise that harnesses collective, co-ordinated action. *Network* told the tale of how, in one of its most underrated subplots, a group of communist revolutionaries could be domesticated into controlled opposition simply by being given a primetime television show. Social media does much the same thing, reducing political action to so many hashtags, avatars, and unceasing but ultimately pointless debates whose sole purpose is to generate the attention economy's currency of the realm, all by diffusing any potential for mass action into individually gestural acts.[7] Rare successes, like the Black Lives Matter movement, are, regrettably, the exception that proves the rule. In lieu of meaningful change, more often than not we simply get a million little rants through the window about being 'mad as hell'. Togetherness alone, at an undreamed-of scale.

4 Various authors, 'NETWORK, Sidney Lumet, 1976 - I'm Mad As Hell and I'm Not Gonna Take This Anymore!' (*YouTube*, 6 March 2018) <https://www.youtube.com/watch?v=MRuS3dxKK9U&lc=UgwZj4GfHK019bevi6Z4AaABAg> accessed 24 May 2022.

5 Chris Rojek, *Presumed Intimacy: Parasocial Interaction in Media, Society and Celebrity Culture* (Polity Press 2015).

6 For but one example of the genre, here's a clip of an Australian pundit's reaction to the recent general election in Australia that saw the centre-left return to power in that country: Kevin Rudd, 'Clip of Sky News presenter criticising the 'left-wing' UK government' (*Twitter*, 22 May 2022) <https://twitter.com/MrKRudd/status/1528294370700455936> accessed 24 May 2022.

7 Ally Mintzer, 'Paying Attention: The Attention Economy' (*Berkeley Economic Review*, 31 March 2020) <https://econreview.berkeley.edu/paying-attention-the-attention-economy/> accessed 24 May 2022.

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If *Network* has anything to teach us today it is the fact that, contrary to popular belief, mass media is *not* hypnotic. One cannot simply put whatever message one wants into the medium and expect it to pass into the public consciousness with perfect fidelity and preservation of original intent. Even when watching media passively, viewers will embark on their own journey of interpretation and meaning-making that will take them in thousands of different directions. But more importantly, the medium itself favours certain messages over others, and will transmit *any* message in a particular way.[8]

The history of computer and information science is marked by many, ever more urgent efforts to engage with this reality. Taken together, they sound a warning about what the ultimate mass communication technology fundamentally constrains us from doing, regardless of our inputs. Alexander Galloway's 2004 *Protocol* marked a landmark effort to argue that the very code on which the internet operated predisposed it to control us rather than liberate us. Kate Crawford and Tarleton Gillespie observed that the act of 'flagging' online content to be reported to moderators is a communicative act that severely constrains engagement and speech—many types of objectionable content and possible harms are collapsed into a tiny number of predetermined checkbox categories, for instance.[9] Sociologist Jenny L. Davis, marshalling years of interdisciplinary research, argued that technology's affordances—the interface between the features of a piece of a tech and the outcomes it produces--reflect politics and power. 'Technologies', she writes, 'don't *make* people do things but instead, push, pull, enable, and constrain. Affordances are *how* objects shape action for socially situated subjects'.[10] There is, in short, a profound limit to what we can actually say and do with 'the most awesome goddamn propaganda force in the whole godless world', to borrow Beale's phrase.

This is one of many reasons why the oft heard refrain about the 'proliferation of speech' being an antidote to whatever one defines as 'bad speech' is painfully naive. Elon Musk's idea, for instance, that we can speak freely with no 'censorship' whatsoever on a social media platform is utterly ignorant of the fact that, with or without formal content moderators, these platforms will nevertheless automatically amplify some speech at the expense of others, and channel *all* speech to particular ends that the speakers won't approve of. The riddle Galloway was trying to solve in *Protocol* was the fact that the internet, though apparently free of centralised control and imposed hierarchy, nevertheless still seemed to manifest that control informally. Power had not gone away, in short.

This is why the last two decades are littered with the tombstones of failed hashtag-driven revolts and half-finished revolutions.[11] So much of their power was shunted into the entertainment complex of social media, rendering their most powerful critiques, their most radical goals, simply unheard.

There's an especially bitter irony that *Network* itself seems to embody this, with Howard Beale forever caught in that Archie Bunker syndrome—of being seen as a role model despite having been authored as a cautionary tale. But also in that we've all come, to some degree, to enact the artistic tricks of the trade that made *Network* immortal as a film, and limp as satire. So much political discourse on social media is reduced to a language of performances, humour, memes, and other assorted theatrics. These are the first signs of virality. It can seem a simple update of the sloganeering of old, but it is, in truth, an entirely new language of activism that constrains its potential.

But what makes for a successful (political) TikTok does not necessarily equate to successful politics. The classic example of changing one's avatar, for instance, whether to a black circle or square, or to the Ukrainian flag, or to Je Suis Charlie, or to show that one is vaccinated against COVID-19, is almost definitionally empty—its sole function is to signal to the viewer that you may, or may not, share some of their political views. That is a precondition for organising, but it's too often treated as the endpoint.

What social media *is* might best be understood through political theorist Hanna Fenichel Pitkin's interpretation of Hannah Arendt's unique idea of 'the social': 'Arendt means a collectivity of people who--for whatever reason—conduct themselves in such a way that they cannot control or even intentionally influence the large-scale consequences of their activities'.[12] Arendt contrasts this to her equally unique view of politics, a domain of collective action that can change the world for the better. It is in this narrow, Arendtian sense, that I would call social media *anti-political*.

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The rare examples of successful social media activism are episodes of activism that *use* but are not necessarily *driven by* social media--the Black Lives Matter movement is the clearest instance of this, using social media as a connective tissue between individuals and on-the-ground activity in the form of protests and direct action. BLM did not stay in the realm of the gestural, it instead tries to use social media to inspire people to act in the physical world.[13] That included using it as a tool to monitor police activity[14] and help protests stay agile in the face of suppressive tactics by the police, as well as keeping tabs

8 Marshall McLuhan, *Understanding Media: The Extensions of Man* (Signet Books 1966).

9 Kate Crawford and Tarleton Gillespie, 'What is a flag for? Social media reporting tools and the vocabulary of complaint' (2016) 18(3) New Media & Society 410–428.

10 Jenny L. Davis, *How Artefacts Afford: The Power and Politics of Everyday Things* (MIT Press 2020) 6.

11 It is profitable to consider the way that social media-driven colour revolutions have met with only very limited success in countries like Egypt, for instance, or how the #MeToo movement has faded into a series of spectacles too easily co-opted by corporations and powerful institutions. It was notable, for instance, that Roberta Kaplan, the former chair of Times Up, an anti-sexual-harassment organisation founded off the back of the MeToo movement, was instrumental in helping former New York Governor Andrew Cuomo cover up his own abuses. Cf. Michael Gold and Jodi Kantor, 'Roberta Kaplan, Who Aided Cuomo, Resigns from Time's Up' *The New York Times* (New York, 9 August 2021) <https://www.nytimes.com/2021/08/09/nyregion/roberta-kaplan-times-up-cuomo.html> accessed 16 June 2022.

12 Hanna Fenichel Pitkin, *Attack of the Blob: Hannah Arendt's Concept of the Social* (University of Chicago Press 1998) 16.

13 E Gilbert, 'The Role of Social Media in Protests: Mobilising or Polarising?' (*89 Initiative*, 6 April 2021) <https://89initiative.com/the-role-of-social-media-in-protests-mobilising-or-polarising/> accessed 24 May 2022; Booke Auxier, 'Social media continue to be important political outlets for Black Americans' (*Pew Research Centre*, 11 December 2020) <https://www.pewresearch.org/fact-tank/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/> accessed 24 May 2022.

14 Farhad Manjoo and Mike Isaac, 'Phone Cameras and Apps Help Speed Calls for Police Reform' *The New York Times* (New York, 8 April 2015) <https://www.nytimes.com/2015/04/09/technology/phone-cameras-and-apps-help-speed-calls-for-police-reform.html> accessed 24 May 2022.

on far-right actors like the Proud Boys who often acted as a lawless paramilitary operating against radical protest. Groundedness in the physical world was key for using social media effectively.

Twitter, in particular, can shine a bright light on abuses by the state. Where once it would've been easier to cover up the crimes of the police against members of the public, now mobile phone video of police murders leaves little doubt about the facts of each case. Social media spreads them quickly, inspiring outrage, which can then inspire direct action.

But even here we see the dangers and limits of social media's protocols. We experience social media as amusement; it is designed to keep us scrolling, liking, sharing, subscribing, and commenting, to increase ad impressions among other things. We get a delightful little dopamine hit from it. We get a sense of control from it, even if we're not consciously enjoying it (see the phenomenon of 'doomscrolling'[15]). It becomes compulsive. And we thus experience everything on it as either pure entertainment or as something we must desensitise ourselves to in order to *enjoy* the more overtly pleasurable parts of the experience.

Thus, many BLM activists began to rail against *how* videos of police murdering Black citizens were being deployed on social media. They'd become clickbait, for both the platform and for news outlets that linked their articles on Twitter or Facebook. Suddenly, people were sharing tips on how to prevent videos from autoplaying on Twitter[16], and Black users were advising each other to take care when another round of police shooting videos were going viral, as well as telling their friends *not* to share the videos if they came across their feeds.[17] What Black social media users experienced as a traumatic reminder of deadly oppression was increasingly being experienced by many others as must-see-TV.[18]

That was when the fear began to blossom—especially after many of these videos failed to lead to police accountability, charges, or convictions for the murderous officers—that the proliferation of video could even be counterproductive to the cause. Aside from being unable to shame the shameless institution of American policing, they ran the risk of further desensitising non-Black internet users to violent episodes of Black death and trauma.[19]

15 'Doomscrolling', *Wikipedia* <https://en.wikipedia.org/wiki/Doomscrolling> accessed 24 May 2022.

16 Chaseedaw Giles, 'Op-Ed: I'm a Black social media manager in the age of George Floyd. Each day is a new trauma' (*LA Times* 23 June 2020) <https://www.latimes.com/opinion/story/2020-06-23/social-media-trauma-black-killings> accessed 24 May 2022; Rachel Charlene Lewis, 'Very Online: Inside the Endless Post-Police Brutality Loop' (*Bitch Media*, 11 September 2020) <https://www.bitchmedia.org/article/very-online/social-media-after-george-floyd> accessed 24 May 2022.

17 Sara Morrison, 'Questions to ask yourself before sharing images of police brutality' (*Vox Recode*, 11 June 2020) <https://www.vox.com/recode/2020/6/11/21281028/before-sharing-images-police-brutality-protest-george-floyd-ahmaud-arbery-facebook-instagram-twitter> accessed 24 May 2022.

18 Dede Akolo, 'Abstract Pain: George Floyd and the Viral Spectacle of Black Death' (*Bitch Media*, 17 June 2020) <https://www.bitchmedia.org/article/black-death-george-floyd-viral-spectacle> accessed 24 May 2022; Rebecca Pierce, 'Criticism of Black death being described as 'cinema/art' in an article' (*Twitter*, 10 June 2020) <https://mobile.twitter.com/aptly_engineerd/status/1270493547691560960> accessed 24 May 2022.

19 Caelan Reeves, 'Front of house: Social media's repackaging of Black death' (*The Student Life*, 29 April 2021) <https://tsl.news/black-death-social-media/> accessed 24 May 2022.

We can also consider the Russian invasion of Ukraine which, as of this writing, enters its 89th day. Much has been made of Ukraine winning the 'information war',[20] at least thus far.[21] This is true, so far as it goes—it has largely outflanked Russian propaganda, particularly in the West where a narrative of potential Ukrainian victory has taken hold. This has proven vital: Western public support translates into political and material support, which remains a lifeline for the besieged democracy. That conditional information war victory has entailed heroic images of Ukrainian military victories, brash speeches from soldiers, and an unending parade of harrowing images of Russian atrocities—from the desolation left by their artillery shells and Iskander missiles, to the bodies of civilians left to rot in the streets of the cities and towns once occupied by the Russians.[22]

Less discussed is the long-term cost of all this, however. As with so many other desperate tactics that such an existential war might occasion, these online ploys are not without their cost. They, too, promote a degree of dehumanisation. In a 1995 BBC documentary, the American writer and Second World War veteran, Paul Fusell observed that soldiery involved learning to 'enjoy murder, enjoy depriving other people of their limbs and their lives'.[23] All war propaganda does this, and mythology about the gloriousness of war has infected even children since antiquity. But social media inundates us with images of a reality that might have shocked even our most jingoistic ancestors and compels us to deal with it by loving it, by cheering it on. With the greatest of ease one can find footage from Ukrainian Bayraktar drones setting Russian tanks alight, cooking three men alive at a time in each tank. Jokes and memes quickly follow.

Social media makes true solemnity impossible and uncool—and I am no exception to this; I've found some pro-Ukrainian memes, deflating Russia's imperialist and autocratic pretensions, quite funny. But it is very easy to lose sight of the humanity that this war obliterates every hour, of every day, and easier still to lose sight of how social media's mass, unexpurgated broadcasts of its slaughter risk desensitising us to those horrors. Or worse, making us enjoy them.

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As with so much else online, good intentions and emancipatory dreams struggled to break free of the paths carved out by the very code of social media. Its logics do not preclude genuinely impactful radical politics, but they do make it significantly harder and introduce countless painful externalities.

20 Michael Butler, 'Ukraine's information war is winning hearts and minds in the West' (*The Conversation*, 12 May 2022) <https://theconversation.com/ukraines-information-war-is-winning-hearts-and-minds-in-the-west-181892> accessed 17 June 2022.

21 It is important to note that the information war looks different outside of Western nations, with a more mixed picture. Cf. Carl Miller, 'Who's Behind #IStandWithPutin?' (*The Atlantic*, 5 April 2022) <https://www.theatlantic.com/ideas/archive/2022/04/russian-propaganda-zelensky-information-war/629475/> accessed 24 May 2022.

22 Paul Baines, 'Ukrainian propaganda: how Zelensky is winning the information war against Russia' (*The Conversation*, 11 May 2022) <https://theconversation.com/ukrainian-propaganda-how-zelensky-is-winning-the-information-war-against-russia-182061> accessed 24 May 2022

23 Adam Curtis, 'The Desperate Edge of Now' [Part 1 of The Living Dead: Three Films About the Power of the Past] (BBC Two, 30 May 1995).

'The founding principle of the internet is control', Galloway writes, 'not freedom—control has existed since the beginning'.[24] He drew this conclusion in part from analysing TCI/IP (transmission control protocol/internet protocol) and the DNS (domain name system) for how they facilitated the exercise of power over the internet, amplifying some voices and stifling others, all while enabling the surveillance of all that information that, we were once told, wanted to be free. This was all before the dawn of Web 2.0, the age of social media whose data-harvesting logics would build on these protocols and lead to what philosopher Shoshana Zuboff calls surveillance capitalism.[25]

You can think of these technological developments—the advent of algorithms, the targeted-ad economy, the coalescing of online communities into an ever smaller number of websites—as channels that constrain political ferment, especially progressive or left-wing politics, with their aspirations towards *collective* change and freedom from capital, redirecting it to ends that are less threatening to the existing power structure. The carnival of lifestyles, affects, and postures afforded by social media is a better fit with a more reactionary, pro-capitalist politics, particularly that aimed at inspiring individual action.

The recent surge of anti-trans and anti-queer legislation in the United States[26] is a prime example, urged on by a politics of screaming rage about 'groomers' in American classrooms (who all just so happen to be LGBT people), it inspires some consequential legislation but it also, primarily, sires hate crimes and bullying. Social media may not give the far-right its dream of Gilead, but it can enable them to crowdsource a decentralised police force to attack people for being gay or trans.

There are precious few similar, easily crowdsourced individual actions that afford the left a similar short-term gain for their political programme. Just as in *Network,* whose communist revolutionaries were turned into TV stars who committed terrorism for ratings but changed nothing about the coming neoliberal ascendancy, social media does not allow us to use its awesome power any way we please.[27]

Howard Beale seemed to command the masses from his primetime broadcast. But the one order he gave that they simply ignored? To turn *off* their TV sets. Some messages will simply go unheard. The medium cannot be bent against its own best interests. Online, this often means watching radical messages be bent and distorted into forms that can be easily co-opted by capital.[28]

Having a voice is powerful, as is technological access that allows us to amplify our voices. But the way our voices are transformed and translated is powerfully, even decisively consequential. And rarely in our favour.

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Network is, in some real ways, a relic. Faye Dunaway's performance as Diana Christensen is transcendent, but cannot completely disguise the anti-feminism at the core of the 'heartless career woman' archetype[29] Paddy Chayefsky wrote for her, for instance. Yet, the film endures because it may have hit on a truth about technology that even Chayefsky might not have been fully aware of. He certainly meant to damn television, but he also, inadvertently, condemned something larger. Something that could have been said of newspapers, the telegraph, telephones, and all the *successors* to television: mass media, steeped in the illusion of user-focused and individual communicative content, shapes us as much as we shape it—and it can constrain our politics as much as emancipate it.

In our profoundly individualistic society, it is all too easy to believe that our intent makes us little monarchs, wandering the world realising our wills in perfect accordance with our actions. But the unintended consequences always catch up to us, and communications and information technologies exponentially accelerate that process, scaling it infinitely. *Network* is a tragedy precisely because it explores this fundamental fact about our most powerful tools. We are constrained by the politics that helped create them, and the enduring politics that governs their use.

Network none-too-subtly suggested that Beale's ability to 'articulate the popular rage' didn't matter because television itself 'destroyed' him and made him its creature, in no small measure because the capitalist context of his network would never have admitted a *true* threat to the system that built its wealth. That remains equally true of social media. Despite the seeming vast proliferation of red roses and hammer-and-sickle emojis on Twitter, there is no revolution waiting in its digital wings, just another social circle for the platform to sort you into.[30]

None of this is to indulge in a reflexive, crotchety attack on the very idea of social media. Its benefits are myriad and obvious; these platforms *have* brought us closer together and materially improved our lives in many ways. But it is worth stepping back to understand that the ways social media can be most helpful—forming connections across international boundaries, quickly fundraising

24 Alexander Galloway, *Protocol: How Control Exists After Decentralisation* (MIT Press 2004) xv.

25 Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs Books 2018). In essence, Zuboff argues that the current phase of capitalism relies on surveillance and the dissolution of privacy in order to generate products and profit.

26 Jules Gill-Peterson, 'Anti-Trans Laws Aren't Symbolic. They Seek to Erase Us From Public Life' (*Them*, 18 April 2022) <https://www.them.us/story/anti-trans-laws-public-erasure-dont-say-gay> accessed 24 May 2022.

27 Edward Nik-Khah and Robert Van Horn, 'The ascendancy of Chicago neoliberalism' in Kean Birch, Julie MacLeavy, and Simon Springer (eds) *Handbook of Neoliberalism* (Routledge 2016) 55–66.

28 Owen Jones. 'Woke-washing: how brands are cashing in on the culture wars' *The Guardian* (London, 23 May 2019) <https://www.theguardian.com/media/2019/may/23/woke-washing-brands-cashing-in-on-culture-wars-owen-jones> accessed 24 May 2022;
Amanda Maryanna, 'the instagram infographic industrial complex' (*YouTube*, 24 March 2021) <https://www.youtube.com/watch?v=q1Op3aPGrrU> accessed 24 May 2022; Lewis (n 16) 6. Each of these works engages with the phenomenon of gestural or 'performative' activism, activism that focuses on empty rhetoric rather than meaningful action, often with the aim of increasing one's social capital through 'making a statement' or appearing to be on the right side of an issue. That genre of activism is easily exploited by corporations precisely because it changes nothing.

29 For more on this archetype's role in mass media, cf. Susan Faludi. *Backlash: The Undeclared War Against American Women* (Crown Publishing Group 1991).

30 Across multiple languages on Twitter, the red rose emoji—long associated with socialist movements—has re-emerged with much the same meaning. In some countries, like the US, it has specifically come to be associated with newer democratic socialist organisations like the Democratic Socialists of America. The hammer-and-sickle emoji, meanwhile, is used by many communists on the platform. While Marxist-Leninists (or MLs) are among the most vocal, the symbol is used by adherents of many different communist philosophies on Twitter.

money through crowdsourcing, networking with like minded people all over the world—are 1) weak attempts to make up for the deficiencies of late capitalism (consider how online fundraising for medical emergencies has emerged as a stopgap against the continued slashing of public health funding worldwide[31]), and 2) easily used by awful people for perverse ends that were once beyond their reach.

The same social media that has allowed the micro-minority of transgender people around the world to talk to each other, form a transnational web of support and even build a movement, has also allowed white supremacists, neo-Nazis, and their assorted ilk to do something similar. But because transgender dreams reach towards structural issues like healthcare and material support, it's harder for our social media activism to achieve them. Meanwhile, for the far-right, hurting individuals from despised minority groups is an immediate goal that social media makes incredibly easy.

This is the dilemma that faces us, and the key to using social media successfully—the key to breaking free of the hideous co-optation that *Network* satirised nearly 50 years ago, freeing ourselves of social media's anti-politics—is to recognise that engagement with and connection to the physical world matters. Social media can be a bridge, but it cannot truly be the public square we were promised, especially not for the purposes of changing the world; it simply wasn't designed to accommodate the expansiveness of such aspirations. *Network* showed that Gil Scott Heron was quite right: the revolution will *not* be televised[32]. The last two decades have shown us it won't be tweeted either.

31 The Lancet Gastroenterology & Hepatology, Editorial, 'Public health funding in England: death by a thousand cuts' (2021) 6(12) The Lancet; John Burn-Murdoch. 'Woke-washing: how brands are cashing in on the culture wars' *Financial Times* (London, 28 April 2022) <https://www.ft.com/content/dbf166ce-1ebb-4a67-980e-9860fd170ba2> accessed 24 May 2022.

32 Ace Records Ltd., 'Gil Scott-Heron - Revolution Will Not Be Televised (Official Version)' (*YouTube*, 7 October 2013) <https://www.youtube.com/watch?v=vwSRqaZGsPw> accessed 24 May 2022.

Where the Thames Meets the Sea

Julian Kirwan-Taylor

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> To stand at the edge of the sea, to sense the ebb and flow of the tides, to feel the breath of a mist moving over a great salt marsh, to watch the flight of shore birds that have swept up and down the surf lines of the continents for untold thousands of years, to see the running of the old eels and the young shad to the sea, is to have knowledge of things that are nearly as eternal as any earthly life can be. -Rachel Carson

It would have been a shame to have missed the scale of the night with sleep and, besides which, it has been too cold. A late May frost has crept across the land, stiffening stalks and deep-freezing my bones. A super-moon has drowned the night with light. It is three in the morning. The ducks who have been swimming all night keeping warm and alert, are now calling to each other in short whispered wheinkk - wheinkkks. An owl patrols the path at the foot of the sea wall and on the silver band of silent water before me huge supertankers hum and throb their way up-river towards London's ports.

The Thames Estuary is not beautiful in any conventional sense. Joseph Conrad, who is probably the estuary's greatest champion wrote, 'it has no noble features, no romantic grandeur of aspect, no smiling geniality'. For centuries, its marshes have been a place for dirty industry where 'tall slender chimneys smoked, speaking of work, manufacture and trade as palm groves on a tropical island speak of luxuriant grace, beauty and vigour of a tropical nature'. Nowadays the chimneys have largely been replaced by the squat tanks and twisting pipes of oil refineries, gas and petrochemical works. Acres of imported cars twinkle like gems in the sun and cones of sand and gravel peak like extinct volcanoes.

But, beyond the cement and aggregate works of Gravesend, is the wild and mysterious Hoo Peninsula. Conrad wrote of the area that it appealed to an 'adventurous imagination'. He wrote of the 'wide open, spacious, and inviting place' which is 'hospitable at first glance'. It is a haunting place where skylarks and curlews have shared the space with convicts, cordite and malaria. The critic, novelist and London biographer Peter Ackroyd, wrote 'even at the beginning of the 21st century, walking alone by the shores of the estuary, it is possible to feel great fear—fear of solitude, fear of being abandoned, fear of the river itself'.

In Gravesend's last pub before the isolation of the marshes begins, grey-haired men with big bellies slouch in metal chairs, drinking mid-morning lagers at the Ship and Lobster. Two St. George flags twitch on the beer garden's fence and another flaps from a flagpole. I walk past the crumbling Victorian warehouses and join a fence which borders the path. A red flag, agitated by the stiff easterly wind, warns of a firing range. A group of police marksmen in fluorescent jackets gather by a firing wall. They shall be the last people I'll see for more than 24 hours.

As the land breaks free from the town, the horse-cropped grass is firm and fast to walk upon. This is that lovely moment at the beginning of a walk when one feels that one could walk forever. A sure and clear path, a wind and a cloudless May sky. Sandwiches, coffee and soup in the back pack. Ahead, avenues of pylons stretch from horizon to horizon and along the sea-wall stubby hawthorns whistle in the wind as they prepare to burst their buds. Wild gypsy horses with huge furry forelocks nibble at short stems. Supertankers filled with oil, others labouring under cliffs of containers, ply the river. They seem ponderous and slow, burdened by their loads, but I cannot keep up with them as they sail downstream. I even ran for a short section, but they are fleeter than they appear.

After an hour or so of walking—and some running—I arrive at Shornmead Fort, one of several built in the 1860s to counter a new French threat. It's no mediaeval fantasy of square keeps and round towers, but rather a low black wall with gun ports on top of a bramble-covered bank. The state had ordered the Royal engineers to blast it in the 1960s and what remains is under the control of the local youths who have mounded earth in the former parade ground to make jumps for bike stunts. Each gunport has its collection of cheap lager cans and NO2 gas canisters piled into a corner. I have the place to myself today and it is perfect for a coffee stop—art on the walls, ingenious inglenooks and wildflowers in the courtyard.

Further along the path, towards Cliffe, near to the low mound of the next abandoned fort, a hawthorn bush bursts with photos and mementos which were tied on to it last week. Dayton Webb, a railway worker, had misjudged a jump on a trial bike and was killed while having reckless fun. He was 23.

This place—this marshland—has a narcotic effect on me. It's my 'go-to' place when I need space in which to breathe. This is where

my spirit rejoices and my mind empties of concerns. I am almost skipping along the path as it continues along the top of the sea wall. The air is rich with sea smells and the light phosphorescent. An unseen moon pulls the trickling tide-waters away from the bank, leaving mud which ripples like a blanket on an unmade bed. Dunlins, black-tailed godwits and shelducks feast on worms and shells. Gulls loll like teens in the sky. Purpling sea lavender and grey green sea purslane grow in the muddy creeks and I pick shoots and leaves as I walk. Tastes of the sea fizzle on my tongue.

Approaching Lower Hope Point the path twists through towering cones of sand and gravel. Conveyor belts wheeze and whine. Tiny particles of silica roll down the steep sides. It is as if another world has been entered where nature has yet to settle on a design. The air smells ferrous and earthy. The path through the works is bordered by a high chain-link fence, on which notices hang warning of death by various means. Gold-green alexanders border the path and sweeten the air. The watery earth of the peninsula has always been exploited—Romans dug for salt, farmers dug ditches and during Victorian times, 'muddies' dug for the mud—Gault Clay—which made the hundreds of millions of bricks needed for the ever-expanding city.

At Cliffe Pools, birds convene in a raucous conference. This former gravel extraction site is now a nature reserve managed by the RSPB, where avocets, spoonbills and egrets roam. They say it's the best place in Britain to hear nightingales. Today the pools are teeming with black-headed gulls, herons and egrets. On the shorelines, redshanks and Kentish plovers are probing the mud whilst a black kite patrols the skies above. In a few days, the rough scrub will tune to the throaty willow warblers, marsh warblers and blackcaps. To see such density of nature re-colonising the rough dug pits is joyous.

Peter Ackroyd wrote that the marshes 'exert a primitive and still menacing force, all the more eerie and lonely because of its proximity to the great city'. It is not difficult to become lost in the autumn rains or in the low light of winter. Paths can take on the appearance of deep ditches and mists twist the shapes of huts and trees into something the irrational imagination fears. In the low, grey light of winter, when red lights blink on masts and pylons, when indefinable noises haunt the turbid air, and the sudden scream of vixen on heat, can chill already cold bones. Today is early summer and the light is full and bright, but a frisson of fear is stalking me as memories of an earlier time return. Now, the RSPB car parks are empty, and I am acutely aware again of the remoteness of these Pools. Here, many decades ago, I nearly met my end when a banger of a car, driven by a skin-head youth, misjudged a hand-brake turn and just missed me. On another occasion, a youth rode a motocross trial bike straight and fast at me, jerking out of the way at the very last second, spraying me with mud and gravel, after which a knot of malevolent youths appeared out of the scrub cheering and jeering, asking—'whachya want mate?' Not responding, I walked fast away.

On a wide sweep of the river stands Cliffe Fort. Domes of sand and thickets of bramble and thorn are piled against the black walls and two non-scaleable fences surround the ditch. Beside the fort are the remains of a Brennan Torpedo launch, one of only eight made, which was designed to propel torpedoes into the Thames. The rails emanating from out of the scrub onto the beach make a perfect place to stop for lunch. Eating cheese and pickle sandwiches, and a salad of fresh sea purslane picked from the shoreline, is the most perfect lunch. I watch ships, and inhale lungfuls of sea air which smells of shells and salt. I watch the waders prodding the mud and the gulls in the canopy of sky above me. There are no dogs sniffing around, no joggers pounding past, no city people leaking their music and noise. These marshes were not always a blissful place to be. Peter Ackroyd described the lands beyond the Pools as 'not a human place'. Malaria—or the 'ague' by which it was known—regularly swept away those who had to live nearby. The Anopheles Mosquito, the largest of its kind in the Western Hemisphere, carried a parasite known as Plasmodium vivax which had a fatal effect. People were still dying of malaria beyond the end of the Great War.

As the afternoon drifts into evening, the land carries a haunted feel. In the nineteenth century, Hay Merricks & Co. set up a small-scale gunpowder storage facility which quickly grew into a chemical explosives factory, producing cordite for the navy. Accidental explosions and deaths were common. Shadows from the now roofless nitro-glycerine huts lengthen across the grass and the hills bordering the flatlands turn a deeper shade of purple. The wind has died. Everything is very quiet. Across the Thames six skeletal monsters at the London Gateway port haul containers from the decks of ships two at a time and lay them down on the quay, where another automated crane carefully places them onto the backs of queuing lorries. Watching this silent and graceful movement is mesmerising.

I reach a large dent in the coastline; Egypt Bay. Google maps has marked the bay with an icon of a sun umbrella and beach ball. What a shift of imagination someone has had! In the waning light, there is a large curve of mud, channelled by shaky rivulets and near the sea wall, a wide expanse of purple sea lavender. The sea itself is a long way away, so far that the oil tanker passing along the river seems as if it's gliding across land. In my weary state the bay seems benign, but it was a fearful place. There is no sign today of the rotting hulks of former ships of the line which, de-masted and decommissioned, spent their last few years as prisons on the Thames. Few sentenced to spend time on these prison ships ever re-emerged. They were chained to the decks, and succumbed to malnourishment and disease. Charles Dickens, who lived on the peninsula's small spine of hills, was appalled by the conditions and campaigned for a more humane treatment of criminals. In his novel, *Great Expectations*, Abel Magwitch escaped from a prison ship in this bay before surprising Pip and demanding 'wittels' in the Cliffe churchyard up on the hill.

I'm tired now and the day is done. The sun is setting. I walk on to where the OS map describes a ruined building as 'Camp Abandoned'. It is a 3 metre square block of old concrete which has been much holed by time, guns and youths. On the inside wall is written, 'Datse loves girls'. The floor is sand banked with dust and dried marsh dirt. In a corner, empty Diet Coke cans and a Subway sandwich packet jerk idly across the rippled concrete floor. I kick away the worst and unroll my sleeping bag.

It is nearly dark and near to freezing. Supper is chunky warm soup. The night quickly turns from chilly to very cold. A gentle wind whines, and ghouls patrol the outside marsh and steal my sleep. However the night is magical. The Rose moon, one of three super moons of the year, is now so large and bright that the marshes glow in a light of silver gilt. Mist steams from dykes. I watch the ducks paddle in circles. Reeds twitch. Ships continue to throb and growl. Lights on the opposite shore blink red and white from towers, chimneys and cranes. In the night light they seem like fallen stars. Directly opposite me is the London Gateway port where the world's largest dockside cranes work in total silence through the night, relieving two ships of their containers. To be so alone and so far from the city, yet so close to its workings, is an extraordinary and thrilling feeling.

Stillness
(Julian Kirwan-Taylor).

Dawn comes early, and after a cup of barely warm coffee from a flask and a chew on a very squashed croissant, I set off into a thin line of mist which lies across the ground. I cannot see my legs, nor anything that is below waist height. I feel my way along the path and make for posts which float like wood on the sea. Birds and fowl commute on invisible lines in the air. Across the river, Southend begins to wake and traffic noise drifts across on the tide. By the time I reach Allhallows-on-Sea I'm nearly ready to re-enter society again, after my time alone with ghosts and the cold. Some early dog walkers are about. We nod as we pass each other in early morning greeting.

As the sun rises on the caravan park, I pass a new concrete and gravel-filled plot commemorating 2nd Lt. Armand John Ramacitti. He'd been flying his first combat mission in a B17 and was returning from northern France. He'd been hit by flak and lost an engine. Over the Thames another engine failed. As he struggled to control his plane, it veered into his section leader, lost a wing and nose-dived into the Thames. He was only 15 minutes away from landing at his base in Essex. A mile or so further on, is a stone memorial to a boy who drowned in the Yantlet channel. The copper plaque with his name and story has long since been prized off and melted down. To those Romans who fell chasing the woad-covered Britons, to the malarial victims, to the women in the nitro-glycerine factories, prisoners, sailors, smugglers, fishermen and others who've died on these watery lands, there is no monument other than the living and ever-changing memorial of the marshes themselves.

Beyond the Yantlet, it really is the end of the world. An obelisk marks it so. Joseph Conrad wrote of this place as where 'the sky and sea are welded together without a joint'. The solitude and immensity is beyond words.

I turn inland and am met by great rusting coils of barbed wire, along with notices warning of death. The MoD shells have long been removed from this firing range but it still remains closed. I toy with the idea of trespass but after such a blissful solitudinous time, I'm in no mood for an argument should I meet a ranger. So I take the new and more circuitous England Coast Path towards the huge cylindrical containers of the Isle of Grain, some white, some rusting brown, some aged grey, resembling gigantic African huts.

On the Isle of Grain there are tank traps along the shore, and another disused fort which is much loved by brambles. Walking along the streets of Grain, and passing un-glamorous housing, is a 'coming-back-to-earth' experience after the euphoria of being in space. The little stains of sadness which inevitably smudge the emotions after the passing of so fine a time, mix with the knowledge that all things must end.

In a public park, beneath the fort, there's a bench with a table where I sit and watch the sun sparkle on the silver sea. A man is mowing the grass creating long horizontal lines of green with his sit-on mower. He decides it's time for a break and so drives his noisy machine straight towards where I am sitting and parks it right in front of me.

'Coffee break', he says and sits on the other side of the table blocking my view of the sea. I have left my words out on the marshes so nod by way of reply. Reluctant to leave, but in need of some sleep and food, I walk towards the stop where the bus will come and take me home.

Blaze of Glory

Jack Graveney

Jack Graveney has just graduated from the University of Cambridge with a Starred First in History and German. His work has been published in The Oxonian Review, ERA Magazine, *and the* Cambridge Review of Books, *and he is currently writing a book about class. Jack is the Content Editor of* CJLPA.

Applause in the executive boardroom. Hands pound backs, mouths twist into smiles. A round man with a stain of indecipherable grease on his shirt collar rises to speak, gesturing inanely at an electronic display. His hands twitch with glee as he highlights data points and maps out forecasts.

'Returns for this quarter are exceptional, a threefold uptick on last year. Our customer base has expanded markedly. Any number of substantial brand deals. And a few bookings of particular extravagance brought in half a million single handedly. Simply put, they're dropping like flies'.

Uproarious cheer breaks out once more. They had indeed sown a good harvest. Fulfilling their customers' most neurotic requests gave the assembled board members and lesser functionaries a perverse satisfaction. In a sense, they did genuinely care. But this care was delightfully finite. After the moment of successfully facilitated self-termination, it could freely evaporate. The business model at Blaze of Glory™ ensured that client relationships never lasted too long.

It had all begun with Dignitas. Geographical localization of euthanasia laws created an inevitable concentration of demand. Desperate and despairing men and women flocked to Switzerland and Belgium in the hope of outpacing the future. But something strange happened. The allure of death began to take a hold beyond those 'expected customers'—the terminally ill, irrecoverably deformed, or incurably paedophilic—and exert an almost inexorable pull on the rest of society. Its rapturous theatricality, devil-may-care vibe, and (above all) resplendent finality proved appealing to those wishing to retroactively cement their social status or claim Warhol's promised fifteen minutes of fame. Minor mutilations did the rounds on social media—for a time, the 'Stigmata Challenge' dominated TikTok—but for the real deal, the whole hog, dedicated corporations sprung up, boutique experiences which promised an extinction like no other.

Centuries of media satirising bourgeois decadence promptly exited the sphere of fiction. It was a matter of months before four Chinese businessmen found themselves sat in a French villa around a fine wooden table, loaded with all manner of delicacies: quail eggs, dripping churros, a trough of bœuf bourguignon, a monumental Yorkshire pudding drenched in the thickest gravy, consuming and devouring and fucking their brains out with three supine street urchins and a buxom schoolmistress until they slowly wound up dead, gorged with fat and cream atop the table lengthways, faithful to the good old *Grande Bouffe* down to the smallest detail.

Newspaper obituary columns burst their banks and were replaced by dedicated magazines. Martyrdoms were orchestrated with such conviction that sanctification seemed almost guaranteed; terror attacks dropped accordingly. Advertising slogans commanding people to 'Die doing what you love!' (or the even less savoury 'Go out with a bang') brought hordes of lascivious old men to the doors, swallowing handfuls of Viagra as they waited for their chance to expire as close to the moment of orgasm as possible. Countless weddings were called off after stag nights got out of hand. Television channels offered a round-the-clock programme of self-murder, a source of envy and inspiration in equal measure. This was more than an industry. Suicide had become an art, an ecstatic unity of swansong and encore. It was the chance to be, in death, all which one had not been in life.

Enough.

That is, I think, enough atrocity for the moment, sufficient verbal bombast.

Carry on like that much longer and my thought experiment won't have any legs to stand on. Since that's all it is, a thought experiment, a little game to play with myself and string out in words. Think of the untapped riches that remain, from psychologizations of the workforce to population crises, government interventions to ideological counterblasts, here in particular the scope is almost endless, with pleas for a return of suicide to its former authenticity, teenage nihilists unable to cope with the realization of their nocturnal insincerities, class strugglers pressing for the industry's nationalization and lamenting its domination by the rich, even in death the poor can't get themselves heard, on and on it goes!

Yet at the same time it goes nowhere, nowhere at all. What do I know of suicide? What, indeed, do I know of the world beyond its reconstitution as a mass of tensions and forces, concepts given tortuous names and flagellated in writing? What will this achieve? What, in short, is my right?

Seek to reduce your guilt by attempting to include others within it. Turn to critique. And generalise. Raise the conceptual stakes as high as possible.

The influence of a writer like Don DeLillo or David Foster Wallace seeps out of the above sketch like mustard from an over-filled sandwich. The same over-stylized form and sprightly ironic tone, the same central motif of a contradiction or minor perversity magnified and drooled over *ad absurdum.* Spellbound by form, that glossy coat and empty shell. The prose is infected by the same sickness as its protagonists. In this respect, at least, it tells us something we already know, without hinting at the possibility of change. It appears as a monument to the inescapability of our condition. In face of such impotence, we have no choice but to laugh. We revel in it. *Infinite Jest* is the brick-sized proof of this; Foster Wallace observed that he set out to write a sad book and ended up with a funny one.[1] After that, he set out to write a boring one and pathetically succeeded. And then, at the age of 46, he killed himself. (DeLillo lives on, thrashing out works of increasing mediocrity.)

Blame modernity: perhaps it isn't possible to write a sad book any longer. Here, there is no tragedy, only farce. Theodor Adorno took a dim view of representational art. For him, it inevitably involved the possibility of sadistic identification on the part of the 'audience'; even the 'sheer physical pain of people beaten to the ground by rifle butts contains, however remotely, the power to elicit enjoyment'.[2] Years later, conservatives argued that kids playing violent video games would learn to associate happiness with violence, and we all laughed at them. But the issue runs deeper than this merely representative function; the status of art itself appears dangerously entangled with its offering of enjoyment. I exit a cinema showing of *Schindler's List* thinking 'what great art I have just been privy to', caught in a terminal spiral of self-satisfaction and fawning praise for Stephen Spielberg. W. H. Auden admitted that no single line of his managed to 'save a single Jew', since 'poetry makes nothing happen'.[3] Art imposes itself over the reality it seeks to depict. This is the ambivalence of aestheticization, the trapdoor lurking in the movement from reality to art to audience, in the fundamental artificiality of everything which secures art's necessary difference from the world.

Friedrich Nietzsche wrote that 'poets are shameless with their experiences: they exploit them'.[4] The lyric poet who confines himself to the nooks and crannies of his own swollen consciousness is a minor offender. Autofiction is arrogant and indulgent, but it knows its place. That Karl Ove Knausgaard's *My Struggle* series, the most notorious project of this kind, resulted in nothing more than an angry uncle and some mundane Norwegian family drama makes clear that the exploitation at work here is trivial. Far more shameless is the appropriation of the suffering of others—thousands, millions, impersonal and uncredited—as grist for the aesthetic mill. Look above: suicide isn't the point. What the piece wants to articulate is a certain feeling for the grotesque nature of modernity. But suicide is traduced, forced to play along in this garish masquerade.

'The Sunday edition of the *Kärtner Volkszeitung* carried the following item under "Local News": "In the village of A. (G. township), a housewife, aged 51, committed suicide on Friday night by taking an overdose of sleeping pills"'.[5] So begins Peter Handke's novella *Wunschloses Unglück* (*A Sorrow Beyond Dreams*); it is his mother who has taken this overdose. Here is no dissimulation; the quoted banality of a regional newspaper report drives home the act's horrific reality. This is not to say that *Wunschloses Unglück* is anti-literary. Handke notes that 'as usual when I am engaged in literary work, I am alienated from myself and transformed into an object, a remembering and formulating machine'—writing as self-reification, mechanisation of the mind.[6] The artist has the privilege of separation from the world, they can write or paint themselves out of a situation and look upon it anew as something transfigured. In the case of Handke, egoistic abstraction is, however, necessarily bound by a filial adherence to the facts of his mother's life and death.

All the same, an unavoidable step is taken by the translation of experience into language, wrestling bodies and minds in motion into the inky strictures of text. For this, form is required—the true engine of prose, that which generates its meaning. Indulgence and alienation loom in this choice also. Selfishness is the inevitable outcome. Claire-Louise Bennett protests that 'experimental' prose is not experimental *for her*, but honest, the product of a background which does not correspond to the literary mainstream.[7] She makes much of being, along with Ann Quin, a working-class female writer who deploys decidedly unusual prose forms in her attempts to make sense of the world. Quin killed herself, in 1973, at the age of 37. Bennett recounts, in *Checkout 19*, finding a corpse hanging from a tree on a visit to Yorkshire.[8] This may or may not be relevant.

Formally, writing appears the opposite of suicide. It is the affirmation of life—even if only one's own. But is not suicide also an act of self-authoring? Why else would we leave suicide notes?

The critic often strikes me as a kind of cuckold, jerking off in the corner of the literary dancefloor. But 'creative' writing itself bears an essentially masturbatory character. Events, people, and feelings are co-opted in the interests of stimulating the self, fantasised about at length, and carefully fiddled with before being splurged onto the page. Autofiction, merely the most explicit variety of this, becomes autoeroticism. The same is true of reading and reception: the way in which I'm able to take such joy from a perceptive line of thought or sublime turn of phrase, without it having the slightest impact on my social or political behaviour; the impotence of the beauty I detect within argumentative and aesthetic forms alike, their incisive and interlocking geometries, motivating no single scrap of action aside from buying and reading yet more books to bask on my shelves and dehydrate in the desert sun.

The miracle involved in this is that such an apparently selfish activity can not only sublimate the writer's dysfunctional emotions but also resonate for others. Bernard Mandeville thought that private vices generated public virtues.[9] The more a decadent aristocracy gambled and luxuriated, the more money circulated, allowing all and sundry

1 Cf. Stephen Burn (ed), *Conversations with David Foster Wallace* (University Press of Mississippi 2012) 55.

2 Theodor Adorno, 'Commitment' (1974) I/87-88 *New Left Review* 85. Originally published in German as 'Engagement' in 1962.

3 Auden quoted in Beth Ellen Roberts, 'W. H. Auden and the Jews' (2005) 28(3) Journal of Modern Literature 87.

4 Friedrich Nietzsche, *Jenseits von Gut und Böse. Vorspiel einer Philosophie der Zukunft* (first published 1886, Reclam 1988) §161. Translation the author's.

5 Peter Handke, *A Sorrow Beyond Dreams* (first published 1972, Farrar, Straus and Giroux 1974) 3.

6 ibid 5.

7 Cf. Moore Institute, 'Experimental Fiction: Rob Doyle and Claire-Louise Bennett' (*Youtube*, 25 November 2021) <https://www.youtube.com/watch?v=PJaHD6mHKdc> accessed 22 June 2022.

8 Claire-Louise Bennett, *Checkout 19* (Penguin 2021).

9 Cf. Bernard Mandeville, *The Fable of the Bees* (first published 1714, Penguin 1989).

to reap the rewards. Self-consciously virtuous action could hope for no such inadvertent benefit. The Dutchman's model is more applicable to aesthetics than economics. Through some perverse transubstantiation in the mind or on the page, the selfish scribbles of those deluded enough to call themselves writers generate a universal benefit. A scrap of daily suffering leavens and nourishes. They slice their own wrists so all can drink.

P.S. A retrospective confession: 'Keep trying, try everything. And if all else fails, say that it is an essay' (Kurt Tucholsky).[10]

10 Ignaz Wrobel [Kurt Tucholsky], 'Die Essayisten' *Die Weltbühne* (28 April 1931) <https://www.textlog.de/tucholsky-essayisten.html> accessed 22 June 2022. Translation the author's.

Stand Up for Singapore: ***Music and National Identity in a Cosmopolitan City-State***

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Modern-day Singapore prides itself as a 'global city' with a commendable level of economic stability as a result of its sustained cosmopolitanism. Having rapidly developed over a time when the differences between nations are increasingly valued, the city-state's cosmopolitan disposition has led many to question the existence of a nation-specific identity. The government's—more specifically, the People's Action Party (PAP) that has led a supermajority government since Singapore's independence—forceful hand in crafting the nation's 'global city' identity has led many to perceive said identity to be artificial if not ill-defined. In this article, I delineate the steps undertaken by the PAP (concerning race and language) that lead to the existing global impression of Singapore before examining the approaches taken by state institutions to musically portray the cosmopolis.

Race in the 'Global City'

Singapore's experience of numerous periods of economic and cultural reinvention precedes the proclamation of its statehood on August 9, 1965. These reinventions were mandated by its obsession 'to become and remain a successful city-state and global city'.[1] Singapore today continues to be described as a 'Global City' or 'International City'. In fact, the terms were 'used regularly throughout the development plans of the State of Singapore, and in numerous planning documents produced for it'.[2] Singapore's association with the 'global' and 'international' leaves many to ponder about what is to be considered its 'local' or 'national'.

Due to its central location in Southeast Asia, Singapore has served perennially as a hub for trade and commerce; it thrived as a cosmopolitan seaport that facilitated trade between Europe and East Asia as a British colony and is today a common midpoint for travel between Europe or Africa to Asia-Pacific as evidenced by its international passenger traffic. The settlement in Singapore of international travellers over time has engendered a multicultural and multiracial population on the island. This multiculturalism—and the determination to maintain it—has proven to be advantageous in ensuring Singapore's economic success and plays a significant role in the genesis of Singapore's cultural identity.

It is important to note that Singapore's 'state creation preceded the process of nation building' as a result of its unanticipated separation from Malaysia.[3] Contrasting with the common narrative of state independence succeeding an intensifying nationalist sentiment amongst its people, Singapore's independence was not founded on such convictions. There was therefore an absence of a well-defined national identity at the onset of statehood. As a small island that lacks a resource-rich hinterland, Singapore's state-creation process fixated on discovering the ways in which the state could generate and assure itself of an economic capital. The concern for its economy was characteristic of the inhabitants of the island, whom Sir Stamford Raffles—a British statesman often regarded as the founder of modern Singapore—described as having embodied a '"spirit of enterprise and freedom" which distinguished it from the rest of Asia'.[4] Singapore's state-creation process was prioritised over nation-building, thus delaying the creation of a cultural capital. That

1 Derek Heng, 'Chapter 3—Casting Singapore's History in the Longue Durée' in Karl Hack and Jean-Louis Margolin, with Karine Delaye (eds), *Singapore from Temasek to the 21st Century: Reinventing the Global City* (NUS Press 2010) 76.

2 Nathalie Fau, 'Chapter 4—Singapore's Strategy of Regionalisation' in Hack and Margolin (n 1) 55.

3 Quoted in Eve Hoon, 'The (In)Significant Foreign Other: A case study on the limits and conditions of Singapore-style cosmopolitanism' (BA Archaeology and Anthropology diss., University College London 2014) 6.

4 Christina Skott, 'Chapter 7—Imagined Centrality: Sir Stamford Raffles and the Birth of Modern Singapore' in Hack and Margolin (n 1) 161–62.

is not to say, however, that the developments of the two capitals are distinct from one another. In recent years, the conception of Singapore's cultural products has reflected a consideration for economic gains (as we shall see below).

Apart from its people's enterprising spirit, more pertinent to this study of identity is Singaporeans' seemingly intrinsic belief in multiracialism. Raffles argued that the people of Singapore were 'characterised by [their] diversity, but also the absence of prejudice'.[5] This statement highlights the past people's cosmopolitan outlook of Singapore. Prior to its independence, Singapore was part of the Straits Settlements, themselves a part of the wider British Malaya. In a bid to maintain their rule over British Malaya, the British instigated a form of colonial nationalism in the region that raised the status of Malay culture, recognising the significance of the Malay population and providing them with a slight sense of autonomy.[6] Schools that instructed in the Malay language were favoured and received more support and funding from the British government than schools that instructed in other languages (such as English or Mandarin Chinese). This privileging of the Malay language and culture—according the Malay population with a sense of superiority over those of other races—displeased the Chinese-majority population in Singapore.[7] The resultant racial tension persisted within the region even after Malaysia gained its independence from the British in 1963, eventually triggering the race riots of 1964 in Singapore. Singapore's intolerance of the existing cultural and racial hierarchy and Malaysia's fear that a 'merger with Singapore would lead to an overall Chinese majority that would threaten the privileges of indigenous Malays' led to Singapore's secession from Malaysia in 1965.[8]

Negotiating Singapore's multicultural and multiracial population proved to be a matter of great importance upon the nascency of the State as then Prime Minister Lee Kuan Yew 'asked rhetorically, "How were we to create a nation out of a polyglot collection of migrants from China, India, Indonesia, and several other parts of Asia?"'.[9] To establish social connections between such disparate communities that was crucial to citizenship (and the forming of a coherent nation) was the primary concern of Lee and his government (led by the PAP). They dealt first with the fundamental issue of the nation's lingua franca (or 'working language') by seeking a linguistic middle ground between its various racial communities. Its previous disputes with Malaysia had dismissed the Malay language as a contender, and while the Chinese now formed the racial majority in Singapore, their native language was not favoured as Lee had also aimed to 'disassociate Singapore's largely ethnic Chinese population from communist China'.[10] The decision was made to refer to the British, whose vernacular was already familiar to the population in Singapore as a result of its colonisation. The English language served as a racially neutral communicative tool upon the departure of the British as it was not inherently associated to a racial majority in Singapore.

A proficient level of English is continually stressed in Singapore, especially since it holds the status today as the world's lingua franca. In a speech given at the launch of a book series titled *Grammar Matters* (2000) produced to aid English-learning, then Minister for Education Teo Chee Hean highlighted the accessibility that English is able to provide to its citizens:

> 1. Singapore has four official languages: Malay, Tamil, Chinese and English, reflecting our ethnic diversity and our history. Our mother tongues give us access to our diverse cultures, values and roots, while English is our working language. Using English as the common language for administration and education has helped Singaporeans from all walks of life understand one another and live together harmoniously.
> 2. Equally importantly, proficiency in the English language has also provided Singaporeans with a medium to communicate with others around the world—for business and trade, in academia, in international fora, for travel and leisure, over the Internet. It has given Singaporeans a key advantage—global literacy—so that we can directly communicate and convey our views to others in many settings around the world.[11]

Teo noted that English was not only able to facilitate communication within Singapore's borders but also beyond on an international level. Alluding to Singapore's economy-centred disposition, Teo also argued that mastery of English would enable Singaporeans to achieve the 'global literacy' essential to the nation's economic development.

With the understanding that one's language is a strong signifier of one's racial identity, the explication of language-learning in Singapore above highlights the government's aspirations for racial equality. English remains today as the state's *de facto* official language and language of business and administration. By proclaiming Malay, Tamil, and Chinese as the other official languages (despite the disparity in numbers of the racial communities who speak them), the Singapore government grants 'equal status to the cultures and ethnic identities of the various "races"', and prompts a racially unbiased society in Singapore.[12] This belief is instilled in citizens through the daily recitation of the National Pledge—that includes the lines, 'pledge ourselves as one united people, regardless of race, language, or religion'—during their years in school.[13] Singapore's penchant for racial equality stems from the issues encountered as a state of Malaysia (as highlighted above), and its societal structure as a British colony which senior diplomat Tommy Koh highlights to be 'both racist and hierarchical'.[14] To inhibit the development of a racial hierarchy within a society, Koh explains that one needs to 'treat [their] minorities as equals', as demonstrated in Singapore.[15]

5 ibid.
6 Siew-Min Sai, 'Educating multicultural citizens: Colonial nationalism, imperial citizenship and education in late colonial Singapore' (2013) 44 Journal of Southeast Asian Studies 49.
7 ibid 55.
8 Hoon (n 3) 10.
9 Anthony Reid, 'Chapter 2—Singapore between Cosmopolis and Nation' in Hack and Margolin (n 1) 50.
10 Melissa Wan-Sin Wong, 'Negotiating Class, Taste, and Culture via the Arts Scene in Singapore: Postcolonial or Cosmopolitan Global?' (2012) 29 Asian Theatre Journal 233, 247.
11 Ministry of Information and the Arts, 'Speech by RAdm Teo Chee Hean, Minister for Education and Second Minister for Defence at the launch of *Grammar Matters*, at Nanyang Girls' High School Auditorium on 31 Mar 2000 @ 2.30 PM', press release, 31 March 2000 <https://www.nas.gov.sg/archivesonline/data/pdfdoc/2000033101/tch20000331b.pdf>.
12 Quoted in Selvaraj Velayutham, 'Everyday Racism in Singapore' in Selvaraj Velayutham and Amanda Wise (eds), *Proceedings of the Everyday Multiculturalism Conference of the CRSI* (Centre for Research on Social Inclusion 2007) 3.
13 'National Pledge', National Heritage Board <https://www.nhb.gov.sg/what-we-do/our-work/community-engagement/education/resources/national-symbols/national-pledge> accessed 11 April 2020.
14 Neil MacGregor, 'Singapore' (*As Others See Us*, 2 September 2019) <https://www.bbc.co.uk/sounds/play/m00082cp> at 41:35.
15 ibid.

Singapore's racial demographics are managed by the state through the Chinese-Malay-Indian-Other (CMIO) model. This four-race model obligates Singaporeans to identify themselves as part of one category in relation to the others. Through administering this model, the government homogenises each category and erects racial boundaries 'in an attempt to erase hybridity'.[16] To be categorised into one of the four racial groups is a significant part of forming one's own Singaporean identity, as Eve Hoon explains:

> The coexistence of race and national identity was represented in the hyphenated identity model of 'nation–race', where Singaporeans were asked to identify as Singaporean–Chinese, or Singaporean–Indian, Singaporean–Malay or Singaporean–Other. Race was therefore foundational to the national identity of a Singaporean, almost serving as a prerequisite.[17]

The ascriptive nature of the CMIO model is exploited in many areas of management in Singapore, ranging from housing where there was 'a quota for each racial group in every block of flats';[18] to education where students were taught Mandarin, Malay, or Tamil as their 'mother tongue' if they were Chinese, Malay, or Indian respectively while a choice is given to those categorised as 'Other'; and to Singapore's racialised public holidays, shown in Fig. 1.[19] (Note that two days are associated with each race to ensure an equal distribution.)

Public Holiday	Racial Marking
New Year's Day	Unmarked
Chinese New Year (Two days)	Chinese
Good Friday	Other
Labour Day	Unmarked
Vesak Day	Indian
Hari Raya Puasa	Malay
Hari Raya Haji	Malay
National Day	Unmarked
Deepavali	Indian
Christmas Day	Other

Fig. 1 *Public holidays in Singapore and their associated race*[20]

As a result of these patent racial demarcations in the lives of Singaporeans, a notion of ethnic absolutism is passively developed within Singaporeans who become acutely perceptive of the nuances of the different racial factions.[21] In opposition to encouraging cultural integration often anticipated within the population of cosmopolises like Singapore, the government has instead made more distinct the racial boundaries between its people.[22]

To further strengthen Singapore's fundamental pillar of multiracialism, a curriculum known as 'National Education' is embedded within its education system. Students are taught of the racial conflicts in Singapore's history—which include the race-related Maria Hertogh riots of 1950 and the racial riots of 1964—in order to comprehend the fragility of inter-racial relationships and to deter racial tensions and its lamentable consequences. Additionally, public discourse concerning racial differences is sanctioned as taboo by the government, thus further mitigating the recurrence of the disabling events in Singapore's history.[23]

Clash of Identities: Singaporeans vs Singapore Government

In comparison with its achievements in other areas of Singaporean society, the government's work as 'architect of nationalism and national identity' has been more contentious.[24] The national identity defined by the government centres around the state's obsession with economic success, rather than the more problematic promotion of an ethnic identity.[25] Policies are constantly changing to encourage economic growth, which results in a continual construction and reconstruction of the Singaporean identity.[26] When Singapore experienced a labour shortage in the 1990s, the government acted upon this deficiency by attempting through several means to make Singapore a favourable place for foreigners to settle and work. First, Singapore's foreign policy was amended, simplifying the immigration process.[27] Second, the government flagged the CMIO model in order to dismiss potential race-related concerns arising from integration into Singaporean society. Singaporeans are reminded of the all-encompassing 'O' of the CMIO model 'to encourage Singaporeans to welcome immigrants of all ethnic backgrounds into Singapore'. Likewise, foreigners are led to view Singapore as an accommodating and cosmopolitan country with the ability to 'incorporate all immigrants into [its] existing [CMIO] model'.[28] Some have termed the 'O' a 'catch-all residual category' due to the convenience it has provided to immigration.[29] The cosmopolitanism offered by the CMIO model and its connection to economic progress therefore constitutes the government's notion of 'Singaporean'. These efforts proved to be successful as the 'O' category saw an increase of approximately 100,000 individuals between 1990 and 2013.[30]

The influx of immigrants led Singaporeans to question the relationship between their national identity and the race-managing CMIO model. Does the cosmopolitanism propagated by the government characterise what the people view as 'Singaporean'? To the government, the 'Singaporean' is a cosmopolite who is inducted to the CMIO model and seeks economic progress. Singaporeans, on the other hand, regard the Singaporean identity as one that accounts for more than a racial identity represented by the CMIO model. The rejection of the convenient incorporation of new citizens into the CMIO model has shown that, to Singaporeans, the Singaporean identity is not simply defined by one's race (or even language or

16 Chua Beng-Huat, 'Culture, Multiracialism, and National Identity in Singapore' in Kuan-Hsing Chen (ed), *Trajectories: Inter-Asia Cultural Studies* (Routledge 1998) 186.
17 Hoon (n 3) 11.
18 ibid.
19 Chua (n 16) 190.
20 Public holidays listed are ones observed in 2020. See 'Public holidays', Ministry of Manpower <https://www.mom.gov.sg/employment-practices/public-holidays> accessed 11 April 2020.
21 Ien Ang and Jon Stratton, 'The Singapore Way of Multiculturalism: Western Concepts/Asian Cultures' (2018) 33 Sojourn: Journal of Social Issues in Southeast Asia, S61, S78; Vicente Chua Reyes, 'Issues of Citizenship, National Identity and Political Socialization in Singapore: Implications to the Singapore Education System' (2013) 1 Studies of Changing Societies 37, 39.
22 Hoon (n 3) 12.
23 Velayutham (n 12) 2–4; Chua (n 16) 192.
24 Kirsten Han, 'One Singapore?: Nationalism and identity in Singapore's mainstream and alternative media' (MA Journalism, Media, and Communication diss., Cardiff University 2013) 1.
25 Quoted in Hoon (n 3) 9.
26 Han (n 24) 1.
27 Hoon (n 3) 17–18.
28 ibid.
29 Quoted in ibid.
30 ibid.

religion) but by one's experience of growing up and living in a society shaped by the CMIO model which has attuned individuals to the practices and tendencies of those in a racial category that is different to their own. To Singaporeans, falling into one category of the CMIO model—as immigrants do—may allow one to attain Singapore citizenship but is insufficient to allow one to claim oneself as 'Singaporean'. Thus, a dispute between the government and the people's notion of 'Singaporean' is established. While the government regards all citizens as Singaporeans, Singaporeans perceive themselves more exclusively as members of an imagined community—to use Benedict Anderson's term—bound together by the experience of the Singaporean way of life.[31]

The discord between the government and the people's notion of 'Singaporean' is highlighted in the arts, which were employed to attract capable foreigners—Westerners, in particular—to join Singapore's workforce. State-funded arts companies (or those with aspirations of state-funding) tend not to be overtly culture-specific in order to cater to what is anticipated to be a cosmopolitan audience. Melissa Wong cites the Singapore Repertory Theatre (SRT) as an example; the SRT's tagline in 2010 was 'World Theatre with an Asian Spirit', which demonstrated that a distinct idea of 'Singaporean-ness' in the arts needs to be substituted for one that is less specific in order to create a cosmopolitan image of Singapore. This falls in line with the government's view of 'Singaporean' and of Singapore as a cosmopolis. While the tagline is no longer in use by the company today, its inclination for global connections is hinted at still by the company's mission, which states that the SRT seeks to collaborate 'with the best talent in the world'.[32]

A Linguistic Analogy

Prime Minister Lee Hsien Loong has noted that 'Singapore is not a melting pot but a society where each race is encouraged to preserve its unique culture and traditions, and appreciate and respect those of others'.[33] The Singapore government's attempts to keep the categories of the CMIO model distinct and prevent a coalescence of said categories is illustrated by their management of languages in the nation. A bilingualism policy put in place in 1959 mandates that all Singaporeans have knowledge of two languages—English and a 'mother tongue'.[34] Aside from being a key marker of one's racial identity, the ability to read, write, and converse in one's mother tongue arguably strengthens one's allegiance with their CMIO category.

In 1979, the *Speak Mandarin Campaign* was initiated by the government to organise the linguistically heterogeneous Chinese population in Singapore. The goal of the campaign was to encourage 'all Singaporean Chinese to embrace the use of Mandarin and enjoy an appreciation of the Chinese language and culture' and to discourage the use of Chinese dialects.[35] The government recognised that an absolute Mandarin-speaking Chinese population would eradicate the need for the teaching of dialects in addition to the bilingual education system. In a speech marking a re-launch of the campaign in 1986, then Deputy Prime Minister Goh Chok Tong dissuaded the use of dialects by branding them as a 'learning burden'.[36] By encouraging the use of Standard Mandarin as the sole Chinese language amongst Singapore's ethnic Chinese population, the government has further defined the Singaporean Chinese identity. While there have not been extensive campaigns for the Malay or Tamil languages, the Malay Language Council and Tamil Language Council (established in 1981 and 2000 respectively) organise events to encourage the continual use of Standard Malay and Standard Tamil amongst the respective racial communities.[37]

In spite of the government's attempts to keep the racial identities distinct and separate, a coalescence of these identity markers has proven to be inevitable—especially considering the close quarters in which people of different races inhabit. This coalescence manifests itself through an English-based creole language known as 'Singlish' which is widely spoken and understood by Singaporeans today. Singlish, while English-based, is characterised by words originating in Hokkien, Cantonese, Teochew, Malay, Tamil, and other common languages used in Singapore. Also part of its features are words created from a blend of languages; for example, 'agaration'—which means an estimation—is an anglicised form of the Malay 'agak-agak' which refers to the act of estimating. Teo attributes the emergence of Singlish to the first-generation English speakers who are more in touch with their mother tongues: 'The syntax, grammar, expressions, pronunciation and rhythms of their own mother tongues come more naturally to them. These creep into the English they use'.[38]

As Singlish is unintelligible to non-Singaporeans (and is thus nation-specific) and is believed to reduce Singaporeans' competence in Standard English, it was viewed by the government as detrimental to Singapore's cosmopolitan image and economic wellbeing.[39] In light of these potentially threatening outcomes, the government initiated the *Speak Good English Movement* in 2000 to discourage the use of Singlish and stress the importance of English to inhabitants of a 'global city'. As part of the campaign, the Ministry of Education revised the English Language syllabus used in schools with a stronger focus on grammar and presentation skills; more debates and essay competitions were organised; and new English-learning aids were published.[40]

Similar to the treatment of Chinese dialects, Singlish was viewed askance by former Prime Minister Lee Kuan Yew who termed it a 'handicap' that '[the government] must not wish on Singaporeans'.[41] Whilst some Singaporeans believe that Singlish is integral to the Singaporean identity—arguing that 'it is a true reflection of Singapore's multiculturalism'[42]—it is seen by the government as a

31 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 2016).

32 'About Us', Singapore Repertory Theatre, <https://www.srt.com.sg/about> accessed 14 April 2020.

33 Nur Asyikin Mohamad Salleh, 'Singaporean identity is unique: PM', *Straits Times* (Singapore, 20 May 2017) <https://www.tnp.sg/news/singapore/singaporean-identity-unique-pm>.

34 Leonard Lim and Mathew Mathews, 'Emerging sense of S'porean identity independent of ethnic heritage', *Straits Times* (Singapore, 15 November 2017) <https://www.straitstimes.com/opinion/emerging-sense-of-sporean-identity-independent-of-ethnic-heritage>.

35 'National Language Campaigns', National Heritage Board, <https://www.nhb.gov.sg/what-we-do/our-work/community-engagement/public-programmes/national-language-campaigns> accessed 16 April 2020.

36 Lionel Wee, '"Burdens" and "handicaps" in Singapore's language policy: on the limits of language management' (2010) 9 Language Policy 97, 99.

37 'National Language Campaigns', National Heritage Board.

38 Ministry of Information and the Arts (n 11).

39 Wee (n 36) 102.

40 Ministry of Information and the Arts (n 11).

41 Wee (n 36) 99.

42 'Searching for the Singaporean Identity'(2019) The*Alum*NUS 116 <http://www.nus.edu.sg/alumnet/thealumnus/issue-116-jan-mar-2019/perspectives/focus/searching-for-the-singapore-identity> accessed 16 April 2020.

peril to its cosmopolitan vision of Singapore. The government's pushback on Singlish evidenced their resistance towards Singaporeans' ideal of a culturally homogenous national identity.

Music in Singapore

Similar to many aspects of Singaporean life, art in Singapore is subjected to the authoritative though pragmatic governance of the People's Action Party. The government frequently argued in the early years of independence that the economically focused people of Singapore lacked 'social graces and refinement', qualities that could be inculcated with art.[43] The civilising ability of the arts was also recently highlighted by Prime Minister Lee Hsien Loong, who cautioned against building a Singapore with 'a first-world economy but a third-rate society, with a people who are well off but uncouth'.[44]

The state's intention to induct the arts into its nation-building process is evidenced in the early years of the state's independence as then Minister of State for Culture Lee Khoon Choy proclaimed at the opening of an art exhibition at the National Theatre in 1966 that 'The days of Art for Art's sake are over. Artists should play an integral part in our effort to build a multi-racial, multi-lingual, and multi-religious society where every citizen has a place under the sun'.[45] More than a decade later, the relationship between the arts and the state is highlighted again in former Finance Minister Hon Sui Sen's speech at the opening of the Third Singapore Arts Festival on December 10, 1980:

> While it may sound romantic for artists to starve and work in their garrets, the output of such artists without patronage must be abysmally low. A Michelangelo could not have given of his best without the beneficence of a Pope Sixtus with a Sistine Chapel to be decorated: Neither could other artists of the Renaissance have done their work without the patronage of princes whose vanity must be flattered or wealth displayed.[46]

Hon emphasised the working relationship between artists and patrons in Renaissance Europe and likened the state and its government to the latter. It was expected that artists would consider the patron's (i.e., the state's) interests when creating art. The arts were to serve a civilising role in the building of a society that is desirable to the government. This role involved instilling a unique sense of identity and belonging in Singapore citizens, which was crucial to retaining the state's human resources following the economic crisis in the 1980s (which led to the emigration of many). In music, ethnic community songs and National Day Parade theme songs (NDP songs) were created to aid the imposition of the government's sociological ideologies.

Ethnic Community Songs

Along with their enterprising spirit, the settlers of pre-independence Singapore brought to the island the songs of their diverse cultures, which are categorised into the definitive 'C', 'M', and 'I' of the CMIO model. In an attempt to create a shared entity amongst its people post-independence, the government appropriated these songs by changing its lyrics to suit a Singaporean context. In the early 1980s, these songs were recorded by celebrities and promoted widely to the nation as 'national folk songs' through television and radio and were made even more accessible with musical scores and records sold at a low price.[47] A disregard for the act of appropriation is blatantly expressed by former Senior Minister of State Lee Khoon Choy:

> Every tune is international. Melody is international. There is nothing wrong in putting new words to suit it to local conditions. You can choose any tune in the world, from any nation, but if you put new words to it, then you can sing it as your own.[48]

Aside from the abovementioned efforts to popularise these 'national folk songs', a 'quiet campaign' known as *Operation Singalong* was introduced to foster a habit of communal singing amongst the population, which the government saw 'as an important way for Singaporeans to develop a sense of belonging to the nation and solidarity'.[49] These songs are incorporated into a mass singing segment in the National Day Parade which is broadcasted nationwide every year. Lee's statement proved to be unconvincing as the campaign was received poorly, with the population lamenting the disingenuity of the songs in reflecting Singaporean culture. *Operation Singalong* was eventually 'quietly shelved and forgotten'.[50] While the songs were not well-received, the campaign was successful in popularising communal singing, a practice to be exploited later with the NDP songs.

In response to the inauthenticity of the pre-existing ethnic community songs, numerous songs of a similar style were composed and added to the repertoire by local composers since the 1980s. Together with NDP songs, ethnic community songs are taught in schools every year in the build-up to the celebration of National Day on August 9.

National Day Parade and Theme Songs

The poor reception of the early ethnic community songs prompted the government to develop an alternative medium with which the population could better identify. The government employed advertising agency McCann-Erickson to produce National Day Parade theme songs in the hope of inculcating a sense of belonging to a unified community striving towards achieving prosperity and progress for the nation. The first of such songs was 'Stand Up for Singapore' composed in 1984 by Hugh Harrison. In contrast with ethnic community songs, the style of 'Stand Up for Singapore' was more akin to that of modern pop songs and appealed particularly to the younger generation. The production of the song (and its accompanying music video that was broadcasted on state media) was of a higher quality, thus augmenting its attractiveness.[51] The song's success was perpetuated with further commissions from

43 Terence Chong, 'The State and the New Society: The Role of the Arts in Singapore Nation-building' (2010) 34 Asian Studies Review 131, 134.

44 Quoted in 'Singapore's approach to diversity has created a distinctive identity across ethnic groups: PM Lee Hsien Loong', *Straits Times* (Singapore, 20 May 2017) <https://www.straitstimes.com/politics/singapolitics/pm-whether-chinese-malay-or-indian-a-singaporean-can-spot-a-fellow-citizen>.

45 Quoted in Chong (n 43) 132.

46 Quoted in ibid 139.

47 Aloysius Ho, 'The Invention of Tradition: Nationalist Songs and Nation-Building in Singapore' (BA History thesis, National University of Singapore 2016) 14.

48 Quoted in ibid 13.

49 Stephanie Ho, 'National Day songs' <https://eresources.nlb.gov.sg/infopedia/articles/SIP_2015-03-11_165927.html> accessed 26 April 2020.

50 Ho (n 47) 16.

51 ibid 30.

Harrison in 1986 ('Count on Me, Singapore') and 1987 ('We Are Singapore'). Aloysius Ho notes that cassette tape sales of NDP songs saw a significant increase in those two years, reaching 73,000 in 1986 and 105,000 in 1987.[52] The popularity of these early NDP songs developed the medium into 'fertile ideological sites for the PAP government's many fantasies'.[53]

The purpose of the early NDP songs was to strengthen the people's community consciousness by evoking a sense of pride and joy in past achievements. This is illustrated in the opening lines of 'We are Singapore', which goes: 'There was a time when people said that Singapore won't make it / But we did / There was a time when troubles seemed too much for us to take / But we did';[54] and in 'One People': 'We've built a nation with our hands / The toil of people from a dozen lands / Strangers when we first began now we're Singaporean'.[55] In addition to encouraging a unified community in Singapore, the songs often implore Singaporeans to ensure the state's continued success, as evinced in the lyrics for 'Stand Up for Singapore': 'Believe in yourself, you've got something to share / So show us all you really care / Be prepared to give a little more'.[56]

In the late 1990s, the NDP songs were reinvented; an alternative narrative that connoted place identity emerged. Contrary to the chest thumping quality of the earlier style, the reinvented songs adopted 'a softer and more sentimental musical style'.[57] This change in musical style catered to the refined taste of the population in the new millennium as the newspapers described: 'the recent repertoire… is ostensibly more melodic, sophisticated and attuned to popular culture than the previous decades' "Count on Me, Singapore" and "We Are Singapore"'.[58] The modified goal of establishing communal identity to a personal place identity warranted the recording of these songs by solo local artists in place of choruses (as before). Similarly, these songs were widely broadcasted through state media in the build-up to National Day.[59]

Apart from the explicit titles, the lyrics of the songs reveal the objective of fostering place identity as demonstrated in 'Home': 'Whenever I am feeling low / I look around me and I know / There's a place that will stay within me / Wherever I may choose to go';[60] and 'My Island Home': 'My island home / Wherever I may be / I never will forget her / Nor will she forget me'.[61] The sentimental style of the music (with its moderate tempo and lush orchestration), through which these texts are delivered, effectively instigates nostalgia and tugs at the heartstrings of singers and listeners.

52 ibid 32.

53 Chong (n 43) 136–137.

54 'We Are Singapore', National Library Board, Singapore <https://eresources.nlb.gov.sg/music/Media/PDFs/Lyric/c322c97d-53a7-40e4-97ac-ee46af810592.pdf> accessed 27 April 2020.

55 'One People, One Nation, One Singapore', National Library Board, Singapore <https://eresources.nlb.gov.sg/music/Media/PDFs/Lyric/3df28aa8-01ee-413c-9b5b-9ff2b732770f.pdf> accessed 27 April 2020.

56 'Stand Up for Singapore', National Library Board, Singapore <https://eresources.nlb.gov.sg/music/Media/PDFs/Lyric/e8f5904d-b46f-4766-a3c8-483433fd4d30.pdf> accessed 27 April 2020.

57 Ho (n 47) 43.

58 Quoted in ibid.

59 Examples of such songs include 'Home' (1998), 'Where I Belong' (2001), and 'There's No Place I'd Rather Be' (2007).

60 'Home', National Library Board, Singapore <https://eresources.nlb.gov.sg/music/Media/PDFs/Lyric/650a3b13-9c4b-4e2a-b38c-a1676c49cacc.pdf> accessed 27 April 2020.

61 'Kaira Gong: My Island Home Lyrics' <https://lyrics.fandom.com/wiki/Kaira_Gong:My_Island_Home> accessed 27 April 2020.

The invented tradition of singing a repertoire of NDP songs en masse at National Day Parades—a result of *Operation Singalong*—is still observed today. The song composed for a specific year is featured 'as the centrepiece of the parade's grand finale, effectuating the climax of a "secular and ritual landscape spectacle"'.[62] In addition to their function within the nation, NDP songs were created to improve the cultural image of Singapore as perceived by other countries and contribute to a hitherto scant musical heritage. The embarrassing state of Singapore's culture was alluded to by former Senior Minister of State Lee Khoon Choy who expressed that 'very often, Singapore delegates abroad are hard put to present a song', and that at such events

> when it comes Singapore's turn—there's no song. It is a disgrace to Singapore's cultural prestige and image. They say Singaporeans cannot sing—Singaporeans only know how to make money. They don't care for culture, they're only materialistic. And that's bad![63]

Despite a reinforced legitimacy of NDP songs as a symbol of national identity (with local composers and artists assuming the responsibility of composition and production), the production of numerous parodies in recent years reveal the apprehension and criticism with which Singaporeans today consume NDP songs.[64]

Case Study One: Singapore Armed Forces Band Military Tattoo

The Singapore Armed Forces (SAF) Band is the musical arm of the Singapore military that provides musical support for state and military events. Besides its engagements with internal events, the SAF Band participates in international events organised overseas. Past participants include the Sweden International Tattoo 2013, the Royal Edinburgh Military Tattoo 2014, and the 2017 Virginia International Tattoo. These tattoo performances are aural and visual spectacles incorporating music, dance, and rifle drills by the SAF Band, SAF Music and Drama Company, and the Silent Precision Drill Squad (SPDS) respectively.

As a representative of Singapore on the international stage, the SAF Band is responsible for presenting the Singaporean identity through its performances. To do so, the SAF Band consistently adopts a performance format which has been applied to their performances at the events listed above. Due to this consistency, this study will take the performance at the Royal Edinburgh Military Tattoo 2014 as an exemplar of the SAF's approach to performing 'Singapore'.

Intro	Indian	Malay	Chinese	Other (Scottish)	Finale
00:35–01:49 (15%)	01:49–02:50 (13%)	02:50–04:14 (17%)	04:14–06:20 (26%)	06:20–07:28 (14%)	07:28–08:40 (15%)

Fig. 2 *Sections of performance with timestamps*[65]

62 Ho (n 47) 24.

63 Quoted in Edna Lim, 'One People, One Nation, One Singapore' in Edna Lim, *Celluloid Singapore: Cinema, Performance and the National* (Edinburgh University Press 2018) 132.

64 For an example, see SGAG, *NDP 2018 Theme Song Parody [Unofficial Music Video] | SGAG* (8 August 2018) <https://youtu.be/FSukmF8cy3U>.

65 As pauses are filled with applause, timestamps are not definitive but close estimates. Percentages are rounded to the closest whole number.

The performance can be divided into six parts with a short pause marking the end of each part. While there is no pause between the first and second parts, a transition is made with a distinct change in artistic material.[66] The parts are distinguished with musical and visual markers which are clearly inspired by Singapore's racial CMIO model. The 'O' of CMIO is assumed by the music and culture of the event's host country—in this case, Scotland. Fig. 2 is a table plotted with timestamps of the performance and parts defined by its associated race and percentage in length in relation to the entire performance.

The performance begins with an introduction constructed with themes and motifs from several NDP songs (including 'We Are Singapore', 'Count on Me, Singapore', and 'Where I Belong') and marches of the SAF ('Tentera Singapura' and 'Bandstand'). A brief transition—in the form of a key change—is made before the part marked 'Indian'. This part is characterised by its compound metre and offbeat accents—rhythmic devices typical of Indian music. The Malay part begins with 'Di Tanjong Katong', an ethnic-Malay community song, performed by a saxophone quintet. A jovial section follows with 'Bengawan Solo', another ethnic-Malay community song of Indonesian origins, before the section returns to and closes with 'Di Tanjong Katong'. A solo on the Chinese flute begins the Chinese part. It is joined first by Chinese drums then by the full band. This part is also characterised by a pentatonic melody, an accompanying ribbon dance, and the band members' drill display executed with handheld fans. In a similar fashion, a tin whistle playing the melody of 'Wild Mountain Thyme' marks the start of the Scottish part. This follows with band members singing the song in two-part harmony and with minimal chordal accompaniment. The finale begins with the ascending motif of 'Wild Mountain Thyme' in the melodic instruments which then morphs into the melodic lines preceding the chorus of 'Count on Me, Singapore'. The song continues with interjections of the iconic fanfares from the Singapore national anthem 'Majulah Singapura' before the performance concludes with a mace throw by the drum major and a pyrotechnic display by the SPDS.

The well-defined parts of this performance correlate to Singapore's profoundly distinct racial communities that resulted from the government's efforts (as previously explored). By displaying all the different parts in one performance, the SAF Band aims to illustrate Singapore as a country where different racial communities coexist and form a part of the Singaporean identity. The rather insignificant differences between the durations of each part of the performance is intentionally contrasted with Singapore's racial demographics, manifesting the nation's constant concern with equal representation of its majority races.

More interesting yet is the substitution of 'Other' with 'Scottish' in the performance. The ill-defined 'O' of CMIO has provided the convenience of adapting it to the culture of the host country. Apart from garnering cheers from the audience—potentially due to their familiarity with the musical content of the 'Other' part—the SAF Band's incorporation of artistic symbols of an external culture into their performance demonstrates the adaptability and accommodating quality of the Singaporean identity and society. With the Scottish part incorporated, the performance communicates a message of inclusivity to its audience (who are presumably of the majority race in the host country) and paints a cosmopolitan image of Singapore. Additionally, it may be observed from an abstraction of the grand scheme that neither the ensemble of a military band nor the tradition of tattoo performance is an artistic attribute of the main cultures in Singapore; thus, the SAF Band's engagement with the medium itself highlights a considerable level of cosmopolitanism.

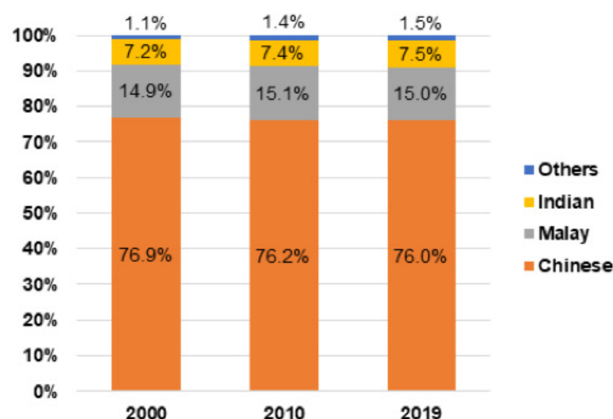

Fig. 3 *Proportions of each race in the citizen population*[67]

Aside from the music, Singapore's generic Asian flavour is evoked through the dancers' oriental costumes and dance while the SPDS characterised Singapore's orderliness through its performance of discipline and skill.[68] As this was an overseas performance presumably intended for a foreign audience, the SAF Band was granted liberty to illustrate a more idealised image of Singapore than an authentic one.

Case Study Two: *Truly, SSO* (2019) by Singapore Symphony Orchestra

Formed in 1978, the Singapore Symphony Orchestra (SSO) is Singapore's civic orchestra. In addition to providing public audiences with the experience of classical music performances, the SSO has recorded several albums and premiered the works of local composers over the years.[69] In 2018 and 2019, the SSO performed concerts of Singaporean music as part of the nation's celebration of National Day. In the latter year, an album of Singaporean music titled *Truly, SSO* was produced as part of the National Day celebrations.

Several tracks on *Truly, SSO* can be characterised by the melange of musical styles and influences—in contrast with the performance of the SAF Band, these pieces do not overtly illustrate the compartmentalised racial factions of Singapore. This is prevalent

66 This analysis is based on the performance dated August 24, 2017, uploaded online (performance starts at 00:35). See Royal Edinburgh Military Tattoo, *Singapore Armed Forces Central Band @ Royal Edinburgh Military Tattoo 2014* (12 September 2014) <https://youtu.be/_9ScZF9Vhug>.

67 'What are the racial proportions among Singapore citizens?', Gov.sg <https://www.gov.sg/article/what-are-the-racial-proportions-among-singapore-citizens> accessed 29 April 2020.

68 The SPDS is regarded as an embodiment of Singaporean efficiency and conscientiousness, having been described once in an NDP souvenir program that it emphasised 'skill, precision and alertness', and the 'qualities for a nation of excellence'. See Lim (n 64) 131.

69 Jan Yap, 'Singapore Symphony Orchestra' <https://eresources.nlb.gov.sg/infopedia/articles/SIP_853_2005-01-11.html?s=singapore%20symphony%20orchestra> accessed 28 April 2020.

in 'Symphonic Suite on a Set of Local Tunes' (2004) and 'Kampong Overture' (2019) by Singaporean composers Kelly Tang and Lee Jinjun respectively. Unlike its stance on the mixing of languages (that resulted in Singlish), the Singapore government assumed a less belligerent position towards the fusion of musical styles. While the reason for this remains unclear, a strong case could be made with the justification that music, compared to language and its immediacy in interpersonal communication, has a weaker influence on the state's economic development; thus, there is no obligation for a universally recognisable style. Moreover, *Truly, SSO* was targeted at Singaporeans experiencing a period of reflection through national celebrations.

Cultural Medallion recipient Kelly Tang is a composer known for incorporating Singaporean folk songs into his work.[70] In addition to folk songs, Tang's compositions are influenced by jazz and classical music amongst other styles. Several works that testify to Tang's penchant for such fusions include 'Tian Mi Mi' (which combines the melody of Indonesian folk song 'Dayung Sampan' and the theme music of *The Simpsons*) and an arrangement of Michael Jackson's 'She's Out of My Life' in the style of a mediaeval motet.[71] 'Symphonic Suite on a Set of Local Tunes' is a symphonic medley of two NDP songs and two Malay community songs. The work's brief introduction is clearly inspired by that of Beethoven's Ninth Symphony, with instruments playing only the interval of a perfect fifth. After a sentimental statement of the melodies of 'Bunga Sayang' and 'Home', the work assumes the style of a concert march with the melodic content of 'Chan Mali Chan'. The sentimental tone returns with a luscious rendition of 'Bunga Sayang' which is then followed by an orchestral fanfare. The piece concludes with a grand and martial delivery of 'Together'. Apart from the work's symphonic character, reviewer Chang Tou Liang also notes 'clever cameos' of Elmer Bernstein's music for *The Magnificent Seven* (1960).[72] While the songs incorporated were executed in isolation, the mixing of musical styles was pervasive throughout the work. This piece's integration of styles is comparable to Singaporeans' national identity with its integration of cultures.

An allusion to the symphonic idiom is apparent from the title of 'Kampong Overture' which utilises the melody of three Malay community songs. It is safe to conclude that Lee's use of folk songs is intended to typically produce a work that is nation specific as he cites the compositional ethics of nationalist composer Antonín Dvořák in his notes for 'Kampong Overture':

> Czech composer Dvořák was famous for melding folk elements into the symphonic form, creating music that sounds nostalgic and genuine, qualities that made him one of the most popular folk-inspired composers of the 19th century. *Kampong Overture* takes a page from Dvorák by using three Malay folk tunes, *Geylang Sipaku Geylang*, *Lengkang Kangkung* [sic] and *Suriram*, and weaving them into a Romantic-styled symphonic overture.[73]

In addition to the work's character (that is reminiscent of Dvořák's *Slavonic Dances*), its melody quotes the 'Largo' of Dvořák's New World Symphony.[74] Another piece recorded on *Truly, SSO* worth highlighting is Tang's 'Montage: Concerto for Jazz Piano & Orchestra' which was commissioned and originally performed by the Singapore Chinese Orchestra in 2010. Besides a melodic resemblance to the theme music of Japanese animation, Tang claims 'Chinese tonal elements', 'Baroque and Jazz harmonies', 'Jamaican Calypso music', and George Gershwin as inspirations for 'Montage'.[75] This outcome of composing with such a myriad of influences can be likened to the linguistic amalgamation that is Singlish.

The two works from *Truly, SSO* examined highlight the diversity of cultures and musical styles that exists in Singapore from which local composers take inspiration. Singapore's cosmopolitan setting has resulted in the conflation of musical styles that can truly be described as unique to the nation. The existence of this musical identity is underscored by Chang who writes in his review of the National Day Concert in 2018 (where Tang's work was performed along with others of a similar style) that the concert 'merely scratched the surface of *Singaporean* music'.[76]

Conclusion

In today's globalised world, some embrace the emergence of global citizenship and identity while others fear the loss of their heritage-claiming national identity.[77] Much like its architectural landscape, Singapore's cultural identity is one that has been inorganically constructed. At the crux of this identity is an observance of racial equality by levelling the dominance of the racial groups despite the differences in population numbers. To do this, the government meticulously defined the characteristics of the nation's ethnic Chinese, Malay, and Indian communities, which include the most common language, religion, and holidays observed by each racial community. A nebulous 'Other' category was added to account for the remaining population which proved more difficult to define. The resulting CMIO racial model is implemented to all areas of livelihood regulated by the government. In times of labour shortage, the CMIO model was flagged to portray Singapore as an accommodating nation ready to welcome all of any race to join its workforce and provide for its economic development. This is facilitated conveniently by the inclusive yet ambiguous 'O' category into which most immigrants fall. The influx of immigrants led Singaporeans to question their communal identity and conclude it to be different from that conceived by the government. This polarity is observed from the people's embrace of the nation-specific vernacular of 'Singlish' and the government's argument that it corrupts Singapore's cosmopolitan image.

70 The Cultural Medallion is regarded as the most prestigious award in the arts in Singapore and is conferred to those distinguished by their achievement of artistic excellence.

71 Venessa Lee, 'Karung guni composer', *Straits Times* (Singapore, 17 August 2015) <https://www.straitstimes.com/singapore/karung-guni-composer>.

72 Chang Tou Liang, 'Something for everyone in concert of Singaporean music', *Straits Times* (Singapore, 14 August 2018) <https://www.straitstimes.com/lifestyle/arts/something-for-everyone-in-concert-of-singaporean-music>.

73 Lee Jinjun, 'SSO National Day Concert', programme notes for *Kampong Overture*, Singapore Symphony Orchestra, Joshua Tan (Esplanade Concert Hall, Singapore, 10 August 2019) 40.

74 Chang Tou Liang, 'SSO National Day Concert examines what is Singaporean music' *Straits Times* (Singapore, 11 August 2019) <https://www.straitstimes.com/lifestyle/arts/sso-national-day-concert-examines-what-is-singaporean-music>.

75 Kelly Tang, 'SSO National Day Concert', programme notes for *MONTAGE: Concerto for Jazz Piano & Orchestra*, Singapore Symphony Orchestra, Joshua Tan (Esplanade Concert Hall, Singapore, 10 August 2019) 36.

76 Emphasis added; Chang (n 75).

77 Jayson Beaster-Jones, 'Globalization' (*Grove Music Online*) <https://doi.org/10.1093/gmo/9781561592630.article.A2256705> accessed 29 February 2020.

Upon realising that Singapore had no music to call its own, the Singapore government took several actions to address this deficiency. Folk songs of external origins were appropriated and promoted through *Operation Singalong*. Due to its limited success, these folk songs were replaced with commissioned National Day Parade theme songs that varied in style from the anthemic to the sentimental. The NDP songs aimed to foster a sense of community and motivate citizens to contribute to the State's economic growth in the early years of its inception but changed to that of establishing place identity in recent decades. On the international stage, the Singapore Armed Forces Band assumes the responsibility of projecting Singapore's CMIO model by incorporating ethnic community songs into the racially marked parts (and NDP songs into the frame) of its performances. The 'Other' part incorporates material from the music of the performance's host country, demonstrating Singapore's cosmopolitanism and illustrating Ulrich Beck's statement that 'cosmopolitans are people who can "internalise the otherness of others"'.[78] Locally, the Singapore Symphony Orchestra performs the work of local composers that take inspiration from a myriad of sources (ranging from ethnic community songs and NDP songs to the canonical works of jazz and classical music) as part of national celebrations. Referring to the polarity between the government and the people's notion of the Singaporean identity, I have shown through the case studies that the SAF Band abides by the government's idealised cosmopolitan image of Singapore while the works in *Truly, SSO* reflect an integration of styles and cultures which is an attribute of the people's definition of 'Singaporean'.

78 Quoted in Luke Lu, 'Singapore and the cosmopolitan ideal', *TODAY* (18 March 2014) <https://www.todayonline.com/commentary/singapore-and-cosmopolitan-ideal>.

Can Modern Appropriation Art be Reconciled with Copyright Law? A Closer Look at *Cariou v. Prince*

Marysia Opadczuk

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Fig 1. *Raphael,* Portrait of Pope Julius II, *1511. Wikimedia Commons: National Gallery. <https://commons.wikimedia.org/wiki/File:Pope_Julius_II.jpg>.*

Fig 2. *Diego Velázquez,* Portrait of Pope Innocent X, *1650. Wikimedia Commons: Doria Pamphilj Gallery. <https://commons.wikimedia.org/wiki/File:Portrait_of_Pope_Innocent_X_(by_Diego_Vel%C3%A1zquez)_-_Doria_Pamphilj_Gallery,_Rome.jpg>.*

Fig 3. *Francis Bacon,* Study After Velázquez's Portrait of Pope Innocent X, *1953. Wikimedia Commons. <https://commons.wikimedia.org/wiki/File:Study_after_Vel%C3%A1zquez%27s_Portrait_of_Pope_Innocent_X.jpg>.*

Artists have drawn ideas, thoughts, and concepts from the works of others for centuries. However, copyright infringement issues frequently arise in the contemporary world. The case discussed in this piece concerns contemporary artworks from the 'Canal Zone' series by Richard Prince. Most of the works had photographs by Patrick Cariou incorporated in them, which were previously published in Cariou's *Yes Rasta* book. Following an analysis of appropriation art history, postmodern theories, contemporary art market, the contradictory nature of copyright law, and finally the US 'fair use' test and 'transformative character' requirement, the author is critical of copyright law not allowing for appropriation art. She is of the view that under certain circumstances, the use of preexisting art is justified.

Appropriation art history

In the history of art, it would be an impossible task to count all the times artists have 'copied', in the broad meaning of the word, one another. Appropriation art *per se* was recognised around the time Pablo Picasso and Georges Braque made their collages from 1912 onwards, and Marcel Duchamp's exhibited his 'Readymades' in 1915.[1] It can be defined as intentional borrowing, copying, and alteration of existing images and objects.[2] Artists have been 'appropriating' each other's works for centuries. One example is Raphael (Fig 1), whose work was recreated by Diego Velázquez (Fig 2), which in turn inspired Francis Bacon (Fig 3).

Another famous example is Marcantonio Raimondi (Fig 4) from whom Édouard Manet took inspiration (Fig 5). In turn, Pablo Picasso recreated Manet's work in his 1960 *Le déjeuner sur l'herbe d'après Manet*.

Appropriation has functioned as a mode of art under different names of imitations, inspirations, or replicas. Artists have used it to signal the influence of other artworks, claim the prestige of a particular heritage, or rework a theme or motif for their own time. With the development of technology and mediums such as photography or digital music recordings, the lines between originality, authorship, and the classic dichotomy of an idea and its concrete expressions have blurred.[3] Today, 'copying' requires as little as pressing a camera button; there is no need for Andy Warhol's photographic silkscreen printing (a stencilling method enabling the production of many similar original artworks e.g. the Marilyn Monroe portraits) or other more complex techniques.

Richard Prince's take on art

New York-based Richard Prince is one of the most globally influential and commercially successful contemporary artists today. His controversial work can be recognized as a prime example of appropriation art. Prince's pieces have been exhibited at many museums, with numerous major solo exhibitions, including a retrospective at the Guggenheim in New York in 2007.[4] Some of his most debated pieces over the years were created using the technique of re-photography. The early series known as 'Untitled Cowboys' consisted of Prince's cropped photographs of Marlboro advertisements.

***Fig 4**. Marcantonio Raimondi,* The Judgement of Paris (After Raphael), *c. 1510-20. Wikimedia Commons: Metropolitan Museum of Art. <https://commons.wikimedia.org/wiki/File:The_Judgment_of_Paris_MET_DP-18212-001.jpg>.*

***Fig 5**. Édouard Manet,* Le déjeuner sur l'herbe, *1863. Wikimedia Commons: Musée d'Orsay. <https://commons.wikimedia.org/wiki/File:%C3%89douard_Manet_-_Le_D%C3%A9jeuner_sur_l%27herbe.jpg>.*

In 2014, Prince took photographs posted on Instagram, added his own words in the 'comments section', and exhibited the works at the Gagosian Gallery in New York, which raised questions of copyright infringements. Finally, in terms of legality, the 'Canal Zone' series discussed below was possibly the most debated of his works.

Postmodern thought

Appropriation art is inextricably linked to postmodern thinking. Creating artworks out of nothing is impossible meaning anything that could be created has already been created in the past and is being

1 Tate, 'Art Term: Appropriation' <https://www.tate.org.uk/art/art-terms/a/appropriation> accessed 5 January 2022.

2 MoMA Learning, 'Pop-Art' <https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation/> accessed 5 January 2022.

3 Marina P Markellou, 'Appropriation art under copyright protection: recreation or speculation?' (2013) 35(7) EIPR 369.

4 Judith B Prowda, *Visual Arts and the Law: A Handbook for Professionals* (Lund Humphries 2013) 88.

reused.[5] Following this thinking, all works, whether artistic, literary, or musical, are built on cumulative creativity.[6] An illustrative way to think about postmodern art is the metaphor of the palimpsest. Palimpsestic practice was especially important in the Middle Ages when the primary text of a book was effaced to make room for new writings.[7] Today, a palimpsest is a 'work of art with many levels of meaning, types of style, etc., that build on each other'.[8] Prince's works can be considered palimpsests, as they are based on content that the artist builds upon by adding new layers and elements.

The French literary theorist and philosopher Roland Barthes wrote on postmodernism. In his essay 'The Death of the Author' (1967), he wrote that a 'text is a tissue of quotations drawn from the innumerable centres of culture'.[9] This meant that the author had no authority over the meaning of the words he or she wrote, and all that happened to the content after it was written was beyond their control.[10] Moreover, he claimed that each artwork was surrounded by a web of connotations and cultural significance, such that it had no definite interpretation and could not be ultimately decoded. He was a firm believer in the idea of ever-present intertextuality—the notion that any text of culture, whether literary or visual, refers to a different text.[11] As an example might serve *The Lion King's* main plot line, which resembles that of Shakespeare's *Hamlet*. Matt Groenig's television show *The Simpsons* is also a flagship example of intertextuality, as references to literature, films, or other cultural phenomena often feature. Similarly, in the essay 'What is an Author?' (1969), Michael Foucault proposed the view that the notion of an author is a social construct, and that discourse should be considered as something freely circulating between individuals.[12] Like Barthes, he was of the view that authors can only divide cultural phenomena and ideas into groups, and nothing can be 'invented' by way of intellect. Moreover, he noted a historical change in the way we recognize and give special attention to the concept of authorship. As of today, individuals have never had more rights over the works they produce.

Even though these theorists' principal focus was on literary works, their theories can be applied to other 'texts of culture' such as the visual arts. Adopting Barthes' and Foucault's thinking in an absolute manner would make it impossible to own rights to an image. In the modern world, the value of intellectual property can amount to unbelievable sums and the view that one should not benefit from what one has created because 'authorship' is a social construct is unlikely to be universally accepted. Even though 'authorship' is commonly recognized in the art market and the notion of 'an author' remains at the heart of copyright law, Barthes' and Foucault's thinking appears to be no less valid as a result. However, as shown in the example of *Cariou*, the idea of authorship can sometimes be more fluid.

5 Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 185-6.

6 Graham Dutfield, and Uma Suthersanen, 'The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) IPQ 379, 390.

7 Cambridge Dictionary, 'Palimpsest' <https://dictionary.cambridge.org/dictionary/english/palimpsest> accessed 5 January 2022.

8 ibid.

9 Roland Barthes, *The Death of the Artist* (Fontana 1977) 146.

10 Lionel Bently, 'Review Article: Copyright and the Death of the Author in Literature and Law' (1994) 57 ModLRev.

11 Roland Barthes, 'Theory of the Text' in Robert Young (ed) *Untying the Text: A Poststructuralist Reader* (Routledge 1981) 31, 39.

12 Michel Foucault, 'What is an Author?' in Vassilis Lambropoulos and David N Miller (eds) *Twentieth Century Literary Theory: An Introductory Anthology* (SUNY 1987) 124-42.

Cariou v. Prince

In 2000, photographer Patrick Cariou released *Yes Rasta*, a book with portraits of Rastafarians and Jamaican landscape photographs. He took the pictures over six years of living on the island, where he studied the Rastafarian way of life based on their closeness to nature, rituals, religion, and self-reliance. Almost like an anthropologist, he gained their trust and they let him photograph their lives. Prince created the 'Canal Zone' series by altering and incorporating Cariou's forty-one photographs from *Yes Rasta*. Their works were exhibited in 2007 and 2008, first at the Eden Rock hotel in Saint Barthélemy and later at the Gagosian Gallery in New York. In most of them, he incorporated Cariou's images by the methods of collage, enlarging, cropping, scanning, tinting, and over-painting. Cariou sued Prince for copyright infringement, and the case went up to the Court of Appeals for the Second Circuit.

Legitimization of appropriation art

Recognizing that appropriation art can be *publicly*, and not only legally, legitimised is crucial, although it was not considered by either the District or the Appeals Court. The public legitimization of different phenomena can subconsciously influence the way we think about things—and, essentially, whether we consider Prince's works to be of fair use. Hence, the author argues that the *public* legitimization of appropriation art may result in the *legal* legitimization of such art. This is because the law adapts to the world around and the public viewpoints, as long as they are not harmful, criminal in nature, etc. In the case of Richard Prince, his established position on the international art scene and the art market should be emphasised. His art has gained legitimacy thanks to major international institutions, such as the Gagosian Gallery, exhibiting his work. The Gallery has held numerous exhibitions of his works (among them the controversial 'New Portraits' where screenshots of Prince's Instagram feed were used), printed exhibition books, and organised exhibition opening dinners. Auction houses are also institutions legitimising artworks. Christie's, Sotheby's, and Phillips—all three most prominent auction houses have sold Prince's works, symbolically showing they agree with his artistic practices. Moreover, the approval of other people can build legitimacy. In this case, the collector's interest in Prince's works suggests their high economic value. Celebrities' interest in his works points towards them being worthy of attention. Lastly, the interest of other artists in Prince's pieces, such as Jeff Koon's, propounds they have artistic merit.

Copyright Law

Copyright is a property right subsisting in particular works 'fixed in a tangible medium of expression'.[13] In the contemporary context of easy reproductions, appropriation art inevitably raises the questions of copyright infringements. Here, the focus is on United States copyright law, as *Cariou* arose before the District Court for the Southern District of New York.[14] When analysing the purpose of copyright law, one stumbles upon a paradox. On the one hand, the right to prevent others from using one's work is supposed to 'stimulate activity and progress in the arts for the intellectual enrichment of the public'.[15] Copyright law is supposed to guarantee

13 *Stroud's Judicial Dictionary* (10th edn and 1st Supplement, 2021).

14 Copyright Act 1976 codified in Title 17 of the United States Code (1976).

15 *Jowitt's Dictionary of English Law* (5th edn, 2019); Pierre N Leval, 'Towards a fair use standard' (1989) 103 HarvLRev 1150, 1107.

artists that no one else will make an unfair economic profit from their work or claim authorship over it. However, this law, which is supposed to protect creativity, may stifle some artists' visions. Not using the postmodern language of incorporating pre-existing artworks may bar the freedom to comment on political agendas, consumerism, wars, gender, or identity.[16] In the twentieth century, numerous artists creating via different mediums have explored appropriation art, either for the purpose of broadening their creativity or voicing their criticism for various social structures.[17] Hence, a question arises—does copyright law have to stand in opposition to appropriation art?

'Fair use' doctrine as a copyright exception

The fair use doctrine answers the question above. It aims at a more flexible application of copyright statutes on occasions where they would stifle artists' creativity.[18] Fair use is the most common exception to copyright law (distinct from the UK 'fair dealing' principle) and limits the original artist's exclusive rights over a given work.[19] The legal doctrine comes from the Copyright Act 1976 and is significant for *Cariou*, as Prince asserted it as his defence.[20] The doctrine appears contrary to the orthodox rule that for an artwork to be protected by copyright, it must be 'original'—meaning it must be an artist's *own* creation and not a copy.[21] However, appropriated works are, at times, far from what is colloquially referred to as 'copies'. The primary rationale for the fair use doctrine is that reinterpretations of old ideas should 'be accessible to the public'.[22] The fair use doctrine is not defined in the 1976 Act, and the courts are free to adapt the doctrine on a case-by-case basis.[23] However, due to the unpredictability of litigation, fair use art cases arise only seldom and are frequently settled out of court.[24] This makes *Cariou* even more significant for the US jurisprudence and copyright law in general.

The 'fair use' test

To determine whether Prince appropriated the photographs for fair use, the judges in both the District and Appeals Courts looked at a four-factor test set out in section 107 of the 1976 Act. The purpose and character of the use is the first factor. The Appeals Court significantly downplayed the role of this requirement. It shifted its focus to whether the work was transformative, i.e. transforming the original work's underlying purpose by adding 'something new' and presenting the photographs using a completely different aesthetics. The Appeals Court decided that Prince's artworks have done just that. Hence, even though 'Canal Zone' was an economic success (several of the works sold for over 2 million dollars), fair use could still be established.[25]

The second factor concerns the nature of the copyrighted work. Here, the Appeals Court found 'no dispute' over Cariou's photographs' creative and public character. However, this was deemed of little relevance due to 'the creative work of art…being used for a transformative purpose'.[26] In terms of the third factor, i.e. the amount and substantiality of the portion used in relation to the copyrighted work, the Appeals Court considered whether the 'taking' from Cariou was proportional to the purpose of Prince's works.[27] This factor consists of quantitative substantiality and qualitative substantiality. The former appears to be the most objective, as it attempts at calculating how much of the secondary work comprises the original one. The quantitative factor is especially relevant, as it enabled the Appeals Court to distinguish between the twenty-five works deemed fair use and the remaining five, which were not.[28]

The fourth factor is 'the effect of the secondary use upon the potential market for the value of the copyrighted work'. The District Court held Prince's work damaged 'the potential market for derivative use licences for Cariou's original work'.[29] The Appeals Court opposed that view and focused on the different target audiences of both artists. Cariou's works would primarily appeal to those interested in the niche knowledge area of anthropological studies of Jamaican Rastafarians. On the contrary, Prince's works target contemporary art enthusiasts, collectors, and people of high social status. This can be evidenced, for example, by the types of guests invited to the Gagosian-held dinner opening the 'Canal Zone' exhibition—among them were Jay-Z, Beyonce Knowles, Anna Wintour, Robert de Niro, Angelina Jolie, and Brad Pitt. Thus, the Appeals Court followed the reasoning in *Blanch* and tried to determine 'whether the secondary use usurps the market of the original work'.[30] It found there was no harm to the potential sales of Cariou's work, as Prince's works appealed to 'an entirely different sort of collector'.[3132] Ultimately, the fair use test will establish whether a fair-minded and honest person would have dealt with the work in the given way. For that purpose, the courts are free to consider any other relevant factors they deem relevant, giving them flexibility. They may consider how the appropriating artist obtained the primary work and the extent to which the work was transformative—a point which was closely scrutinised in *Cariou*.

Transformative art

The term 'transformative' was coined in 1990 and has been a significant consideration in the fair use doctrine.[33] It was first relied upon in *Campbell v Actuff-Rose Music, Inc.*[34] Since then, the courts have adopted various definitions of the word—the narrowest being that a work must be a parody and the broadest that the newer work must manifest a different purpose from the original one.[35] It was precisely the 'transformative' nature of Prince's works that led to the

16 'Brief of Amicus Curiae and the Andy Warhol Foundation for the Visual Arts, Inc In Support of Defendants-Appellants and Urging Reversal' 19 <http://cyberlaw.stanford.edu/briefs/CariouVPrinceWarholFoundationAmicusBrief.pdf> accessed 5 January 2022.

17 E Kenly Ames, 'Beyond Rogers v/ Koons: A Fair Use Standard for Appropriation' (1993) 93 ColumLRev 1473.

18 *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos (*1980) 621 F.2d 57 (2d Cir.).

19 Khanuengnit Khaosaeng, 'Wands, sandals and the wind: creativity as a copyright exception' (2014) 36(4) EIPR 239.

20 (n 15) s 107.

21 Markellou (n 3) 370.

22 *Suntrust Bank v Houghton Mifflin Co* (2001) 268 F 3d 1257.

23 Title 17 of the United States Code*, Historical and Revision* Notes (House Report No. 94-1476) s 107.

24 Prowda (n 4) 83.

25 In *Campbell*, even though the song 'Oh Pretty Woman' was commercially successful, because it was transformative enough, the fair use defence could be used. *Campbell v Acuff-Rose* (1994) 510 U.S. 569, 584.

26 *Bill Graham Archives v Dorling Kindersley, Ltd* (2006) 448 F.3d 605 2d Cir.

27 *Blanch v Koons* (2006) 467 F. 3d, 257.

28 *Graduation*, *Meditation*, *Canal Zone (2008)*, *Canal Zone (2007)*, and *Charlie Company*.

29 *Cariou v Prince* (2013) 714 F.3d 694 2d Cir., 353.

30 *Blanch v Koons* (n 28) 258.

31 Khaosaeng (n 20).

32 *Cariou v Prince* (n 30) 18.

33 Pierre Leval 'Toward a Fair Use Standard' (1990) 103(5) HarvLRev.

34 *Campbell v Acuff-Rose* (n 26).

35 'Copyright Law — Fair Use — Second Circuit Holds that Appropriation Artwork Need Not Comment on the Original to Be Transformative. — *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013)' (2014) 127(4) HarvLRev 1228.

Court of Appeals applying the fair use doctrine. The judges adopted a new definition of the word 'transformative'—it was enough for the work to have a distinct meaning and not comment on the original work.[36] Before considering the 'transformative' element, the District Court decided 'Canal Zone' infringed on Cariou's copyright. The infringement was seen as so abusive that the District Court ordered to 'deliver up for impounding, destruction, or other disposition […] all infringing copies of the Photographs'.[37] The decision to destroy what many considered art outraged the artistic community.[38] However, after establishing twenty-five works by Prince to be of a transformative nature, the Appeals Court held 'the law does not require that a subsequent use comment on the original artist or work, or popular culture'.[39] The works only had to have a different character, atmosphere surrounding them, or a distinct mood. The Appeals Court stated that Prince's artworks: 'manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative'.[40] The unanswered question concerns the remaining five works remanded to the District Court to consider whether Prince was entitled to a fair use defence. One of the five works based on Cariou's photograph was *Graduation*, where Prince allegedly 'little more than paint[ed] blue lozenges over the subject's eyes and mouth, and paste[d] a picture of a guitar over the subject's body'. Unfortunately for us, the case was settled out of court, and whether those works presented a 'new expression, meaning, or message' will forever remain judicially undecided.[41]

Other jurisdictions

Prince's works were considered 'fair use' and 'transformative', and therefore not infringing on Cariou's copyright in the US jurisdiction. It is uncertain whether a similar decision would have been reached e.g. in a French or an English court. In English and Welsh law, two different outcomes could be reached in *Cariou*. On the one hand is the 'pessimist' (for Prince) stance of Martin Wilson, an experienced art lawyer. In his book, Wilson claims the law of fair use under UK jurisdiction is considerably narrower than in the US, and it remains unclear whether Cariou would have been successful in UK courts.[42] On the other hand, section 30A of the Copyright, Designs and Patents Act 1988 on caricatures, parodies, and pastiches says works from those categories do not infringe on copyright. Here, it is helpful to consider whether Prince's works could be considered pastiches. The ordinary definition of pastiche says that it is an 'imitation of style of pre-existing works, the incorporation of parts of earlier works into new works, and the production of a medley'.[43] Moreover, pastiches usually make 'no attempt to ridicule, lampoon or satirise the copied work, or comment critically on that work or other themes'.[44] The pastiche exception could help avoid difficulties in assessing whether work is transformative for the purposes of the fair use doctrine.[45] Considering the above, it could be that if tried in the UK, Prince's artworks would be classified as examples of pastiche, given the artistic techniques applied, and be found as not infringing on copyright.[46]

Conclusion

In closing, Richard Prince, even though controversial for his immense commercial success, has proven numerous times that his appropriation practices enable him to break conventions and create new meanings—which, essentially, is the very purpose of art. Simultaneously, it seems perfectly reasonable for Patrick Cariou to have his photographs protected from being copied and taken commercial advantage of. With appropriation art being so deep-rooted in art history, a compromise between the rigidness of intellectual property law and artistic freedom must be found. By developing new rules across jurisdictions, such as the 'transformative' principle discussed in *Cariou*, there is a chance of arriving at a comprehensive set of legal principles in copyright law. A certain anomaly is necessary—a legal framework which would enable artists to freely create and have their creations protected.

36 Prowda (n 4).
37 *Cariou v Prince,* 08 CV 11327 (S.D.N.Y. 18 March 2011) 37.
38 (n 19).
39 *Cariou v Prince* (n 30) 694, 699.
40 ibid.
41 Prowda (n 4). *Campbell v Acuff-Rose* (n 26) 569, 579.
42 Martin Wilson, *Art Law and the Business of Art* (Edward Elgar Publishing 2019) 11.
43 Emily Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' (2017) 4 IPQ 362.
44 ibid 346.
45 ibid 366.
46 ibid 365.

*Icono*plastic: An Institutional Reform Agenda

Polly Mackenzie

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The last few months, in particular the furore over Partygate[1], have scarred the reputation of many of Britain's most vital institutions. Police are investigating law breaking not just by the Prime Minister and his team, but among their own ranks. Parliament's ability and willingness to hold power to account has come into question. We face a government whose answer to the old question—'who guards the guards?'—is a simple one. No-one. This is a government that claims its democratic mandate trumps all constraint on its power, from the police, from the law, from the courts, from honour, convention, tradition, or rules.

Gone is the conservative mission of the Conservative Party: the instinct to protect and preserve institutions. In its place is a revolutionary, iconoclastic movement, far more interested in dismantling the things it doesn't like than in building anything to replace them.

It is clear we can no longer rely on what Peter Hennessy called the 'good chaps' theory of government: that those who rise to the top will always be honourable people, willing to submit to informal rules of behaviour.[2] Instead, we need to think creatively and imaginatively about a different kind of constitutional future: how to reform and rebuild the institutions that hold power, and those that hold it to account.

In this essay I'm going to set out—briefly—an institutional reform agenda for some of the most important institutions that frame our lives. Devolution, in my view, is fundamentally important, and a new settlement between the power of the centre and the power of the cities must be core to how we reform the United Kingdom, to stop it sliding into political self-destruction.

1 'Partygate' is the term given to the UK Government scandal that revealed the gatherings – which violated COVID-19 lockdown rules – taking place. The full timeline of events and police investigation results can be found at <https://www.bbc.co.uk/news/uk-politics-59952395>.

2 Cf. Robert Saunders, 'Has the "good chaps" theory of government always been a myth?' *The New Statesman* (London, 3 August 2021) <https://www.prospectmagazine.co.uk/politics/has-the-good-chaps-theory-of-government-always-been-a-myth-peter-hennessy-boris-johnson> accessed 24 June 2022.

Principles for institutional reform

This is a central truth of all institutions, which they often struggle to deal with. They come under attack from their enemies for existing at all; their defenders get defensive and refuse to change anything; they worry that capitulation will start them down the slippery slope of institutional decay. This is wrong-footed.

Institutions play an essential role in creating binding relationships between people and each other, including and especially relationships between generations. They have the potential to last hundreds of years: an institutional mindset is far more likely to worry about the legacy for generations to come—generations that most of us are not even thinking about yet—than individuals are. And yet, if institutions fail to adapt to changing times, they come under attack from the iconoclastic impulse.

In physics, the word plastic doesn't just mean the stuff used in packaging and littering our oceans. Plastic, the adjective, is the opposite of elastic. An elastic material will snap back to its original shape if you stretch it, while a plastic material will stay in its new shape.

Instead of being iconoclastic, we need to be icono*plastic*: ambitious and aggressive in reshaping our institutions to protect them from being smashed to pieces. An iconoplastic movement should be built around three core principles:

> Acceptance of New Power: The thesis of Jeremy Heimans and Henry Timms in their book *New Power* is that we have moved away from a primarily hierarchical system of political power to a collaborative, bottom-up one.[3] Grassroots movements, membership uprisings, social media campaigns: all challenge the old power structures that vested decision-making at the top of organisations. New Power institutions need to be built to cope with this reality, not challenge or protect against it.

3 Jeremy Heimans and Henry Timms, *New Power* (Penguin Random House 2018).

> Participation, not just representation: In an Old Power system, representation has been the primary way that members or voters' voices have been able to influence decision-making. Representative democratic systems have their place, but technology is increasingly making it far easier for mass participation in decision-making, including through deliberative methods. The great benefit of including people in the process of choice is that it builds a kind of democratic skillset: understanding, compromise and collaboration. Participative institutions will be far less focused on semi-regular elections to the top, and far more focused on maximising constant collaboration.
>
> Openness: New Power and mass participation need to be facilitated by greater openness about decision-making, data, and opportunity. Organisations under iconoclastic threat can become fearful: hoarding information to protect it from bad actors who will use it to contribute to their destructive agenda. An institution confident in its own ability to continue its own process of constant reform has to stay open to challenge, sharing its weaknesses as well as its strengths.

Parliament

For too long we have believed the hype about Westminster being the 'Mother of Parliaments'.[4] The truth is that all the pomp and tradition disguises the fact that Parliament is too often a hollow sham, ignored by an over-mighty executive of ministers and civil servants. No wonder, when new democracies were emerging from the Soviet bloc in the 1990s, not one of them copied our model of governance. Our system does not deliver what people want, it does not keep government or politicians honest, and it does not foster the meaningful debate we need.

First, I think we should move Parliament to Manchester, though I'd be open to a public consultation on the best place to put it. Our current Parliament buildings have become a potent symbol of political decay, propped up by scaffolding, beset by leaking roofs and drafty doors, even the clockwork of the nation's favourite bell running out of steam. Billions are being spent shoring up these crumbling edifices, misguidedly trying to preserve the old order in the old stonework.[5]

Those of us who love London have to accept that this city is toxic to millions of people. It is a byword for distance, disengagement, and disconnection from the rest of the UK.[6] Government from London cannot offer the transformative moment the country needs: a recognition that the rage has been heard and that change will really come.

Moving Parliament offers the chance to fundamentally rebalance our economy, as well as our politics. For thirty years or more, governments have promised to regenerate the North, and rebalance growth away from the overheated south-east. Billions of pounds have been invested; entire civil service careers have been spent mapping and planning and designing initiatives with all the goodwill and ambition in the world. Some achievements have been wrung from this sustained effort. Labour transformed the city centres of many great Northern cities. Transport investment is finally arriving across the North's rail network, in a much more coordinated way than before.

But all this goodwill is fighting gravity and it isn't working. London and the south-east of England still outstrip everywhere else in wealth and growth[7]. The UK is Europe's most regionally divided nation[8]. Only when politicians have to go to work every day on the rickety trains of our northern cities will they really change this, and give the North the infrastructure investment it actually needs to grow and thrive.

There will be huge agglomeration effects of shifting this vitally important state institution to a city where it might do some good, rather than just contributing to the overheating of the housing market. It won't be just politicians who will move; it will be journalists, public affairs companies, regulators and regulated industries: anyone whose business relies on knowing what the government is up to.

London will remain our financial and cultural capital, and will recover from the economic shock quickly. In the process, the North will be transformed.

Countries do not need to have their economic and their political capitals in the same city. The US has four cities bigger than its capital. Australia and Canada each have five. Shanghai is larger than Beijing. And countries can move their capital for the sake of the nation: Canberra was established to stop Melbourne and Sydney from quarrelling; Abuja replaced Lagos as Nigeria's capital because the latter was considered a divisive place to be (as well as being hot and overcrowded). Brasilia was established as Brazil's capital, replacing Rio de Janeiro, in 1960. Belize, Botswana and Pakistan followed soon after. Myanmar recently moved its capital city to Naypyidaw.

But of course, the traditionalists will declare, it's alright for these funny foreign, modern sort of places to go 'messing around' with the institutions of their government. We can't: we're English. We speak the language (as Bernard Shaw put it) of 'Shakespeare, Milton and the Bible'. We've got the very 'Mother of Parliaments'. They declare that Parliament is a symbol of a thousand years of history and must, therefore, be protected from anything that smacks of modernity or reform.

This is, of course, historical hokum. There have been buildings used for and by our rulers on the site of Westminster for a thousand years, but the vast majority of the current Palace of Westminster

4 UK Parliament, 'A beacon of democracy' (*UK Parliament*) <https://www.parliament.uk/about/living-heritage/building/palace/big-ben/much-more-than-a-clock/a-beacon-of-democracy/> accessed 13 April 2022.

5 Aubrey Allegretti, 'Parliament renovation could take 76 years and cost £22bn, report says' *The Guardian* (London, 23 February 2022) <https://www.theguardian.com/politics/2022/feb/23/parliament-renovation-could-take-76-years-and-cost-22bn-report-says> accessed 13 April 2022.

6 Roch Dunin-Wasowicz, 'London Calling Brexit: How the rest of the UK views the capital' (*LSE Blogs,* 13 November 2018) <https://blogs.lse.ac.uk/brexit/2018/11/13/london-calling-brexit-how-the-rest-of-the-uk-views-the-capital/> accessed 13 April 2022.

7 Sam Bright, 'The Shocking Divides Between London and the Rest of Britain' (*Byline Times*, 28 April 2022) <https://bylinetimes.com/2022/04/28/the-shocking-divides-between-london-and-the-rest-of-britain/> accessed 13 April 2022.

8 Jamie Hailstone, 'UK one of the most divided countries in Europe, study warns' (*NewStart,* 27 November 2019) <https://newstartmag.co.uk/articles/uk-one-of-the-most-divided-countries-in-europe-study-warns/> accessed 13 April 2022.

was completed just 150 years ago. It looks older partly because Westminster Hall, which fronts the road, is truly ancient, but mostly because our national predilection for the ancient led to its being designed in the Gothic style.

In fact, Parliament's history is not of continuity but of a series of radical changes forced upon it. From the destruction by fire of the old Palace in the 1830s to the destruction of the debate chamber by bomb in the 1940s and the establishment of something approaching democracy in the Great Reform Act to the full national franchise for men and women in 1928, Parliament changes when it needs to change. A proper reading of history shows that our greatest institutions survive when they adapt. The adaptation Parliament needs now is to move, if it wants a chance of being loved again.

Democracy doesn't live in a building. We can take Big Ben north with us, if people want to. We can hold the state opening of Parliament once a year in our crumbling relic on the Thames, if it makes life easier for the Queen and her golden carriage. But now is a time for national rebirth, and we should mark that with change, not stagnation.

Political parties

To cross the divides of identity politics our political parties must be transformed too. This is because membership of parties is increasingly based on identification with a particular 'tribe' or group, contributing to the polarisation of our politics and weakening the ability of our parties to be representative of the country at large.

It was during the election of 2015 that I wrote the first draft of the constitution of the Women's Equality Party (WEP). We included one truly radical proposition: that party members were allowed to be members of other parties, too. WEP was set up to be a 'cross-party' party: to welcome feminists from across the political spectrum, and offer them a second home. This is a completely different conception of what politics and parties are for, and many people laughed at us and still do.

It's the direct opposite of the rules that are set by the other parties. They can throw you out of the party for even tweeting support for a friend who's standing under another party's ticket; for making a £50 donation to a friend in another party; or for admitting you voted tactically in your seat. The Labour party's constitution says that its primary purpose is to ensure the continued existence of the Labour party. Their idea is to create a community of trust in which everyone is fighting for the same purpose. Otherwise, your opponents could infiltrate your local party and, for example, choose an unelectable candidate.

Of course, there's an easy solution to this and it's to open up candidate selection to everyone in your constituency. The closed shop of political parties does more to sabotage good politics than anything else we do wrong in Britain. Open primaries are the only way to give real voice to constituents in a two-party system; I'd be happy to change our voting system instead, but that's a more structural reform that's hard to imagine happening.

So, for the moment, let's just open up the parties. Pass a law against party exclusivity so the Conservatives can't ban you from joining the Women's Equality Party and Labour can't ban you from campaigning for the Green candidate in your local area. Mandate and fund open primaries in every constituency. Allow people to donate a few pounds, at the ballot box, alongside their vote, from taxpayer funds and ban big donations completely from party politics.

All elections should be majority publicly funded, and we should introduce legislation to force political parties to show all donors. Donations should not be more than £1000 per person, and can only be made once every year.

The monarchy and the honours system

It's hard to do much better than the proposals set out in Demos' early days for the British monarchy. The transition to a new monarch must be a moment of renewal and reformation. The honours system is an important first step: while in the last twenty years reforms have been implemented to honour more everyday people, and prevent those who don't pay their full taxes from being honoured, we need further change:

> First, we need to replace the outdated references to the British Empire: an order of British excellence is a sensible shift to the naming conventions of our honours.
>
> We should also think about the privileges conferred on those who receive an honour. Many recipients have the right to marry, or for their children to marry, in a special chapel at St Paul's Cathedral. This is a nice perk, but we should take a less London-centric view. We should work with our civic infrastructure—town halls, guildhalls, cathedrals, temples and more—to give real status and honour to those who've been recognised for their service in normal life.
>
> We need a better system for stripping those who commit crimes or abuse the tax system, of their honour, in order to protect its integrity for the future.
>
> We should use the Royal magic to celebrate places, as well as people. Let every town get involved in choosing the people to be honoured from their place—instead of having the lion's share of honours going to Londoners.
>
> Create honours for towns and villages, too: the right for every place to be Royal for a year, instead of only Leamington Spa and Tunbridge Wells.

Devolution and community power

Over centralisation is one of the greatest failings of our system of governance. Over the last couple of decades we have slowly inched towards progress—establishing mayors, combined authorities and devolving some power to more local organisations. We need to go much further; the central assumption needs to be reversed. We must move away from a system in which local areas must come cap in hand to central government and beg for powers and responsibilities, to one in which central government must make the case for why things need to be standardised and centralised.

At Demos, we have made the case for transforming our public services by centering them around strong relationships—between citizens and the state, between citizens and each other, and—crucially—between the various services who so often work at cross purposes to one another. This is only possible if we devolve power and centre reform around places instead of the vertical specialisms of individual government departments and professional specialisms.

We've argued for complete decentralisation of employment support services, replacing JobCentres with a Universal Work Service to help all working people develop their career and find better work.[9] That should be run and managed locally, built around the needs and opportunities of particular areas.

We've also argued for a new approach to crime prevention, putting local authorities in the lead role, and giving them oversight of the police.[10] There is little logic in having a powerful City mayor and a separate Police and Crime Commissioner. And there is little logic in leaving crime prevention to the police alone, when the factors that reduce crime are usually to be found in social services, education, housing, and youth provision.

Of course, devolution has its critics. One of the best arguments against devolution, of course, is that it enables far more variation between places and that tends to benefit people who are better off: instead of a single national system, you get good services where people can pay for them, and bad services where need is highest—also known as the 'postcode lottery'. Thus, the desire to standardise across the country is driven by an ideological commitment to fairness and equity that has huge merit.

Of course, national systems tend to have huge variation in them, too, no matter what the theory says. But it's vital that we don't allow community devolution to exacerbate inequality: in fact, we should use it to push in the opposite direction. Efforts to build social capital and democratic capability need to be concentrated in areas of higher deprivation. Whether through the transfer of community assets, the investment of time and resources in training, education, and relationship building, or simply through more direct funding, poorer areas need far more support, to enable them to take power, and develop their capabilities.

Still, there's the risk that politics gets more intense locally, and you end up surrendering evidence about what works and replacing it with what people fancy, even if that's no housebuilding, unsafe hospitals, or expensively-subsidised, but hardly-used, post offices. So why open ourselves up to the risks associated with far greater democracy at the local level?

It's because taking decisions away from people absolves them of responsibility for managing trade-offs and complexity. It allows them to outsource difficult decisions to politicians who they then complain about, and this slowly builds resentment that eats away at the political system.

Many of the policy problems we face today are in fact better resolved at community level because it's where we have the best chance of building legitimacy for so many uncomfortable decisions. But the community level is also where you can leverage human relationships, voluntary networks, and community infrastructure to be far more effective, often for less money. The state can be mobilised at national level to meet demand, but only a really strong social system can actively reduce demand.

9 Andrew Philipps, 'Working Together: The case for universal employment support' (*Demos*, May 2022) <https://demos.co.uk/project/working-together-the-case-for-universal-employment-support/> accessed 13 April 2022.

10 Alice Dawson, Polly Mackenzie, and Amelia Stewart, 'Move on Upstream: Crime, prevention and relationships' (*Demos*, May 2022) <https://demos.co.uk/project/move-on-upstream-crime-prevention-and-relationships/> accessed 13 April 2022.

The Community Paradigm is the name given by New Local, a think tank working with local government and other organisations, to their work.[11] It identifies why the community paradigm is more likely to be effective at tackling the kind of systemic problems identified in earlier chapters. It engages people at a level that is far more likely to influence their own behaviour and choices. It has agility and personalisation that are vital in a diverse society. It builds connections and relationships between people that, over time, add up to social capital.

Starting the journey

It is far easier to set out ideas for reform than it is to implement them. Institutional reform requires careful, slow, patient, and confident work. Some may look at our government and feel hopeful: the Levelling Up White Paper does suggest a level of analysis and ambition that has rarely been paralleled.[12] Others may look at it and despair: where is the long-term financial commitment? Why has this generational goal of shifting power and opportunity in the country disappeared from public view within a few short months?

But neither naive hope nor despair are the right approach. Perhaps this government will become great, and perhaps it will be replaced by a great government. At some point in my lifetime, I do expect that we will have a government that is willing to initiate structural change from the centre. But we should not wait. It is in the nature of 'new power' that we do not need to. Organisations in the public and private sphere can start to take an iconoplastic approach. We can all add a little more participation and a little more openness to the way we run our businesses, our charities, our universities, and our local systems of government. Instead of waiting for the iconoclastic enemies at the gates wanting to tear us to pieces, we can think about how to share the power we have. Change is best started yesterday, but today will do. The government that replaces Boris Johnson's finally provides an opportunity for leadership to reset our institutions.

11 Adam Lent and Jessica Studdert, 'The Community Paradigm: Why public services need radical change and how it can be achieved' (*New Local*, 4 March 2021) <https://www.newlocal.org.uk/publications/the-community-paradigm> accessed 13 April 2022.

12 Department for Levelling Up, Housing and Communities, 'Levelling Up the United Kingdom' (February 2022) <https://www.gov.uk/government/publications/levelling-up-the-united-kingdom> accessed 13 April 2022.

Amir Tataloo, Beyond Resistance and Propaganda: The Appropriation of Iranian Rap Music and the Negotiation of its Legality

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Introduction

No one knows about Amir Tataloo.

Bahman Ghobadi's film *No One Knows About Persian Cats* (2009) could be seen as a dynamic and thrilling introduction to Iranian popular music: two rock musicians form a band and run around Tehran, desperately looking for a way to leave the country. Many Iranian musicians, however, criticised the film's sensationalist representation of the popular music scene, stating that it greatly exaggerated the danger they face in order to depict them as victims of an oppressive regime.[1]

The rapper Amir Tataloo, too, has been subject to an overly politicised portrayal, failing to be considered as a complex figure by the media and in scholarship. I first became aware of Tataloo's music when I came across his video *Energy Hasteei* [Nuclear Energy], in which he sings in support of the Iranian nuclear program on board a navy ship. At the time, I was interested in the intersections between rap and politics in Iran, and had never before heard any rap songs in support of the government. I was intrigued as to what led Tataloo to produce the music video—was he coerced into making it, or perhaps rewarded with a small fortune? My further research did not provide answers to these questions. His story only became increasingly confusing: in May 2017, he appeared in a high-profile meeting with current president Ebrahim Raisi, but only three years later, in January 2020, Iranian judicial authorities requested that Interpol issue a 'red alert' for his arrest in Turkey 'for spreading corruption'.[2]

With each article, whether from news outlets or academic journals, it was difficult to gain any real sense of who Amir Tataloo was. It appeared that Tataloo the person, the rapper, could not be disentangled from his relations to the Iranian government. Writers seemed only able to view him through the distorted lenses of resistance or propaganda: he has generally been portrayed either as an illegal party rapper, fighting against the autocratic government, or as a mere pawn of the Iranian regime's propaganda centres.

In this article, I aim to look beyond the reductionist binaries that often dominate discussions of popular music and power in Iran (anti- vs. pro-regime, liberal vs. hardliner) and present a more multifaceted perspective of rap music's significance in Iranian politics. Looking at this music scene through the figure of Tataloo provides a deeper understanding of its evolution in the last few years, how social media has impacted the genre, and the ways in which rap's legality is constantly under negotiation.

The main body of this paper is divided into two sections. The first section explores the evolution of Tataloo's image and artistry through three music videos: *Energy Hasteei* [Nuclear Energy], *Shohadā*

1 Theresa Parvin Steward, *'I Am the Brave Hero and this Land is Mine': Popular Music and Youth Identity in Post-revolutionary Iran* (University of Edinburgh 2013) 22-130.

2 'Iranian Rapper Tataloo Reportedly Arrested in Turkey' (*RFERL*, 28 January 2020) <https://www.rferl.org/a/iranian-rapper-arrested-in-turkey-tehran-authorities-say/30402470.html> accessed 12 June 2022.

[Martyrs], and *Jahanam* [Hell]. The stark contrast between each video's discourse and artistic choices highlights the need for more complex portrayals of Tataloo, depictions that consider the significance of these works for the rapper and his career. In addition, I argue that scholars and journalists, in their focus on the political messages in the first and second videos, funded by the Revolutionary Guard, have omitted an important perspective. An analysis of these videos' aesthetic elements reveals two noteworthy processes taking place: an appropriation and sanitisation of conventional hip-hop tropes for the purpose of propaganda, as well as a clear improvement in the artistry of rap music videos.

The second section considers what Tataloo's career and interactions with several branches of the Iranian government can reveal about the legitimisation of rap music in Iran. I explore the main arenas on which the negotiation of rap's legality can play out, and identify the principal stakeholders and agents of influence in this process.

Amir Tataloo – Background

Amir Tataloo is the stage name chosen by Amirhossein Maghsoudloo; a popular but controversial Iranian rapper considered part of the first generation of the Iranian underground hip-hop scene. The musician was born in Tehran on September 21, 1987. He started singing pop music at the age of 17 in 1998 and, in 2003, set up a blog where he would publish his compositions.[3]

Tataloo's career began as an illegal 'underground' rapper, directly criticising the government for not providing him with a legal outlet for his music. He has repeatedly sought to obtain official licenses for the release of his music from the Ministry of Culture and Islamic Guidance, but to no avail. Indeed, to this day, very few rap albums have ever been approved by the Ministry for official release.[4] For this reason, Tataloo chose to publish all his music online.[5]

On three separate occasions, the rapper has been detained at the orders of Iranian authorities: 2013, 2016 and 2020. In December 2013, Tataloo was briefly arrested by the Iranian *gasht-e ershād* [morality police] on charges of cooperating with foreign satellite news channels[6]. The rapper was arrested for a second time in 2016 on charges of '*tashviq be fesād u fahshā*' [encouraging corruption and prostitution].[7] It was later revealed that the cause of his arrest was an audio file posted to his Instagram, which lead to Tataloo being charged with several crimes, such as insulting a government official, *qazf* [accusing someone of adultery or sodomy], and inciting threats.[8] Finally, in January 2020, Tataloo was arrested for a third time by Turkish authorities in Istanbul, who stated that Interpol had issued a 'red notice' for him. This notice was reportedly issued by Iranian judicial authorities who accused him of 'encouraging citizens, especially young people, to use drugs, especially psychotropic drugs, and for spreading corruption'.[9]

Having once held the most followed account on Instagram, Tataloo also broke several other records on social media, such as the most comments on a single Instagram post: 18 million[10], and the most viewed live broadcast on Instagram: 626,000 views.[11] The rapper, in the court session during his first arrest, suddenly stood up and stated: '*nemi tavānid harkāri mi khāhid bā man bekonid; man milionhā havadār dāram*' [You can't do whatever you want with me; I have millions of fans].[12] After his arrest in 2016, his fans took to social media to defend him and demand his release, posting 700,000 comments on Instagram, including on the accounts of the Supreme Leader Ayatollah Ali Khamenei, saying that musicians do not belong in jail. According to the data recorded by the users themselves on Twitter, these reactions came from two age groups: 13 to 17 years old and 18 to 24 years old.[13]

The rapper's immense popularity on social media has allowed him to explore a space in which he can express himself freely, uninhibited by most of the cultural and political restrictions facing musicians living in Iran. Tataloo's unofficial online releases, which have been published and shared endlessly on social media apps such as Telegram and Instagram, essentially sidestep the state's official cultural institutions. The public forums and comment sections which surround these releases represent a worryingly opaque space for hardline Iranian authorities, where fiery young people could possibly gather to chat about subversive beliefs or to 'spread corruption'.

Overall, Tataloo occupies a highly contested position in Iranian society. The rapper's most ardent fans refer to themselves as '*tatāliti*' [Tatalites], and have written a 500-page fan book compiling his biography, transcribed interviews and his complete lyrics. They follow certain rituals inspired by their idol, such as the '*dure-ye pāki*' [period of purity]: fourteen days in which fans should not eat or smoke, sin or have relationships with the opposite sex, and should exercise daily. Tataloo even designed a flag for his fans.[14] As a result of the near-zealotry of his fans, he has been perceived as a cult leader or as a fraudster who exploits the vulnerability of adolescents.[15]

Literature Review

Popular music and politics in Iran

The relationship between music and politics in Iran is a complex tapestry, in which several interweaving power structures have varying degrees of influence over music's permissibility, making the

3 Mohammad Fowladi, *Hell & Purgatory* (Tatality.com, January 2020) 16-17.

4 Laudan Nooshin, 'Hip-Hop Tehran: Migrating Styles, Musical Meanings, Marginalized Voices' in Byron Dueck and Jason Toynbee (eds), *Migrating Music* (Routledge 2011) 99.

5 Fowladi (n 3) 16-17.

6 '*Amir Tataloo khānande-ye irāni bāzdāsht shod*' [Iranian Singer Amir Tataloo Was Arrested] (*BBC Persian,* 3 December 2013).

7 '*Amir Tataloo be etehām-e 'tashviq be fesād u fahshā' bāzdāsht shod*' [Amir Tataloo Was Arrested on Charges of 'Encouraging Corruption and Prostitution'] (*Voa News,* 25 August 2016).

8 '*Barresi-ye hoquqi-ye anāvein-e etehami-ye Amir Tataloo*' [Legal Investigation of the Accusatory Topics of Amir Tataloo] (*JameJamOnline*, 3 September 2016).

9 *RFERL* (n 2).

10 '*Rekord-e tāze-ye Tataloo dar Instagrām*' [Tataloo's New Record on Instagram] (*Radio Farda,* 4 September 2019).

11 Fern Taghizadeh, '*Live-e Instagrām dar qarantiye; az sargarmi va āmuzesh tā sokhanrāni va mosābehe*' [Instagram Lives in Quarantine; From Entertainment and Education to Lectures and Interviews] (*BBC Persian*, 13 April 2020).

12 '*Mored-e ajib-e Tataloo u tatalitihā*' [The Strange Case of Tataloo and Tatalites] (*ISNA*, 28 August 2016).

13 '*Talāsh-e tatalitihā*' [The Endeavours of Tatalites] (*BBC Persian*, 2 September 2016).

14 Fowladi (n 3) 17, 72.

15 '*Jomhouri-ye tatalitihā*' [The Republic of Tatalites] (*Radio Zamaneh*, 29 August 2016); '*Tasir-e tatalihā dar tartib-e nojavānān*' [The Impact of Tatalites on Adolescents] (*Farhang News*, 11 September 2016).

latter exist in a constant state of negotiation. Rap music, which is the focus of this article, stands in marked contrast to other genres of popular music: rappers are very rarely granted a license from the Ministry of Culture and Islamic Guidance, without which it is illegal for any musician to record or release music.

Tataloo's pigeonholing in scholarship as either a protest rapper or a pawn of Iran's propaganda centres prevents us from understanding the implications of his unique position in Iranian society. Both Nooshin[16] and Semati[17] have drawn attention to the reductionist binaries which dominate discussions of popular music and power in Iran, with overly simplistic conceptions of hegemony and resistance, reformists and hardliners, modernity and tradition, etc.

Indeed, in their haste to view music through the lens of politics, scholars have missed something fundamental about music: its aesthetic value. Street[18] and Steward[19] stress the danger of looking at music purely through a political lens when, for many, it functions primarily as a source of aesthetic pleasure. Within the context of Persian cultural studies, this sentiment is echoed by Nooshin, who discusses the romanticisation of 'resistance' in representations of Iranian popular music.[20] In over-politicising music scenes in Iran, she argues that scholars disregard or push other equally important aspects of musical activities to the margins, and that this portrayal is more representative of the author's beliefs than the motivations of the musicians. The political fetishisation of musicians from the Middle East has also been discussed by Swedenburg[21] in relation to Palestinian musicians, who finds that their music is only appreciated if it fits within a narrative of Palestinian resistance.

The necessity of stepping beyond reductionist narratives of hegemony and resistance in interpretations of popular music is crucial to the analysis of Tataloo's music, motivations, and persona. Laachir and Talajooy's book, though centred around *Resistance in Middle Eastern Cultures*, compiles several convincing examples of how to surpass oversimplification in analyses of resistance.[22] Mozafari, for example, succeeds in conveying the resistance of solo female vocalists, a marginalised group in Iran, whilst still granting them agency.[23] By focusing on the social and professional implications of these musicians' strategies to resist censorship, Mozafari provides a multifaceted perspective of the significance of this form of resistance. The works cited above stand as the exception that proves the rule, revealing the gap in current scholarship of accounts of popular music that examine the differing motivations of musicians beyond the purely political.

16 Laudan Nooshin, 'Prelude: Power and the Play of Music' in Laudan Nooshin (ed), *Music and the Play of Power in the Middle East, North Africa and Central Asia* (Routledge 2009) 1-31.

17 Mehdi Semati. 'Sounds like Iran: On Popular Music of Iran' (2017) 15(3) Popular Communication 155-62.

18 John Street, "Fight the Power': The Politics of Music and the Music of Politics' (2003) 38(1) Government and Opposition 113-30.

19 Steward (n 1).

20 Laudan Nooshin, 'Whose Liberation? Iranian Popular Music and the Fetishization of Resistance' (2017) 15(3) Popular Communication 163–91.

21 Ted Swedenburg, 'Palestinian Rap: Against the Struggle Paradigm' in Walid El Hamamsy and Mounira Soliman (eds), *Popular Culture in the Middle East and North Africa: A Postcolonial Outlook* (Routledge 2013) 17–32.

22 Karima Laachir and Saeed Talajooy (eds), *Resistance in Contemporary Middle Eastern Cultures: Literature, Cinema and Music* (Routledge 2013) 207-275.

23 Parmis Mozafari, 'Female Solo Singing in Post-Revolution Iran' (2013) in ibid 262-278.

Iranian rap music

Beyond its subversive potential, there are several more aspects of rap music worthy of scholarly investigation. Ranjbar insists that all rap music in Iran should be considered oppositional due to its unofficial and highly contested nature, regardless of whether the lyrics of songs are political, however this assertion rests on the idea that rap music is entirely 'underground'.[24] This is a misleading and reductionist term which fails to account for the several occasions on which rap albums have been licensed by the Islamic Republic's Ministry of Culture, as early as 2003,[25] or on which rappers have collaborated with the state's media centres.[26] Although such examples are as of yet relatively uncommon, they problematise Ranjbar's clear-cut model of resistance and hegemony.

Few English-language works in scholarship supersede this binary in their analysis of rap lyrics. In Persian, however, some scholars treat the oppositional lyrics of rappers with more nuance. Goudarzi and Alvandi, whilst focusing on counter-hegemonic themes, reveal the numerous socio-economic topics tackled by rappers beyond the purely political: widespread poverty, unemployment, corruption, or addiction.[27] Similarly, Kowsari and Mowlaei emphasise how Iranian rap music, in addition to being a marginal discourse in society, itself contains several dominant and marginal discourses; radical protest only constituting one of the nine discourses they identified. These discourses indicate several other lyrical themes worthy of scholarly investigation, notably feminism and hedonism.[28] Tataloo is acknowledged as one of the main rappers in the latter discourse, stressing the need to consider his position in Iranian society with an aesthetic angle, and from the perspective of his audience.

It is relevant to consider how Iranian rappers have been classified in scholarship, and whether Tataloo fits neatly into these categories. As I have already mentioned, Kowsari and Mowlaei grouped rappers into certain themes of discourse, based on an analysis of their song lyrics. The consensus, however, is that categorisation based on the goals and motivations of rappers is the most useful.[29] Johnston and Ranjbar divide these musicians into three categories: aggressive 'gangsta' rappers who break taboos, moralistic rappers who strive for social awareness and commercial 'pop' rappers. As Golpushnezhad[30] and Johnston[28] point out, however, the traditional distinction between 'political' and 'party' rappers is of limited use:

24 Morvarid Ranjbar, 'Emergent Culture: Iranian Rap Music as a Tool for Resistance' (Wilfrid Laurier University 2016) 50-57.

25 Nooshin (n 4) 99.

26 Narges Bajoghli, *Iran Reframed: Anxieties of Power in the Islamic Republic* (Stanford University Press 2019) 99-106; Elham Golpushnezhad, 'Untold Stories of DIY/Underground Iranian Rap Culture: The Legitimization of Iranian Hip-Hop and the Loss of Radical Potential' (2018) 12(2) Cultural Sociology 271-73.

27 Mohsen Goudarzi and Alireza Alvandi, '*Musiqi be masabe-ye moqāvemat; mazamin-e kanterhezhemonik dar rap-e fārsi-irāni*' [Music as Resistance; Counter-Hegemonic Themes in Persian-Iranian Rap] (2019) 8(30) Jām'e farhang resāne [Society Culture Media] 122–44.

28 Masoud Kowsari and Mohammad Mahdi Mowlaei, '*Gune-shenāsi-ye goftemānhā-ye musiqi-ye rap-e irāni-fārsi*' [A Typology of the Discourses in Iranian-Persian Rap] (2013) 29(8) Motāle'āt farhang va ertebātāt [Cultural Studies and Communication] 91–116.

29 Sholeh Johnston, 'Persian Rap: The Voice of Modern Iran's Youth' (2008) 1(1) Journal of Persianate Studies 102–19; Ranjibar (n 24) 50-54; Mahmood Shahabi and Elham Golpoush-Nezhad, 'Rap Music and Youth Cultures in Iran: Serious or Light?' (2016) 3 Youth, Space and Time 218–19.

30 Golpushnezhad (n 26) 268.

many artists known for poppy, superficial songs became outspoken critics of President Ahmadinejad during the 2009 Green Movement, including Amir Tataloo.[31]

Whereas rap remains essentially unauthorised and unofficial in Iran, several genres, like pop and rock, have now become legalised and accepted following a period of illegality in the wake of the Islamic Revolution. Nooshin argues that whereas in the 1980s the Islamic Republic essentially gave pop music its subversive power by banning it, in the following decade, the government appropriated this genre and embedded it into official establishment institutions in order to render it safe, controllable and docile.[32] She later discussed the recurrence of this trend with the genre of rock music.[33]

Siamdoust points out that the Islamic Republic would rather bring certain music under its control and express a vacuous joy through it, than permit musicians to freely express real, potentially subversive feelings.[34] Only Golpushnezhad has specifically focused on this trend of appropriation in rap. By dividing an analysis of Iranian rap music into three chronological phases, she argues that it has evolved from being completely marginal and unauthorised, to a genre partially supported and funded by the IRGC.[35]

New nationalist propaganda

There is general agreement in scholarship that Iran's youth is the demographic that the Islamic Republic is most focussed on to preserve its political legitimacy and perpetuate its revolutionary values. Bobbio, Khatam, and Zimmt argue that the Islamic Republic's lack of support from the youth arises from its failure to respond to their demands of economic and social freedoms. Their analysis of the political situation in Iran, however, tends to be overly reductionist; the broad assertions that young people are moving away from Islamic values towards a 'Western' (read 'liberal', 'democratic') lifestyle[36] and that Iran is essentially a 'post-Islamist' society[37] reveal more about the author's political fantasies than those of the young Iranian population. In addition, Bobbio's claim that Western-inspired music is forbidden in Iran betrays a rather superficial understanding of the Iranian cultural sphere: far from being banned, pop and rock music have gradually become endorsed by the Islamic Republic's cultural centres.[38]

31 Nahid Siamdoust, *Soundtrack of the Revolution: The Politics of Music in Iran* (Stanford University Press 2017) 271-281.

32 Laudan Nooshin. 'Subversion and Countersubversion: Power, Control, and Meaning in the New Iranian Pop Music' in Annie Randall (ed), *Music, Power, and Politics* (Routledge 2005) 250-262.

33 Laudan Nooshin, 'The Language of Rock: Iranian Youth, Popular Music, and National Identity' in Mehdi Semati (ed), *Media, Culture and Society in Iran: Living with Globalization and the Islamic State* (Routledge 2008) 70; Laudan Nooshin, "Tomorrow Is Ours': Re-Imagining Nation, Performing Youth in the New Iranian Pop Music' in Nooshin (ed) (n 16) 246–249.

34 Golpushnezhad (n 26) 268.

35 ibid 262–73.

36 Raz Zimmt, 'The Conservative Predicament in Iran' (*Institute for National Security Studies*, 2017) 2 <https://www.inss.org.il/wp-content/uploads/2017/06/No.-944.pdf> accessed 12 June 2022.

37 Azam Khatam, *Struggles over Defining the Moral City: The Problem Called 'Youth' in Urban Iran* (Oxford University Press 2010) 14.

38 Emanuele Bobbio, 'Winning Back the "Left Behind": Iran's New Nationalist Agenda' (Istituto Affari Internazionali (IAI), 2018) 8 <https://www.iai.it/en/pubblicazioni/winning-back-left-behind-irans-new-nationalist-agenda> accessed 12 June 2022.

Other scholars offer more nuanced and valuable perspectives, such as Varzi[39] with a wide focus on various forms of data (media, newspapers, interviews etc.) and Bajoghli, with detailed findings obtained through two years of participant observation. Propaganda producers in the Revolutionary Guard espouse a view that through their work, they have 'distanced [them]selves from young people and that's the real danger'. Alongside this perceived estrangement exists an acute awareness that the young population would be unlikely to defend the regime in times of crisis, as their fathers and grandfathers had done during the Iran-Iraq War: 'we could turn into Syria!'[40] In addition, their argument that the regime's cultural producers are redirecting propaganda away from a traditional Islamic conception of nationalism towards one that emphasises Iran's uniqueness is highly significant, as it reveals the motives behind the production of new forms of nationalist propaganda in Iran, such as Tataloo's music videos *Energy Hasteei* [Nuclear Energy] and *Shohadā* [Martyrs].

In examinations of this new form of propaganda, however, too much agency has been granted to the media producers of the IRGC, rather than the artists involved. In all accounts of Tataloo's collaboration with conservative branches of government,[41] the rapper is never treated as anything more than a puppet of the regime's propaganda centres. Bajoghli's call for the need in scholarship to perceive regime media producers as 'complex actors' is not extended to the musicians and directors who actually create the nationalist promotional material—the question of who these artists are, and whether they are all fully supportive of the regime, remains wholly unexplored.

In valuing the regime producers' experience over that of the artists they employ, this scholarship has inadvertently reproduced the authoritarian and prescriptive dynamics between official cultural institutions (the Ministry of Islamic Culture and Guidance, the Islamic Propaganda Organisation) and Iranian artists; artists have been stripped of their agency and have failed to be considered beyond the gaze of the state and its intentions. An exploration of Tataloo's unique status would encourage a multifaceted portrayal of the artists involved in regime-supported media, and help paint a fuller, more complex picture of all the actors involved.

Sources and method

The first two music videos by Tataloo selected for analysis, *Energy Hasteei* [Nuclear Energy] and *Shohadā* [Martyrs], were produced in collaboration with regime media producers and the third, *Jahanam* [Hell], was released independently. Together, they reveal the broad evolution in Tataloo's beliefs, values, and aesthetics from 2015 to 2020.

Since it is impossible for rappers to appear on state media and in concerts, the virtual space of these Internet-propagated mediums is the only concrete link between the rapper and his audience. Whereas most sources discussed above tend to primarily examine the messages found in the lyrical text of these music videos, their visual and musical form is also worthy of investigation. The first two videos do not merely convey the regime media producers' nationalistic messages—they also entertain with aesthetic elements, and form a part of Tataloo's artistic image. Further, the context of

39 Roxanne Varzi, *Warring Souls: Youth, Media, and Martyrdom in Post-Revolution Iran* (Duke University Press 2006) 13-21.

40 Bajoghli (n 26) 15-22.

41 ibid 104-106; Bobbio (n 38) 8; Abbas Milani, 'Iran's 2017 Election: The Opposition Inches Forward' (2017) 28(4) Journal of Democracy 30–37; Zimmt (n 36).

their production is highly significant—*Jahanam* [Hell] is all the more significant due to the stark contrast it draws with the relatively conservative aesthetics of *Energy Hasteei* [Nuclear Energy] and *Shohadā* [Martyrs].

Section 1: Propaganda, entertainment or more? - Amir Tataloo through his music videos

Energy Hasteei [Nuclear Energy]

'*hich qodrati nemi tavānad melat-e Irān rā az dāshtan-e energi-ye salah āmiz-e hasteei mahroum sāzad*' [No power can deprive the Iranian nation of peaceful nuclear energy]. This Persian phrase, appearing at the beginning of *Energy Hasteei*[42] (0:01), is the most straightforward expression of the music video's message. Most striking, however, is the sight of Tataloo, a rapper previously shunned by the Iranian regime, singing and dancing on the deck of the IRIS Damavand, the flagship of the Islamic Republic of Iran Navy's northern fleet.[43] This image quickly captured the attention of international media, who, in conventionally sensationalist terms, noted the significance of such propaganda being released in the final stages of the Iran nuclear talks in Vienna.[44]

It is clear why international journalists exclusively focused on the music video's elements of propaganda—these are the most immediately apparent, and require only a basic knowledge of Iran's nuclear policy to decode.[45] Visually, there is an evident involvement of the regime in the music video's production, in the presence of soldiers, a navy frigate and a not-so-subtle portrait of Khamenei in the background.[46]

The song's lyrics (helpfully translated into English for the benefit of international audiences) condemn the hypocrisy of foreign powers in prohibiting Iran from developing nuclear energy whilst being in possession of nuclear weapons: 'If it's bad, then it's bad for you too!' Tataloo questions why critics have focused on the negative aspects of nuclear energy, when all things contain both 'good' and 'bad': the sky can provide 'rain' but also 'hurricanes, lighting and hailing', a fire can both 'burn' and be 'warm', and water can both 'drown you' and 'save you from thirst'. There is a sudden escalation in analogies however, when the same judgement is applied to guns: they can 'kill' but also 'protect your homeland'.[47] Here, firearms are posited as an extension of nature, hence making it seem perfectly natural for a nation like Iran to develop the capacity for nuclear energy. Released in the final moments of the JCPOA's negotiation (an agreement on the Iranian nuclear program), this message reads as a nationalistic cry of victory.

Bajoghli discusses a new tactic employed by regime media producers to make their propaganda less easily identifiable—they create small and unidentifiable production studios, still funded by the Revolutionary Guard and the government's cultural budget, but not directly affiliated with them.[48] Indeed, nothing in the music video nor the 'behind-the-scenes' footage published alongside it suggests that this video was funded by these organisations—besides one small detail. In its final frame, acknowledgements of all the military divisions who assisted with the music video's production are followed by a reference to '*shabake-ye interneti-ye nasr*' [Nasr Internet Network].[49] The '*darbāre-ye mā*' [About Us] section of this production studio's website reveals that it was founded in order to combat the domination of the '*mafiyā-ye resāne-ye sihonisti*' [Zionist media mafia],[50] betraying some of the Revolutionary Guard's harsh anti-Israeli zeal.[51]

There are several elements of *Energy Hasteei*, however, that journalists and scholars alike have omitted in their focus on its nationalistic propaganda—who the video is addressing and how the video addresses this audience. The populist message in Tataloo's lyrics, portraying him as a simple, everyday Iranian who is unaware of 'what is happening in [his] country' but who senses 'a scent of exhaustion'[52] is not only meant for an audience in Iran. The fact that this was Tataloo's first music video to come with English subtitles is not a mere coincidence: the video was clearly intended to have a global reach. At regular intervals, images of 'normal' Iranian citizens holding posters with English slogans appear, urging viewers not to 'let the media fool [them]', and declaring that Iran is a 'peacful' (sic) nation who has 'never invaded a country'.[53] Behind these citizens are some of the most popular Tehrani sites that any tourist would recognise: the Azadi and Milad towers (0:42, 1:48), the Darabad quarter leading up to the Alborz mountains (0:34) and the capital's train station (0:16).[54] Tataloo's assertion that 'silence is for statues'[55] also gives the impression that he is a courageous hero speaking out against injustice, a narrative that is easily digestible for foreign viewers who only have a superficial knowledge of Iranian politics.

Beyond this political narrative, however, there is also something else at play. Conventional aesthetic elements of hip-hop music videos are appropriated and sanitised in *Energy Hasteei*, in order to instinctively appeal to Iran's young population, without crossing any of the government's cultural red lines. The standard rap trope of backup dancers, usually a troupe of attractive women or members of the rapper's clique, is here replaced by stone-faced soldiers in uniform performing a drill with their rifles in hand. These servicemen can even be seen singing along to the song's chorus.[56] Considering dance's position as the most vilified art form in Iran,[57] the use of a

42 '*Energy Hasteei*' [Nuclear Energy], (*Youtube*, Amir Tataloo, 12 July 2015) 0:01 <https://www.youtube.com/watch?v=VywTiTVMHts> accessed 12 June 2022.

43 ibid 1:07-1:14

44 Hanif Kashani, 'Iranian Rapper Drops Bomb with Pro-Nuke Video' (*Al-Monitor*, 14 July 2015) <https://www.al-monitor.com/originals/2015/07/FOR%20WED%20iran-rapper-tataloo-video.html> accessed 12 June 2022.

45 Kay Armin Serjoie, 'This Is the Surprising Way the Iranian Military Responded to the Nuclear Deal' *Time* (New York, 16 July 2015) <https://time.com/3958928/amir-tataloo-iranian-military/> accessed 12 June 2022; Ishaan Tharoor, 'Watch: Iranian Rapper Celebrates Nuclear Power from the Deck of a Warship' *The Washington Post* (Washington, 16 July 2015) <https://www.washingtonpost.com/news/worldviews/wp/2015/07/16/watch-iranian-rapper-celebrates-nuclear-power-from-the-deck-of-a-warship/> accessed 12 June 2022.

46 Tataloo (n 42) 1:03, 1:06, 1:21.

47 ibid 0:04, 0:31-33, 0:42, 0:46, 0:59.

48 Bajoghli (n 26) 114.

49 Tataloo (n 42) 3:15.

50 NasrTV, (*NasrTV*, 2021, fa.nasrtv.com/page/about).

51 Al-Monitor Staff, 'IRGC Chief: Israel Could Be Blown up in a Single Operation' (*Al-Monitor*, 6 May 2021) <https://www.al-monitor.com/originals/2021/05/irgc-chief-israel-could-be-blown-single-operation> accessed 12 June 2022.

52 Tataloo (n 42) 1:38-41.

53 ibid 0:16, 0:36, 1:49.

54 ibid 0:42, 1:48, 0:34, 0:16.

55 ibid 2:44.

56 ibid 1:04, 1:19.

57 Parmis Mozafari, *Negotiating a Position: Women Musicians and Dancers in*

military drill as a substitute for backup dancing allows the video's producers to preserve the form of a hip-hop trope whilst avoiding any problematic display of immodesty. Similarly, the fog machine typically employed in music videos for atmospheric effect is here replaced by smoke grenades and the navy ship's funnels.[58]

A parallel process of the militarisation and sanitisation of hip-hop tropes is also audible in the music of *Energy Hasteei*. Several conventional elements of rap music are present, such as a groovy, hip-hop style break being played on the drums, as well as floaty arpeggiated melodies from a keyboard in the verses. In the chorus, however, a noticeable shift takes place.[59] Monotone, choir-like backing vocals, short staccato notes on the strings, and intermittent shouts all imbue the music with an element of tension, more typical of military parades or anthems than rap songs.

Shohadā **[Martyrs]**

The music video for Amir Tataloo's song *Shohadā* [Martyrs] was released on September 23 2015, during Sacred Defence Week, Iran's most important annual commemoration of the Iran-Iraq war, for which the government schedules public events, television and radio shows.

The narrative of martyrdom has its origins in the Battle of Karbala (680 AD) during which the grandson of the prophet Muhammad, Hussain ibn Ali, was killed and beheaded. In fact, virtually all Shi'i imams excluding the 12th are conventionally believed to have been killed in their youth by their opponents. Consequently, *shahādat* [martyrdom] is intrinsically linked to the ideal of heroism in Shi'ism. In Hamid Dabashi's words: 'the only hero is a dead hero'.[60]

When Iraq invaded Iran in September 1980, Ayatollah Khomeini was provided an ideal opportunity to strengthen his authority as a religious leader. The largest mobilisation of the Iranian population was essentially achieved by embracing martyrdom as 'state policy'.[61] The phrases *jang-e tahmili* [imposed war] and *defā'e muqaddas* [sacred defence] became common in public discourse, due to their implication that fighting on the front, more than a protection of the nation, constituted a heroic religious act.[62]

Released only two months after *Energy Hasteei*, the music video for *Shohadā* similarly represents the desire of regime media producers to move away from traditional Islamic conceptions of nationalism towards those that will resonate with Iran's youth. Much like the Museum of Sacred Defence, opened in 2012 in Tehran, *Shohadā* redirects the narrative of martyrdom: instead of being seen as a heroic deed or a path to heaven, dying for one's country is portrayed as being brutal, but necessary.

Shohadā opens with a dedication in Persian: '*be khānevādehā-ye shohadā-ye jang-e tahmili va hasteei*' [to the families of the martyrs of the imposed and nuclear war].[63] The video is essentially comprised of three perspectives: soldiers dying at the front, the assassinations of nuclear scientists, and Amir Tataloo paying tribute by singing and rapping. Throughout the music video, the casualties of the 'imposed' Iran-Iraq war are visually equated with the assassinations of nuclear scientists, which the state claims were orchestrated by Israeli spies.[64] This parallelism allows regime producers to renew the narrative of martyrdom for a new generation by presenting scenes that young people will be familiar with, since the assassinations portrayed are seemingly based on real events: the first[65], on Mostafa Ahmadi Roshan's killing by car bomb[66] and the second,[67] on the drive-by shooting of Darioush Rezaeinejad in 2011.[68]

The core message here, that all those who die for the state are martyrs, is expressed in several ways which aim to appeal to young people. Firstly, the emotional impact of the assassinations is increased by portraying the victims as '*sāde va 'āsheq'* [simple and in love]: the first is shown buying a teddy bear, presumably for his love interest, moments before his death, and the second is shown laughing with his wife on the doorstep of their home.[69] Secondly, the image of such a popular celebrity as Tataloo standing in front of coffins draped with the Iranian flag presents a role model for young people to follow in the expression of their nationalistic grief. Furthermore, Tataloo's singing and rapping conveys grief through a medium that the youth will be able to relate to: '*bazi harf-hā geriye dārand*' [some words cry]. Finally, his assertion that anybody can give their life for their country, '*farq nadāre ke jensi, ke rangi, ke qomi*' [no matter what gender, colour or ethnicity], reads as a rather unusual attempt to appeal to the more liberal tendencies of Iran's youth.[70]

Amir Tataloo, though taking centre stage in *Energy Hasteei* and *Shohadā*, has failed to have been considered as a complex character. Any investigation of his motivations, actions and goals in the context of the music videos has been omitted in favour of what he represents: a shocking symbol of the regime's desperation to appeal to young people, or of rap's appropriation for the purposes of propaganda. It is no less important to ask what *Energy Hasteei* and *Shohadā* mean for Tataloo, lest he be treated as a mere pawn of the regime's media producers. Though the rapper claims 'No, I am not involved in political games',[71] for over a decade he has either been directly associated with politicians, sung about political issues, or taken a public stance on contemporary political issues. In 2009, Tataloo sang in support of the reformist politician Mir Hossein Mousavi during the Iranian parliamentary elections, with the song *Irān-e Sabz* [Green Iran]. Keeping in mind also that Tataloo was arrested in 2013 for appearing on unauthorised satellite channels, such high-profile, state-supported productions as *Energy Hasteei* and

Post-Revolution Iran (The University of Leeds 2011) 240.

58 Tataloo (n 42) 2:02, 1:38.

59 ibid 1:04-28.

60 Hamid Dabashi, *Shi'ism: A Religion of Protest* (Harvard University Press 2011) 82-4

61 Roxanne Varzi, 'Iran's Pieta: Motherhood, Sacrifice and Film in the Aftermath of the Iran–Iraq War' (2008) 88 Feminist Review 47.

62 Pedram Partovi, 'Martyrdom and the "Good Life" in the Iranian Cinema of Sacred Defense' (2008) 28(3) Comparative Studies of South Asia, Africa and the Middle East 522.

63 '*Shohadā*' [Martyrs], (*Youtube*, Amir Tataloo, 23 September 2015) 0:01 <https://www.youtube.com/watch?v=HK_A-tgM5C0> accessed 12 June 2022.

64 Ian Black, 'Bullet-Riddled Cars and Lush Gardens: Iran's Memorial to Its 'Nuclear Martyrs'' *The Guardian* (London, 2 July 2015) <https://www.theguardian.com/world/2015/jul/02/iran-memorial-museum-nuclear-martyrs> accessed 12 June 2022.

65 Tataloo (n 63) 2:04-20.

66 Saeed Kamali Dehghan, 'Iran Nuclear Scientist Killed in Tehran Motorbike Bomb Attack' *The Guardian* (London, 11 January 2012) <https://www.theguardian.com/world/2012/jan/11/iran-nuclear-scientist-killed> accessed 12 June 2022.

67 Tataloo (n 63) 2:40-55.

68 Saeed Kamali Dehghan, 'Iran Denies Assassinated Academic Worked on Nuclear Projects' *The Guardian* (London, 25 July 2011) <https://www.theguardian.com/world/2011/jul/25/iran-denies-assassinated-academic-nuclear-connection> accessed 12 June 2022.

69 Tataloo (n 63) 2:02, 2:04, 2:43.

70 ibid 2:45, 2:30.

71 Tataloo (n 42) 2:02, 1:32.

Shohadā could be seen as providing the rapper with an opportunity to reinvent himself, and wipe his slate clean in the eyes of the Ministry of Culture and Islamic Guidance. Certainly, his attire in the music videos suggests as much: the understated tones of his clothing, his beard and the Islamic prayer beads around his neck would seem far more tolerable to government officials than his trademark long hair, exposed chest, arm tattoos and cross necklace.

Jahanam [Hell]

Tataloo's music video for *Jahanam*, released independently in 2020, is far more ambitious than *Energy Hasteei* and *Shohadā*, both conceptually and in terms of production value. In duration alone, *Jahanam* has a longer runtime than both of the state-funded projects combined. Where *Energy Hasteei* and *Shohadā* were both literal and realistic in their narratives, *Jahanam* stands as a multi-layered symbolic exploration of hell through themes of depression, betrayal and political injustice.

Three scenarios are juxtaposed in *Jahanam*, all of which end in Tataloo's death. The first shows the rapper walking to the edge of a rooftop, looking down at a city, only to turn around and be pushed off by his double.[72] This marks the culmination of his character's increasingly deteriorating mental state, reflected in the song's lyrics: *'az hamishe ghamgin taram'* [more depressed than ever], '*chizi namunde azam'* [there's nothing left of me] and '*jahanam mirize tu tanam'* [hell is pouring into me].[73] Here, hell is used as a symbolic representation of a dark mental state, from which there is no escape. In the second narrative, Amir Tataloo depicts a passionate love affair which ends in heartbreak. This hell - the pain of his lover's betrayal—is expressed visually through Tataloo's second death: moments after being resuscitated by a doctor, his partner plants a kiss on his lips and proceeds to stab him in the heart.[74]

The third narrative portrayed in *Jahanam* is arguably the most intricate: Tataloo's tale of incarceration and torture functions on both a symbolic and a literal level. *Jahanam* opens with a scene of Tataloo on trial—he is seen standing in the defendant's podium in a prison uniform and handcuffs. Following this trial, Tataloo is violently thrown into a prison cell[75]. It quickly becomes clear, however, that this tale of imprisonment is more than just a metaphor for his vilification and ostracization by society. The song's lyrics suddenly become very literal: *'bāyad jelo bāzpors chet furan barge ru pureh kossher konam'* [I have to fill the paper with a bunch of bullshit in front of the interrogator] and *'mige bas ni bāzam benevis be ki vasli martike olāq?'* [he orders me to write more and asks me: who are you working for, you prick?].[76] The tendency of the Iranian criminal justice system to crack down on artists for ludicrous charges is well documented[77], and here Tataloo reveals another face of hell, a country where his fate is either *'a'dām ya qafs'* [execution or a cage][78] ('*Jahanam'* 5:12). The injustice of this system is not only expressed through the very direct portrayal of abuse in an interrogation cell, but the image of a prison guard psychotically attempting to stab a bird with a screwdriver through the bars of its cage.[79]

Whether or not one enjoys Tataloo's character or music, it is undeniable that *Jahanam* uncovers an artistry which transcends the rapper's one-dimensional portrayal in scholarship and media as a mere party rapper or a puppet of the Revolutionary Guard's media centres. In addition, it is hard to think of a greater change of lifestyle than Tataloo's in between *Energy Hasteei* and *Jahanam*. Whereas the rapper appears as a model Islamic citizen in the former, his self-portrayal in *Jahanam* deliberately crosses the regime's cultural red lines, as if he is keen on provoking officials at every turn. The music video shows Tataloo drinking whisky, cracking a whip whilst staring at a woman's derriere and smoking cannabis.[80] Tataloo's lyrics, too, in addition to being sexually explicit, also contain numerous examples of profanity. With *Janaham*, Tataloo consciously crosses the point of no return in attempting to appeal to the Iranian authorities - the values espoused in *Jahanam* are the polar opposite of regime-friendly.

Energy Hasteei and *Shohadā* stood out upon their release in 2015 due to their impressive visuals, and seemed to suggest that regime-funded music videos were far superior in production value to those independently released by rappers. The video for Tataloo's *Jahanam*, however, reveals that such a large contrast no longer exists in 2020: unofficial rappers are now able to release productions which rival the quality of state-supported projects.

A small sign in one frame of *Jahanam* reveals that the music video was filmed in Turkey: '*hasta hizmetleri*' [patient services],[81] where Tataloo currently lives. The new trend of Iranian rappers releasing immensely popular tracks and music videos from abroad—*Jahanam* has 3.5 million views, and the LA-produced *Tehran Tokyo* by Tataloo's friend Sasy has 5 million—is reminiscent of Iranian expatriate music releases in the 80s and 90s. So-called *Tehrangelesi* [a portmanteau of Tehran and Los Angeles] musicians were able to reach Iranian audiences on the black market through cassettes—a new technology far harder for authorities to confiscate and which listeners could copy with ease.[82] It would seem that for this recent wave of rappers, who have also left Iran and are taking advantage of the possibilities of a novel medium, social media is the new cassette.

Section 2: The legitimisation of rap in Iran

Whether rap music is to become fully sanctioned in Iran remains in question. However, it is clear that a process of co-option and sanitisation has begun in relation to rappers, their music, and aesthetics. If this trend were to continue, rap would join both pop and rock as genres which were once entirely subversive, but gradually became adopted into official state framework in order to rid them of any disruptive potential. The figure of Amir Tataloo, as the most noteworthy and infamous rap musician involved in politics, provides a valuable angle from which it is possible to consider on what arenas the legalisation of rap music could play out, and who could contribute to its unfolding.

72 '*Jahanam*' [Hell], (*Youtube*, Amir Tataloo, 15 Jan. 2020) 0:49, 3:22, 6:14 <https://www.youtube.com/watch?v=c1OELRZ0eOo> accessed 12 June 2022.

73 ibid 1:19, 6:11, 6:17.

74 ibid 5:42, 5:49, 5:57.

75 ibid 0:17, 1:10.

76 ibid 4:30, 4:45.

77 'Tortured Filmmakers and Musicians Face Imminent Arrest Amid Crackdown on Artists', (*Amnesty International*, 1 March 2016) <https://www.amnestyusa.org/press-releases/iran-tortured-filmmaker-and-musicians-face-imminent-arrest-amid-crackdown-on-artists> accessed 12 June 2022.

78 Tataloo (n 72) 5:12.

79 ibid 5:01, 5:35.

80 ibid 1:43, 1:44, 5:51.

81 ibid 3:39.

82 GJ Breyley and Sasan Fatemi, *Iranian Music and Popular Entertainment from Motrebi to Losanjelesi and beyond* (Routledge 2016) 141.

As explored in the first chapter, music videos funded by the Revolutionary Guard's media centres such as *Energy Hasteei* and *Shohadā* mark the beginning of a co-option of rappers and the aesthetics of their music for the purpose of making nationalist propaganda more appealing to young people. As such, they constitute an important arena through which rappers could gain a higher profile, and their music could gradually become more acceptable. If, like the Chinese government,[83] the propaganda centres of the Islamic Republic such as the IRGC or the Islamic Propaganda Organisation continue to fund and produce music videos to further their message, this would undoubtedly improve rap's reputation amongst even the most hardline branches of the state—as it would demonstrate that even the vilified rap music can be used to promote the values of the Islamic Republic.

Social media provides a space both for famous rappers to gain official social recognition, and for the transmission of hardline political views. Tataloo has published several posts in support of the Ayatollah and the Revolutionary Guard, and has sought to legitimise himself through social media in other ways, such as appearing alongside celebrities that are accepted in the official sphere. As an example, the rapper attended a Persepolis F.C. training session in April 2020 and was photographed alongside famous footballers such as Payam Sadeghian and Mohsen Bengar.[84] Such photoshoots are beneficial for both parties involved: footballers are able to gain publicity through Tataloo's countless social media followers, and the rapper, by association with figures that are legally recognised by the government's cultural system, acquires an air of legitimacy and greater cultural influence.

The presence of unlicensed yet popular musicians at official events and conferences is an additional site for the negotiation of rap's legitimacy: much like with footballers, appearing alongside eminent politicians allows rappers to seem endorsed by the regime, whereas politicians can extend their sphere of influence to the musicians' young fanbase. The principlist politician Hamid Rasaee, prior to denouncing Tataloo for his 'heretic' views on Instagram, was seen shaking the rapper's hand and gifting him a 'prize' caricature at a Fars News ceremony in July 2017.[85] Fars News is the 'semi-official' news agency of the Iranian government, associated with the Revolutionary Guard[86]—suggesting that Tataloo's relationship with the latter extended beyond the production of music videos or the publishing of conservative opinions on his social media.

Undoubtedly the most significant of these encounters between rappers and hardline politicians remains Tataloo's meeting with Iranian president Ebrahim Raisi in May 2017. This 'Elvis Meets Nixon' moment came as a shock to many Iranians, not least for the sheer absurdity of seeing the two figures sitting side by side: the rapper's tattoos, visible on his bare forearms, strongly juxtapose with Raisi's sombre black cleric robes.[87] Beyond their appearance, Tataloo's career path and past arrests for 'encouraging prostitution and corruption' appear wholly irreconcilable with Raisi's exceptionally conservative politics: the latter was named as one of the four figures who led the 1988 executions of Iranian political prisoners, in which over 5,000 political dissidents were imprisoned, interrogated and killed because of their opinions or non-violent campaigning[88] ('Blood-Soaked Secrets: Why Iran's 1988 Prison Massacres Are Ongoing Crimes Against Humanity'). In a video of the meeting, Raisi is noticeably uncomfortable as they discuss Imam Reza, the eighth Imam in Twelver Shi'ism, and his national significance: Tataloo asserts that Imam Reza is not just for clerics but '*barā-ye hame-ye Irān-e'* [but for all Iranians!].[89] Indeed, Raisi is also the custodian for the Imam Reza shrine in Mashhad, and the son-in-law of Ahmad Alamolhoda, the prayer leader and Grand Imam of the shrine who, incidentally, banned all music performances in the city of Mashhad.[90]

Raisi was in the midst of his presidential bid when the video of his meeting with Tataloo was released in May 2017, and many joked that the rapper cost him the election, as Rouhani was re-elected.[91] The implications of this encounter, however, between hardline cleric and unauthorised musician, are quite serious. The fact that such a conservative politician would even consider meeting a rapper, let alone release a video of their encounter, is a testament to the hardliners' sheer desperation to appeal to young people. It also suggests that similar compromises in the future could pave the way to the legitimisation of unauthorised musicians.

Despite the fact that Tataloo emigrated to Turkey, and spoke out against the regime and Islam in Instagram posts and his music video *Jahanam*, his popularity on social media continues to be exploited to spread conservative political messages. In December 2020, a video recorded from Instagram Live was posted on Youtube by the channel 'Amir Tataloo Original Fan'. In the video, an older woman discusses sexual topics with a teenager in order to encourage him to delete Instagram.[92] Iran's Communications and Information Technology Minister, Mohammad Javad Azari-Jahromi, stated that a 'certain hardline thinktank' was responsible for the widespread distribution of the video, which reached half a million views on Youtube.[93]

83 'Chinese Health Workers Dance and Sing in Music Video to Promote Covid Vaccine', *The Independent* (London, May 2021) <https://www.independent.co.uk/tv/news/chinese-health-officials-dance-and-sing-in-music-video-to-promote-covid-vaccine-v68bb264d> accessed 12 June 2022.

84 (*Varzesh3*, 21 April 2020) <tinyurl.com/tataloofootball> accessed 12 June 2022.

85 Hossein Velayati, 'Hamid Rasaee and Amir Tataloo' (Wikimedia Commons, Fars News, 16 July 2017) <https://commons.wikimedia.org/wiki/File:Hamid_Rasaee_and_Amir_Tataloo_13960425001800636358248576455809_36810.jpg> accessed 12 June 2022.

86 Maryam Sinaiee, 'Iranian News Agency Targeted by US Sanction Resorts to Hacking to Get Domain Back' (*Radio Farda*, 25 January 2020) <https://en.radiofarda.com/a/iranian-news-agency-targeted-by-us-sanction-resorts-to-hacking-to-get-domain-back-/30396680.html> accessed 12 June 2022.

87 *'Jalase-ye Amir Tataloo bā Ebrahim-e Ra'isi'* [Amir Tataloo's Meeting with Ebrahim Raisi], (*Aparat*, amiromega, June 2020).

88 'Blood-Soaked Secrets: Why Iran's 1988 Prison Massacres Are Ongoing Crimes Against Humanity', (*Amnesty International*, 2018) <https://www.amnesty.org/en/documents/mde13/9421/2018/en> accessed 12 June 2022.

89 (n 87) 0:50-5.

90 Rohollah Faghihi, 'Senior Iran Cleric Faces down Culture Minister over Concerts' (*Al-Monitor*, 23 August 2016) <https://www.al-monitor.com/originals/2016/08/iran-mashhad-concerts-friday-prayer-leader-alamolhoda.html> accessed 12 June 2022.

91 Holly Dagres, 'This Young Iranian Rapper May Have Cost Raisi the Presidency' (*Al-Monitor*, 31 May 2017) <https://www.al-monitor.com/originals/2017/05/iran-raisi-tataloo-tatalee-election-race-endorsement-rapper.html> accessed 12 June 2022.

92 'Amir Tataloo Original Fan', (*YouTube*, Amir Tataloo Original Fan, 17 December 2020) <https://www.youtube.com/watch?v=JMqe-B_1Ohc> accessed 12 June 2022.

93 'Iran Judiciary Prosecutes Communications Minister Over Internet Access', (*Iran International*, 20 January 2021) <https://old.iranintl.com/en/iran-politics/iran-judiciary-prosecutes-communications-minister-over-internet-access> accessed 12 June 2022.

What is unusual about this video, however, is the appearance of the woman, Mina Namdari. She appears without a hijab (compulsory in Iran) and with visible cleavage and a bottle of wine in her hands (though she fails to actually drink from it during the video). It is difficult to understand why a hardline think tank would promote such a video that is blatantly in transgression of Iran's modesty laws, unless one considers the Revolutionary Guard's tendency in recent years to attempt to conceal their role in the production of certain propaganda videos.[94] IRGC producers often include profanity and anti-regime messages in their media in order to mask the fact that it is propaganda. With this video, it seems as if hardline producers are hiding their involvement by employing a woman who superficially appears to be breaking the Islamic Republic's modesty laws.

There exist several stakeholders which negotiate the legality and legitimacy of rap music through the arenas outlined above. Media producers in the Islamic Revolutionary Guard Corps such as Reza Hosseini believe that they need to 'tell better stories'[95] to young people through their content, so that they do not feel ostracised by nationalistic or revolutionary values; they recognise a need to speak 'in the language of youth'. By pushing their sanitised and professionally-produced appropriation of rap into the limelight, they are also able to detract attention from its more subversive form, essentially silencing any voices of dissent. Their enduring interest in rap as a means to talk to young people, even after Amir Tataloo has turned against them, is clearly visible in the propaganda video published through a Tataloo fan page on Youtube.

Hardline politicians too, such as Hamid Rasaee and Ebrahim Raisi, by appearing alongside Tataloo, essentially recognise rap music's legitimacy and influence in Iranian society and bring it into an official framework. Politicians meeting such rappers displays this genre of music in the light of public attention, and suggests that their transgressive history can be overlooked on certain occasions –casting doubt on the legitimacy of rap's illegality.

Of course, the central factor in any question of rap's possible legalisation in Iran remains the Ministry of Culture and Islamic Guidance, from which all musicians must obtain a license in order to perform and release any music legally. The ministry's opposition to rap as a genre seemingly arises out of an aversion to its implications of Western influence, rather than out of any particular opposition to its musical aesthetics. It appears that it mostly fears the word 'rap', and its 'European and American' allusions, but recognises that there is potential for a legitimate form of the genre to be fully licensed in the future: the director of the ministry's music department Pirooz Arjmand suggests that the term '*goft-avāz*' [musical spoken word] be used to replace 'rap', which he asserts takes notice of a tradition of musical spoken word that existed far before rap arrived in Iran, called '*tartil khāni*' [recitation].[96]

Indeed, the arrest in March 2021 of producers associated with Sasy Mankan's video *Tehran Tokyo*, in which he appears alongside American porn star Alexis Texas, reveals that combating the influence of these expatriate rappers still remains a matter of great concern to the Islamic Republic and its cultural centres. Several members of the Iranian parliament decried the video's harmful influence, perceiving it as an issue of '*āsibha-ye rohāni [...] barāye kudakān-e bi dafā'e*' [psychological harm to helpless children][97] or '*kudakān rā be tamāsha-ye pornogrāfi tashviq konad*' [encouraging children to watch pornography].[98]

The example of pop music's legalisation, which partially arose from the government's failure to quash the inflow of subversive expatriate pop in the 80s and 90s, suggests that the Ministry of Culture and Islamic Guidance would benefit from giving licenses to more rappers. Since they are unable to prevent the songs of expatriate rappers such as Amir Tataloo and Sasy Mankan from spreading through the internet, sanctioning a legitimate domestic rap scene would provide a viable alternative to the 'obscene content' these musicians freely release from abroad.[99]

The IRGC as well as hardline politicians such as Hamid Rasaee and Ebrahim Raisi, perhaps inadvertently, provided Tataloo with a certain legitimacy and cultural standing by granting him an official stage. To a certain extent, propaganda posted through Tataloo's fan pages reveals that the IRGC hardliners still recognise rap's powerful influence. There is also the sense, however, that the compromise between hardline branches of the state and rappers such as Tataloo is no longer deemed beneficial to either party. Why would Raisi deem it necessary to resort to endorsing such controversial figures when presidential elections were rigged in his favour?[100]

Furthermore, as *Jahanam* has shown, rappers no longer need to depend on the Revolutionary Guard's media centres or the Ministry of Culture and Islamic Guidance in order to release professional music and video productions. The power of social media such as Instagram and Youtube has allowed certain rappers to create a 'hyperground' rap scene, which the Iranian government cannot censor and through which they can escape its restrictions. Though it is still uncertain whether rap music is to become fully legitimate in the next few years, the case of Tataloo suggests that rappers like himself hold immense influence over the future of the genre, and continues to stand as a strong symbol of rap's persistence influence and significance in Iranian society.

Conclusion

If we are to know about Amir Tataloo, it is clear that a different approach is needed.

Until researchers move beyond the overly simplistic narratives by which they define rappers, as either fighting against the regime or collaborating with it, they will fail to gain any real sense of rap music's significance in Iran. In this article, I have attempted to provide several alternate perspectives which account for the multifaceted intersections between music and Iranian politics and paint a more complex picture of the status of rappers in Iranian society.

Firstly, I have discussed how certain aesthetic aspects of Amir Tataloo's music videos, which are taken for granted in favour of

94 Bajoghli (n 26) 114.

95 ibid 2, 100.

96 *'Ayā vezārat-e ershād musiqi-ye rap rā be rasmiyat mi shenāsad?'* [Does the Ministry of Culture officially recognise rap music?] (*Tarāne Music*, 13 May 2016).

97 Mojtaba Tavangar, (*Twitter,* 2 March 2021) <https://twitter.com/motavangar/status/1366636303828340739> accessed 12 June 2022.

98 Mohammad Sarshar, (*Twitter,* 2 March 2021) <https://twitter.com/m_sarshar/status/1366637692038107137> accessed 12 June 2022.

99 'Iranians Arrested Over Viral Video Featuring US Porn Star', (*IranWire*, 10 March 2021) <https://iranwire.com/en/features/69145> accessed 12 June 2022.

100 Ali Vaez, 'Iran's Rigged Election' (*Foreign Affairs*, 16 June 2021) <https://www.foreignaffairs.com/articles/iran/2021-06-16/irans-rigged-election> accessed 12 June 2022.

their immediate political messages, reveal deeper trends affecting rap music in Iran behind the scenes. In *Energy Hasteei* [Nuclear Energy] and *Shohadā* [Martyrs], certain tropes of hip-hop culture are co-opted and rendered 'safe': a troupe of backup dancers is replaced by a military parade, and smoke grenades become fog machines. Tataloo's *Jahanam* [Hell] reveals that rappers no longer have to depend on funding from the Revolutionary Guard's media centres in order to create visually impressive music videos. In addition, by juxtaposing the discourse between the videos funded by the IRGC and one which Tataloo released independently, I call for a more multifarious and subtle portrayal of the rapper: one which considers what these videos could represent from his perspective.

Secondly, I have examined Amir Tataloo's career and interactions with various branches of government in order to explore the negotiation of rap music's legality in Iran. I have revealed how the IRGC and other conservative branches of government continue to recognise rap music's influence, and the extent to which social media rappers from abroad constitute a threat to the strict guidelines of the Ministry of Culture and Islamic Guidance. It is worth considering whether such factors could lead to the emergence of an official form of rap music, vacuous and emptied of any potentially subversive meaning, as has occurred previously with the genres of pop and rock.

Copyright in the Digital Age: Analysing the Achievements and Flaws in the EU Copyright Exceptions Domain

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Copyright exceptions are an important part of international and European copyright frameworks, designed to ensure the balancing of copyright with other fundamental rights and policy objectives. More and more, the increasing use of digital technology has challenged previously accepted copyright norms.[1] As a result, the EU and its Member States alongside many other states have sought to reform and update their laws to meet the challenges posed by a new era of creative works. The domain of copyright exceptions is no different. Ranging from the Information Society (InfoSoc) Directive in 2001[2] to the most recent Digital Single Market (DSM) Directive,[3] the EU has consistently sought to create a more unified and harmonious market ecosystem for intellectual property. These efforts have been targeted at reducing market fragmentation and ensuring the protection of core exceptions to copyright that are grounded in fundamental rights. However, such efforts have not always borne fruit and problems remain. For example, critics point to the limited and inflexible nature of the current framework which results in new technologies being stifled or else being unable to benefit from the protections offered by narrowly-drafted exceptions. In fact, in some cases, the approach taken by the EU in attempting to reform the area of exceptions has counter-intuitively led to more fragmentation of the internal market.

This article aims to critically analyse the EU's policy and legislative approach toward copyright exceptions, examining, with a view to reform, the achievements and shortcomings of the EU's legislative efforts. For the purposes of this article, the term 'exceptions' will be used to refer to provisions within EU and Member State law that refer to similar concepts like limitations, defences, and so forth, although the author acknowledges that these terms can in and of themselves denote a certain preference as to the ideological conception of copyright.[4] It will begin by delving into the core reasoning for the existence of copyright exceptions, exploring the historical context found in the Berne Convention and the broader international and European copyright system. The article shall focus on a number of key exceptions falling within the scope and context of the InfoSoc Directive, using the areas of the 'three-step test', parody, private copying and temporary reproduction to illustrate the achievements and flaws within the copyright exceptions framework. The aim is to identify common principles and overall criticisms which pervade the domain of EU copyright exceptions. It will then move to examine the DSM Directive and the relevant achievements and flaws present there. The article will then move to consider the ways in which improvements could be made, including a brief consideration of the benefits of a 'user right' framework. Finally, the article will conclude by summarising the broad analysis of the EU copyright exceptions domain, its successes and failings, and the overall impact of such exceptions on the digital and tangible markets.

1 See for instance Matthew Sag, 'Copyright and Copy-Reliant Technology' (2009) 103 Northwestern University Law Review 1607.

2 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, (herein '**InfoSoc Directive**')

3 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) PE/51/2019/REV/1 OJ L 130, 17.5.2019 (herein, '**DSM Directive**')

4 Annette Kur, 'Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations Under the Three-Step Test?' (Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04, 2008) <https://ssrn.com/abstract=1317707> accessed 1 December 2021.

Copyright Exceptions: Rationale and Policy Objectives

To contextualise the discussion of copyright exceptions, it is worthwhile to first consider why exceptions are necessary in the first place. One of the most oft-advanced arguments in favour of exceptions is on economic and creative grounds. This argument in essence states that copying is a vital component of almost all creation and innovation, whether it be scientific, academic or purely recreational. Indeed, many services beneficial for knowledge-sharing, like Google Books, make use of copying technology.[5] This is particularly the case in the digital age, where online services like news aggregators, streaming services and meta-aggregation engines all challenge traditional norms in their use of works. While these copy-reliant services use other works, they are absolutely vital in the creation of a pluralistic and dynamic creative economy, one where innovation can thrive.[6] On further market-based grounds, the argument can be made that the use of material and its transformation can also encourage growth for the original work, such as with music sampling.[7] Many of the technologies and innovations today are built upon caching and temporary reproduction exceptions, thereby illustrating the clear necessity of exception in fostering a mature digital market. As a result of these benefits, market and innovation reasons are strongly embedded in the EU's legal efforts at copyright exception harmonisation and the Union has explicitly acknowledged the benefits of copy-reliant technologies in the preambles to these directives.[8]

Moreover, exceptions have their policy rationale firmly grounded in free expression and in related fundamental rights.[9] This line of policy argument in favour of exceptions is often raised in respect of the use of works for satire or parody purposes as well as for enabling access to information to those who are disabled, for instance the making available of materials to the blind.[10] This addition of speech considerations adds a constitutional dimension to any intervention in this area, meaning that competing rights must be weighed in any legislation. Although these rationales are supported by key human rights justifications, the scope of such rationale is narrow, often requiring non-commercial usage or attribution. Free expression is of course not an absolute right and must be balanced with the rights of creators to the benefits and usage of their intellectual property as guaranteed in the EU Charter of Fundamental Rights.[11]

Without doubt, copyright exceptions have a clear and important place in the overall legislative frameworks that underlie the system. It can clearly be observed by examining these policy aims that the goal of copyright exceptions is the balancing of copyright privileges with other rights and objectives. As a result, it is important to analyse the successes and failures of EU copyright exceptions through this lens, identifying if and how the law on exceptions achieves a balancing act between copyright protection and other policy goals. Although nuance is important, for the sake of clarity, the core exception policy rationales for the purposes of this essay can be generally summarised thus:

Firstly, the fostering of innovation and growth and the enabling of technological functionality. This goal is inherently linked to high-levels of market integration and the ease of cross-border trade.

Secondly, the safeguarding of fundamental rights, particularly free expression albeit with the balancing of said rights with intellectual property protections.

Having now established and mapped out the key policy objectives of the EU copyright exceptions regime, it is possible to evaluate effectively the impact that has been had by the various interventions into the domain.

Copyright Exceptions in European Law: Vertical to Horizontal Development

Copyright exceptions have a long history and can be traced far back. The Berne Convention, for instance, contains only one mandatory exception, specifically regarding quotation from works that have been made available lawfully to the public and only where that use is fair and not in excess of what is necessary.[12] Aside from that specific mandatory exception, all others are optional for contracting states, for instance in respect of teaching and research.[13] The test is also found in the TRIPS agreement[14] and in the World Copyright Treaty.[15]

When considering copyright in the EU, it is vitally important to consider the drafting background and policy rationales that informed the creation of key legislative provisions. Prior to the introduction of the InfoSoc Directive, harmonisation of the copyright system across the EU was undertaken on a relatively piecemeal basis, generally targeted at very specific areas.[16]The first such efforts at harmonising exceptions came in the form of the Software Directive[17] with the Database Directive[18] following on in 1996. Both of these Directives contained mandatory exceptions that served to facilitate key policy goals in these specific areas, namely the encouragement of growth and innovation in these two technological areas.

Although the concept of the digital single market is a relatively recent policy initiative, the idea of a more harmonised ecosystem

5 For a critical analysis see Pamela Samuelson 'Google Book Search and the Future of Books in the Cyberspace' (2009) 94 Minnesota Law Review 1308, 1353.
6 Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 4.
7 Mike Schuster, David Mitchell, Kenneth Browne, 'Sampling Increases Music Sales: An Empirical Copyright Study' (2019) 56(1) American Business Law Journal 177.
8 See for instance InfoSoc Directive Recital 4 and DSM Directive Recitals 2, 5 and 18 etc.
9 See European Convention on Human Rights (1950), Article 10.
10 Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242.
11 Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, Article 17(2).
12 Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Texts, Cases and Materials* (2nd edn, Oxford University Press 2013) 203.
13 Berne Convention for The Protection of Literary and Artistic Works (Paris Text 1971), Article 10(2).
14 Agreement of Trade-Related Aspects of Intellectual Property Rights, Article 13.
15 World Copyright Treaty, Article 10.
16 Annette Kur and Thomas Dreier, *European Intellectual Property Law: Texts, Cases and Materials* (1st edn, Elgar Publishing 2013) 270.
17 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009.
18 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77, 27.3.1996.

for digital trade in the internal market is of much more substantial vintage. This is seen in the Commission's move from piecemeal reform to a more concerted effort which manifests in the InfoSoc Directive. In essence, this was a move from vertical to horizontal legislative initiatives, aimed at ensuring the harmonisation of the internal market.

The InfoSoc Directive: Lessons from Copyright Exceptions

The InfoSoc Directive aimed to be a more ambitious attempt at modernising the copyright system, ensuring its suitability for the digital age. In particular, it came about as a response to concerns about the lack of harmonisation that existed between Member States in respect of artistic and literary works, something initially sparked in the *Patricia* decision.[19] The most key change to the framework was the introduction of a closed list of exhaustive exceptions.[20] However, it should be noted from the outset that only one, temporary reproduction, was a mandatory exception.

The following sections will now analyse key exceptions and provisions, in essence using them as examples to illustrate the broader successes and failures of the InfoSoc Directive's approach to copyright.

Article 5(5) and the Three-Step Test

Before launching into an analysis of the specific exceptions within the overall domain, it is useful to first consider one of the major early achievements of the InfoSoc Directive in achieving the key goals of EU copyright policy. The notion of the 'three-step test' is an important mainstay of the copyright system. The test originates from the Berne Convention's 1967 revision.[21] It is set out as follows:

> "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[22]

The test essentially was designed to act as a 'catch-all' provision to limit the scope of available exceptions to the reproduction right, something textually evident above.[23] The test was included in both TRIPS and the WIPO Copyright Treaty, with its aim being to act as a criterion for consideration in analysing compliance of all national exceptions.[24]

Article 5(5) of the InfoSoc Directive formally imports and establishes the test within the EU legal order. Mazziotti notes that the inclusion of the 'Three-Step Test' in Article 5(5), and therefore specifically in EU law, constitutes a remarkable step toward the harmonisation of copyright exceptions within the Union.[25] The inclusion of the test ensures that national courts are steered toward a uniform application of copyright exception jurisprudence.[26]

Without doubt, one of the key achievements in this regard has been the inclusion of the test, not only in mere international law but as a key part of the EU's copyright framework, meaning it benefits from the doctrine of supremacy in its applicability. The imposition of the test helps to guide national courts in their adjudication, ensuring the harmonised application of the test across the EU and safeguarding against the risk of fragmentation arising from differing interpretation.

Overall, the inclusion of the test in the InfoSoc Directive alongside the CJEU's guidance has helped to cement the hard limits of copyright exceptions within the EU copyright framework. It is submitted that in this respect, Article 5(5) represents a major achievement in the domain of EU copyright exceptions. The fact that the 'three-step test' is now universally applied and interpreted across Member States serves one of the key policy objectives in this area, namely the harmonisation of exceptions across the Union. This positively impacts the market environment by ensuring consistency for creators, rights-holders, and users.

The InfoSoc Directive's Parody Exception: Striking A Balance

One of the key areas where there has been achievement in the domain of EU copyright exceptions is in relation to parody works. The area of parody is one of the key collision points between intellectual property rights and fundamental rights, namely free expression.[27] As discussed above, it is important for legislators and the courts to strike a balance between these two categories of rights in order to protect both creators and users. It is important to note that in spite of the role of fundamental expression rights in the rationale for this exception, EU law does not conceive of this exception as a type of users' right.[28] As such, this does not grant an actionable right in parody works but rather acts to permit an activity that would normally be infringement.[29]

Parody by its very nature poses major problems from a copyright standpoint. Generally speaking, parody requires some form of a riff being made on a pre-existing work, meaning that some level of copying or infringement is essentially inherent in the creation of parody works.[30] It is for this reason that parody is not found as an explicitly acceptable ground under the Berne Convention[31] and Ricketson suggests that the provision of such a ground poses valid concerns for the EU's compliance with the Berne Conventions obligations.[32] It is submitted that a parody exception is in keeping with the Berne Convention, insofar as it should be seen as constituting a special case not overly prejudicial to authors in

19 Case C-341/87 *EMI Electrola v Patricia* [1989] ECR 79 para 11.
20 InfoSoc Directive, Article 5.
21 Berne Convention for The Protection of Literary and Artistic Works (Paris Text 1971), Article 9(2).
22 Ibid.
23 Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 134.
24 Mihaly Ficsor, *The Law of Copyright and the Internet: the 1996 WIPO Treaties , their interpretation and implementation* (Oxford University Press, 2002) 521.
25 Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (1st edn, Springer 2008) 84.
26 Ibid, 85.
27 Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 169.
28 Sabine Jacques, *The Parody Exception in Copyright Law* (1st edn, Oxford University Press 2019) para 2.2.
29 Ibid.
30 For further see Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 170-171.
31 Although see Article 9(2).
32 Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (SCCR/9/7, WIPO 2003) 72.

accordance with Article 9(2) and thus compliant with the 'three-step test'.[33] This is especially so given the free expression rationale and the safeguards against abuse present in European interpretation of this exception.

Notwithstanding the lack of clarity regarding the Berne Convention, parody, pastiche and satire are specially recognised as exceptions to copyright in the InfoSoc Directive. Article 5(3)(k) of the Directive grants an exception to reproduction rights for parody works. The CJEU provided considerable guidance on the interpretation of the parody exception in the case of *Johan Deckmyn and another v Helena Vandersteen and others (Deckmyn)*.[34] The instant case involved calendars that were produced by the first named party, a politician from the far-right Belgian political party, Vlaams Belang. The calendar's cover comprised a parodied image based on a comic book drawing by Mr Vandersteen, which depicted the mayor of Ghent showering coins onto the ground for immigrants. As a result, the heirs of Mr Vandersteen launched proceedings for copyright infringement. In its preliminary reference, the Belgian court asked the CJEU for guidance in relation to whether parody constituted an autonomous concept in EU law and whether it was required to have certain characteristics to benefit from protection.[35]

The Court held that, in order to satisfy the harmonisation goals in the Directive, the provision must be given 'an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question.'[36] Jacques notes the strong emphasis placed by the Court on the nature of parody as an autonomous concept, ensuring the uniformity of its interpretation across Member States.[37] The Court further decided that permissible parody must display its own original character, be reasonably attributed to a person aside from the author of the original work, and also relate to or mention the source of the parody.[38] The test adopted in this instance clearly is not predicated on any element of the transformative nature of the parody work, which can be contrasted to the position internationally, for instance in the US.[39] However, the CJEU does require that the parody have an element of humour, which Karapapa notes is problematic for free expression, especially in a digital context.[40]

Overall, however, it is submitted that the case of parody provides a good example of the achievements present in the EU's approach to copyright exceptions. Through its decisive and rounded judgment in *Deckmyn*, the CJEU has acted in many ways as the driver of European copyright policy objectives. Its strong emphasis on the autonomous conception of parody can be observed as a clear indication of the Court's desire to advance the harmonisation objectives of the Directive. While a preference is obviously present for better legislative provision, the Court's emphasis on the core policy objectives ensures the success of this exception.

33 Sabine Jacques, *The Parody Exception in Copyright Law* (1st edn, Oxford University Press 2019) para 2.4.1.

34 Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132

35 Ibid, para 13.

36 Ibid, para 16.

37 Sabine Jacques, 'Are national courts required to have an (exceptional) European sense of humour?' (2015) 37(3) European Intellectual Property Review 134, 135.

38 Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132, para 33.

39 *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994) (USA).

40 Stavroula Karapapa, *Defences to Copyright Infringement* (1st edn, Oxford University Press 2020) 175.

Private Copying: Disparity and Discord in the Internal Market

One of the best examples of where (due to the lack of mandatory exceptions) the degree of choice is left up to Member States is the issue of private copying exceptions. This area has generated a degree of debate in academic circles.[41]

Private copying is set out in Article 5(2)(b) of the InfoSoc Directive.[42] It allows for a natural person to copy a work, provided it is done so in a non-commercial way and that the rights-holder receives 'fair compensation'.[43] Member States can therefore create levies, allowing them to choose the arrangement of the scheme, the level of fair compensation to be paid out and, indeed, consider how harm is caused to right-holders in this situation.[44] Where private copying is an exception, a lack of fair compensation requires Member States to phase out levies in favour of technological solutions i.e., DRM technologies.[45] While the level of fair compensation was largely left to the discretion of the Member States, the CJEU clearly identified it as an autonomous concept in EU law.[46] In Padawan, the CJEU held that as a result, uniformity was required amongst all states that had implemented the exception regardless of the Directive's granting of derogation in this respect.[47] The administration of these levying systems has also raised a number of issues ranging from intermediary costs to lack of efficiency in collecting agencies.[48] It has also led to a great deal of legal action in which key clarification has been needed such as to whether national budget provision was acceptable[49] and other specific administrative details.[50]

In many ways, the private copying exception acts as a case study in the risk of fragmentation that comes with the à la carte approach adopted in the InfoSoc Directive. It perfectly encapsulates the contradictions present in the internal market logic, where one private copying use can be totally legal in one Member State subject to fees while completely prohibited in another Member State. Similarly, the decision as to which devices should be subject to levies also was left to the Member State, meaning that the administration of levies will be localised to that state, thus creating a fragmented market. Indeed, even the levies charged vary widely between Member States, creating confusion and disparity, which serves to complicate cross-border digital trade. In spite of the CJEU's interventions to provide clarity, the impact of non-mandatory exceptions is illustrated clearly in this example, highlighting one of the copyright exception domain's most problematic flaws.

41 DigitalEurope, *Private Copying: Assessing Actual Harm and Implementing Alternative Systems to Device- Alternative Systems to Device-Based Copyright Levies* (Digital Europe, Brussels 2015) 4. <https://www.digitaleurope.org/wp/wp-content/uploads/2019/01/Private%20Copying%20Assessing%20harm%20and%20implementing%20alternatives%20to%20copyright%20levies.pdf> Accessed 11 December 2021.

42 InfoSoc Directive, Article 5(2)(b).

43 Ibid.

44 Giuseppe Mazziotti, *Copyright in the EU Digital Single Market* (CEPS, 2013) 97.

45 Ibid.

46 C-467/08 *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* [2010] ECLI:EU:C:2010:620

47 Ibid, para 33-37.

48 Giuseppe Mazziotti, *Copyright in the EU Digital Single Market* (CEPS, 2013) 103.

49 It wasn't - C-470/14 EGEDA and Others [2016] ECLI:EU:C:2016:669.

50 C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015] ECLI:EU:C:2015:750.

Interpretation and Flexibility from the CJEU

Moving on from specific exceptions, on a more general level it can be seen that the CJEU has in many cases acted as a driving force behind the harmonisation of exceptions, a fundamental aim of EU copyright policy in this domain. Another such example of this role can be seen in the area of interpretation under the InfoSoc Directive, specifically in regard to exceptions. There exists in the domain of copyright exceptions the general principle that any exceptions provided must be interpreted by the courts in a strict way. This has been acknowledged by the CJEU in a number of decisions.[51] The Court's interpretative role was also seen in the substantial jurisprudence arising out of the temporary reproduction exception.[52] There, a strict interpretation was identified as being vital to harmonisation, and the aim was to facilitate the operation of new technologies which relied on such an exception to exist.

However, in general, the InfoSoc Directive aims to strike a balance between rights-holders' interests and those of users, seen for instance in Recital 31. That Recital mandates that exceptions should be effective in achieving their stated aim.[53] This means that the strict interpretation normally applied can be tempered to allow an exception to fulfil its purpose. Further precision has been added to this by the CJEU's jurisprudence, most notably in the *Painer* decision.[54] This case involved the claimant, Ms Painer, a photographer whose photographic portraits of a missing girl were used in newspapers without her consent. In interpreting the quotation exception, the Court held that the strict interpretation can give way to a more purposive understanding of the provision which strikes a better balance between copyright and free expression.

As was further noted in the aforementioned *Deckmyn* decision, the strict interpretation cannot be allowed to make the exception redundant. Although the stricter interpretation errs on the side of protecting the rights-holders as per the general principle, the Court acknowledged that a risk was posed to the functionality of the exception if the interpretation was too rigid.[55] Thus, it held, the correct approach was to allow the exception to fulfil its policy purpose. What these judgments illustrate is the CJEU's overall desire to adopt a more purposive approach, with the broader aim of protecting exceptions and the policy objectives they pursue. While the argument can certainly be made that the EU approach to copyright exceptions is overly strict and rigid, this is an example of how flexibility from the courts can best advance the fundamental aims of copyright policy, namely in facilitating new technological growth.[56]

51 See for instance C-435/12) *ACI Adam BV v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* [2014] ECLI:EU:C:2014:254 at para 23.

52 See for example Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465; Case C-302/10 *Infopaq International A/S v Danske Dagblades Forening* [2012] EU:C:2012:16; C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083

53 InfoSoc Directive, Recital 31.

54 Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2013] ECLI:EU:C:2013:138

55 Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 at 14, 23.

56 Asta Tūbaitė-Stalauskienė, 'EU Copyright Law: Developing Exceptions and Limitations Systematically – An Analysis of Recent Legislative Proposals' (2018) 11(2) Baltic Journal of Law and Politics 162.

The DSM Directive: Exceptions for a Mature Digital Market

While the InfoSoc Directive was not the only update to copyright law at a European level, in many ways copyright remained fairly static even in the face of a rapidly changing digital economy. In the realm of exceptions, one example is the Orphan Works Directive[57] which simplified and harmonised the system for the use of orphan works across the Union, although it is still subject to substantial academic criticism.[58] Overall, however, with unprecedented technological advancements, the proliferation of online content sharing and an explosion in the popularity of user-generated content, it was clear that updates were seriously needed to the copyright framework. After over a decade of policy considerations, the DSM Directive aims to update copyright in the EU, including in the area of exceptions.

For example, Article 3 of the DSM Directive provides for a mandatory exception in respect of text and data mining, one which previously existed only in domestic legislation.[59] One of the key benefits of this exception is that it is mandatory, ensuring that lawful users (i.e., researchers and universities) can benefit from their work across all Member States.[60] Another area where the DSM Directive brings some clarity is the cross-border online teaching exception, which previously lacked harmonisation and created much legal uncertainty for teachers with resultant discord for the internal market in that area.[61] Again, it is posited that one of the primary benefits to be found here is the fact that this exception is mandatory, ensuring consistency and legal certainty.

Unfortunately, there are concerns about the impact that the DSM Directive will have on freedom of expression. Article 17 of the DSM Directive, in practice, requires online content-sharing service providers to obtain authorisation from rights-holders for user content that makes use of copyrighted works based on the designation of their activities as being 'communication to the public'.[62] However, in order to know that user content contains copyrighted works, these services will have to engage in oversight which enables them to act accordingly.[63] The Article thus seemingly creates an obligation to monitor or filter content, although bizarrely this would contradict Article 17(8)'s exemption from general monitoring.[64] This is something which will inevitably be performed using algorithmic moderation systems.[65] The use of algorithmic

57 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA OJ L 299, 27.10.2012.

58 Elenora Rosati, 'The Orphan Works Directive, or throwing a stone and hiding the hand' (2013) 8(4) Journal of Intellectual Property Law and Practice 303.

59 For example, the Irish Copyright and Other Intellectual Property Law Provisions Act 2019 s14.

60 DSM Directive, Article 3(1).

61 Asta Tūbaitė-Stalauskienė, 'EU Copyright Law: Developing Exceptions and Limitations Systematically – An Analysis of Recent Legislative Proposals' (2018) 11(2) Baltic Journal of Law and Politics 163-164.

62 DSM Directive, Article 17(1)

63 Celine Castnets-Renard, 'Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement' (2020) 2 U. Ill. J.L. Tech. & Pol'y 283, 297.

64 Indeed, this is being disputed in legal action by Poland, see Michaela Cloutier, 'Poland's Challenge to EU Directive 2019/790: Standing up to the Destruction of European Freedom of Expression' (2021) 125(16) Dickinson Law Review 161, 187.

65 See Youtube's Content ID system: *Using Content ID* (Youtube 2020) <https://support.google.com/youtube/answer/3244015?hl=en> Accessed 10 December 2020.

or artificial intelligence-based content moderation as envisaged under the directive arguably places many of the expression-based exceptions at risk, given the lack of nuance that can often be observed in AI systems. For instance, one can easily imagine an algorithm having difficulty establishing whether a piece of parody content is unique enough to avoid being removed. While there may be the opportunity to appeal, it is argued that such measures will invariably have a chilling effect on free expression.[66] Such a result is therefore a clear indication in the failure of the legislation to safeguard the raison d'être of the parody exception.[67] While some exceptions are carved out, it remains to be seen how effective they will prove and whether the parody exception can be protected in this new regime.[68] Overall, the DSM Directive provides a number of new and necessary exceptions that fundamentally serve the aims of EU copyright policy. There certainly are flaws that underlie the system generally but it is argued that several of the new inclusions are welcome additions.

Critical Analysis and Opportunities for Reform

While it might appear that the harmonisation achieved in respect of exceptions is substantial, in fact the overall impact is more modest. The fact that many of the exceptions are optional has meant that a contradiction exists between the stated policy goals of the legislation[69] and the actual outcome that has occurred as a result. Indeed, a large degree of disparity exists between domestic copyright laws across the Member States more broadly.[70] One of the lessons that can be drawn from analysing the provisions under EU copyright law is that the failure to provide for mandatory exceptions has led to divergence and discord for the market, something clearly evident from the private copying exception. While the development of an exhaustive list of copyright exceptions is indeed an achievement in the harmonisation of this area of law, unfortunately the failure to make the exceptions mandatory undermines that achievement.[71]

It is argued that the key failure of exception policy is the lack of mandatory exceptions which has caused numerous issues. In general, future reforms to the area of copyright exceptions would be well served by ensuring that they are mandatory and that the choice offered to Member States to derogate is severely reduced. This would help to prevent fragmentation within the digital single market and provide clarity to creators and users, thereby allowing for innovation and growth in line with broader policy objectives. It also would ensure universal protection of free expression rights, without the need for judicial intervention to clarify the area. One possibility for truly harmonised reform would be the introduction of a European copyright code, one that is mandatory and comprehensive. The author is sceptical as to the feasibility of such a proposal.

66 Timothy Chung, 'Fair Use Quotation Licenses: A Private Sector Solution to DMCA Takedown Abuse on YouTube' (2020) 44(1) Columbia Journal of Law and the Arts 69.

67 See the cautionary commentary in *Deckmyn*.

68 Celine Castnets-Renard, 'Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement' (2020) 2 U. Ill. J.L. Tech. & Pol'y 283, 301.

69 See generally InfoSoc Directive Recitals 1, 4, 6, 7, 9 etc.

70 Christophe Geiger and Franziska Schönherr, 'Defining the scope of protection of copyright in the EU: The need to reconsider the acquis regarding limitations and exceptions' in Tatiana Synodinou (ed.) *Codification of European Copyright Law: Challenges and Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2012) 142.

71 Bernd Justin Jütte, *Reconstructing European Copyright Law For The Digital Single Market: Between Old Paradigms and Digital Challenges* (1st edn, Nomos 2017) 244.

Arguably, many of the issues identified throughout the areas considered above could be remedied by a radical shift in the conception of exceptions. One possible way for this to occur would be through the reform of the exceptions system to provide for a broad user rights norm that would grant flexibility and user-based enforceability to the current domain.[72] Mazziotti argues that shifting from a system of exceptions toward a system of user rights would help to better balance the rights of copyright holders and those of end-users.[73] He envisages categories of non-waivable and harmonised user rights that fall within the broader fair use structure, overall serving the purposes of market integration.[74] While it is not possible in the scope of this essay to engage in a broader discussion about the need for a shift to a user rights framework, the author is of the view that this would be a positive way to ensure that copyright remains balanced in the digital age and it would safeguard a rights-based approach. Furthermore, a mandatory system of user rights would enable a smoother harmonisation, limiting the ability for Member States to derogate too widely and thereby undermine a core policy objective.

Nonetheless, while the DSM's provisions seem to take a step in the right direction, it can be observed that the copyright exceptions system currently in place is a patchwork of measures, each with achievements and flaws. While the achievements have served the policy goals well, the flaws have harmed the internal market and hindered harmonisation.

Conclusion

In conclusion, it is clear that in many ways the domain of copyright exceptions is a mixed bag with clear successes and failures evident in legislation and case law. The core aims of the exceptions are to further enhance the growth of innovation and growth while also protecting fundamental rights that could be restricted by strict insistence on copyright protections. Intrinsic to these goals has been the harmonisation of copyright exceptions in order to provide clarity and legal certainty to rights-holders and end-users alike.

In specific areas, it is apparent that the domain of copyright has achieved successes. This is especially the case regarding the inclusion of the 'three-step test' within Article 5(5) which ensures the uniformity of interpretation across the Member States. Furthermore, the parody exception illustrates that a balance can be struck between rights within the scope of the InfoSoc Directive. However, while there are successes, shortcomings are also present in the framework. One of the key failures is the complete absence of more mandatory exceptions, which leaves the system for copyright exceptions largely fragmented and lacking in certainty. This problem is best showcased in the area of private copying, where the non-mandatory character of that exception has led to a broad divergence in its application. This lack of clarity invariably has impacts on the integrity of the single market, both in a digital and physical sense. The unfortunate contradiction is that exceptions, which are designed to ensure stronger and more dynamic markets, end up causing fragmentation and weakening the efficacy of cross-border market exchanges of cultural and creative works.

72 Asta Tūbaitė-Stalauskienė, 'EU Copyright Law: Developing Exceptions and Limitations Systematically – An Analysis of Recent Legislative Proposals' (2018) 11(2) Baltic Journal of Law and Politics 174.

73 Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (1st edn, Springer 2008) at 288.

74 Ibid 289.

On a general level, it can be observed that the CJEU has time and again been the driver of copyright exceptions policy, reiterating the fundamental balance that must be achieved between copyright and the objectives of exceptions. Finally, it is submitted that the DSM Directive aims to take copyright policy in general into a more innovative and technologically advanced age. While the introduction of new exceptions for text/data mining among others are welcomed, concerns remain from an expression-based perspective about the risks that Article 17 may pose.

Without doubt, copyright exceptions have a vital role to play in maintaining the overall functionality of the copyright system. Indeed, it is argued that this is especially the case in the digital market where exceptions are absolutely vital to enable the growth and development of innovative creative industries. It is argued that reforms are needed in the copyright system to best ensure that the EU's key goals are met and that exceptions, contained within a well-designed framework, can serve as the counterweight to intellectual property rights, thus enabling an innovative marketplace and the safeguarding of rights.

Art in the Time of NFTs: Navigating the Challenges and Role of NFTs in Artists' Reclamation of Control over their Publicity Rights

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> I see NFTs as a way to innovate, empower others and push the boundaries of how artists interact with their fans. I see NFTs…as the future of the creator economy… NFTs are democratising art.
>
> — Paris Hilton[1]

Introduction

This year marks the 25th anniversary of Jay-Z's debut album, *Reasonable Doubt.*[2] The 1996 album jump-started the Brooklyn-born rapper's career from a fledgling artist to a business mogul, who became the first to be declared a hip-hop billionaire by *Forbes* magazine.[3] Hailed by fans as his 'rawest and most vulnerable work', Jay-Z's first album recently spotlighted novel legal challenges with regard to ownership and regulation of the emerging asset class of non-fungible tokens (NFTs).[4]

Since 1994, when Jay-Z was first introduced to Damon 'Dame' Dash, a young music executive from Harlem, the now-estranged pair went from selling CDs out of the trunk of Jay-Z's car to co-founding *Roc-A-Fella Records, Inc* ('RAF, Inc.').[5] However, twenty-seven years after their first encounter, they now find themselves embroiled in a lawsuit centred on Dash's alleged attempt to auction off the copyright for *Reasonable Doubt* as an NFT.[6] The suit is replete with implications for current and prospective NFT market participants, especially for those in the arts and entertainment industry, ranging from artists and promoters to developers. While NFTs present challenges due to the absence of guidelines, they may, with the development of certain legal and regulatory contours, herald the beginning of a new normal that would allow artists to better control and monetise their work.

Against this backdrop, this article explores the principal legal issues that arise in the NFT space, specifically those related to the arts and entertainment industry. First, this article provides an overview of NFTs, including examples that illustrate how artists use them. Second, it examines the ongoing *Roc-A-Fella Records, Inc. v. Dash* lawsuit[7] and its practical implications. Third, this article argues that

1 Paris Hilton, 'I'm Excited About NFTs—You Should Be Too' (*Paris Hilton*, 8 April 2021) <https://parishilton.com/nft/> accessed 25 October 2021.

2 Sotheby's, 'Heir to the Throne: An NFT in Celebration of JAY-Z's Reasonable Doubt 25th Anniversary by Derrick Adams' (*Sotheby's*, 2 July 2021) <https://www.sothebys.com/en/digital-catalogues/heir-to-the-throne> accessed 25 October 2021.

3 Zack O'Malley Greenburg, 'Artist, Icon, Billionaire: How Jay-Z Created His $1 Billion Fortune' (*Forbes*, 3 June 2010) <https://www.forbes.com/sites/zackomalleygreenburg/2019/06/03/jay-z-billionaire-worth/?sh=7bf3f7d53a5f> accessed 25 October 2021.

4 Chris Richardson, 'Jay-Z', *100 Entertainers Who Changed America: An Encyclopaedia of Pop Culture Luminaries* (2013) 289.

5 Asondra Hunter, 'Rockin' On A Roc-A Fella' (*Yahoo Music*, 5 January 1999) <https://web.archive.org/web/20070609232211/http:/music.yahoo.com/read/interview/12048673> accessed 25 October 2021.

6 A.D. Amorosi, 'In Lawsuit Over Jay-Z NFT Auction, Damon Dash and Roc-A-Fella Dispute What's at Stake, Beyond a 'Reasonable Doubt' (*Variety*, 21 June 2021), <https://variety.com/2021/music/news/damon-dash-jay-z-lawsuit-rock-a-fella-records-1235001534/amp/> accessed 25 October 2021.

7 Complaint, *Roc-A-Fella Records, Inc. v. Damon Dash* (Southern District of New York 2021) (No. 1:21-cv-5411), <https://fingfx.thomsonreuters.com/gfx/legaldocs/xegpbrrwwpq/IP%20JAYZ%20COPYRIGHT%20

despite the associated challenges, if utilised properly NFTs may serve as a medium through which artists and public figures may relinquish control over the usage of their name, image, and likeness.

A Brief Overview of NFTs

A non-fungible token (NFT) is a digital unit of value stored on a digital ledger where each unit represents a unique digital item ranging from artwork and collectibles, to even tokenised versions of real-world assets such as real estate.[8] One of the primary attributes of NFTs that distinguishes them from other cryptocurrencies like Bitcoins is their uniqueness.[9] NFTs are unique because no two NFTs are interchangeable. Each NFT contains unalterable, permanent metadata describing the asset that it represents while certifying its authenticity.[10]

The uniqueness of NFTs may provide artists and entertainers with a vehicle to not only enhance fan interaction, but also build highly engaged communities. Indeed, minting and issuing NFTs allows artists to provide their fans with unique experiences, engaging with them in novel ways in the digital age. By reverse token, NFTs democratise public access to art and entertainment by allowing them to participate without having exclusive invite-only tickets or retaining the services of an art consultant for a hefty fee. For instance, in early 2021, Kings of Leon, the four-time Grammy -winning American rock band, released their new album, *When You See Yourself* as NFTs, becoming the first band to release an album as an NFT.[11] Each NFT was unique in that token holders received a limited-edition 'Golden Eye' vinyl and exclusive artwork, along with tickets to four front-row seats to a show of each Kings of Leon tour for life.[12] Through the NFT sales, Kings of Leon reportedly raised $2 million, where over $500,000 was donated to a fund through which musicians have been supporting the industry throughout the COVID-19 pandemic.[13]

NFTs are also characterised by their indivisibility, unlike other types of cryptocurrencies.[14] Under smart contracts implementing ERC-721, the current industry standard for minting NFTs, certain terms in executing functions via NFTs such as assignment of ownership and management of transferability are defined in a network, as in a regular contract.[15] An NFT holder's rights to the work depend on the terms embedded in the NFT through the smart contract, and these terms are automatically enforced when the programmed conditions are met.[16] For instance, NFT royalties may be automatically paid out to the original creator once the coded terms of the smart contract are fulfilled upon a secondary sale transaction.[17] Accordingly, if an NFT contract is designed to trigger such an automated resale royalty payment mechanism, the artist would retain the right to future resale royalties and more control over his work.

This is best illustrated through the digital artist Beeple's sale of *Everydays*, a collage of images that Beeple created and shared online every day since 2007. *Everydays* was sold for a record-breaking price of $69.3 million at Christie's, rendering the preeminent auction house the first amongst its counterparts to offer a purely digital work with a unique NFT.[18] Notably, the artwork is known as the most expensive NFT to date.[19] Due to an automatic 10% resale royalty executed through an NFT platform called Nifty Gateway, Beeple reportedly gained more through the resale of his artwork compared to the price he received from the original sale.[20] Hence, creators that mint NFTs may benefit from implementing a custom creator share percentage for each subsequent resale to receive royalties, so long as they ensure that their work is resold within the platform.[21]

Another important attribute is its interoperability, which allows NFTs to be traded and purchased in different distributed ledger technologies with relative ease.[22] The interoperability of NFTs between different platform chains allows the original creator of the digitised item to receive a steady source of income each time the NFT is sold in the secondary market, without an agent or distributor who would charge commission fees.[23]

Meanwhile, the value of NFTs corresponds to fluctuations in market supply and demand because their value lies not in the intrinsic nature of the token itself, but rather in the value assigned by those who deem it valuable.[24] Indeed, the prices of NFTs vary widely. To illustrate, *CryptoPunks*—the 24x24 pixel, 8-bit-style avatars—first created by software developers in 2017, were valued at a mere $1-$34 each when they were initially released.[25] However, their values have risen considerably over the years; a *CryptoPunk* owner

complaint.pdf>.

8 Nir Kshetri, *Blockchain and Supply Chain Management* (Elsevier 2021) 23.

9 Ramakrishnan Raman and Benson Edwin Raj, *Enabling Blockchain Technology for Secure Networking and Communications* (Adel Ben Manouer and Lamia Chaari Fourati eds, IGI Global 2021) 92.

10 ibid.

11 Samantha Hissong, 'Kings of Leon Will Be the First Band to Release an Album as an NFT' (*Rolling Stone*, 3 March 2021) <https://www.rollingstone.com/pro/news/kings-of-leon-when-you-see-yourself-album-nft-crypto-1135192/> accessed 28 October 2021.

12 Sam Moore, 'Kings Of Leon have generated $2million from NFT sales of their new album' (*NME*, 12 March 2021) <https://www.nme.com/news/music/kings-of-leon-have-generated-2million-from-nft-sales-of-their-new-album-2899349> accessed 28 October 2021.

13 ibid.

14 Kshetri (n8) 24.

15 Ethereum, 'Non-fungible tokens (NFT)' (*Ethereum*, 6 March 2021) <https://ethereum.org/en/nft/#:~:text=NFTs%20are%20minted%20through%20smart,the%20NFT%20is%20being%20managed> accessed 29 October 2021.

16 ibid.

17 Cyberscrilla, 'NFT Royalties: What Are They and How Do They Work?' (*Cyberscrilla*) <https://cyberscrilla.com/nft-royalties-what-are-they-and-how-do-they-work/> accessed 30 October 2021.

18 Christie's, '*Beeple's opus*' (*Christie's*) <https://www.christies.com/features/Monumental-collage-by-Beeple-is-first-purely-digital-artwork-NFT-to-come-to-auction-11510-7.aspx> accessed 30 October 2021.

19 Lynnae Williams, 'The 5 Most Expensive NFTs—And Why They Cost So Much' (*MakeUseOf*, 7 September 2021), <https://www.makeuseof.com/most-expensive-nfts-why-they-cost-so-much/> accessed 30 October 2021.

20 Grace Kay and Brittany Chang, 'A digital artist known for his satirical work is breaking sales records, making over $10 million on 2 crypto-art piece' (Business Insider, 5 March 2021),< https://www.businessinsider.com/art-nft-beeple-blockchain-pieces-sell-for-millions-2021-3> accessed 30 October 2021.

21 Evan Vischi, 'The NFT resale dilemma: How can creators make sure they keep getting paid?' (*Medium*, 24 April 2021), <https://blog.tatum.io/the-nft-resale-dilemma-how-can-creators-make-sure-they-keep-getting-paid-e929c96a6599> accessed 30 October 2021.

22 Raman and Raj (n 9) 93.

23 Cybrscrilla (n 18).

24 Maria L. Murphy, CPA, 'NFTs come with big valuation challenges' (*Journal of Accountancy*, 16 July 2021), <https://www.journalofaccountancy.com/news/2021/jul/nft-nonfungible-token-valuation-challenges.html> accessed 30 October 21.

25 Katie Rees, 'What Is a CryptoPunk and Why Are They Worth So Much?' (*MakeUseOf*, 26 August 2021), <https://www.makeuseof.com/what-is-a-cryptopunk-why-are-they-worth-so-much/> accessed 30 October 2021.

is reported to have been offered $9.5 million for his *CryptoPunk*.[26] This reflects a positive correlation between the value of NFTs and their increased public perception and popularity.[27] Furthermore, appreciation of CryptoPunks' value proves not only the prestigious status that accompanies the ownership of rare NFTs, but also NFTs' potential to become lucrative investment opportunities.[28]

Roc-A-Fella Records v. Dash: A Case Study of the Legal Challenges Surrounding NFTs

The case study of *Roc-A-Fella Records v. Dash* shows that there are unresolved problems in the nascent terrain of NFTs. On June 18, 2021, RAF, Inc. filed a lawsuit against Damon Dash in the US District Court of the Southern District of New York.[29] RAF, Inc. sought to enjoin the latter from selling any interest in *Reasonable Doubt* and requested that the court enter a judgement declaring, amongst others, that (i) RAF, Inc. owns all the rights to *Reasonable Doubt*, including its copyright; and that (ii) Dash must transfer to RAF, Inc., any NFT in his possession, custody, or control reflecting rights to *Reasonable Doubt*.[30]

The complaint alleged that Dash, an owner of a 1/3 equity interest in RAF, Inc. along with Jay-Z and Kareem Burke, attempted to steal *Reasonable Doubt*, a company asset, mint it as an NFT, and auction his purported interest in the copyright on the album.[31] According to RAF, Inc., however, Dash as a minority shareholder of the record label did not actually hold any individual ownership interest in the album.[32] This is because the copyright, and all rights, title, and interests to and in *Reasonable Doubt*—including the right to sell, reproduce, distribute, advertise, and exploit the album without limitation—all belong to RAF, Inc.[33] Stated simply in the words of RAF, Inc.'s attorneys, 'Dash can't sell what he doesn't own'.[34]

Despite his non-existent property interest in the album, Dash is alleged to have knowingly and intentionally breached his fiduciary duty and duty of loyalty by leveraging his position as a shareholder to entice bidders and proceed with the sales of the corporation's asset.[35] In support of its argument, RAF, Inc. quoted language from the auction announcement on an NFT platform called SuperFarm containing representations that Dash is auctioning off '[his] ownership of the copyright to Jay-Z's first album Reasonable Doubt'.[36] The announcement boldly stated that 'the newly minted NFT will prove ownership of the album's copyright, transferring the rights to all future revenue generated by the album from Damon Dash to the auction winner'.[37]

Moreover, it elaborated that 'thanks to the magic of the…blockchain technology…[the auction] will set a precedent for how artistically created value and ownership can be proven, transferred, and monetised seamlessly through a public blockchain'.[38] According to RAF, Inc., Dash had not only stolen the copyright to *Reasonable Doubt* by minting it as an NFT and offering it for sale, but also refused to stop his actions despite warnings from RAF, Inc.[39] Rather, he proceeded to search for another venue to consummate the transaction after SuperFarm decided to cancel the auction upon RAF, Inc.'s request.[40]

On June 21, 2021, three days after filing the complaint, RAF, Inc. argued for and obtained a temporary restraining order barring Dash from minting and issuing *Reasonable Doubt* as an NFT.[41] In response, Dash filed a Memorandum in Opposition of RAF, Inc.'s Order to Show Cause, in which he refuted any claims that he attempted 'to auction off' or 'otherwise sell off' the *Reasonable Doubt* copyright.[42] Dash contended that RAF, Inc. erroneously relied on SuperFarm's internal memo in claiming that he represented to SuperFarm that he owned 100% of the copyright, or that he wanted to mint an NFT based on the copyright. Further, he claimed 'nothing was ever minted!'[43] and that he was attempting to sell his 1/3 interest in RAF, Inc. as an NFT that he later planned to create, as opposed to a specific copyright interest in the album.[44] Thus, Dash claimed there was no basis for the court to grant a preliminary injunction, as he was merely exercising his right to freely transfer his lawfully owned 1/3 interest in RAF, Inc.[45]

Thereafter, Dash successfully convinced RAF, Inc. and Southern District of New York Judge John Cronan to limit the preliminary injunction to the sale of *Reasonable Doubt*.[46] Specifically, the parties agreed to include explicit language in the court order not to prevent Dash from disposing of his 1/3 ownership interest in RAF, Inc. in any way to the extent compliant with applicable laws.[47] Meanwhile, both parties have engaged in their own NFT transactions outside of the suit. Dash began an auction for his share of RAF, Inc., with a starting bid of $10 million, in which the winner would receive a commemorative NFT representing a certificate of ownership.[48] Likewise, Jay-Z proceeded to sell his own NFT that celebrates the 25th anniversary of *Reasonable Doubt* through Sotheby's for the price of $138,600.[49]

26 MK Manoylov, 'CryptoPunk owner declines a $9.5 million bid for his rare NFT' (*The Block*, 15 October 2021), <https://www.theblockcrypto.com/linked/120873/cryptopunk-owner-declines-a-9-5-million-bid-for-his-rare-nft> accessed 30 October 2021.
27 Williams (n 20).
28 ibid.
29 *Dash* (n 7).
30 ibid [11].
31 ibid [B.22], [C.23].
32 ibid.
33 ibid [B.21].
34 ibid [6].
35 ibid [34]-[36].
36 ibid. [C.24].
37 ibid.
38 ibid.
39 ibid [42]-[43].
40 ibid [27].
41 Blake Brittain, 'Jay-Z label Roc-A-Fella blocks co-founder's 'Reasonable Doubt' NFT auction' (*Reuters*, 23 June 2021), <https://www.reuters.com/legal/transactional/jay-z-label-roc-a-fella-blocks-co-founders-reasonable-doubt-nft-auction-2021-06-22/> accessed 2 November 2021.
42 Memorandum of Law in Opposition of Plaintiff'sx Order to Show Cause and in Support of Defendant Damon Dash's Motion to Disqualify Plaintiff's Counsel, *Roc-A-Fella Records, Inc., v. Damon Dash* (Southern District of New York 2021) (No. 1:21-cv-5411), II.B., <https://www.thetmca.com/files/2021/07/Rockafella-v-Dash-Response.pdf>.
43 ibid [I].
44 ibid [II.D]- [III].
45 ibid [I-III].
46 Stipulation and Order, *Roc-A-Fella Records, Inc., v. Damon Dash* (Southern District of New York 2021)(No. 1:21-cv-5411), <https://www.thetmca.com/files/2021/07/Rockafella-v-Dash-Amended-Order.pdf>.
47 ibid 1.
48 Chris Dolmetsch and Bloomberg, 'Jay-Z's legal dispute with Damon Dash hits the NFT space' (*Fortune*, 17 September 2021), <https://fortune.com/2021/09/16/jay-z-damon-dash-roc-a-fella-nft-lawsuit/> accessed 5 November 2021.
49 Sotheby's, '[JAY-Z]; Derrick Adams [artist]. Heir to the Throne, 2021' (*Sotheby's*, 25 June 2021), https://www.sothebys.com/en/buy/auction/2021/jay-z-x-derrick-adams-heir-to-the-throne-an-nft/heir-to-the-throne accessed 5 November 2021.

Legal Implications of the *Roc-A-Fella Records, Inc. v. Dash* Case

While the case is ongoing, the high-profile NFT case involving the industry's moguls brings to the forefront a myriad of issues that courts have only recently begun to grapple with. First, the above case sheds light on the risks involved in minting and selling an NFT based on an underlying work over which its creator, promoter, or seller does not own the copyright. The proprietary issues presented by the process of minting NFTs is two-fold. Creators should be alerted to the fact that only the owner of the copyright (or one operating with the copyright owner's permission to do so) in the underlying work may engage in the act of minting an NFT.[50] Otherwise, minting the NFT risks a copyright infringement, and potential, additional infringements arising from its promotion and sale.[51]

Indeed, RAF, Inc. based its argument on this very issue, claiming that Dash was not entitled to mint and sell the *Reasonable Doubt* NFT because it was RAF, Inc., not Dash, that owned the album and its underlying proprietary rights. In fact, the *Dash* case is not the first precedent in this regard. In April 2021, an NFT of a Jean-Michel Basquiat drawing was withdrawn from a planned auction on the OpenSea platform after the late artist's estate intervened, confirming that no license or rights were conveyed to the seller, and that the estate owned the copyright in the artwork.[52] Although it did not lead to litigation because the NFT was subsequently removed from sale, the Basquiat incident reiterates the need for clear guidance on proprietary rights associated with NFTs and for the implementation of best practices in this regard when NFT transactions are concerned.

Likewise, purchasers should conduct reasonable due diligence before purchasing an NFT so as to preclude incurring liability and legal risks.[53] The following is a non-exhaustive list of factors that purchasers may consider prior to an NFT acquisition: whether the artist is indeed the original author of the work at issue; whether the NFT platform through which the purchase will be made, provides any IP warranties; and the scope of license for an NFT holder.[54] Another ancillary issue in relation to this is a common misconception harboured by many purchasers that they are entitled to intellectual property rights to the underlying work upon acquiring an NFT. However, this is not necessarily true because the rights governing the use and resale of an NFT that are conferred to a purchaser depends on the smart contract associated with each NFT.[55] Accordingly, purchasers should be advised to scrutinise the specific terms governing the smart contracts contained within each token to determine whether certain intellectual property rights (e.g. copyright) are transferred upon its sale.[56]

Secondly, the *RAF, Inc.* case raises questions about the regulation of the offers and sales of NFTs under the US federal securities law framework. By arguing instead that he intended to sell 1/3 of his shares of RAF, Inc. in the form of an NFT as opposed to the copyright to *Reasonable Doubt*, Dash risks subjecting himself to the US securities laws. That is, Dash's claim gives rise to whether an NFT would constitute an 'investment contract' and thus, a 'security' subject to regulation by the US Securities and Exchange Commission ('SEC').[57] Whether an instrument constitutes a security is determined under the Supreme Court's *Howey* test.[58] *Howey* involves a four-part test under which all of the following four factors must be present for an instrument to constitute a security: (1) an investment of money (2) in a common enterprise (3) with a reasonable expectation of profits (4) to be derived solely from the efforts of others.[59] Moreover, the *Howey* Court stated that the foregoing test embodies a flexible principle where form would be disregarded for substance while placing emphasis on economic reality.[60] In other words, it is 'immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise'.[61] This means that depending on the facts and circumstances, any instrument may be deemed a security for purposes of the *Howey* test.

If Dash's sale of his equity interest as an NFT falls within the purview of the federal securities law, he would be subject to the registration requirements of the Securities Act of 1933[62] and the disclosure requirements of the Securities Exchange Act of 1934,[63] the non-compliance of which will constitute an unregistered sale of securities. There has been increasing public demand for the SEC to offer specific guidance regarding this matter. Most notably, in April 2021, a registered broker-dealer sent a petition to the SEC requesting the publication of a concept release surrounding the regulation of NFTs.[64] However, the SEC has yet to issue any guidance on NFTs.

Nevertheless, creators and issuers of NFTs should be aware of the flurry of lawsuits that give rise to the question of whether such NFTs constitute a security and thus trigger the application of the SEC's general analytical framework for the broader issue of digital assets to NFTs. In the 2019 'Framework for 'Investment Contract' Analysis of Digital Assets' ('Framework') published by the SEC's Strategic Hub for Innovation and Financial Technology, the SEC explicitly included language cautioning potential issuers: 'If you are considering…engaging in the offer, sale, or distribution of a digital asset, you need to consider whether federal securities laws apply'.[65]

50 Harsch Khandelwal, 'Minting, distributing and selling NFTs must involve copyright law' (*Coin Telegraph,* 22 August 2021), <https://cointelegraph.com/news/minting-distributing-and-selling-nfts-must-involve-copyright-law> accessed 5 November 2021.

51 ibid.

52 Anny Shaw, 'Basquiat NFT withdrawn from auction after artist's estate intervenes' (*The Art* N*ewspaper*, 28 April 2021), <https://www.theartnewspaper.com/2021/04/28/basquiat-nft-withdrawn-from-auction-after-artists-estate-intervenes> accessed 5 November 2021.

53 Georgina Adam, 'But is it legal? The baffling world of NFT copyright and ownership issues' (*The Art Newspaper*, 6 April 2021), <https://www.theartnewspaper.com/2021/04/06/but-is-it-legal-the-baffling-world-of-nft-copyright-and-ownership-issues> accessed 6 November 2021.

54 ibid.

55 Margaret Taylor, 'Digital assets: surging popularity of NFTs raises important legal questions' (*International Bar Association*, 5 August 2021), <https://www.ibanet.org/surging-popularity-of-NFTs-raises-important-legal-questions> accessed 6 November 2021.

56 ibid.

57 *Securities and Exchange Commission v. W. J. Howey Co.*, 328 U.S. 293 (1946).

58 ibid.

59 ibid 301.

60 ibid 299.

61 ibid.

62 15 U.S. Code § 77a.

63 15 U.S. Code § 78a.

64 Vicent R Molinari, *Rulemaking Regarding Non-Fungible Tokens*, (*Sustainable Holdings*, 12 April 2021), <https://www.sec.gov/rules/petitions/2021/petn4-771.pdf> accessed 10 November 2021.

65 U.S. Securities and Exchange Commission, *Framework for 'Investment Contract' Analysis of Digital Assets* (2019), <https://www.sec.gov/corpfin/ framework-investment-contract-analysis-digital-assets#_edn1 [hereinafter, 'the framework'> accessed 10 November 2021.

The Framework echoes the language from the Supreme Court's *Howey* test. It urges entities and individuals engaged in the offers and sales of digital assets to examine the relevant transactions in determining the applicability of the federal securities laws because the applicability of *Howey* to digital assets is a fact-specific inquiry.[66]

The applicability of the Framework recently became the centre of a class action suit filed in the Supreme Court of New York (later removed to the Southern District of New York) in May, 2021.[67] There, purchasers of NFTs depicting video clips of highlights from NBA basketball games alleged that the NFTs promoted, offered, and sold by Dapper Labs, Inc., a Canada-based blockchain-focused technology company, were unregistered securities under the Framework.[68] While the suit is still pending, the case serves as a warning to industry professionals, the trajectory of which should be closely monitored.

Moreover, earlier this year, SEC commissioner Hester Peirce—a pro-crypto member of the SEC also dubbed as 'crypto mom'—specifically warned against selling fractionalised NFTs.[69] Fractionalised NFTs refer to NFTs that can be split into smaller pieces and sold to multiple purchasers for partial ownership interest, risking the likelihood of being deemed as securities.[70] Dash's proposed offering of his equity interest in RAF, Inc. as NFTs may raise red flags with financial regulators. This is because such an offering would involve a large number of purchasers to invest sums of money to gain the NFT, with the expectation of profits from a fractional ownership of a highly valuable record company. Furthermore, depending on the promotional activities and the structure of the transaction, the purchasers' profits may be deemed to derive from the entrepreneurial efforts of Dash or a third-party NFT platform. Thus, issuers and developers of digital assets should remain alert to future developments in this regard. That way, such issuers and developers may preclude any potential disputes and penalties resulting from their failure to exercise care in offering and selling these innovative assets, which may unintentionally be characterised as investment products.

NFTs as a Potential Medium for Artists and Public Figures in Regaining Authority over their Publicity Rights

Although NFTs pose certain challenges, the technology may—if properly and ethically utilised—be channelled to inspire and empower creators and entertainers. As a novel response to the long-standing problems in the digital terrain arising from the easy dissemination and exploitation of digital images by third parties without consent, public figures are now embracing NFTs as a medium of regaining authority over the usage of their name, image, and likeness. NFTs not only allow them to reclaim control over their appropriated digital identities, but also allow them to receive rightful compensation for its usage and distribution. The exploitation of name, image, and likeness and lack of control over the commercial use of identity is especially prevalent amongst celebrities, owing to the fact that celebrities voluntarily make themselves public figures.[71] There is currently a relative dearth of case law regarding the commercial exploitation of publicity rights in the US, rendering disputes surrounding publicity rights unpredictable. Moreover, there is a lack of clarity regarding the current state of law due to varied interpretations and statutes on publicity rights because there are no federal statutes recognising the right of publicity, while state laws lack uniformity as statutes differ across jurisdictions.[72]

The economic and emotional ramifications arising from the unauthorised use of name, image, and likeness were recently brought to the forefront by American model and actress Emily Ratajkowski. In an effort to reclaim her image wrested from her for the profit of another, Ratajkowski recently minted an NFT named 'Buying Myself Back: A Model for Redistribution' that was auctioned at Christie's for $175,000.[73] Upon discovering that a photo she had publicly posted on Instagram had been printed on a large canvas and sold as part of a collection released by artist Richard Prince, Ratajkowski decided to mint an NFT consisting of a photo of herself posing in front of Prince's artwork.[74] In vocalising her decision to do so, she pointed out the ironical loss of commercial control over her image as a public figure: 'as somebody who has built a career off of sharing my image, so many times—even though that's my livelihood—it's taken from me and then somebody else profits off of it'.[75] However, through her recent NFT sale, she not only regained partial possession of her own image, but also revealed she would receive 'an undisclosed cut' of the profits of each resale.[76] Commenting on the potential that NFTs carry, she expressed her hopes to set a precedent for others to 'have ongoing authority over their image and to receive rightful compensation for its usage and distribution'.[77]

Despite the benefits conferred by NFTs in repossessing digital identities in the age of social media, a fatal drawback of this budding technology is the risk of counterfeiting. If NFTs are minted with false information or the core code underlying the NFT is stolen, original creators of the NFTs may incur difficulties in tracing or exercising effective control over unauthentic or identical products.[78] Likewise, purchasers may be misled as to the authenticity or value of their tokens.[79] Indeed, a counterfeit NFT of the renowned British graffiti artist, Banksy, was recently sold for $900,000 on OpenSea (the world's largest NFT platform), reigniting concerns

66 *Howey* (n 58).

67 Complaint, *Friel v. Dapper Labs, Inc., et al.*, (Supreme Court of the State of New York 2021) (No. 653134/2021) <https://www.scribd.com/document/507902520/Jeeun-Friel-v-Dapper-Labs-Complaint>.

68 ibid.

69 Sophie Kiderlin, 'The SEC's 'Crypto Mom' Hester Peirce says selling fractionalized NFTs could be illegal' (*Business Insider*, 26 March 2021), <https://markets.businessinsider.com/news/currencies/sec-crypto-mom-hester-peirce-selling-nft-fragments-illegal-2021-3> accessed 13 November 2021.

70 ibid.

71 Peter A. Carfagna, *Representing the Professional Athlete* (3rd edn, West Academic Publishing 2018) 153.

72 ibid 156.

73 Christie's, 'Emily Ratajkowski (B. 1991)' (*Christie's*, 25 April 2021),< https://www.christies.com/en/lot/lot-6317722> accessed 15 November 2021.

74 Emily Kirkpatrick, 'Emily Ratajkowski Is Auctioning Off an NFT Called 'Buying Myself Back" (*Vanity Fair*, 23 April 2021), <https://www.vanityfair.com/style/2021/04/emily-ratajkowski-nft-buying-myself-back-richard-prince-instagram-painting-new-portraits-christies> accessed 15 November 2021.

75 ibid.

76 ibid.

77 Rachel King, 'Emily Ratajkowski on ownership, consent, and the #FreeBritney movement' (*Fortune*, 25 June 2021), <https://fortune.com/2021/06/24/emily-ratajkowski-book-nft-social-media/> accessed 17 November 2021.

78 Incopro, 'Brand Protection & NFTs: Scams, Fakes & How to Mitigate Risks' (*Incopro*) <https://www.incoproip.com/nft-fakes-scams-brand-protection/> accessed 17 November 2021.

79 ibid.

over counterfeit NFTs.[80] Counterfeiting issues are exacerbated by the fact that many blockchain platforms currently allow virtually anyone to mint their own NFTs. It remains to be seen whether such platforms will impose internal control systems to mitigate such risks and whether they will be subject to external regulations with the evolving use of NFTs.

Conclusion

The NFT market has seen a stunning growth trajectory, surging to a record-high of $10.7 billion in sales volume in the third quarter of 2021.[81] The numbers mark an eightfold increase from $1.3 billion in the previous quarter.[82] Such an explosive growth was catalysed in part by the COVID-19 pandemic.[83] The pandemic led to shifts in business models such as remote working and digitalisation of work products, as well as an unprecedented increase in online spending as a substitute for traditional off-line consumption.[84] In line with such developments, creators and artists have also tapped into the NFT space to use the technology to their benefit. Some industry professionals and commentators have dubbed the current state as 'a golden opportunity…for digital entertainers'.[85] Indeed, NFTs may be a boon to many creators and artists, restoring autonomy by means of exercising greater control of distribution and resale royalties, provided that the smart contracts stipulate the exact terms of resale mechanisms, and such resales are made within the same marketplace as discussed above.

However, this golden age is not without its shadows. Indeed, in the words of Gary DeWaal, a former trial lawyer with the US Commodity Futures Trading Commission, 'this whole industry…suffers from a paucity of clear regulation, and as a result folks are sort of left on their own to figure it out the best they can'.[86] As such, due to an absence of clear regulatory guidance, pending cases should be closely monitored because they may serve as meaningful guideposts in providing regulatory clarity regarding NFT regulation. Meanwhile, to preclude significant adverse legal consequences and regulatory risks, market participants should conduct due diligence prior to any issuance or transaction involving an NFT. Furthermore, the rights and terms of the transaction in the underlying smart contract should be clearly drafted so acquirers of NFTs may fully avail themselves of its protections and benefits by limiting the grant of proprietary rights and stipulating terms for automated royalty payments, amongst others.

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80 Anny Shaw, 'Banksy-Style NFTs have sold for $900,000–but are they the real deal and does it even matter?' (*The Art Newspaper*, 22 February 2021), <https://www.theartnewspaper.com/2021/02/22/banksy-style-nfts-have-sold-for-dollar900000but-are-they-the-real-deal-and-does-it-even-matter> accessed 20 November 2021.

81 Elizabeth Howcroft, 'NFT sales surge to $10.7 bln in Q3 as crypto asset frenzy hits new highs' (*Reuters*, 5 October 2021), <https://www.reuters.com/technology/nft-sales-surge-107-bln-q3-crypto-asset-frenzy-hits-new-highs-2021-10-04/> accessed 20 November 2021.

82 ibid.

83 Arushi Chawla, 'NFT: Creating Buzz in Digital Ecosystem' (*Counterpoint*, 16 June 2021), <https://www.counterpointresearch.com/nft-creating-buzz-in-digital-ecosystem/> accessed 21 November 2021.

84 ibid.

85 Jordan Lintz, 'The Future of NFTs: Digital Entertainment At Its Finest' (*Forbes*, 19 November 2021), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/11/19/the-future-of-nfts-digital-entertainment-at-its-finest/> accessed 21 November 2021.

86 Dolmetsch and Bloomberg (n 49).

'What's in a Name?' The Role of Motive in the Definition of a 'Terrorist Act' under the Australian Commonwealth Criminal Code

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Introduction

Motive is traditionally considered to be an unwelcome guest in criminal trials, a *bête noire* that should only appear at a sentencing. The common law draws an important distinction between *mens rea* and motive in criminal proceedings. The principle of *mens rea,* meaning 'guilty mind', provides that 'criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences, it may have'.[1] Motive refers to personal reasons, such as vengeance or financial gain, from which criminal intent may be inferred. While most offences require *mens rea* to be proven beyond reasonable doubt, the motive is traditionally considered irrelevant to criminal liability.[2] The inclusion of a 'political, religious or ideological cause'[3] element in the definition of 'a terrorist act' in Australia has invited the concept of motive back into criminal liability. In addition to the evidential issues of proving motive beyond reasonable doubt, defining terrorism is commonly regarded as a Sisyphean task due to the political, ideological and jurisprudential questions it raises about the legitimate exercise of violence and the role of criminal law.

Rather than viewing anti-terrorism laws as a vanguard in a broader trend towards the inclusion of motive in criminal liability, this article asserts that the unique nature of terrorism as strategically targeted violence necessitates a motive element. Whilst the physical elements of terrorist acts can be covered by existing criminal offences, such as murder or conspiracy, the underlying motive to influence socio-political outcomes through the use of violence adds a distinct layer of criminality. Hacker describes terrorism offences as 'triadic'[4] because it involves not only the offender and the victim but also the general public through the targeted perpetuation of fear. Premised on the notion that the motive behind terrorism is what creates a moral distinction from other criminal offences, this article presents three central arguments. Firstly, a discrete category of terrorism offences is necessary in accordance with community expectations that political, religious and ideologically oriented violence warrants distinct classification under criminal law as an affront to the democratic process. Secondly, that terrorism offences should be fairly labelled with reference to a motive element in the definition of a 'terrorist act' to adequately reflect the nature and extent of an offender's criminality, particularly when many terrorist offences are inchoate. Thirdly, the inclusion of a motive element in terrorism offences substantially broadens the scope of admissible evidence at trial and thereby heightens the importance of safeguards in criminal procedure to protect the fairness of criminal proceedings.

I. The legal definition of 'a terrorist act'

The Australian definition of 'a terrorist act' under Section 100.1 of the *Commonwealth Criminal Code* was introduced by the *Security Legislation Amendment (Terrorism) Act 2002 (Cth)* as part of a legislative response to the September 11 attacks. The anti-terrorism laws

1 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2013) 155.

2 *De Gruchy v The Queen* [2002] HCA 33 [28] per Gaudron J, McHugh J and Hayne J.

3 Criminal Code 1995, (Cth) s. 100.1.

4 Frederick J Hacker, 'Terror and Terrorism: Modern Growth Industry and Mass Entertainment' (1980) 4 Terrorism: An International Journal 143.

include a wide range of offences that can only be enlivened once the three limbs of the definition of 'a terrorist act' are proven beyond reasonable doubt:

> I. 'the action is done, or the threat is made with the intention of advancing a political, religious or ideological cause' ('the motive element');[5]
>
> II. 'the action is done or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public'[6]; and
>
> III. the 'action' falls within subsection (2) and does not fall within subsection (3). Subsection (2) includes actions such as causing a person's death, serious damage to property and endangering a person's life. Subsection (3) provides that advocacy, protest, dissent or industrial action are not terrorist acts.[7]

This definition blurs the legal distinction between intention and motive by focusing on the reasons *why* the accused engaged in the prohibited conduct (for advancing a political, religious or ideological cause) rather than an intention to commit the act itself. Thus, the 'motive element' under subsection (1)(b) presents a departure from intent as the cornerstone of criminal liability[8] and ventures into the hearts and minds of the accused.

II. The role of motive in criminal responsibility

Criminal offences ordinarily comprise a physical element (*actus reus*) and subjective fault element (*mens rea*). The fault element is based on intention, whereby criminal liability is restricted to 'those who, from a subjective perspective, intended, knew or at least were aware of the risk of a particular harm occurring'.[9] However, what is the difference between motive and intention? In *Hyam v Director of Public Prosecutions (Cth)* [1974] UKHL 2, Lord Halisham explained that 'motive is entirely distinct from intention or purpose. It is the emotion that gives rise to an intention, and it is the latter and not the former which converts an *actus reus* into a criminal act'.[10] By considering the emotional and subjective reasons why someone intended to commit an offence, criminal liability becomes perilously intermixed with moral and political judgments. Norrie argues that it is the link between social conflicts and individual motives that drives the exclusion of motive from criminal responsibility.[11] For example, the mental element of larceny is the *intention to steal* rather than motivating factors or emotions such as hunger or poverty. The primacy of intent over motivation protects the criminal law from 'moral infection'[12] and attributes fault to the autonomous individual rather than the broader structural and societal issues that contribute to crime. Notwithstanding this, Horder claims that a 'privileged class' of offences permit motive into criminal liability.[13] For example, the motive is important for offences where there is no *prima facie* wrong.[14] In the case of terrorism, a significant portion of terrorist offences are constituted by preparatory acts whereby the criminality of the offence is unclear without the motive. Furthermore, it is the motivation behind the intention – to advance a political, religious or ideological cause through coercion or intimidation– that captures the 'wrongfulness' of the offence. For example, terrorism prosecutions in Australia have included the possession of a magazine published by Al-Qaeda[15] and attempting to seek a *fatwa* against an army base.[16] In these cases, the criminality of possessing a magazine or seeking a religious declaration is not adequately understood until the motive behind these acts is established. There is indeed merit to the longstanding view that motive should be excluded from criminal liability to keep the offender's political, religious or ideological orientations outside of the courtroom and thereby reducing the risk of bias. However, in the case of terrorism, it is these very motivations that differentiate terrorism from other serious offences. As noted by former Attorney-General Phillip Ruddock, 'it would be short signed to divorce these motivational contexts from the crimes themselves when they directly inform the gravity of the conduct'.[17] The incorporation of a motive element to advance political, religious or ideological causes into the statutory definition of a 'terrorist act' ensures that the essential characteristics and criminality of terrorism is sufficiently particularised within the legislation.

III. The moral distinction between terrorism and other offences

'Terrorism' is a politically and ideologically contentious term that incites extreme moral outrage and public indignation. But what makes terrorism distinct from other offences which are also considered morally wrong? Offences that are violent, indiscriminate or otherwise evoke widespread terror will inevitably provoke media attention and emotive public response. However, on a deeper level, terrorism is an attack on the fundamental principles of a peaceful and democratic society. It was expressed by the United Nations Commission on Human Rights that 'terrorism poses a severe challenge to democracy, civil society and the rule of law'.[18] While arguably all criminal offending may inadvertently undermine the rule of law, Ben Saul asserts that terrorism 'should be specifically criminalised because it strikes at the constitutional framework of deliberative public institutions which make the existence of all other human rights possible'.[19] By replacing politics and dialogue with intimidation and violence, terrorism represents an affront to the Western liberal ideal of the peaceful democratic process. Ultimately,

5 Criminal Code (n 3) 100.1(1)(b).

6 Criminal Code (n 3) 100.1(1)(c).

7 Criminal Code (n 3) 100.1(1)(a).

8 The requirement for proof of *mens rea* is described by the Commonwealth Attorney-General's Department as 'one of the most fundamental protections in criminal law' (Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.26]). The principle of *mens rea* is confirmed in the Australian High Court case of *He Kaw The v The Queen* (1985) 157 CLR 523, 582.

9 Bernadette McSherry, 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27 UNSW Law Journal 354, 360.

10 *Hyam v Director of Public Prosecutions (Cth)* [1974] UKHL 2 [73].

11 Alan Norrie, *Law and the Beautiful Soul* (The Glasshouse Press 2005) 37.

12 ibid 67.

13 Jeremy Horder, 'On the Irrelevance of Motive in Criminal Law' in Jeremy Horder (ed) *Oxford Essays in Jurisprudence,* (4th edn, Oxford University Press 2000) 114.

14 ibid.

15 *DPP v Karabegovic* (2013) 41 VR 319.

16 *Director of Public Prosecutions (Cth) v Fattal* [2013] VSCA 276.

17 Phillip Ruddock, 'Law as a Preventative Weapon Against Terrorism' in Andrew Lynch, Edwina MacDonald, and George Williams (eds) *Law and Libery in the War on Terror* (The Federation Press 2007) 5.

18 *United Nations Human Rights Commission,* UNComHR Res 2001/37: Human Rights and Terrorism (2001) Preamble.

19 Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2006) 36.

it is the public-oriented motive that most clearly reflects the core normative judgments about the wrongfulness of terrorism and distinguishes it from other offences.

One of the main criticisms of the inclusion of a motive in the definition of 'a terrorist act' is that terrorist offences can be prohibited through existing criminal offences. Roach argues that 'although anti-terrorism laws have been enacted on the basis that existing criminal law is inadequate, we should not lightly assume that the existing criminal law is not up to the task'.[20] Roach asserts that offences of murder, conspiracy, incitement and attempt can be applied to apprehended acts of terrorist violence and 'from the perspective of public safety, it should not matter why someone explodes a bomb'.[21] In contrast, the Parliamentary Joint Committee on Intelligence and Security stated that 'terrorism is qualitatively different from other types of serious crime' because it is typically directed toward the public to create fear and promote political, religious or ideological goals.[22]

This distinction between public and private motives is illustrated in the case of *R v Mallah*.[23] Mallah was indicted on two counts of preparation for a terrorist act and a third count of recklessly making a threat to cause serious harm to a Commonwealth public official.[24] The alleged facts were that Mallah applied for a passport which was subsequently refused by the Department of Foreign Affairs and Trade (DFAT). Following an appeal to the Administrative Appeals Tribunal, police executed a search warrant in his house and located a rifle, ammunition, a document entitled '*How can I prepare myself for Jihad*', and a manifesto setting out his grievances and identifying DFAT as his target. During a covert phone call, Mallah admitted to an undercover operative that he was planning an attack on a government building and made threats to kill ASIO and DFAT officers. After a trial by jury, he was acquitted of Counts 1 and 2 and convicted of Count 3. Despite the facts of the case having the hallmarks of a terrorist offence, such as the targeting a government institution, possession of religious manuscripts and references to 'jihad', the sentencing Judge remarked that 'by its verdict, it is clear that the jury was not satisfied beyond reasonable doubt…having regard to the definition of a "terrorist act"'.[25] Chief Justice Wood found that Mallah did not possess a publicly-oriented motive to advance a political, religious or ideological cause but rather was an 'embittered young man' who 'personally felt that he had been the subject of an injustice' as a result of his passport refusal.[26] While the physical elements of the charge appeared to be terrorist in nature, Mallah's motive was considered to be a personal one. This case illustrates the important distinction between public and private motives in signifying the unique wrongfulness of terrorism, whereby a threat to a government institution out of personal frustration cannot be considered a terrorist attack.

IV. Terrorism & the declaratory function of the law

Ashworth outlines the three key functions of criminal law: to declare that certain conduct is a public wrong, to institute the threat of punishment as a deterrent, and to censure those who nevertheless commit the offence.[27] These three functions are not equally applicable to every offence. In the case of terrorism, it is unlikely that criminalisation and the risk of censure will significantly deter terrorists from committing a terrorist act. Anti-terrorism laws have 'marginal deterrent value'[28] because criminal sanctions are not believed to dissuade terrorists from their political, religious or ideological cause, particularly if they are willing to die in pursuit of their motive or reject the legitimacy of the legal system, to begin with. Adopting this view, the enactment of anti-terrorism laws serves a declaratory rather than punitive function to publicly condemn acts of terrorism, satisfy public indignation and placate demands for justice.

The declaratory function of anti-terrorism laws is supported by the Sheller Committee's Parliamentary Review of Security Legislation. The Committee noted that 'Parliament intended that the definition of a 'terrorist act' reflect contemporary use of that term in political and public discourse to stigmatise certain political acts…' and that the motive element under subsection (1)(b) 'appropriately emphases a publicly understood quality of terrorism'.[29] From this review, it is apparent that Parliament's primary focus on the motive element in the definition of 'a terrorist act' is an alignment with community expectations and popular understandings of terrorism. However, there is a fine balance between legitimating criminal laws by aligning offences with community standards and moral values and exercising penal populism to satisfy public demands for vengeance.

V. The terrorist label & fair labelling

Despite its evolving definition, the concept of terrorism has retained significant political and moral currency. From the 'Reign of Terror' during the French Revolution to radical Islamic terrorism after the September 11 attacks, the 'terrorist' label has endured a longstanding capacity to stigmatise and de-humanise those upon whom the label is imposed. The moral potency of the terrorist label beyond its legal signification has rendered the term 'slippery and much-abused'.[30] It has been deployed to censure various manifestations of violence, from revolutions, and political protests to State terrorism. This debate over how violence is represented and defined becomes a struggle over its legitimacy.[31] In the absence of a clear definition, the label of terrorism becomes more vulnerable to misappropriation. Borradori argues that this 'semantic instability' and 'conceptual chaos in public or political language' privileges dominant powers to de-legitimise or criminalise conduct according to prevailing political interests.[32]

20 Kent Roach, 'The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive' in Lynch, MacDonald and Williams (n 17) 39.

21 ibid.

22 Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terror Legislation* (December 2006) 5.25.

23 *R v Mallah* [2005] NSWSC 317.

24 Criminal Code (n 3) s. 147.2.

25 *Mallah* [2005] NSWSC 317 [26].

26 *Mallah* [2005] NSWSC 317 [38].

27 Ashworth and Horder (n 1) 22.

28 Saul (n 19) 16.

29 Security Legislation Review Committee (Sheller Committee), Parliament of Australia, *Report of the Security Legislation Review Committee* (Australian Parliament House, 2006) 6.22.

30 Paul Wilkinson, *Terrorism and the Liberal State* (Macmillan 1977) 47.

31 Michael V Bhatia, 'Fighting Words: Naming Terrorists, Rebels and Other Violent Actors' (2005) 26(1) The World Quarterly 13.

32 Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida* (University of Chicago Press 2013) 105.

Given the strong moral and political stigma attached to the term 'terrorist', careful attention must be given to the principle of fair labelling when defining terrorism offences. Labelling, in its literal sense, as the process of classifying, describing, and identifying, plays a significant role in criminal law. Criminal offences are defined and categorised into a statutory framework that demarcates degrees of wrongdoing and sentencing options depending on the seriousness of the offence. Chalmers and Leverick argue that labels are important in describing the offences to the general public and differentiating the offending behaviour for those working within the criminal justice system.[33] This process of labelling is a declaratory enterprise whereby the label of an offence communicates the nature of a crime and the degree of condemnation that should be attributed to an offender by the general public and criminal justice system. Ashworth notes that one of the primary aims of criminal law is to ensure a proportionate response to law-breaking and that fairness demands that offenders be labelled and punished commensurate with their wrongdoing.[34]

In the context of terrorism, it must first be asked who the intended audience of the label is?
The legal definition of terrorism is intended for the offender, operatives of the criminal justice system and the community at large. In terms of the offender, labelling is important in communicating what constitutes a terrorist offence and how the commission of such an offence will impact findings of guilt, sentencing, and the offender's criminal record. While it is argued that anti-terrorism laws have a minimal deterrent effect, it remains essential that acts of terrorism are clearly defined due to the harsh penalties involved (maximum penalty of life imprisonment) and strong social stigma. This is particularly pertinent in the prosecution of inchoate offences, such as the possession of documents or financing of groups with terrorist affiliations. These preparatory acts carry heavy sanctions and stigma under the wide umbrella of 'terrorism'. Agents of the criminal justice system, such as judges, lawyers and parole officers, also rely on the labelling of offences. Prior to conviction, the labelling of offences dictates the elements that need to be proven beyond a reasonable doubt, plea negotiations and jurisdiction of the court. After conviction, labels also affect the sentencing outcome, notations on criminal records and classifications within prisons. The labelling of an offence as an act of terrorism can have a significant impact on an offender's prospects of bail, procedural implications such as control orders and the length of detention without charge, as well as the level of media and political attention. In addition to the practical implications of labelling, offence labels also convey to the community the seriousness of an offence and the extent of the offender's wrongdoing. Labels may draw upon existing social values and signify the degree of moral condemnation and 'othering' to be imposed on an offender.

Accepting that labels play an essential role in criminal law, consideration must then turn to how terrorism offences can be fairly labelled. Ashworth notes that fair labelling has a more direct connection with common patterns of thought in society, and 'where people generally regard two types of conduct as different, the law should try and reflect that difference'.[35] The distinguishing feature of a terrorist act (as opposed to existing offences such as murder or conspiracy) is the motive element to advance a political, religious or ideological cause. Simester and Sullivan note that 'the criminal law speaks to society as well as the wrongdoers when it convicts them, and it should communicate its judgement with precision, by accurately naming the crime of which they are convicted'.[36] Under the Australian Commonwealth *Criminal Code Act 1995*, the category of terrorism offences is far-reaching, ranging from large-scale terrorist acts causing significant casualties[37] to 'possessing things connected with terrorist acts'.[38] Despite the significant variation of harm caused by such actions, the strong stigma of the 'terrorist' label remains constant.

In light of the severe moral stigma attached to terrorism, liberal use of the term would dilute its declaratory function and cause unfairness to an accused due to the lack of certainty regarding what constitutes a terrorist offence. Given the broad ambit of conduct that may be considered terrorist in nature, the inclusion of a motive element under statute provides greater legal clarity to criminal justice practitioners and accused persons. From a declaratory standpoint, the legislature has defined a terrorist motive to publicly declare that the use or threatened use of violence for a political, religious or ideological cause is considered distinctly wrongful and will attract distinct legal sanctions. The inclusion of a motive element ensures that the 'terrorist' label is appropriately directed towards offenders who intend to use violence to advance their political, religious or ideological causes and safeguards offenders who do not harbour such public-oriented motives, as in the case of *Mallah* above.[39]

Terrorism offences often attract media attention that draws upon popular preconceptions of terrorism rather than its legal definition. As a result, many accused persons are branded with the 'terrorist' label without being proven to have committed 'a terrorist act' to the requisite legal standard. An example is the '2019 Sydney CBD Stabbings', which was initially reported in the media as a terrorist attack but was ultimately prosecuted under non-terrorism offences. In this case, Mert Ney stabbed one woman to death, stabbed a second woman indiscriminately and then proceeded to run through the Sydney CBD yelling '*Allahu Akbar*'. The Supreme Court ultimately ruled that the offender possessed the requisite intent to kill, partly informed by his mental disorder, but did not have a terrorist motive: 'The evidence indicates that the Offender had no commitment to any faith and was not a religious zealot. He had become obsessed with the Christchurch massacre, but not because he was adherent to radical and extremist beliefs himself.

On 13 August 2019, he took on the trappings, gestures and language of a terrorist in the apartment after murdering Ms Dunn and in the streets of Sydney. All who saw him would be forgiven for concluding that he was a fixated person with a commitment to a terrorist cause involving violent jihad. However, the evidence does not support such a conclusion'.[40]

Bhatia notes that 'rarely is the combatant's decision attributed to a complex array of factors and events'[41], such as mental illness or discrimination, and media outlets often focus solely on the terrorist motive 'in the belief that simplicity is a stronger pull than context'.[42] This gives rise to the argument that a statutory distinction between terrorism and non-terrorism offences through a motive

33 James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) MLR 217-46.
34 Ashworth and Horder (n 1) 77.
35 Ashworth and Horder (n 1) 79.
36 Andrew Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn, Hart Publishing 2007) 30.
37 Criminal Code (n 3) s. 101.1.
38 ibid s. 101.4.
39 Saul (n 19) 5.
40 *R v Ney* [2021] NSWSC 529[166-167] per Johnson J.
41 Bhatia (n 31) 18.
42 Bhatia (n 31) 19.

element does not necessarily translate into a practical distinction. Conduct which bears the hallmarks of a terrorist offence, such as indiscriminate public violence, may result in a person being labelled a terrorist without possessing a legally defined motive.

VI. Proving motive at law: prejudice, evidential difficulties & the importance of procedural safeguards

The inclusion of a 'political, religious or ideological cause' in the definition of 'a terrorist act' raises evidential difficulties and a risk of prejudice against the accused. Accordingly, evidence of motive in proving an element of the offence must be adduced cautiously in criminal trials and longstanding procedural safeguards, such as the exclusion of unfairly prejudicial evidence under section 137 of the *Evidence Act 1995 (NSW)*, carries great importance. This section will consider the practical application of the 'motive element' in a number of terrorism prosecutions and analyse the evidential implications of proving a political, religious or ideological motive beyond a reasonable doubt.

Counter-terrorism policies have placed a strong emphasis on preventative strategies and the containment of risk.[43] This is understandable given the threat of large-scale casualties and destruction inflicted by previous terrorist attacks. Section 137 of the *Evidence Act 1995* provides that a court must refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice against the defendant. Unfair prejudice refers to the risk that evidence may be used to make a decision on an improper, perhaps emotional, basis, such that it 'appeals to the fact-finder's sympathies, arouses a sense of horror, or provokes an instinct to punish'.[44] This can present difficulties in the prosecution of terrorism offences where proving that an accused sought to advance a political, religious or ideological cause can require the admission of prejudicial or highly subjective evidence, such as extremist religious views or anti-nationalistic sentiments.

The use of prejudicial evidence to prove the mental element of a terrorist act was considered by the NSW Supreme Court of Criminal Appeal (CCA) in the case of *Elomar*.[45] Five co-offenders were convicted of conspiracy to do an act in preparation for a terrorist act. One ground of appeal was that the trial judge erred in admitting evidence that the co-offenders were associated with a group of Islamic fundamentalists who were convicted of terrorism offences in Melbourne. It was argued that there was a real risk that the appellants would be prejudiced by the evidence of their association with the Melbourne group, and the jury would conflate their criminality with that of the Islamic fundamentalist group. The CCA ruled that the expressed attitudes of the leader of a terrorist group with whom the appellants associated and allegedly took religious guidance 'had the capacity to significantly affect the assessment of the probability of the existence of that fact. The evidence, therefore, had probative value to a significant degree'.[46] Whilst it is peculiar to tender the violent extremist views of one person to evince the state of mind of another, the legal threshold of the probative value outweighing the prejudicial effect means that such evidence is often admissible in terrorism trials.

In *Elomar*, there was also an objection to the tendering of 'gruesome imagery', including video footage of beheadings, photographs depicting dead bodies and footage of the September 11 attacks.[47] The trial judge permitted the admission of this evidence due to its high probative value, stating 'it will enable the jury to see, according to the Crown case, that the state of mind of the accused, both individually and as a group, has gone well beyond mere anger and outrage, beyond jubilation at the success of the 2001 destruction, to a point where it exults in the cruel humiliation and gross murder of innocent persons'.[48] While the inclusion of a motive element significantly increases the probative value of evidence which would have otherwise been excluded, the Courts retain an important discretion to mitigate the prejudicial effect of admissible evidence through procedural rulings and judicial directions. In this case, the quantity of material was restricted to playing only one of six executions, without the actual beheading and audio track to minimise unfair prejudice contrary to s.137 of the *Evidence Act 1995* and distress to the jury.[49] Furthermore, the judge gave directions to the jury as to how this evidence could be appropriately used in their deliberations and that its relevance was contained to assessing the state of mind of the accused. In the case of *Fattal*,[50] the appellant was convicted of conspiring to do acts in preparation for a terrorist act. The proposed terrorist act was to attack the Holsworthy Army Barracks by shooting as many soldiers as possible, and Fattal's involvement was to assess the susceptibility of the target. In support of the motive element, there was a substantial body of evidence, mostly intercepted telephone calls, proving that Fattal possessed a hatred for Australian 'kuffars' (non-believers) and institutions, particularly Australia's military involvement in the Middle East. Generally, the admission of evidence indicating an accused's hatred for a country and its citizens would be highly prejudicial as it can evoke an emotional response from the jury or sentencing judge. However, for terrorism offences, the evidence goes directly to an element of the offence. As with the *Elomar* case, the inclusion of this evidence is indeed prejudicial; however, not *unfairly,* so it warrants exclusion under Section 137 due to its high probative value in proving motive.

It is argued that the addition of a motive element to the definition of 'a terrorist act' creates a further hurdle for the prosecution, which can be difficult to prove because of its subjective nature. In the case of *AB*[51], the accused faced two charges of doing an act in preparation for a terrorist act and using a telecommunications network with the intention to commit an offence. The accused was seventeen years of age and was diagnosed with an intellectual disability and Asperger's syndrome. The Crown alleged that AB published a series of posts on a website stating he intended to kill members of the public with a knife in a suicidal attack in a crowded area in Sydney. The Crown did not allege that AB planned his attack in association with any religious or political affiliation but rather wanted to make a statement about the mistreatment of persons with mental illness. In AB's bail application, Justice Beech-Jones considered the Crown case, noting, 'I have great difficulty in accepting that that material is capable of demonstrating an intention to advance a 'political, religious or ideological cause'.[52] While AB's plan displayed the physical hallmarks of a terrorist act, namely indiscriminate violence on members of the public to advance a cause, it did not meet the

43 Commonwealth of Australia, *National Counter-Terrorism Plan* (4th edn, Australia and New Zealand Counter-Terrorism Committee, 2017) 10.
44 *Papakosmas v The Queen* (1999) 196 CLR 297[97].
45 *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303.
46 *Elomar* [2014] NSWCCA 303, 248.
47 *Elomar* [2014] NSWCCA 303, 156.
48 *Elomar* [2014] NSWCCA 303, 419.
49 *Elomar* [2014] NSWCCA 303, 409.
50 *Fattal* [2013] VSCA 276.
51 *AB v Director of Public Prosecutions (Cth)* [2016] NSWSC 1042.
52 *AB* [2016] NSWSC 104 [226].

legislative requirement that the cause is 'political, religious or ideological'. Whilst it may be arguable that raising awareness sof mental health issues is a political issue, a broad interpretation of the motive element carries inherent dangers in the misuse of terrorism offences and disproportionate labelling, as discussed above.

VII. Constitutional challenges

The constitutional validity of the inclusion of a 'political, religious or ideological cause' in the definition of 'a terrorist act' has been challenged in Australia and abroad. Returning to the *Fattal* case, one ground of appeal was that the appellant El-Sayed had a constitutional right to freedom of religion under s.116 of the Commonwealth Constitution and thus was free to seek an Islamic fatwa to carry out a planned attack on the Holsworthy Army Barracks. It was held by the Victorian Supreme Court that s.116 of the Constitution does not confer absolute freedom of religion, and Parliament is acting within its constitutional authority to enact laws prohibiting the *violent* practice of religion if reasonably necessary for the protection of the community and the interests of social order.[53]

This reasoning is echoed by the Canadian Supreme Court in the case of *Khawaja*.[54] Under the Canadian *Criminal Code*, section 83.01(1)(b)(i)(A) provides that terrorist activity must be 'for a political, religious, ideological purpose, objective or cause'.[55] It was argued that this motive clause was an infringement of the freedom of expression encoded in s.2(b) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court upheld the constitutional validity of the motive clause ruling that, while the prohibited terrorist activities are in a sense expressive, threats and acts of violence fall outside the protection of s.2(b) of the Charter.[56] A purposive interpretation of the *actus reus* and *mens rea* requirements of the terrorism legislation excludes liability for non-violent conduct that a reasonable person would view as capable of facilitating terrorist activity.[57] Furthermore, the secondary argument that the motive clause would encourage unfair profiling on the basis of ethnicity or religious belief was rejected by the Court. It was held that improper conduct by State actors and law enforcement agencies 'cannot render what is otherwise constitutional legislation unconstitutional',[58] and the provision is clearly drafted in a manner respectful of diversity, allowing for the non-violent expression of political, religious, or ideological views.

Conclusion

This article presents a discussion on the role of motive in terrorism offences and whether the definition of a 'terrorist act' under section 100.1 of the *Criminal Code* should include the intention to advance a political, religious or ideological cause. Contrary to the longstanding principle that motive is irrelevant in criminal liability, it is argued that the motive element behind terrorism offences is what makes it distinctly wrongful. By delineating a moral distinction between terrorism offences and other crimes which share the same *actus reus* (such as murder), it is argued that the exclusion of motive would defeat the declaratory function of the criminal law to signify the use of violence for political, religious or ideological purposes as a discrete public wrong.

However, in light of the strong social stigma and legal sanctions attached to the terrorist label, careful consideration must be given to the principle of fair labelling when defining 'a terrorist act'. Fair labelling demands that offenders be labelled and punished in proportion to the degree of wrongdoing. In order to fairly label terrorism offences, the inclusion of a motive provides a clear indication of the degree of wrongdoing and, consequently, the level of legal and social sanctions which should be imposed on the offender. Furthermore, the strong political and moral judgment attached to the 'terrorist' label means that the term can be subject to misuse. The added specificity of a motive element in the definition of a terrorist act can prevent the misappropriation of the label.

Whilst this article ultimately supports the inclusion of a motive in the definition of 'a terrorist attack', there are clear evidential issues arising from the onus on the prosecution to prove the accused intended to advance a political, religious or ideological cause beyond a reasonable doubt. The motive element significantly broadens the scope of admissible evidence that would otherwise be impermissible, such as the accused's religious beliefs or hatred for their country. Consequently, the admission of evidence to establish motive must be balanced against conventional safeguards in criminal procedure to protect the fairness of the trial and integrity of the criminal trial, such as the exclusion of prejudicial evidence under Section 137 of the *Evidence Act*. Finally, the motive element under section 100.1 is constitutionally valid as it does not violate the freedom of religion under section 116 of the Commonweal Constitution and only prohibits the advancement of a religious cause through *violent* means. Ultimately, it is imperative that terrorism is carefully defined with reference to a clear motive element to accurately distinguish it from other types of offences and serve the criminal law's declaratory function of communicating to offenders and society what makes terrorism distinctively wrongful.

53 *Fattal* [2013] VSCA 276 [126] – [127].
54 *Khawaja v The Queen,* 2012 SCC 69.
55 Criminal Code (Canada), RSC 1985, s. 83.01(1)(b)(i)(A).
56 *Khawaja* (n 54) 7.
57 *Khawaja* (n 54) 6.
58 *Khawaja* (n 54) 47.

Unfiltered, Candid, and Interdisciplinary: Reflections on the 'Human values and global response in the Covid-19 pandemic' 2022 Tanner Lectures

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The *Tanner Lectures on Human Values* are prestigious gatherings of globally renowned scholars across the humanities and the sciences. This year's lectures addressed the questions of *Providing for a nation's health, in a global context*, where philosophers, economists, a physician and a social psychologist offered their take on different aspects of the healthcare response to global pandemics. In this piece, students, research fellows, and visiting fellows currently at Clare Hall, Cambridge provide their individual and distinct reflections on the lectures. They highlight a continual need for openness and multi-disciplinary engagement surrounding complex, global, and often polarising issues. The reflections presented herein reflect the views and ideas of scientists, philosophers, sociologists, and healthcare professionals from diverse backgrounds and nationalities. Beyond sharing these different and complementary perspectives, we aim to promote diverse, informative and welcoming forums for scholarly engagement in the pressing global issues of our time.

Introduction

The Tanner Lectures on Human Values[1] were founded in July 1978 at Clare Hall, Cambridge, by the American scholar, industrialist, and philanthropist, Obert Clark Tanner. His hope was to foster a legacy of lectures which 'will contribute to the intellectual and moral life of mankind'. Tanner stated: 'I see them simply as a search for a better understanding of human behaviour and human values. This understanding may be pursued for its own intrinsic worth, but it may also eventually have practical consequences for the quality of personal and social life'. The Tanner Lectures are financed by an endowment, and other gifts, donated to the University of Utah exclusively for this purpose. Permanent lectureship has only been

1 'The Tanner Lectures on Human Values' (*Clare Hall, Cambridge*) <https://www.clarehall.cam.ac.uk/tanner-lectures> accessed 10 April 2022.

granted to eight other universities outside Cambridge. Outstanding scholars or leaders in broadly defined fields of human values—which transcend ethnic, national, religious, or ideological distinctions—are recognized and honoured through the invitation. Their lectures are also published as a written version of their presentation.

This year's Tanner Clare Hall lectures[2] invited presenters to discuss broad philosophical, financial, political and artistic aspects of the Covid-19 pandemic. The two evenings featured six speakers from various disciplines. During the first evening, Professor Allen Buchanan, an American philosopher, was invited to speak on 'The relationship between national and global health'. His presentation covered several areas, including how one defines 'crisis', when it is ongoing, as was the case for the duration of the Covid-19 pandemic. Two responses to his presentation followed, and were delivered by Cécile Fabre, Oxford Professor of Political Philosophy and Senior Research Fellow in Politics, who addressed moral duty and how it might be sustained, and by Sir Paul Tucker, a Research Fellow at Harvard's Kennedy School, who commented on public health governance and its financing. For the second evening's topic, 'The consequences for healthcare practice, globally', the invited speakers preferred a less hierarchical order of presenters and shared equal 'rank'. Oxford's Professor Trish Greenhalgh pleaded for the prudence and prevention masks offered; Professor Ama de-Graft Aikins, the British Academy's Global Professor at University College, London, provided a compelling and colourful portrait of pandemic realities and resilience strategies in Ghana and other African countries; and Alexander Bird, Cambridge's Bertrand Russell Professor of Philosophy, contrasted and compared the costs approved and disbursed by the NHS in 'standard' cases with those associated with Covid-19 expenses in this pandemic.

Clare Hall students, research fellows, and two visiting fellows reflected on which of the Tanner 2022 messages proposed by this year's speakers were most salient. We considered the lecture content and the subsequent, animated, discussions held during the question periods and social interactions immediately following the presentations. We submit these independently written perspectives, inviting readers to consider commonalities and discrepancies between them. Beyond the narrative, we discuss and highlight the role, and importance, of multidisciplinary and diverse perspectives in global health issues.

Reflections

An Interdisciplinary Pandemic (Lauren Adams)

As someone whose academic work lies in modelling the spread of infectious diseases, and who has practical experience of working in healthcare during the on-going Covid-19 pandemic, I was interested to see how a lecture series focusing on human values would tackle this issue.

Though not necessitated by the title, it was unsurprising that every speaker mentioned Covid-19. The first speaker, Prof. Allen Buchanan, spoke about the nature of crisis. He proclaimed that crises are declared promptly, but argued that the same cannot be said for announcing when the crisis is over. This made me wonder: although I would argue the Covid-19 pandemic is on-going, would I still consider it a national crisis?

2 Available online at <https://www.youtube.com/watch?v=eOrxqw_CdbA>.

The second part of the talk was dedicated to distinguishing the differences between imperfect and perfect duties.[3] In the discussion that followed, much attention was devoted to the speaker's proposed view on vaccinations. Buchanan suggested that 'endless booster vaccinations', in light of extreme vaccine supply issues across the globe, were unsustainable. This opinion led to an emotionally charged debate between the audience and the speakers.

This was my first experience of highly emotive arguments defending very different points of view from academics from a broad range of backgrounds. I realised how limited an individual's work can be if they only consider their own expertise. Although there are many factors that contribute to the spread and management of infectious diseases that I cannot model, I can consider them in future discussions of my findings. I hope taking this away from the event will lead to my work being better informed and more well-rounded.

Global health and the duty to help: some practical considerations (Luke Neill)

There were two broad questions that I thought were most salient in this year's Tanner lectures: how can we prevent extreme harm to people both in this pandemic and the next; and how can we institutionalise the duty to alleviate pandemic-related problems in other countries?

On the latter point, Prof. Allen Buchanan and Prof. Cécile Fabre set the groundwork. Using the Kantian distinction between perfect and imperfect duties[4], they underlined the difficulty of the 'imperfect' duty to adopt a positive end, or, in the case made by Prof. Buchanan, to provide pandemic relief to less developed countries. Fabre explored these duties in relation to non-compliance: if, in contravention of an agreement, one country fails to provide any support, is there a duty for other countries to 'take up the slack'? And if so, how can that be enforced? As Prof. Ama de-Graft Aikins asserted the following evening, there was a notable failure to provide adequate vaccine supplies to Africa, showing that the duty remains unfulfilled by most Western nations.

One solution, offered by Sir Paul Tucker, was an economic one. Tucker asserted that countries must internalise their incentive to help others because it is in their self-interest (avoiding the re-importation of the pandemic, mass migrations, and creating allies, etc.). Moreover, he proposed that this could be furthered by adding a second 'player' to the currently existing world health organisation, headed by the West and China, respectively, which could then compete for greater provision of services in developing countries. Whether or not this is a viable structure, the idea that the existing WHO, beleaguered by universal veto rights and poor funding, was in many ways unable to provide comprehensive support to developing countries was a striking point. The lectures were effective in exploring how the WHO and national governments had to balance the demands of the scientific community with the competing economic, political, and social questions, complicating their approach to pandemic relief.[5]

3 Perfect duties are proscriptions of specific kinds of actions, where violation is morally blameworthy; imperfect duties are prescriptions of general ends, where fulfilling them is praiseworthy. Cf. Christopher Bennett, Joe Saunders, and Robert Stern (eds), *Immanuel Kant. Groundwork for the Metaphysics of Morals* (Oxford University Press 2019).

4 ibid.

5 Eyal Benvenisti, 'The WHO – Destined to Fail? Political Cooperation and the COVID-19 Pandemic', *American Journal of International Law* (2020) 114(4) 588-597.

The discussion was sometimes waylaid by Buchanan's comments about the low efficacy of 'endless booster vaccinations' and the need for implementing gene testing instead, which provoked tense scrutiny from health professionals in the audience. Nevertheless, the bleak diagnosis as to the state of our existing global health institutions, and the difficulties of enforcing the duty to aid poorer nations, was a question that ought to weigh heavily on those interested in responding to the next pandemic.

Creatively responding to Covid-19 in Africa (Lundi-Anne Omam)

One of the presentations that marked me most during the lectures was that of Prof. Ama de-Graft Aikins who, in her response to the presentation given by Prof. Allen Buchanan, talked about how creative arts in Ghana helped shape the response to Covid-19. I am familiar with how different forms of arts can communicate key prevention messages to communities. However, it was interesting to listen to Prof. de-Graft Aikins speak of artists in Ghana creatively communicating about Covid-19 in their bid to demystify beliefs surrounding this new virus which was largely considered to be a 'colonial virus'.

Coming from an African country, I easily related to Prof. de-Graft Aikins' presentation as communities in Africa relate very well to communications in local languages and dialects they speak. What's more, means of communication using forms like textile designs and murals speak to the recognition of African cultures and traditions as important aspects of disease prevention.[6] The Covid-19 outbreak affected many parts of Africa with total deaths recorded being 250,948 as of the 29th March 2022.[7] Public health containment measures, especially the introduction of vaccines, have seen resistance in Africa.[8] A holistic approach that acknowledges the impact of tradition and culture is thus particularly important in measures aiming to contain the spread of Covid-19 in Africa, as was the case in Ghana. Previous academics have published on the role tradition and culture play in the spread of pandemics.[9] Thus, the use of different forms of arts, including music, textile designs and murals that encompass many forms of expression, are creative mediums through which stories are told. These creative means of communication could, and should, be used to further strengthen the Covid-19 response in Africa.

The Buchanan compromise meets (needs!) scientific inference (Michael Nelson)

As a scientist working in computational analysis, my instinct in the face of data and inference is to consider the modelling, prior knowledge, and uncertainty one can ascribe to that data. The *model* is a typically parametric representation of the system under study and how that system might change when other parameters (e.g. time) are varied.[10] Initially assumptions about those parameters are captured by the *prior knowledge*.[11] The output of such a model will be some predicted central value of the system, and an associated level of confidence in that value. Variations in this value due to external and systematic factors are absorbed into the model *uncertainty*. For me the significance of models, priors, and uncertainties is particularly prescient for the on-going Covid-19 pandemic, where government policy, law enforcement, and everyday life have been affected by the outputs of epidemiological data science models (the model *inference*). Given the significant variability in measures by which government response is considered successful, including mortality, infection rates and economic outcomes, and the immutable role of uncertainty and prior assumptions in these models, it is necessary to look beyond the pure data science approach in dealing with such crises. Which *other features* require careful consideration in any government's response?

In this year's Tanner lectures, Prof. Allen Buchanan emphasised the influence of nationalism and cosmopolitanism in Covid-19 responses, and how dealing with Covid-19 would have been more optimal if the approach had been positioned between these two extremes. Buchanan proposed that *purely nationalistic* and *purely cosmopolitan* responses were suboptimal for dealing with the problem. I found this compromise sensible and well-motivated, but questioned the lack of pragmatic, scientific treatment in Buchanan's argument, a viewpoint that seemed common among the scientifically aligned attendees. That said, there are important considerations to take home from Buchanan's pragmatic compromise, particularly the role of spending and economic efficiency in responses to the pandemic. This point was further emphasised by the economic arguments set forth by Sir Paul Tucker and Prof Alexander Bird on how a Buchanan compromise could be realised in the realm of international banking and by international agencies. This pragmatic response would be well served if integrated with the results of scientific modelling and healthcare analysis.

My feeling is that much could be gained by combining the economic practicalities of the Buchanan argument with the necessary scientific models of the impact and development of the pandemic. One approach can be seen to triage elements of the other, and it will become increasingly important for scientific, economic, and philosophical camps to actively discuss and debate these issues, strengthening the Buchanan compromise and improving upon it.

Public health crises and trust in government (Will Hanna)

Professor Allan Buchanan's 2022 Clare Hall Tanner lectures offered important critical reflections on the normative desirability of prolonged emergency measures and widespread restrictions on conduct as response measures to public health crises. Such reflections involved confronting difficult questions about how public institutions ought to balance rights and responsibilities in

6 Ama de-Graft Aikins and Bernard Akoi-Jackson, 'Colonial virus? Creative arts and public understanding of COVID-19 in Ghana' (2020) 54(Suppl. 4) 86-96; Bronwen Evans, 'African Patterns' (*Contemporary African Art*, 2020) <https://www.contemporary-african-art.com/african-patterns.html> accessed 10 April 2022; Chris Spring, 'Social Fabric: African Textiles Today' (*Google Arts & Culture*, 2015) <https://artsandculture.google.com/story/social-fabric-african-textiles-today-the-british-museum/twWxNsyPc0L4Iw?hl=en> accessed 10 April 2022.

7 'Coronavirus Disease 2019 (COVID-19)' (*Africa Center for Disease Control*, 2022) <https://africacdc.org/covid-19/> accessed 10 April 2022.

8 Polydor Ngor Mutombo et al, 'COVID-19 vaccine hesitancy in Africa: a call to action' (2022) 10(3) Lancet Glob Health 320-321.

9 Angellar Manguvo and Benford Mafuvadze, 'The impact of traditional and religious practices on the spread of Ebola in West Africa: time for a strategic shift' (2015) 22(Suppl. 1) The Pan African Medical Journal 9; Philip Baba Adongo et al, 'Cultural factors constraining the introduction of family planning among the Kassena-Nankana of Northern Ghana' (1997) 45(12) Social Science & Medicine 1789-1804.

10 Trevor Hastie, Robert Tibshirani, and Jerome Friedman, *The Elements of Statistical Learning: Data Mining, Inference, and Prediction* (2nd edn, Springer 2001).

11 Andrew Gelman et al, *Bayesian Data Analysis* (Chapman and Hall/CRC 2004).

the face of significant resource constraints. One constraint which was tactfully considered by Buchanan, and which had received less consideration in my own thinking prior to attending the lecture, was the importance of designing institutional responses to public health crises with an eye to preserving the public's belief in the authority of government—what Buchanan called 'sociological legitimacy'. Building on the typology of legitimacy crises first developed by German sociologist and philosopher, Jürgen Habermas, Buchanan explored how public health crises could put strain on the people's trust in their governing institutions.[12] The consequences of a deficit of trust became all too apparent over the duration of the pandemic in the many examples of widespread non-compliance with government policy and the initiation of protests movements in response to public institutions' perceived mishandling of the pandemic response. Buchanan pointed out how important the_governments' task of clear communication under conditions of uncertainty is in preserving the sociological legitimacy of institutions. Any public health response must take measures to preserve trust in government lest it undermine its own ability to steer individuals' choices in the direction of the common good.

In the question period following the lecture, some members of the audience challenged Buchanan's framework for its lack of scientific rigour. His framework was, they claimed, an exercise in abstraction which often glossed over details which might be considered vitally important in other forms of scholarly inquiry. Indeed, the assumption built into Buchanan's model which struck me as most obviously problematic was the delimitation of the concept of 'relevant harm' to that which individuals suffer directly because of contracting a disease (i.e. without including, for example, knock-on harms resulting from a dysfunctional healthcare system). However, Buchanan's framework does not stand or fall on its ability to 'get everything right'. In the spirit of the founding goal of the Tanner Lectures, I think that it ought to be evaluated on its ability to render the conversation on these vital matters more articulate. It certainly had this effect on my own thinking.

Dialogue, debate, and imperfect freedoms (Yoanna Skrobik)

Intensive care units were my professional home. They provide front row seats during pandemics, with gritty, up-close observation of illness and death. Being there convinces 'front-liners' that our emotional perspective is the most real. Is this why the 2022 Tanner Lectures triggered such strong and discordant reactions? On one hand, these erudite moments in the Tanner Lecture 'birthplace', Cambridge, are the epitome of the wondrous luxury of celebrating intellectual debate. On the other, the inherent detachment from my Covid-19 reality and that experienced by many colleagues worldwide made this distancing from the grit seem surreal.

I most enjoyed the knowledge, grace, humour, and deep irony with which Prof. de-Graft Aikins described 'the colonial virus'. The (contentious) previous evening's speaker's tenets, particularly those addressing what privilege, versus relative disadvantage, mean, were deconstructed with quiet dignity. The lecture contained interesting, grounded, and well-researched facts, along with good stories. Examples of the humour with which Ghanaians deal with irrational or harmful attitudes and actions among the egregiously misinformed and/or misguided 'privileged', was inspiring. Finally, how much art, from cartoon humour to woven cloth patterns to public spaces covered in paint and imagery, serves as a public information-conveying vessel, in addition to its role in fostering hope, was both useful and entertaining. Such artistic expression allows Ghanaians to own the narrative. I thought how much there is to learn from such tangible wisdom and perspective.

The amalgam of Sir Paul Tucker's response with Prof. Alexander Bird's analysis of Covid-19's costs, weaving national and international politics, crisis management optics and general mayhem through financial and public health consideration issues, were eye-openers. Their lively debate at the end added a lighter humour to two lectures that would have otherwise been very serious indeed.

One discomfort remains: intellectual conflict of interest necessarily plagues experts.[13] Prestigious lecture invitations highlight, and heighten, academic and perceived hierarchical ranking, anchor professional identity, and may help promotions within universities. Are these 'experts' therefore more likely to keep a narrower view as it helps maintain 'expert' status and control? Does this preclude a broader and perhaps more accurate view on more high-stake 'what should be done[14] in a pandemic' questions?

Thoughtful scholars, like Hans-Jörg Rheinberger, contend that only multifaceted and multidisciplinary approaches can procure any semblance of credible substance. Such transparency, stemming from parameters grounded in what is known and understood, should be procured by considering multiple data sources, followed by sharing knowledge and discussing its meaning. A priori, any field's academics would consider results obtained using multiple research methods within their area. Once experts from each relevant discipline have shared the information garnered in this way, dialogue between them would then bring a broader perspective. This is arguably the only rational approach to complex topics, whether the Covid pandemic or related to other equally multifaceted subjects. If approaches to public health, which can be perceived to override individual choices, are to be implemented, the exercise described above must precede their implementation. Instead, we witnessed pandemic-related information laced with 'false news'. Few rigorous journalists clarified information beyond reporting on health care system capacity limits and governmental imposition of health care measures. Clare Hall's 2022 Tanner lecturers diverged radically in both content and opinions, and some steadfastly held on to narrower interpretations during the discussion periods following their lecture. What could be considered credible, and desirable, was received differently still by the audience, adding layers to the high-stakes moral quagmires, elegantly invoked in Prof. Cécile Fabre's response to the first lecturer.

Should we screen, and thus censor, lecture content accuracy or bias if the event's intent is to 'contribute to the intellectual and moral life of mankind'? Or do we acknowledge that here, as in democracy, expressing views where context adds to their credibility is not perfect but the best we've got? The frustration at not finding a solution to how alternative, accountable, and transparent ways to minimise the harm imprecision or misinformation can create—a feeling I experienced often throughout the pandemic—remains.

Global health institutions and disciplinary pessimism (Elina Oinas)

As a sociologist whose work focuses on global health and illness, the key argument of the opening lecture by Prof. Allen Buchanan was

12 Jürgen Habermas, *Legitimation Crisis* (Heinemann 1976).

13 'Personal and intellectual conflicts' (*Office of Research Integrity*) <https://ori.hhs.gov/content/Chapter-5-Conflicts-of-Interest-Personal-and-intellectual-conflicts> accessed 10 April 2022..

14 What should be done strategically, morally, financially, in public health terms, etc.

the observation that health is a societal issue seen to be totally held in the hands of nation states. This contrasts with how pandemics such as Covid-19 clearly show the need to have a global infrastructure for health emergencies, and possibly even for health care, especially in regions where states do not deliver or procure practical or helpful resources. The obviousness of this insight is astounding, particularly in the light of the lack of discussion on how the situation could be improved. Despite all talk of globalisation, in health the nation state seems to be the unit of analysis and practice. Institutions like the WHO are important but vulnerable, and do not address the key issues of actual implementation of policies.

Prof. Buchanan suggested that any new view on globalised health care cannot be based on an extreme nationalistic nor cosmopolitan view on duties and responsibilities for 'the distant stranger'. He was thus not challenging the nation state structure, but instead suggesting a global structure in addition to the existing national ones. The remainder of the discussion, however, confirmed the complexity and even impossibility of any such propositions being feasible. Thus, the Tanner talks in total underlined the different disciplinary contributions to how, on an abstract level, a global health agenda will *not* be achieved. The ambitious goal of the event, to create an interdisciplinary platform for discussing future objectives for global health, in my view fell on disciplinary narrowness, inability to communicate across fields, and general pessimism.

Sir Paul Tucker, the economist in the room, contended that while there are serious arguments of self-interest for the wealthy nation states to engage in a global health care structure, nation states will find such duties more voluntary than obliging. Prof. Cécile Fabre agreed that a binding global contract is a radical proposition and one that is very hard to achieve, as seen in wars.

The theoretical tenor of the first day's lectures took on a more concrete tone during the second day, when public health Professor Trish Greenhalgh applied a pragmatist's view on Covid-19 policymaking, urging to trust sufficient, partial, and contingent knowledge instead of demanding absolute certainty. Prof. Ama de-Graft Aikins pointed out that African health systems have always dealt with complexities and been able to diversify policies depending on different domestic and international pressures. She addressed phenomenological violence when moral failures to distribute vaccines to 'distant strangers' occur, and how the denial of equal status as global citizens affects trust in biomedical health messages. Her talk was also the only one directly addressing lay people and their ability to deal with multiple messages. Prof. Alexander Bird brought the discussion back to the economy by asking if not the focus on Covid-19 only leads to an economic disaster and neglect of other diseases, further advocating for a consideration of a complex policy landscape beyond Covid-19.

A notable absence in the panel discussion was the microbe itself, claimed the audience question by a medical historian. The panel was no doubt highly human-centred and held little epidemiological and virological expertise. In the comments section the diverse scales of the talks spurred provocative questions and comments from the audience, especially those working more strictly in healthcare, arguing that the philosophers, economists and public policy experts missed important aspects of the knowledge required to even grasp the real issues. The heated debate brought me one insight above anything else: while the Covid-19 really has opened our eyes to the necessity of an interdisciplinary health policy dialogue, as academics we are still not up to the challenge. The pandemic is inevitably a societal phenomenon that neither medicine, pharmacology, vaccine industry, philosophy, economy, public administration or social psychology can solve alone. Even with a 100% protective vaccine, the challenges of cost, manufacturing, distribution, and incentive for lay people to take it, would remain.

The Tanner lectures highlighted challenges inherent to interdisciplinary discussion, especially in the face of a public crisis. The speakers were astonishingly unwilling to listen and respect the expertise of another's field of knowledge. The philosophers seemed unable to examine their own biases and narrow conviction, yet willing to integrate hard scientific arguments involving efficacy and viral contagion into their discourse. Thus, my own take home message was that practices for developing interdisciplinary negotiation are urgently needed. Not to force everyone to share one framework of ontological, epistemic, not moral or ethical standpoints, but to better negotiate what Prof. Greenhalgh called sufficient reliability for action.

There is a strong tradition of discussions on interdisciplinarity from Thomas Kuhn[15] to Donna Haraway[16], but our current crisis thinking does not seem to take lessons from them. Interdisciplinarity is often celebrated as the future of science yet it is hard to practise.[17] This, of course, is also built in the competitive nature of contemporary academia, where winning, and presenting the prevalent truth, dominates approaches that are open for negotiation, uncertainty and partial, contingent truths. Alternative traditions, however, flourish alongside mechanistic positivism, with multiple roots in both Bayesian probability theories,[18] game theories,[19] as well as anthropology and multi-species post-human feminist traditions.[20] What is new is that those are urgently needed for health policy making, complementing the more mechanistic evidence-based traditions.[21] The Tanner lectures were a case study on both the difficulty of and need for interdisciplinary, negotiative approaches.

Discussion

The different perceptions described by the Tanner lecture attendees reflect the diversity in their identity and in what most captured their interest or attention. The multidisciplinary diversity of presenters added to the range of topics and points of view. In addition, the commonality of the pandemic's impact on each participant's experience added a unique dimension of engagement. The threat it brought to quotidian aspects of our lives may have heightened emotion in receiving and interpreting presenters' opinions. Beyond this, the heated debates surrounding some of the more polarising features proposed by the lecturers added a dimension of controversy that may have been considered unexpected in a highly prestigious lecture series with invited expert speakers.

15 Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1962).

16 Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press 2016).

17 Andrew Abbott, *Chaos of Disciplines* (University of Chicago Press 2001).

18 Gelman et al (n 11).

19 Alejandro Caparrós and Michael Finus, 'The Corona-Pandemic: A Game-Theoretic Perspective on Regional and Global Governance' (2020) 76(4) Environ Resour Econ (Dordr) 913–927.

20 Margaret Lock, 'Mutable environments and permeable human bodies' Journal of the Royal Anthropological Institute (2018) 24(3) 449-474.

21 Caterina Marchionni and Samuli Reijula, 'What is mechanistic evidence, and why do we need it for evidence-based policy?' (2019) 73 Studies in History and Philosophy of Science 54-63.

In welcoming participants to the Tanner lectures, the President of Clare Hall, Professor Alan Short, expressed his hope that the event would provide a 'safe space to reflect more conceptually on the different models for healthcare available nationally and globally'. Theoretically, multidisciplinary environments increase the probability the setting will be perceived as 'safe' and thus promote overall creativity and performance.[22] Were the disagreements stemming from different perspectives overcome through open-minded dialogue in these Tanner lectures? This is less certain. Although different convictions among experts with heterogeneous backgrounds may hamper understanding of another's field, anchored beliefs and biases might be set aside if sharing understanding is clearly defined as desirable. Highly prestigious university environments, however, may encourage invited speakers to wish, or feel an expectation, to project authority. Staking academic territory holds disadvantages, as was shown with the incrementally entrenched position witnessed in some presenters. This can in turn oppose participants, and become confrontational, thus eschewing opportunities to listen, learn and converse. Beyond this event, the absence, and evident benefit, of any public forum in which to hold such dialogues was brought up by several speakers and later in the audience's comments and questions. One of the few rallying themes, beyond the challenges in creating such opportunities, was how significant such exchanges are for responding to a pandemic and beyond. Broader discourse in a variety of economic, political, philosophical, and scientific issues would surely benefit an ever more globalised world. The Tanner experience thus provided both a model for the challenges, while emphasizing the importance of, ensuring respectful and open-minded dialogue.

Diversity and multidisciplinarity add richness and depth in numerous ways when studies consider the perspectives of individuals from different disciplines, or whose ethnic, cultural, racial backgrounds, gender, or opinions, vary. From morale and workplace performance, to profitability, creativity, and even educational breadth and accomplishments, multidisciplinarity holds unequivocal advantages in comparison to any comparable metrics produced by more homogeneous groups. Each Clare Hall student or scholar took with them new outlooks and thoughts. As each author produced their individual summary of impressions before sharing its content with others, both what was considered salient and memorable, and the order of hierarchical importance it held for each person, reflected their personal and academic identity. The genuine engagement with which we read each other's Tanner reflections, and the interest it generated, led to further exchanges of ideas and knowledge. The lesson in opening horizons echoes publications describing how useful dialogue can be within intellectually respectful, multidisciplinary, and diverse groups. How being part of Clare Hall made this possible should be recognized, and indeed, celebrated.

Conclusion

Our experience leads to the following concluding thoughts. Lecture series, particularly those addressing complex topics, where the necessary knowledge to address it is broad, and necessarily incomplete for each expert, are most valuable to any audience when the invited speakers are themselves diverse and multidisciplinary. As with each of this piece's authors, we trust this would make their experience and perspectives richer. What elements would make participants value exchanging ideas on par with the value placed on expressing them? How can open exchanges be fostered? These questions triggered sobering reflections as to our own academic penchant for critical analysis, to which adding an openness for dialogue seems essential. It is in this spirit of openness that communities must address questions related to *human values*, and for which forums such as the Tanner Lectures provide a much-needed mouthpiece for more universal scholarly engagement.

22 Stephen Frenkel and David Weakliem, 'Morale and Workplace Performance' (2006) 33(3) Work and *Occupations* 335-361.

The Ministerial Code: A Scarecrow of the Law?

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Mishcon de Reya is an independent law firm, which now employs more than 1200 people with over 600 lawyers offering a wide range of legal services to companies and individuals. With presence in London, Singapore and Hong Kong (through its association with Karas LLP), the firm services an international community of clients and provides advice in situations where the constraints of geography often do not apply. This article was written in May 2022

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.
- Measure for Measure, II.i.1-4

Angelo may have been the bloodthirsty antagonist who becomes an abuser of the very law he enforces, but his speech opening Act II of *Measure for Measure* recognises the impotence of law without proper enforcement. While few are calling for the legal system to act as a 'terror' to deter rule-breakers (Angelo had a penchant for execution), recent events have led to concerns that the Ministerial Code has become a rather comfortable 'perch' for ruling politicians. The code—which outlines standards of conduct for government ministers—is a set of guiding principles rather than law (it has no statutory footing) but the opening quotation resonates with the ongoing debate about the extent to which those in power are held to account in Britain.

In particular, various controversies over alleged breaches during Mr Johnson's premiership have contributed to a perception that there is an issue with the application of the Ministerial Code, namely, that apparent contraventions do not appear to result in sanctions.[1] In the opening months of 2022, many, including members of Mr Johnson's own party, expressed concern at his failure to resign despite being the first sitting Prime Minister to be sanctioned for breaking the law and in spite of multiple claims that he misled Parliament about Downing Street parties during lockdown (at the time of writing these claims are being investigated by the Privileges Committee). In May 2022, within days of the publication of senior civil servant Sue Gray's report, which found 'failures of leadership and judgment [in] No 10', Mr Johnson responded by publishing an 'updated' Ministerial Code which was met with controversy in the press, not least because of the timing.

The Prime Minister is the ultimate arbiter of the Ministerial Code: only the Prime Minister can initiate or consent to the launch of an inquiry into whether a Minister has broken the code, but the Prime Minister does not have to accept such an inquiry's findings. It is for the Prime Minister to decide what, if any, sanctions should be applied. In a sense, it is up to the Prime Minister to 'shape' the code. Thanks to its previous drafting, popular conception has been that any breach of the Ministerial Code should result in dismissal or resignation, but Mr Johnson's recently updated code has introduced a range of sanctions available for breach, which has led to some critics alleging a watering-down. The updated code does retain the only specific breach with a defined punishment: knowingly misleading parliament. It keeps the pre-existing clause that '[i]t is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity' and that Ministers 'who knowingly mislead Parliament' will 'be expected to offer their resignation to the Prime Minister'.[2] It seems that its original writers did not conceive that the Prime Minister may be the person so accused.

'Partygate' and other recent scandals are far from the first ministerial breaches that have engaged a possible misleading of Parliament. Applying the terms of the title quotation to selected examples over time, has the Ministerial Code served more as a 'terror' or a 'perch'?

1 For example, the scandal surrounding Priti Patel's alleged bullying of Home Office civil servants (paragraph 1.2 of the Code states that bullying and harassment by Ministers 'will not be tolerated'). Sir Alex Allan, the then Independent Adviser on Ministers' Interests, found that Ms Patel had not consistently met the 'high standards required by the Ministerial Code', concluded that on occasion her treatment of civil service staff amounted to behaviour that could be described as bullying and confirmed that her behaviour was in breach of the code. Notwithstanding Sir Allan's conclusions, the Prime Minister took the view that her behaviour did not breach the code and declared his full confidence in Ms Patel, resulting in Sir Allan's resignation.

2 Ministerial Code, para 1.3(c).

Background to the Ministerial Code

Mr Johnson's Foreword to the previous code (before his recent update) summarised the standards expected of Ministers as follows,

> There must be no bullying and no harassment; no leaking; no breach of collective responsibility. No misuse of taxpayer money and no actual or perceived conflicts of interest. The precious principles of public life enshrined in this document—integrity, objectivity, accountability, transparency, honesty and leadership in the public interest—must be honoured at all times; as must the political impartiality of our much admired civil service.

The updated code includes a new Foreword which removes references to 'integrity, objectivity, accountability, transparency, honesty and leadership' (although the principles are embedded in the code itself).

The Ministerial Code started life in 1945 as two documents, 'Cabinet Procedure' and 'Questions of Procedure', both introduced by then Prime Minister Clement Attlee.[3] In 1946, Attlee re-issued the guidance as one document called 'Questions of Procedure for Ministers'. The code is generally revised at the start of each new administration and it remained confidential until John Major approved its publication in May 1992, opening it to external scrutiny. The code was given its current name under Tony Blair's government in 1997.

The Ministerial Code's guidelines are intended to serve as a yardstick of procedure and conduct for all ministers, including the Prime Minister.

However, as noted, the Prime Minister is the ultimate judge of breaches of the code and this has been the case since 1997.[4] Prior to then, the code stated that it was for 'individual Ministers to judge how best to act in order to uphold the highest standards'. The First Report of the Committee on Standards in Public Life recommended that the code be changed so that 'It will be for individual Ministers to judge how best to act in order to uphold the highest standards. *It will be for the Prime Minister to determine whether or not they have done so in any particular circumstance*'.[5] This recommendation is reflected at paragraph 1.6 of the current Ministerial Code.

The Ministerial Code and Misleading Parliament

One of the most high-profile ministerial resignations in the 20th century was that of John Profumo in 1963. Profumo, then Secretary of State for War, denied his affair with Christine Keeler stating there was 'no impropriety whatsoever' (impropriety in this case meaning sexual relations), thereby knowingly misleading the House of Commons.[6] The relevance of the relationship was not purely a moral issue; Ms Keeler was also involved with Colonel Yevgeny Ivanov, a naval attaché at the Soviet Embassy. Lord Denning's subsequent inquiry into the scandal was primarily concerned with the potential security risk. Then Prime Minister, Harold Macmillan, lamented the level of the lie in the debate following Profumo's resignation, stating:

> I do not remember in the whole of my life, or even in the political history of the past, a case of a Minister of the Crown who has told a deliberate lie to his wife, to his legal advisers and to his Ministerial colleagues, not once but over and over again, who has then repeated this lie to the House of Commons as a personal statement which, as the right hon. Gentleman reminded us, implies that it is privileged, and has subsequently taken legal action and recovered damages on the basis of a falsehood. This is almost unbelievable, but it is true.[7]

In Profumo's case, there was no question that he had blatantly misled the House of Commons. Once the truth came out, he had no choice but to resign. Breach of the Ministerial Code was not necessarily the only factor behind the resignation but the single misdemeanour that should prompt resignation in today's code—knowingly misleading Parliament—was enough to do so then, tilting the balance towards the code at least having teeth, if not serving as a 'terror'.

However, subsequent examples are not as clear-cut. The Scott Inquiry was launched in 1992 after government lawyers instructed prosecutors to stop the trial of executives from machine tool firm, Matrix Churchill, who were accused of selling arms-related equipment to Iraq in breach of export controls.[8] The collapse of the trial led Prime Minister, John Major, to launch an inquiry under Sir Richard Scott, resulting in the publication of the Scott report in 1996 which found, amongst other things, that government ministers had misled Parliament over the export policy.

The report concluded with the seemingly clear indictment that, '[i]n the circumstances, the Government statements in 1989 and 1990 about policy on defence exports to Iraq consistently failed, in my opinion, to comply with the standard set by paragraph 27 of the Questions of Procedure for Ministers and, more important, failed to discharge the obligations imposed by the constitutional principle of Ministerial accountability'.[9] However, in a vote over the findings of the report, John Major's government narrowly survived (by a single vote) 'by quite simply brazening it out and by openly disagreeing with the verdict that the Scott report had reached'.[10] The report led to no resignations.

At the time of the Scott report's publication, only William Waldegrave (who had been a junior minister in the foreign office), remained in office from the time period in question. Following the report's publication, there were calls for Mr Waldegrave to resign—as Adam Tomkins writes, 'on a number of occasions, the Scott report did find that Mr Waldegrave had misled Parliament, albeit without apparently realizing so at the time'.[11]

Tomkins queries, '[h]ow did we get from the strong words ('inaccurate', 'misleading', 'designedly uninformative') of the Scott report to the position where no minister resigned?' and proffers a variety of reasons in answer to this.[12] These range from the

3 Although based on an earlier document, 'The War Cabinet: Rules of Procedure', produced in 1917—see *FDA v Prime Minister* [2021] EWHC 3279 (Admin) [5].
4 ibid [12].
5 'The First Report of the Committee on Standards in Public Life' (1995) 49. Proposed addition emphasized.
6 HC Deb 22 March 1963, vol 674 col 810.
7 HC Deb 17 June 1963, vol 679 col 55.
8 Richard Norton-Taylor, 'Iraq arms prosecutions led to string of miscarriages of justice' *The Guardian* (London, 9 November 2012).
9 See HL Deb 26 February 1996, vol 569 col 1238.
10 Adam Tomkins, *The Constitution After Scott: Government Unwrapped* (Oxford University Press 1998) 36.
11 ibid 35-36.
12 ibid 36.

fact that the Major government had access to the report prior to its publication meaning they had time to analyse it and '[p]ublish an extremely partial (in two senses) and in places positively (i.e. knowingly and deliberately) misleading summary of and response to the report', to the lack of highlighted conclusions in the report's dense 1806 pages, which in themselves were not 'sharp verdicts'.[13]
In relation to Waldegrave, the report held that he did not intentionally mislead Parliament (even though Parliament was indeed misled and he ought to have realised the same). Further, there was no 'duplicitous intention' behind potentially misleading statements by government ministers to Parliament.[14]

This is an example of a literal interpretation of the wording of the Ministerial Code being utilised in the government's favour, in doing so potentially rendering it more of a 'perch' than a 'terror', particularly in the context of the wider report's findings on government failings. This calls to mind some potential similarities with the current 'Partygate' scandal and, as with the Scott report, specifically, the Ministerial Code's prescription that a Minister must 'knowingly' mislead Parliament. Boris Johnson has stated,

> Let me also say—not by way of mitigation or excuse, but purely because it explains my previous words in this House—that *it did not occur to me, then or subsequently, that a gathering in the Cabinet Room just before a vital meeting on covid strategy could amount to a breach of the rules* (emphasis added).[15]

Mr Johnson's defence here relied on inadvertent error and a more literal application of the Ministerial Code's wording that only those who 'knowingly mislead' Parliament are expected to resign.

A contrasting example of the inadvertent misleading of Parliament came to the fore in 2018 when Amber Rudd resigned as Home Secretary after unintentionally misleading the Home Affairs Select Committee within the context of the Windrush Scandal. Arguably, '[i]n constitutional terms, this is a precedent'.[16]

Amber Rudd's resignation letter to Prime Minister Theresa May was produced in response to a leak of an internal document setting out immigration targets. In the letter, Ms Rudd described her resignation as necessary 'because I inadvertently misled the Home Affairs Select Committee over targets for removal of illegal immigrants during their questions on Windrush'. Although Ms Rudd continued to deny any awareness of specific removal targets, she accepted that 'I should have been aware of this, and I take full responsibility for the fact that I was not'. Arguably, this indicates that a literal application of the linguistics of the Ministerial Code is not always appropriate or sufficient and the question is whether a minister 'should have been aware' and should therefore, as Rudd did, take responsibility.

There were a number of other high-profile resignations under the May administration for improper behaviour that could be seen to breach the standards expected under the Ministerial Code. These included Secretary of State for Defence Michael Fallon, Secretary of State for International Development (and current Home Secretary) Priti Patel, and First Secretary of State Minister for the Cabinet Office Damian Green. Theresa May has been viewed by various political commentators as a 'stickler for the rules'.[17] This raises the speculative question of whether the behaviour in question would have resulted in resignations had it occurred under a different administration led by a different leader.

Scarecrow of the Law?

In his book *The Good State: On the Principles of Democracy*, A C Grayling quotes Roman poet Juvenal's question, 'quis custodiet ipsos custodes? (who watches the watchmen?)' in relation to the House of Commons Code of Conduct.[18] The same might apply to the Ministerial Code. The instances explored above are merely selected examples and are too few and unrepresentative to seek to arrive at a definitive evaluation—there are obviously a myriad of factors that contribute to any ministerial resignation. However, they do illustrate that the Ministerial Code, with its lack of statutory footing, appears to have been applied inconsistently over time, depending on the current administration and Prime Minister. The code consequently operates with an extremely wide discretion and, to some degree, at the whim of the incumbent Prime Minister.

Returning to the title quotation, would Angelo consider the Prime Minister's approach to ministerial breaches to be making a 'scarecrow' of the Ministerial Code by offering the sanctuary of a 'perch' instead of serving as a 'terror'? Almost certainly yes. However, Angelo calls for the law to be carried out to the letter and without discretion in order to be adhered to. This is not necessarily the answer either, not least given that the code's historic lack of specificity on sanctions often led to a perception or expectation that any breach should lead to a blanket resignation, regardless of the scale or significance of the breach in question. This may alter now that the updated code provides for a range of sanctions, presumably to be applied proportionately with the gravity of the breach.[19] However, enforcement still relies on each Prime Minister's discretion.

Angelo may have been the chief advocate for rigid enforcement of definable rules, but at the end of *Measure for Measure* his own life is spared (after breaking those same rules) by an act of political mercy. As the title of the play suggests, balance is key. Shakespeare well understood that neither 'perch' nor 'terror' equates to good governance: a helpful reminder when considering the Ministerial Code and how it might best serve its purpose.

As noted above, this article was written in May 2022. The political landscape has since changed. At the time of publication, a new Ministerial Code has not been published although, as noted in the article, the Ministerial Code is generally revised at the start of each new administration.

13 ibid 36-37.

14 ibid and see HL Deb 26 February 1996 vol 569 col 1259.

15 Boris Johnson, 'Easter Recess: Government Update' *Hansard*, vol 712, debated on 19 April 2022.

16 Mike Gordon, 'The Prime Minister, the Parties, and the Ministerial Code' (*UK Constitutional Law Blog*, 27 April 2022).

17 'Britain's good-chap model of government is coming apart' *The Economist* (London, 18 December 2018).

18 AC Grayling, *The Good State: On the Principles of Democracy* (Oneworld Publications 2020) 88.

19 The Institute for Government's July 2021 report in fact recommended an updated code including, amongst other things, a range of possible sanctions. Tim Durrant, Jack Pannell, and Catherine Haddon, 'Institute for Government: Updating the Ministerial Code' (July 2021). In April 2021, the Committee on Standards in Public Life called for the same. See the letter from Lord Evans, Chairman of the Committee, to the Prime Minister dated 15 April 2021.

All Form but No Substance? A Critical Examination of the ENP's Success in Promoting Democracy and Good Governance in the EU's Neighbourhood

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As a key European Union (EU) foreign relations instrument, the European Neighbourhood Policy (ENP) governs the relations between the Union and sixteen countries to the east and south of EU territory.[1] These countries are primarily countries which aspire to become an EU member, or to pursue closer integration policies with the EU in general.[2] The key focus of the ENP is that of stabilising the EU neighbourhood in terms of economy, politics, and security.[3] In exchange for EU financial assistance, countries must meet strict conditions for governance and economic reforms, as articulated in the EU Association Agreements between its own government and Brussels.[4] Association Agreements concluded between the EU and partner countries typically stipulate commitments to economic and human rights reforms to be carried out, in exchange for tariff-free access to parts of the single market, and various forms of technical assistance.

In 2011, the European Commission (EC) articulated in its 'Review of The European Neighbourhood Policy' that the ENP's focus was to build 'deep and sustainable democracy and inclusive economic development'.[5] The Joint Communication issued the same year conceptualised the ENP as a guardian of the 'stability, prosperity and resilience of the EU's neighbourhood', rather than a custodian of democratic advancement, suggesting a slight shift from the original focus on promoting democracy as one of the ENP's foreign policy initiatives to an emphasis on promoting the EU's security interests.[6] Nilsson and Silander argue that the paradigm change from promoting democracy to enhancing regional security manifestly confirms the EU's implicit admission of the ENP's inadequacies in fulfilling the former endeavour.[7]

I argue that the ENP has largely been effective in promoting formal democratic reform, in terms of setting up electoral institutions and legislative infrastructure in the Eastern Neighbourhood,[8] but has

1 The sixteen countries include Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine in the East, and Algeria, Morocco, Egypt, Israel, Jordan, Lebanon, Libya, Palestine, Syria, and Tunisia in the South.

2 Florian Carmona, Kirsten Jongberg and Christos Trapouzanlis, 'The European Neighbourhood Policy | Fact Sheets on the European Union | European Parliament' (2021) <https://www.europarl.europa.eu/factsheets/en/sheet/170/the-european-neighbourhood-policy> accessed 18 April 2022.

3 ibid.

4 ibid.

5 European Commission, 'Review of the European Neighbourhood Policy' (European Commission 2011) <https://www.europarl.europa.eu/doceo/document/A-7-2011-0400_EN.html> accessed 6 June 2022.

6 European Commission, High Representative of the Union, 'Joint Communication to The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions. A New Response to a Changing Neighbourhood' (European Commission 2011) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011DC0303> accessed 6 June 2022.

7 Martin Nilsson and Daniel Silander, 'Democracy and Security in the EU's Eastern Neighbourhood? Assessing the ENP in Georgia, Moldova, and Ukraine' (2016) 12 Democracy and Security 44-61.

8 The Eastern Neighbourhood comprises Armenia, Azerbaijan, Belarus,

failed in promoting democratic values and adopting principles of good governance, for example by implementing anti-corruption policies or empowering civil society. In addition, I suggest that the limited progress of democratic advancement in the EU's neighbourhood is a result of the ENP's intergovernmental organisational logic; the existing institutional structure enables elites to strategically adopt an ostensibly democratic apparatus while neglecting the promotion of normative democratic principles.

This essay draws on quantitative and qualitative evidence and focuses its discussion on the Eastern Neighbourhood. Conventional literature on the EU's democratising impact has highlighted conditionality as one of the main causal modes.[9] It assumes that EU target states are rational actors in the international system, motivated to maximise their economic and security interests, and that strategic exchange between actors is conditional upon their relative bargaining power.[10] It follows that the larger the gains target states perceive from adopting the EU's conditionality requirements, the greater the likelihood of reforming their internal governance structures.[11] While the EU does not initiate coercive intervention under this model, the domestic adoption costs may upset the target state's internal status quo, particularly if presiding governments are soft authoritarian regimes.[12]

Throughout the years, the Southern Neighbours have struggled to gain EU membership; Turkey's progress has been tumultuous and uncertain, and Morocco's application was rejected in 1987. Considered against the later enshrinement of the geographic membership criterion, scholars have asserted that the Eastern Neighbours generally have more incentive to adopt democratic reforms as compared to the Southern Neighbours.[13] The Southern Neighbours vary widely in terms of the depth of their economic links to the Union; Scazzieri's study is illuminative regarding the lesser economic gain these countries perceive from potential EU membership, particularly in view of the substantial government reforms needed to adhere to EU conditionality requirements.[14] The regional strife and political turmoil following the Arab Spring in 2011 has also rendered many of these states hesitant to adopt institutional democratic reforms.

The causal mechanism between conditionality and the relative success of formal democracy over substantive democracy has not been addressed thoroughly enough in existing literature and warrants further discussion. To this end, this paper illustrates how conditionality under the ENP is effective in promoting democracy among the Eastern Neighbours, only to the extent that their governments have been able to perceive economic benefits from instituting reforms. I begin by surveying the organisational logic of the ENP and the Eastern Partnership, after which I examine the skewed progress of democratic advancement among the Eastern Neighbours in relation to indicators of formal democracy and substantive democracy. I then discuss how elites have abused the ENP's top-down operational practices and manifestly slanted the democratic advancement of the Eastern Neighbourhood towards the formal adoption of democratic apparatus, and at the expense of substantive democracy. I conclude by refuting the purported significance of Russian influence as inhibitory towards democratic advancement in the region.

The ENP was originally conceptualised as a catalyst of 'democracy, rule of law, respect for human rights and social cohesion' for states without EU membership prospects.[15] Ever since its official establishment in 2004, this foreign policy initiative has run in tandem with the EU's policy aim of enlargement.[16] Under this framework, the EU formulates bilateral Association Agreements which set tangible goals for democratic governance. Fulfilment of such conditionalities allow target countries access to economic and technological rewards.[17] Critics have often described the relationship as 'coercive' and 'asymmetrical'; nevertheless, it is largely the EU's attempt at transforming its neighbourhood through soft, ideational power as opposed to military intervention.[18] The Eastern Partnership (EaP) was launched in 2009 as an Eastern dimension of the ENP; with a particular focus on the Eastern Neighbourhood including Caucasian and former Soviet states.[19]

While formal democracy is contingent upon electoral practices and mechanisms, substantive democracy is based not only on 'citizens' [participation] in the making of decisions that concern them, but also that decisions must not be served wrapped in a shroud of ignorance'.[20] Measurement of substantive democracy therefore requires an examination of the outcomes of democratic governance and practice, with a focus on fairness, equality, and justice. Insofar as democratic procedures alone cannot overcome inequalities between individuals by mobilising political resources to their benefit, certain democratic principles must be incorporated into governance structures and policies.[21] Addink further operationalises the definition of substantive democracy to encapsulate 'good governance' principles such as establishing strong democratic norms, accountability systems, independent anti-corruption institutions, and legal-rational guarantees of media freedom and independence.[22]

Building on this, Pridham conceptualises the ENP's promotion of democracy as a two-track model.[23] Under this model, the ENP

Georgia, Moldova, and Ukraine.

9 Frank Schimmelfennig and Hanno Scholtz, 'Legacies and Leverage: EU Political Conditionality and Democracy Promotion in Historical Perspective' (2010) 62 Europe-Asia Studies 443-460.

10 ibid.

11 ibid.

12 Naim Mathlouthi, 'The EU Democratisation of The Southern Neighbours Since the 'Arab Spring': An Inherently Inadequate Approach' (2021) 4 International Journal of Social Science Research and Review.

13 Schimmelfennig and Scholtz, (n 9) 2.

14 Luigi Scazzieri, 'Rethinking The EU'S Approach Towards Its Southern Neighbours' (Centre for European Reform 2020) <https://www.cer.eu/publications/archive/policy-brief/2020/rethinking-eus-approach-towards-its-southern-neighbours> accessed 22 April 2022.

15 European Commission, 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Office for Official Publications of the European Communities 2003) 11-12 <https://www.europarl.europa.eu/sides/getDoc.do?objRefId=31192&language=EN> accessed 18 April 2022.

16 Mor Sobol, 'It's the Member States, stupid! The deadlock which bedevils the European Neighbourhood Policy' (2015) 68 Studia Diplomatica 63-76.

17 ibid.

18 Ondřej Horký-Hlucháň and Petr Kratochvíl, "Nothing Is Imposed in This Policy!': The Construction and Constriction of the European Neighbourhood' (2014) 39 Alternatives: Global, Local, Political 252-70.

19 Frank Schimmelfennig, 'Europeanisation Beyond the Member States' (2010) 8 Zeitschrift für Staats- und Europawissenschaften 319-39.

20 Manuel Couret Branco, *Political Economy for Human Rights* (Routledge 2020) 88.

21 Johanna Severinsson, 'Defining Democracy in The European Union: Assessing the Procedure and the Substance' (PhD, Lund University Department of Political Science 2022) 4-22.

22 Henk Addink, *Democracy and Good Governance* (Oxford University Press 2019) 91–96.

23 Nilsson and Silander, (n 7) 1.

promotes both formal and substantive elements, but in a disjointed manner. As a result, a country may succeed in the former while completely neglecting the latter. This is apparent in Moldova's electoral development: in the early 2000s, Moldova's parliament required at least 6% share of the primary vote for political parties to be represented in the legislature, 9% for two-member electoral blocks, and 2% for three and more member-coalitions.[24] This arrangement severely undermined pluralism in the Moldovan parliament, as measured by the number of parties as an indicator for formal democracy. In 2005, the European Parliament Resolution on Parliamentary Elections in Moldova directed the country to reduce this threshold to 4% for political parties and 8% for electoral blocks, so that smaller parties could have greater representation in civic discourse.[25] Furthermore, the EU-Moldova Action Plan (2005) exemplifies the formal aspects of democracy by prioritising the 'the stability and effectiveness of institutions guaranteeing democracy [and] ensuring the democratic conduct of parliamentary elections… in accordance with European standards'.[26]

Moldova's significant degree of adherence to formal democratic reform has not, however, been matched by attention to aspects of substantive democracy. Despite recommendations on the empowerment of civil society, media transparency, and attempts at combating corruption, official descriptions of such initiatives have been equivocal and rarely been scaled against a quantitative benchmark.[27] The stark contrast as observed between indicators of formal democracy and substantive democracy is indicative of how the Moldovan government has pursued the two tracks of democracy with different degrees of commitment.

As per this two-track model, it is evident that while the ENP has successfully influenced Eastern Neighbours into adopting formal aspects of democracy through electoral mechanism reform, the latter have not undergone further development in terms of substantive democracy. Inhibitors of substantive democracy and good governance such as corruption and elite nepotism, media repression, and poor political representation of civil society have not been eradicated. As will be explained in the following sections, this two-track model results in the consistently poor scores of Eastern Neighbours in various democracy indicators. In particular, negative trends have been reported, based on heavily-weighted substantive democracy factors.

Ukraine's case further demonstrates the uneven development and entrenchment of formal democracy and substantive democracy. Having consistently improved its electoral integrity per the EU directive, the International Election Observation Mission concluded that 'voters [were able to make] informed choices between distinct alternatives and to freely and fairly express their will' in Ukraine's 2006 parliamentary elections.[28] In July 2019, the Parliament approved a new Electoral Code that had begun being drafted in 2015, providing for a proportional representation system which combined an open and closed party list system, as well as a new system for local elections.[29] The EU-Ukraine Association Agreement established the primary reform objectives in the country, and following these developments, Ukraine held open and democratic presidential and legislative elections in 2019, marking the country's first peaceful shift of power since the events of Euromaidan.[30] These examples demonstrate how EU directives have substantially improved formal democracy in Ukraine.

Nevertheless, factionalism continues to account for conflictual relationships between elites, at times even leading to constitutional crises; power struggles over anti-corruption reforms between the Constitutional Court of Ukraine, the Ukrainian Parliament, and the President have gripped the country since October 2020.[31] As for media freedom, Ukraine has consistently ranked around 90th out of 180 countries from 2006 to 2020; its Freedom House score of 62 in 2020 only puts it in the 'partly free' range.[32] Ukraine's EIU democracy index has dropped from 6.94 in 2006 to 5.81 in 2020, further demonstrating the dearth of substantive democratic norms in the country.[33] Prevailing corruption problems also remain a contentious issue. Although Ukraine revamped its anti-corruption legislation in 2011 and 2014, selective law enforcement severely hampers its operation.[34] In 2019, Zelensky's presidency even commenced with the pursuit of a corruption investigation against his predecessor.[35] Although the country's Corruption Perceptions Index (CPI) score has incrementally improved from 2.8 in 2006 to 3.3 in 2020, anti-corruption campaigns still emphasise form over substance.

In Moldova and other Eastern Neighbours, there is a similar trend of unequal development between official (formal) democracy and genuine (substantive) democracy. The EU-Moldova Action Plan established a framework for Moldova's domestic institutions and foreign policy that was compatible with EU membership standards; the Law on Whistleblowers was implemented in November 2018, following major democracy-related aspects of the EU Action Plan.[36] New regulations provide legal protection for anyone ready to testify about wrongdoings and irregularities, as well as a specialised

24 The European Commission for Democracy Through Law (Venice Commission, Council Of Europe), The Office for Democratic Institutions and Human Rights of the OSCE, 'Joint Recommendations on the Election Law and the Election Administration in Moldova' (Organization for Security and Co-operation in Europe 2004) <https://www.osce.org/odihr/elections/moldova/41959> accessed 6 June 2022.

25 Nilsson and Silander (n 7) 1.

26 European Commission. (2005). *EU-Moldova Action Plan* (Office for Official Publications of the European Communities) 4 <https://eeas.europa.eu/archives/docs/enp/pdf/pdf/action_plans/moldova_enp_ap_final_en.pdf> accessed 6 June 2022.

27 ibid.

28 Yhiah Information Agency, 'Ambassador Maasikas: IMF, EU financial aid, visa-free travel depend on fighting corruption' (2020) <https://www.unian.info/politics/ambassador-maasikas-imf-eu-financial-aid-visa-free-travel-depend-on-fighting-corruption-11218355.html> accessed 22 April 2022.

29 Oksana Huss and Oleksandra Keudel, 'Ukraine: Nations in Transit 2021 Country Report' (Freedom House, 2021) <https://freedomhouse.org/country/ukraine/nations-transit/2021> accessed 18 April 2022.

30 ibid.

31 Emily Channell-Justice, 'Can the High Anti-Corruption Court Fix Ukraine's Corruption Problem? Q&A with REECA Grad Ivanna Kuz' <https://huri.harvard.edu/high-anti-corruption-court-ivanna-kuz> accessed 20 April 2022.

32 The Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health?' (The Economist 2020) <https://www.eiu.com/n/campaigns/democracy-index-2020/> accessed 18 April 2022.

33 ibid.

34 Andrew McDevitt, 'The State of Corruption: Armenia, Azerbaijan, Georgia, Moldova and Ukraine' (Transparency International 2015) 8-11 <https://www.transparency.org/en/publications/the-state-of-corruption-armenia-azerbaijan-georgia-moldova-and-ukraine> accessed 18 April 2022.

35 Al Jazeera, 'Ukraine probes ex-leader Petro Poroshenko in intelligence case' (2010) <https://www.aljazeera.com/news/2020/6/10/ukraine-probes-ex-leader-petro-poroshenko-in-intelligence-case> accessed 18 April 2022.

36 Victor Gotisan, 'Moldova: Nations in Transit 2021 Country Report' (Freedom House, 2021) <https://freedomhouse.org/country/moldova/nations-transit/2021> accessed 18 April 2022.

reporting mechanism.[37] Moldova held its first parliamentary elections in February 2019, adopting a mixed electoral system of one national constituency in which fifty one legislators were elected by first-past-the-post in single-member constituencies and fifty were elected by proportional representation from closed party lists.[38]

Nevertheless, while Moldova's Bertelsmann Transformation Index (BTI) score – which sheds light on the quality of substantive democracy – has seen incremental improvement from 5.40 in 2006 to 5.80 in 2020,[39] this trend is often attributed to the protests in 2009, 2015, and most recently, in 2019.[40] In 2009, in the wake of an allegedly fraudulent election in which the governing Party of Communists of the Republic of Moldova (PCRM) won a majority of seats, civic unrest rocked several Moldovan cities.[41] The movement represented a turning point in contemporary Moldovan politics. Having held snap elections after Parliament was dissolved, the Alliance for European Integration, a centre-right anti-communist ruling coalition, was created in response to the PCRM's victory in the July 2009 polls, paving the way for closer Moldovan-EU relations and a greater drive to fulfil EU conditionality requirements in the years to follow.[42] After the fall of the PCRM in 2009, the unfulfilled hopes that Moldova may institute governmental reforms of transparency and accountability ultimately paved the way for the 2015 protests, far exceeding the scale of their predecessor.

Finally, in 2019, a constitutional crisis and subsequent attempts to form a new government culminated in the positions of President, Prime Minister, and Speaker of the Parliament being contested by competing claims.[43] This unleashed a movement of protests in which opposing factions rallied their support for different candidates. Apart from calls for the government's resignation and the annulment of recently approved laws, the protests have illuminated how Moldovan-EU relations have transcended the institutional level by galvanising democratic advancement, having socialised the Moldovan polity to expect higher standards of transparency and accountability from their government. With the internalisation of democratic values and good governance principles, these examples demonstrate the inextricability of Moldovan-EU relations from democratic progress and political awakening in the country on the level of both institutions and the citizenry.

In comparison, Belarus' BTI score remained the same at 4.38 throughout 2006 to 2020.[44] It is worth noting that while Belarus did experience protests against President Alexander Lukashenko in 2005, followed by a subsidiary movement in 2006, these were quickly and heavily suppressed by the police.[45] Similarly, Azerbaijan's BTI score has even noted a 0.37 fall from 3.80 in 2006 to 3.43 in 2020.[46] Although protests against an alleged government fraud in parliamentary elections erupted in Azerbaijan in mid-2005, the movement subsided after five months when the police eventually suppressed riots with tear gas and water cannons.[47] These examples illustrate that progress in various democracy changes remains negligible, if not regressing, among certain states of the Eastern Neighbourhood.

I will now consider the reasons for the incongruence between formal and substantive democratic norms as brought about by the institutional framework under the ENP. An examination of the causal mechanism necessitates a dual consideration of the role played by elites as well as the EU policy net. The ENP imposes rigid conditionality requirements on partner countries. As elites in target states fail to perceive reasonable prospects for EU membership, they also believe that there is little to gain from adopting substantive democratic reforms in their countries, since the economic benefits of EU membership are closed off to them. They are also wary of potential domestic costs, as they are likely to bear the largest costs of political instability. Elites therefore strategically adopt formal forms of democratisation (for which benefits from the EU are more easily achieved) while neglecting the development of good governance principles. This problem is exacerbated by the lack of organisational guidelines through which the European Commission may review the progress of substantive reforms in partner countries and adopt signalling measures.

As EU-EaP cooperation initiatives have largely adopted a top-down approach, I argue that incumbent EaP government office-bearers strategically adopt formal forms of democratisation while neglecting the promotion of normative democratic and good governance principles. Caiser similarly attributes the phenomenon to elite perception of unlikely EU-membership prospects, as well as a fear of losing power.[48] This discussion warrants a closer examination of the role of elites in hindering democratic advancement. Given the inequality of bargaining power between the two actors, democratisation conditions are imposed by the EU upon EaP states as a crucial criterion to receive economic rewards.[49] The adoption of EU legislation, legal acts, and court decisions in Moldova serves as a prime example – having repeatedly demanded Moldova adopt EU electoral standards and laws, the ENP has demonstrated its leverage over EaP governments via potential economic incentives.[50]

Elites seek both to legitimise their regimes and to extract economic benefits from the EU; thus, they strategically adopt democratic reforms, such as legislative overhauls, which are most perceptible to their EU partners.[51] In contrast, improvements in substantive democracy, such as establishing independent anti-corruption agencies, safeguarding media freedom, and empowering civil society, are not only less quantifiable and recognisable indicators of

37 ibid.
38 ibid.
39 The Economist Intelligence Unit, (n 33) 6.
40 Cristian Cantir and Ryan Kennedy, 'Balancing on the Shoulders of Giants: Moldova's Foreign Policy toward Russia and the European Union' (2014) 11 Foreign Policy Analysis 397-416.
41 Ellen Barry, 'Protests in Moldova Explode, With Help of Twitter' *The New York Times* (New York, 7 April 2009) <https://www.nytimes.com/2009/04/08/world/europe/08moldova.html> accessed 18 April 2022.
42 ibid.
43 Patrick Kingsley, 'Moldova Had Two Governments One Has Finally Resigned' *The New York Times* (New York, 14 June 2019) <https://www.nytimes.com/2019/06/14/world/europe/moldova-new-government.html> accessed 18 April 2022.
44 'BTI Index. Political Transformation' <https://bti-project.org/en/> accessed 6 June 2022.
45 ibid.
46 ibid.
47 OECD, 'Anti-Corruption Reforms in Azerbaijan: Pilot 5th Round of Monitoring Under the OECD Istanbul Anti-Corruption Action Plan' (2022) <https://www.oecd-ilibrary.org/content/publication/3ae2406b-en> accessed 6 June 2022.
48 Tom Casier, 'The EU's two-track approach to democracy promotion: the case of Ukraine' (2011) 18 Democratization 956–77.
49 Sonja Grimm, 'Democracy Promotion and the European Union' in Peace Research Institute Frankfurt / Leibniz-Institut Hessische Stiftung Friedens- und Konfliktforschung, *Democracy Promotion in Times of Uncertainty: Trends and Challenges* (Peace Research Institute Frankfurt 2018) 16-19.
50 ibid.
51 ibid.

democracy to EU partners, but are also perceived to be potentially disruptive towards the hierarchical entrenchment of the incumbent regime.[52]

Civic society in former Soviet states such as Moldova often lacks channels of political representation and participation. Coupled with failed authoritarianism, the circumstances give rise to a political pluralism that renders substantive governance reforms extremely precarious to elites seeking to preserve their power.[53] Furthermore, elites interpret the ENP's rigid policy conditionality and its reluctance to offer a reasonable prospect of EU membership as indicative of the minimal economic benefits to be gained by adopting substantive democratic reforms.[54] Given that these reforms also create possibilities of upsetting vested interests and decrease support for the governing administration, which may directly threaten elites' hold on power, their cost-benefit analysis produces an incongruence between formal and substantive democratic norms in these countries.

Office-bearers must be convinced of the value of abandoning the old equilibrium – as elites are primarily concerned with preserving their power and vested interests, the incentives towards instituting substantive democracy must, to some extent, benefit them also. In this respect, a parallel may be drawn between EaP states and the Southern Neighbours: as the latter's geographical location preemptively refutes the possibility of EU membership, they are also less incentivised towards improving the quality of democracy.[55] The 2017 EU-EaP Summit Joint Declaration has negated any possibility for EU membership entry for at least the coming decade.[56] Given that EU membership prospects are expected to be confined within the Association Agreements, elites are understandably deterred from abandoning the current equilibrium to institute substantive democratic reforms.[57]

Here, Ukraine again serves as an apt illustration. In keeping with EU recommendations, Ukraine has introduced proportional representation to improve electoral inclusivity.[58] This development did not, however, resolve entrenched issues of factionalism, selective law enforcement, and large-scale electoral fraud, and largely failed to clarify the power distribution between the Prime Minister and the President.[59] Zelensky's administration has continued to stifle media freedom by banning opposition news outlets such as Yandex and RosBiznes Consulting (RBC), despite EU recommendations.[60]

Although an independent High Anti-Corruption Court of Ukraine (HACC) was established in April 2019, the vested interests of the judicial elite continue to threaten the rule of law.[61] During mid-2020, members of the Constitutional Court made a series of decisions which threatened to destroy the HACC.[62] The following August saw the Constitutional Court declaring Artem Sytnyk's appointment as director of the National Anti-Corruption Bureau (NABU) in 2015 as unconstitutional, a move that was deemed 'politically motivated' by officers of the NABU.[63] By autumn, the blockage of a judicial reform initiative was backed by the Parliament, the President, and by twenty members of the High Council of Justice, some of whom face corruption charges. This marks the culmination of democratic backsliding; attempts to adopt transparency reforms are being reversed.[64] Although contemporary Ukrainian elites reportedly identified the institution of democratic reforms as a prerequisite for EU candidacy, they also contended that only formal democratic measures should be implemented.[65] These examples not only demonstrate the endorsement of formal democracy over substantive democracy, but also illuminate the extent to which vested interests have subsumed attempts at improving the transparency and accountability of the government, particularly in view of the low EU membership prospects.

The model is also evident in other EaP states. Following EU recommendations, Georgia introduced proportional representation in its 2004 constitutional reform.[66] Although the initiative purportedly promotes pluralism, critics have pointed out that the demarcation of electoral districts do not reflect geographical distribution of voter density.[67] Georgia is yet one more example where the advancement of substantive democracy has been considered subsidiary to that of formal democratic apparatus.

The lack of precise organisational guidance is one of the principal shortcomings of this top-down strategy, as it provides elites with substantial flexibility to circumvent the adoption of substantive democratic reforms, and deprives the European Commission of the ability to follow up with countermeasures, should elites fail to meet the original commitments.[68] Although the European Commission can in principle sanction regressions by withdrawing the conditional EU economic benefits, this watchdog function is greatly hampered by the fact that democratic backsliding or stagnation itself is not reflected in the current indicators. To the extent that top-down EU policies neglect the quantification and appraisal of procedural democratic elements, the European Commission remains powerless in closing this policy loophole. This limitation creates an especially undesirable effect for the EU's normative power: elites interpret it as a sign of weakness or general apathy, creating a positive feedback loop which further encourages the incongruence of formal and substantive democratic reforms.

52 Schimmelfennig and Scholtz (n 9)

53 ibid.

54 Heather Grabbe, 'European Union Conditionality and the *Acquis Communautaire*' (2002) 23(3) International Political Science Review 249-68.

55 Tanja Börzel and Frank Schimmelfennig, 'Coming Together or Drifting Apart? The EU's Political Integration Capacity in Eastern Europe' (2017) 24 Journal of European Public Policy 122–40.

56 Petra Kuchyňková and Juraj Hajko, 'Ten years of EaP: successes but also new challenges' (2019) 28 International Issues & Slovak Foreign Policy Affairs 73-83.

57 ibid.

58 ibid.

59 Kenneth Geers, *Alliance Power for Cybersecurity* (Atlantic Council 2020) 11-16.

60 'Russian Media Organisations Banned for Three Years in Ukraine' (Safety of Journalists Platform, 31 July 2018) <https://fom.coe.int/en/alerte/detail/36211014> accessed 6 June 2022.

61 Diane Francis, 'Ukraine's reforms remain hostage to corrupt courts' (Atlantic Council, 15 September 2020) <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraines-reforms-remain-hostage-to-corrupt-courts/> accessed 22 April 2022.

62 Channell-Justice (n 32) 5.

63 ibid.

64 ibid.

65 Geers (n 64) 10.

66 Neil MacFarlane, 'Afterword' in Stephen Jones and Neil MacFarlane (eds) *Georgia: From Autocracy to Democracy* (University of Toronto Press 2020) 229-36.

67 ibid.

68 Morten Broberg, 'Furthering Democracy through the European Community's Development Policy: Legal Limitations and Possibilities' (International IDEA 2010) <https://www.idea.int/sites/default/files/publications/chapters/the-role-of-the-european-union-in-democracy-building/eu-democracy-building-discussion-paper-12.pdf> accessed 6 June 2022.

To conclude this essay, I will refute the purported inhibitory effect of Russian influence upon democratic advancement in the Eastern Neighbourhood. Such arguments assert that the Russian administration has interfered with democratic and governance reforms of EaP states to hamper their chances at EU membership.[69] Scholars have argued that geopolitical interests have characterised the Russian administration's perception of Eastern Europe, meaning that Moscow will seek to frustrate EaP states' attempts at building harmonious relations with the EU.[70] There is, however, insufficient evidence to suppose a clear relationship between Russia's autocratic influence and the stagnant democratic development among EaP states. While theoretical predictions associate geographical proximity to Russia with democratic foreclosure, Armenia demonstrates that the success of democratic advancement is also largely dependent on strategic policy formulation. While Armenia abandoned the Association Agreement for membership in the Russian-led Eurasian Union in 2013,[71] the country has articulated plans for judicial reform pursuant to the EU-Armenia justice policy dialogue and continued its partnership with the EU.[72] Alongside the installation of a pro-democracy government following the 2018 Armenian Revolution, these developments have holistically improved its EIU democracy index from 4.09 in 2012 to 5.35 in 2020.[73]

It is apparent that the ENP has yielded skewed results in promoting formal democracy over substantive democracy, calling for a thorough understanding of the underlying causes to remedy this situation. This essay has argued that the top-down intergovernmental promotion of democracy has manifestly encouraged elites to adopt an asymmetrical approach towards democratic reforms. Ultimately, attempts to promote the EU's democratic norms must go beyond the formal apparatus – they must focus on the operational logic of the ENP, and work towards empowering civil society from the level of the citizenry.

69 ibid.

70 Jean Crombois, 'Conflicting Narratives? Geopolitical and Normative Power Narratives in the EU Eastern Partnership' (2017) 49 Politeja 109-26.

71 Stanislav Secrieru and Sinikukka Saari (eds) *The Eastern Partnership a Decade On* (European Union Institute for Security Studies 2019) 84-95 <https://www.iss.europa.eu/sites/default/files/EUISSFiles/cp153_EaP.pdf> accessed 22 April 2022.

72 ibid.

73 The Economist Intelligence Unit, (n 33) 6.

The Forgotten Question: Clarifying the Extent of the Protection Afforded by Actual Occupation under the Land Registration Act 2002

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Introduction

Issues of priority are at the centre of English land law. Where a plot of land in which a third party has an interest is transferred from one party to another, a conflict arises between this third party and the transferee: whose interest has priority? If push comes to shove, can the transferee prevent the third-party interest holder from exercising her right, or is the third-party interest-holder entitled to enjoy her interest in the face of the transferee's objections?

The Land Registration Act ('LRA') 2002 does much to answer this question. Under section 29, pre-existing unregistered interests are postponed to the interests of a registered disponee taking for valuable consideration. As a result, any such unenforceable interests are rendered *prima facie* unenforceable against a purchaser. However, section 29 only has this effect where the priority of the interest in question is not 'protected'. Interests falling under any of the paragraphs of schedule 3 LRA 2002 are within this special category of 'protected' interests.[1] This article is concerned with paragraph 2 of schedule 3, which serves the important function of safeguarding interests 'belonging at the time of the disposition to a person in actual occupation'[2] and 'whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition'.[3] Paragraph 1 is limited to leaseholds and paragraph 3 is limited to easements and *profits à prendre*. By contrast, paragraph 2 is not constrained in its application to any particular interests. This makes paragraph 2 potentially far-reaching in its effects and a powerful defence against the postponement mechanism in section 29.

However, the interpretation of schedule 3 paragraph 2 has proved a significant headache for the courts. First, disagreement has emerged regarding precisely when the disposed land must be occupied.[4] Second, there has been debate as to which factors might be relevant when deciding whether a person is in actual occupation. The relevance courts should accord to a person's 'intentions and wishes' has remained particularly ambiguous in this regard.[5] Third, in the context of the rectification and alteration provisions in the LRA 2002, the question has arisen whether a 'right to rectify' the register might amount to an overriding interest under schedule 3 paragraph 2.[6]

1 LRA 2002, s 29(2)(a)(ii).
2 ibid sch 3 para 2.
3 ibid sch 3 para 2(c)(i).

4 Lewison J in *Thompson v Foy* [2009] EWHC 1076 (Ch) suggested that actual occupation must exist both at the time of the disposition and at the time of registration. This view differs from the position under section 70(1)(g) LRA 1925 (see, for example, Lord Oliver in *Abbey National Building Society v Cann* [1991] 1 AC 56, 88).
5 Courts have increasingly considered a party's state of mind when analysing actual occupation. See, for example, *Link Lending Ltd v Bustard* [2010] EWCA Civ 424 [27] (Mummery LJ) and *Bernice Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB) [38] (Ramsey J). For criticism of this approach, see Christopher Bevan 'Overriding and over-extended? Actual occupation: a call to orthodoxy' (2016) 2 Conveyancer & Property Lawyer 104–117.
6 The so-called '*Malory 2* argument', named after *Malory Enterprises Ltd v*

Behind these controversies, however, the question whether the protection afforded by paragraph 2 is coextensive with actual occupation seems to have been largely forgotten. This question did receive some notable attention under the LRA 1925. Applying section 70(1)(g) LRA 1925—the precursor to schedule 3 paragraph 2 in the LRA 2002—the decisions in *Ashburn Anstalt v Arnold*[7] and *Ferrishurst v Wallcite*[8] came to opposite conclusions regarding whether occupation of part of the land could protect an interest in the whole. The LRA 2002 seems to preclude this possibility by providing that an interest is only overriding 'so far as relating to land … in actual occupation'.[9] However, schedule 3 paragraph 2 is not free from ambiguity in this respect. In particular, the change in the wording from section 70(1)(g) LRA 1925 raises the question whether the words 'relating to' enable the protection afforded by paragraph 2(1) to extend *beyond* the land actually occupied.

I will attempt to answer this forgotten question. First, I will outline in brief the pre-LRA 2002 disagreement regarding the scope of the protection afforded by actual occupation. Second, I will analyse the changes implemented by the LRA 2002. I will demonstrate that the vexed question is whether 'relating to land … in actual occupation' should be interpreted narrowly or broadly. Under the narrow interpretation, only an interest in land which is actually occupied by the interest-holder would be protected against postponement; under the broad interpretation, schedule 3 paragraph 2 also protects an interest in land which, although not itself occupied, still 'relates to' occupied land. Third, I will consider the merits of both the broad and narrow interpretations. I will examine the alternative drafting options available to Parliament, analogous language in the pre-LRA 2002 case law, the suggestions of The Law Commission of England and Wales, and the policy implications of each interpretation. From these I will argue that only the narrow interpretation is ultimately convincing. As I will demonstrate, this conclusion has far-reaching implications for the interaction between postponement and protection provisions in the LRA 2002.

I. Pre-LRA 2002 Judicial Disagreement

Under the LRA 1925, there was conflicting case law surrounding the extent of the protection afforded by actual occupation. Section 70(1)(g) LRA 1925 served a function analogous to schedule 3 paragraph 2 LRA 2002. Under section 70(1)(g), the '[t]he rights of every person in actual occupation of the land' would be overriding and thereby take priority over the interest of a subsequent purchaser. However, while section 70(1)(g) made it clear that a right in the land actually occupied would be overriding, the statute was unclear as to precisely how far this overriding status would extend. Two cases interpreting section 70(1)(g) came to markedly different conclusions on this point.

In *Ashburn Anstalt v Arnold*[10], Mr Arnold held the head-lease in several properties and granted an informal sublease to Arnold & Co. Arnold & Co. entered into possession of two of these properties. Mr Arnold and Arnold & Co. then both entered into an agreement with Matlodge Limited to sell the head-lease and sub-lease in the properties, respectively. The agreements permitted Arnold and Arnold & Co. to remain in the property as "licensees". The benefit of these agreements was assigned by Matlodge to Cavendish, resulting in the head-lease and sub-lease merging in the freehold. The freehold was ultimately transferred to Ashburn Anstalt subject to the original agreement between Arnold & Co. and Matlodge. Ashburn Anstalt wrote to Mr Arnold, requesting that Arnold & Co. give up possession; when the latter refused, Ashburn Anstalt brought proceedings seeking an order for possession. The relevant question before the court was whether the agreement between Arnold & Co. and Matlodge had created a tenancy which took effect as an overriding interest under section 70(1)(g) LRA 1925 by virtue of Arnold & Co.'s actual occupation. Fox LJ in the Court of Appeal found that Arnold & Co. had a tenancy in the property and that the tenancy was overriding under section 70(1)(g). However, while denying Ashburn Anstalt an order for possession, Fox LJ also adopted a narrow interpretation of the protection afforded by section 70(1)(g):

> The land occupied by Arnold & Co. at the date of the sale and transfer to the plaintiff was registered land; it was part of a larger area comprised in a single title. The overriding interest will relate to the land occupied but not anything further. Thus, we do not think it can extend to any area comprised in the single title but not then occupied by Arnold & Co.[11]

This passage reflects two important propositions. First, occupation of part does not automatically constitute occupation of the whole. This follows from Fox LJ's conclusion that, although Arnold & Co occupied 'part of a larger area comprised in a single title', an interest in the 'area comprised in the single title' was not protected beyond the land actually occupied. This precludes any argument that a claimant might be deemed in law to be occupying the whole site by virtue of her occupation of part. Second, and more far-reaching, the overriding status of any interest extends only so far as the land is occupied. To use the 'protection' terminology adopted in the LRA 2002, the protection against postponement afforded by actual occupation only encompasses an interest in the land actually occupied. An interest in land which is not in actual occupation cannot benefit from section 70(1)(g) LRA 1925.

The Court of Appeal reached a different conclusion in *Ferrishurst v Wallcite*.[12] Ferrishurst Ltd had an option to purchase the underlease of a site. The site consisted of a building, comprised primarily of office space, and an adjoining garage. Ferrishurst sought to exercise this option after Wallcite Ltd acquired the property. However, Ferrishurst had failed to protect its option by entering it in the register. Ferrishurst therefore argued that the option was an overriding interest under section 70(1)(g) LRA 1925. Ferrishurst's justification was that it was in actual occupation of the office space under a sub-underlease granted by Wallcite's predecessor in title. The vexed issue was whether Ferrishurst's actual occupation of part of the site protected its option to purchase the whole of the site.

Judge Wakefield in the County Court held that *Ashburn* was binding. He therefore found that Ferrishurst's interest was only overriding under section 70(1)(g) LRA 1925 to the extent of Ferrishurst's actual occupation of the office space and denied Ferrishurst the right to

Cheshire Homes (UK) Ltd [2002] EWCA Civ 151. There is also the related debate over whether an adverse possessor's right to be registered as proprietor of an estate is a potentially overriding interest under schedule 3 paragraph 2(1), as the Law Commission has suggested: Law Com No 271, para 14.64.

7 *Ashburn Anstalt v Arnold* [1989] Ch 1.

8 *Wallcite Ltd v Ferrishurst Ltd* [1999] Ch 355.

9 LRA 2002, sch 3 para 2(1).

10 *Ashburn* (n 7).

11 ibid 28F.

12 *Wallcite Ltd v Ferrishurst Ltd* [1999] Ch 355. Robert Walker LJ referred to *Ashburn* as a 'formidable obstacle' to Ferrishurst's argument: 361.

exercise its option.[13] Robert Walker LJ, however, accepted an argument, advanced by counsel for Ferrishurst, that *Ashburn* was decided *per incuriam* because the Court of Appeal 'would not have decided the case as it did' if it had been made aware of the relevant authorities.[14] On the basis of the third exception in *Young v Bristol Aeroplane*,[15] Robert Walker LJ held that he was not bound by the precedent in *Ashburn*. He instead held that

> a person in actual occupation of a part of the land comprised in a registered disposition can enforce against the new registered proprietor any overriding interest which he has either in the land, or part of the land, occupied by him or in the remainder, or part of the remainder, of the land comprised in the registered disposition in question.[16]

Since Ferrishurst was in actual occupation of part of the site, the unregistered option was protected with respect to the whole plot of land. Therefore, following *Ferrishurst*, the protection afforded by actual occupation under section 70(1)(g) LRA 1925 is not necessarily coextensive with the actual occupation itself.

II. Schedule 3 Paragraph 2 LRA 2002

A. The broad and narrow interpretations

The LRA 2002 departs from the position in *Ferrishurst* that occupation of part of the land can protect an interest in the whole. Schedule 3 paragraph 2 provides that

> An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—[17]

Notwithstanding this clarification—which reflects a conscious decision by the Law Commission[18]—the new provision is not wholly devoid of ambiguity. In particular, the phrase 'relating to' is problematic. The meaning of this phrase in schedule 3 paragraph 2 has only once been touched on judicially, in *Chaudhary v Yavuz*.[19] Yavuz's predecessor in title had promised Chaudhary that Chaudhary could erect and use a stairway on the land adjoining Chaudhary's in order to access the upper floors of Chaudhary's property. Chaudhary claimed that this promise by Yavuz's predecessor in title gave rise to a proprietary equity by estoppel under section 116(a) LRA 2002. Yavuz acquired the adjoining land for valuable consideration and was registered as a freehold proprietor. Yavuz then refused to permit Chaudhary to use the stairway on the basis that any equity by estoppel Chaudhary may have had in the land had been postponed under section 29. Counsel for Chaudhary argued that Chaudhary's purported interest over the stairway and alleyway was protected under schedule 3 paragraph 2 LRA 2002 by virtue of actual occupation on four grounds.[20] Three of these grounds were more 'conventional': first, counsel argued that Chaudhary was in actual occupation through the metal structure that had been erected in the physical space containing the stairway.[21] Second, that Chaudhary had acquired occupation by his contractors some years prior which he had never given up.[22] Third, that Chaudhary was in actual occupation through his tenants, who had been using the stairway and balcony.[23] Each of these grounds was rejected by Lloyd LJ in the Court of Appeal.[24]

Only the fourth ground put forward by counsel for Chaudhary raised the ambiguity surrounding 'relating to' in schedule 3 paragraph 2 LRA 2002.[25] Counsel argued that, even if there was no actual occupation of the stairway, the purported interest over the stairway could nevertheless be protected by actual occupation of the balcony since 'a right over the staircase and the alleyway would relate to the balcony'.[26] I will term this argument the 'broad interpretation' of schedule 3 paragraph 2(1). By contrast, I will term the argument that protection of an interest in the land only extends so far as the relevant land is in actual occupation (i.e., the interpretation of section 70(1)(g) LRA 1925 adopted by Fox LJ in *Ashburn*) the 'narrow interpretation' of schedule 3 paragraph 2(1). Lloyd LJ, delivering the only reasoned judgment in the Court of Appeal, commented that he could 'see force' in the broad interpretation.[27] However, because he found that Chaudhary was not in actual occupation of the balcony, he did not have to decide the point. The existing academic literature has not addressed which of the two interpretations best represents the current law.[28]

13 ibid 362.

14 ibid 372. The key authorities that had not not been before the Court of Appeal were *Hodgson v Marks* [1971] Ch 892 and *Williams & Glyn's Bank Ltd v Boland* 1981 AC 487. In the former case, Russell LJ remarked, *obiter* (*Hodgson* 391), that 'the judge relied upon the correct conclusion that "the land" [in section 70(1)(g) LRA 1925] included part of the land'. In *Boland*, Lord Wilberforce emphasised that actual occupation under section 70(1)(g) LRA 1925 (like sch 3 para 2 LRA 2002) does not only protect interests giving rise to a right to occupy. Instead, actual occupation is merely the mechanism by which *any* interest is protected: 'In the case of registered land, it is the fact of occupation that matters. If there is actual occupation, and the occupier has rights, the purchaser takes subject to them.'

15 This third exception holds that '[t]he [Court of Appeal] is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam': *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 730.

16 ibid.

17 LRA 2002, sch 3 para 2(1).

18 Law Com No. 271, para 8.54: 'An interest belonging at the time of the registered disposition to a person in actual occupation is an overriding interest, so far as it relates to land of which he or she is in actual occupation'.

19 *Chaudhary v Yavuz* [2011] EWCA Civ 1314.

20 Although not explicitly identified by Lloyd LJ as four stand-alone arguments, it is clear from his judgement that he considered each ground separately; ground one is discussed at [32], ground two at [33], ground three at [34] and ground four at [35]. Arguably, there is a fifth, more general ground, discussed from [27]–[31] that mere 'passing and repassing' over the stairway merely amounts to 'use', not 'occupation'; it is in support of this more general proposition—that mere use does not constitute actual occupation under schedule 3 paragraph 2—that *Chaudhary* (n 19) is most frequently cited.

21 ibid [32].

22 ibid [33].

23 ibid [34].

24 ibid [32]–[34].

25 ibid [35].

26 ibid.

27 *Chaudhary* (n 19) [35]. This was picked up on in 'Sex, Lies and Land Registration', part of the ten old square 2011/2012 seminar season, where it was noted at [49] that Lloyd LJ 'did … give a hint that he was in favour of Mr Chaudhary's less restrictive interpretation': https://issuu.com/keithplowman/docs/seminar_notes_sex_lies_and_land_registration_feb_2.

28 McFarlane, commenting on *Chaudhary* (n 19), notes that the argument advanced by counsel for Chaudhary 'points out an ambiguity in the wording' of the statute, but does not discuss the matter further: Ben McFarlane, 'Eastenders, Neighbours and Upstairs Downstairs: Chaudhary v Yavuz' (2013) 1 Conveyancer & Property Lawyer 74–82, 78. The ambiguity surrounding the words 'relating to' also goes entirely unaddressed in all of the major commentaries, including *Gale on the Law of Easements* (21st edn, Sweet & Maxwell 2020) and *Megarry & Wade:*

The relevance of the distinction between the broad and narrow interpretations is best illustrated by an example. Assume that A is the registered proprietor of a plot of land with a large two-storey building. A grants B, by deed, a leasehold over the building. B fails to register his leasehold and lives exclusively on the second floor, only ever using the ground floor to access the first floor. Is B's leasehold protected from postponement under schedule 3 paragraph 2(1) LRA 2002 by virtue of actual occupation?

Since B is living in the upstairs area his presence is certainly more than 'mere[ly] fleeting'.[29] Applying the traditional test, B is therefore in actual occupation of the second floor. Whether B occupies the downstairs area is more open to doubt. It is unlikely that using the land merely as an accessway creates a sufficient 'physical presence'[30] to amount to actual occupation.[31] It is therefore unlikely that B is in actual occupation of the ground floor.

Assume now that A, still the owner of the freehold, sells this freehold to C. Under the narrow interpretation, B's unregistered leasehold would only be overriding insofar as he was in actual occupation of the land. B's interest in the lower floor would therefore be postponed to C's newly acquired interest under section 29. Under the broad interpretation, however, B may argue that the bottom floor 'relat[es] to land of which he is in actual occupation'. B's leasehold over the whole estate would therefore be protected against postponement as an overriding interest.

Therefore, which of the narrow and broad interpretations of 'relating to' is ultimately adopted has potentially far-reaching implications. However, before evaluating the merits of the narrow and broad interpretations, it is necessary to consider a third possible interpretation.

B. 'Relating to' as a reflection of proprietary status?

Both the narrow and broad interpretations of schedule 3 paragraph 2(1) outlined above suggest that 'relating to' qualifies the extent of the land protected under schedule 3 paragraph 2(1). A third possible interpretation is that 'relating to occupied land' in schedule 3 paragraph 2(1) emphasises that the interest must be proprietary. In contrast to the broad and narrow interpretations, this interpretation decouples 'relating to' from 'actual occupation' entirely. It thereby creates *two* restrictions on the scope of overriding interests under schedule 3 paragraph 2(1). First, the relevant interest must be a proprietary interest in the land being disposed of. Second, the interest is only overriding insofar as the land is in actual occupation. Under this interpretation, the phrase 'relating to' does not broaden the scope of the protection offered by schedule 3 paragraph 2(1). Instead, it narrows it.

Several observations weigh against this interpretation. First, the fact that only proprietary interests in the disposed land can be overriding is already made clear elsewhere in the statute: section 29(1) only postpones 'interest[s] *affecting the estate*'.[32] Interests that are merely personal and non-proprietary can therefore never survive a disposition.[33] Repeating this in schedule 3 paragraph 2(1) would be redundant. Second, if the intended purpose of the words 'relating to' had been to make clear that only proprietary interests in the disposed land could override, then one would expect to see similar language in the other paragraphs of schedule 3 referenced in section 29. However, no such language can be found: 'relating to' appears only in paragraph 2, and similar wording which might conceivably be aimed at emphasising the proprietary nature of the overriding interests is also almost entirely absent.[34] In the LRA 2002 as a whole, conjugations of the verb 'relate' appear quite rarely. Where 'relate' *is* used, the intention is almost always to establish a relationship to something other than land.[35] This further detracts from the argument that the phrase 'relating to' in schedule 3 paragraph 2(1) confirms the proprietary nature of the interest. It seems unlikely, therefore, that the words 'relating to' in schedule 3 paragraph 2(1) are intended to operate independently of the provision's reference to actual occupation.

The vexed question is therefore whether the narrow or broad interpretation of schedule 3 paragraph 2(1) should prevail. If a narrow interpretation of 'relating to' is adopted, the current law will have made a full return to the approach in *Ashburn.* In other words, only an interest in land that is actually occupied can override a disposition for valuable consideration. Under the broad interpretation, however, the phrase 'relating to' could encompass land which, although not itself occupied, 'relates to' land which *is* occupied. If this interpretation is accepted, schedule 3 paragraph 2 would not have fully embraced the position in *Ashburn.* The argument advanced by counsel for Chaudhary is therefore a middle ground between the outcomes of *Ashburn* and *Ferrishurst* under the LRA 1925: while occupation of part does not *automatically* protect an interest in the whole,[36] occupation of part may have this effect if the unoccupied area is sufficiently related to the occupied area. Since following a broad interpretation of 'relating to' in schedule 3 paragraph 2 would open the door to a potentially far-reaching expansion to the protection afforded to unregistered easements, the merits of this approach must be closely examined.

The Law of Real Property (9th edn, Sweet & Maxwell 2020). T B F Ruoff and R B Roper, in *The Law and Practice of Registered Conveyancing* (Sweet & Maxwell 2021), implicitly accept that schedule 3 paragraph 2(1) has brought about a return to the *Ashburn* (n 7) approach for cases decided under the LRA 2002. Commenting on the effect of schedule 3 paragraph 2(1), the authors write without qualification that, under the new legislation, 'the legal reach of the adverse interest is limited to the factual reach of the occupation' [17.015]. Similarly, Roger J. Smith, in *Property Law* (10th edn, Longman Law Series, Pearson 2020) 273, writes that the 'question [of whether protection of an interest in the land can extend further than actual occupation] *is now settled* by the wording of para 2: the overriding interest relates only to land over which there is actual occupation' (emphasis added). Smith cites *Chaudhary* (n 19) but does not mention counsel's argument that the wording of schedule 3 paragraph 2(1) leaves open the possibility that actual occupation and protection of an easement might not necessarily be coextensive. It should be noted, however, that Lloyd LJ's positive reception of the broad interpretation was noted in 'Sex, Lies and Land Registration' [49] (n 27).

29 *Abbey National Building Society v Cann* [1991] 1 AC 56, 93.

30 *Boland* (n 14) (Lord Wilberforce). See also, Law Com No 271 para 8.22.

31 See, for example, *Chaudhary* (n 19), where the use of an external stairway to access an upstairs flat did not constitute actual occupation of the stairway.

32 LRA 2002, s 29(1) (emphasis added).

33 *Ashburn* (n 7). Of course, a new, direct interest can always be created by the words or conduct of the disponee.

34 Only schedule 3 paragraph 1 makes explicit reference to estates 'in land'. Paragraph 3 makes no reference to the fact that an overriding interest must be proprietary.

35 See, *inter alia*, section 4(8)(a), section 5(2), section 33(c), section 42(4) and section 72(2), (3).

36 As would have been the case under the approach following *Ferrishurst* (n 8).

III. Evaluating the Broad Interpretation

We have seen that the relevant alternatives are the broad and narrow interpretations of schedule 3 paragraph 2(1). In this part, I will consider the comparative merits of each interpretation.

First, I will demonstrate that schedule 3 paragraph 2(1) could have been drafted more clearly, and that Parliament's failure to adopt an alternative formulation supports the broad interpretation. This analysis is lent further credence by judicial interpretation of schedule 3 paragraph 2(1) in a different context. However, merely looking at alternative drafting offers an incomplete picture of Parliamentary intent. Second, I will argue that the analogous language in *Ashburn* can serve as an important source of guidance for interpreting the LRA 2002. Owing to similarities in language and context, 'relating to' in schedule 3 paragraph 2(1) should be attributed the same interpretation as in *Ashburn*. Third, I will examine the Law Commission report to glean the meaning behind the ambiguous language in schedule 3 paragraph 2(1). Although the Law Commission does not explicitly comment on the meaning of 'relating to', it does enumerate its reasons for rejecting the approach in *Ferrishurst*. If these same reasons also militate against the broad interpretation, it may safely be concluded that the Law Commission was not advocating in favour of the broad interpretation when suggesting its proposal to Parliament. Fourth, and finally, I will consider the policy implications of adopting both the broad and the narrow interpretation. I will suggest that the uncertainty introduced by the broad interpretation and its potentially far-reaching implications make it the less plausible of the two interpretations. Drawing from the above considerations, I will argue that the narrow interpretation better reflects the current state of the law.

A. Alternative drafting

A textual analysis of the LRA 2002 might suggest that the phrase 'relating to land … in actual occupation' in schedule 3 paragraph 2 has a meaning distinct from the interpretation of section 70(1)(g) adopted in *Ashburn*. One might reasonably opine that, had Parliament intended to limit the protection afforded by schedule 3 paragraph 2 to an interest in land in actual occupation, it would have said so more clearly.

Indeed, eliminating the relevant ambiguity from the statute would have required little more than removing 'relating to land'. Schedule 3 paragraph 2(1) (excluding subparagraphs (a)–(d)) could have been rephrased as follows:

> An interest belonging at the time of the disposition to a person in actual occupation, so far as he is in actual occupation of the land, except for—

Why did the Law Commission (and Parliament) shy away from the above wording?[37] One possible reason is that it fails to make explicit the fact that the relevant interest must be an interest in the land (i.e., a proprietary rather than merely personal interest). However, as discussed above, it is unlikely that 'relating to' was intended to fulfill this purpose. Moreover, if Parliament had sought to make this explicit,[38] it could have done so with less ambiguity by adopting the following wording:

> An interest in the land, provided the interest belongs at the time of the disposition to a person in actual occupation and only so far as that person is in actual occupation of the land, except for—[39]

If schedule 3 paragraph 2(1) had adopted the above language, it would have established beyond any doubt that an interest in the land is only overriding insofar as the land is in actual occupation. Therefore, it may reasonably be suggested that Parliament would have adopted this phrasing if it had intended schedule 3 paragraph 2(1) LRA 2002 to mirror the interpretation of section 70(1)(g) LRA 1925 in *Ashburn*. The fact that the phrase 'relating to' was used instead suggests that Parliament intended the provision to carry a different meaning.

This kind of argument has already been accepted when interpreting schedule 3 paragraph 2(1) in a different context. Lewison J in *Thompson v Foy*[40] considered, *obiter*, whether actual occupation must exist only at the time the disposition of the interest occurs or also at the time the disposition is registered.[41] Lewison J held that the choice of language in schedule 3 paragraph 2(1)—'An interest belonging at the time of the disposition to a person in actual occupation'—suggested that actual occupation must exist at both times. This is because '[a]s written, the phrase can be read as tying the "belonging" to the date of the disposition, while leaving at large the date of actual occupation'.[42] Lewison J pointed out that, had Parliament intended to make actual occupation at the time of the disposition the 'sole criterion', it could easily have done so by rewording the beginning of schedule 3 paragraph 2(1) to read 'An interest belonging to a person in actual occupation at the time of the disposition'.[43] The current phrasing of schedule 3 paragraph 2(1) was not inherently incompatible with a construction which only required actual occupation at the time of disposition. Nonetheless, the availability of this alternative, clearer wording led Lewison J to conclude that this was not the correct interpretation of the statute.

This reasoning lends support to the broad interpretation because it indicates that there has been at least *some* judicial receptiveness to this kind of argument in a very similar context. Indeed, the reasoning accepted by Lewison J is weaker than the argument being considered here. In *Thompson*, a construction that required actual occupation only at the time of the disposition did not render any part of the provision superfluous.[44] By contrast, if the narrow interpretation were adopted, 'relating to' in schedule 3 paragraph 2 is arguably left without any obvious meaning at all. I return to this issue below.

37 In addition to the likely influence of *Ashburn* (n 7), discussed below.

38 As mentioned above, this is unnecessary, since section 29(1) already qualifies an 'interest' as being 'any interest affecting the estate'.

39 Of course, it might be simpler to refer to 'A proprietary interest belonging at the time of the disposition to a person in actual occupation, so far as he is in actual occupation of the land, except for—'. However, the term 'proprietary interest' is unknown to the LRA 2002. Therefore, the Law Commission, although it uses the term in the Bill and Accompany Commentary to the LRA 2002 (see Law Com No 271, para 2.18), may have wanted to avoid introducing it into the Act here.

40 *Thompson* (n 4).

41 Because neither party advanced the interpretation favoured by Lewison J and because the leading commentators were against it, Lewison J 'le[ft] the point to a case in which it needs to be decided': ibid [126].

42 ibid [29].

43 ibid [124].

44 As Lewison J recognised, 'As written, the phrase can be read as tying the 'belonging' to the date of the disposition, while leaving at large the date of actual occupation' (emphasis added): ibid [125].

However, Lewison J's analysis has also been met with significant criticism.[45] Particularly noteworthy is the comment by Emma Lees. Lees argues that Lewison's interpretation is an 'artificial reading of the statute' because it is 'impractical in practice … and inconsistent with the approach taken under the 1925 legislation'.[46] Other factors, such as the practicability of the interpretation and the treatment of analogous provisions, can be quite appropriately considered alongside alternative drafting. Therefore, although clearer language may have been available to Parliament, this fact cannot be considered in isolation.

Moreover, as will be demonstrated below, the Law Commission had a particular understanding of the words 'relating to' in mind when it proposed the draft Bill of the LRA 2002 to Parliament, and it made that understanding clear. When Parliament deliberated on the proper wording of schedule 3 paragraph 2, it did so in light of the Law Commission's interpretation of the provision.

B. Analogous language in the case law

In the absence of language similar to 'relating to land … land in actual occupation' in the LRA 2002, it is worth considering whether similar language can be found in case law. Astute readers will already have noticed that the phrasing of schedule 3 paragraph 2(1) closely mirrors some of the language used in *Ashburn*. Considering the the scope of the protection afforded by actual occupation under section 70(1)(g) LRA 1925 in the penultimate paragraph of his judgment, Fox LJ opined that

> [Arnold & Co.'s] overriding interest will *relate to the land occupied* but not anything further. Thus, we do not think it can extend to any area comprised in the single title but not then occupied by Arnold & Co. Accordingly, the existence of the overriding interest does not entitle Arnold & Co. to enforce any rights it may have under clause 6 of the 1973 agreement over any land other than land in its occupation at the time of the 1985 sale and comprised in that sale.[47]

The italicised words bear stark similarities to the material language in schedule 3 paragraph 2(1), which states that an interest is only overriding 'so far as relating to land of which he is in actual occupation'. As discussed above, the decision in *Ashburn* established that the protection afforded to an interest in the land was coextensive with the actual occupation of that land. While this may not be evident from the italicised words themselves, it is made abundantly clear by the sentences that follow. Arnold & Co.'s overriding interest did not extend to any area 'not then occupied', and Arnold & Co. could not enforce rights over land 'other than land in its occupation'. This language—were it included in schedule 3 paragraph 2(1)—would preclude any argument on the broad interpretation raised in *Chaudhary*. Fox LJ was therefore not using the phrase 'relate to' in order to open up the possibility that an interest in land not itself occupied might be protected by virtue of actual occupation—that is, the broad interpretation. In fact, he meant quite the opposite. 'Relate to' as used in *Ashburn* makes clear that *only* interests in land that is actually occupied are overriding.

The similarities in context and language outlined above[48] suggest that schedule 3 paragraph 2(1) adopted, at least in part, the language used in *Ashburn*. If this is accepted, then 'relating to' in schedule 3 paragraph 2(1) should be accorded the same meaning as 'relate to' in *Ashburn*. The helpful context that is lacking in the statutory drafting may thus be compensated for by Fox LJ's elaboration above.

C. Law Commission Report

A narrow interpretation of schedule 3 paragraph 2(1) also aligns better with the meaning of schedule 3 paragraph 2(1) in the Law Commission's commentary to the draft Bill. Taking into account Law Commission reports 'does not of course imply that the meaning which the context provided by this material suggests will be decisive'.[49] However, such reports do offer a useful insight into the 'true intentions of the legislature'.[50]

In the commentary to the proposed Bill that was to become the LRA 2002, the Law Commission discusses the scope of protection afforded by actual occupation under the heading 'Qualification: Protection is restricted to the land in actual occupation'.[51] When the Law Commission goes on to note in the first line of that section that 'actual occupation only protects a person's interest so far as it relates to land of which he or she is in actual occupation',[52] the words 'relates to' are being used in their narrow form—referring only to land actually occupied.

This is further evidenced by the Law Commission's comment that, at the time of the consultation, the proposed legislation 'did no more than reflect the way in which section 70(1)(g) of the Land Registration Act 1925 had been interpreted by the Court of Appeal in *Ashburn Anstalt v Arnold*'.[53] The report goes on to explain that the decision in *Ferrishurst* departed from the analysis in *Ashburn*. It also explains why the Law Commission considers the approach in *Ferrishurst* to be unfit for the new system of land registration.[54]

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45 In addition to what follows, see, for example, Ruoff and Roper (n 29) [17.013]: 'it is not clear that the LRA 2002 was meant to alter the principle established by *Abbey National v Cann*. In any event, given that the changes made by the LRA 2002 were designed to ensure that actual occupation was discoverable by a potential purchaser before he completed his purchase, there is nothing to be gained by requiring actual occupation at the date of registration save to provide a fortuitous and unmerited lifeline for a purchaser otherwise caught by discoverable actual occupation at the time of completion.' See also Martin Dixon, *Modern Land Law* (Routledge 2021) 64; Ben McFarlane, Nicholas Hopkins, and Sarah Nield, *Land Law: Text, Cases & Materials* (4th edn, Oxford University Press 2018) 627; and Emma Lees, *The Principles of Land Law* (1st edn, Oxford University Press 2020) 475. Contrast Barbara Bogusz, 'Defining the scope of actual occupation under the LRA 2002: some recent judicial clarification' (2011) 4 Conveyancer & Property Lawyer 268–284, 272.

46 Lees (n 46) 272.

47 *Ashburn* (n 7) 28F (emphasis added). The first sentence in this quote is cited above in relation to the case law pre-LRA 2002.

48 As well as the Law Commission's explicit reference to *Ashburn* in its proposal, which is discussed in further detail below.

49 Law Commission and Scottish Law Commission, *The Interpretation of Statutes* (Law Com No 21 and Scot Law Com No 11, 1969) para 52.

50 *Pepper (Inspector of Taxes) Respondent v Hart Appellant* [1993] AC 593, 635 (Lord Browne-Wilkinson). See also *R v Secretary of State for Transport, Ex parte Factortame Ltd* [1990] 2 AC 85. Here the House of Lords had regard to a Law Commission report when ascertaining Parliamentary intention from the fact that Parliament failed to implement one of the recommendations of the Law Commission.

51 Law Com No 271, para 8.55.

52 ibid.

53 Law Com No 271, para 8.56.

54 ibid paras 8.56–8.58.

Also relevant are the reasons underpinning the Law Commission's rejection of the *Ferrishurst* approach. Commenting on the proposed change to the law, the Law Commission explicitly states that the Bill reversed the ruling in *Ferrishurst* because this decision ran counter to two central objectives of the new land registration regime.[55] The first was the objective of creating 'a faster and simpler electronically based conveyancing system'.[56] The LRA 2002 sought to make interests in the land discoverable on the online register without the need for many additional enquiries. The interpretation in *Ferrishurst* increases the possibility that an interest—not discoverable on the register—would be protected against a subsequent disponee. The interpretation is therefore in direct conflict with this objective of the LRA 2002. The second objective undermined by the decision in *Ferrishurst* was the objective of encouraging registration of rights.[57] *Ferrishurst* makes it more likely that an interest will be protected as an overriding interest by virtue of actual occupation. The decision thereby discourages registration and, perhaps more importantly, continues to uphold the notion 'that it is somehow unreasonable to expect those who have rights over registered land to register them'.[58] The Law Commission concluded that the Bill reverses *Ferrishurst* 'in furtherance of these two objectives'.[59]

These same considerations militate against the adoption of the broad interpretation of schedule 3 paragraph 2(1). With regard to the first objective of land conveyancing the broad interpretation is out of line with the Law Commission's intention for two reasons. First, by departing from the straightforward approach in *Ashburn* that only an interest in land actually occupied can be protected as an overriding interest, the broad interpretation generates a degree of uncertainty that is inimical to the first objective's aims of creating a 'faster and simpler'[60] land registration system which minimises the need for in-person examination of the land.[61] 'Relating to' under the broad interpretation of schedule 3 paragraph 2(1) could take on a wide range of definitions.[62] In *Chaudhary*, for example, it was suggested that the external stairwell 'related to' the balcony. Would it also have related to the house itself? What of a garage at the other side of the house where the dominant owner always parked before entering his house through the stairway? Because of this uncertainty in application, the broad interpretation fails to encourage the 'absolute minimum of additional enquiries and inspections'.[63]

Second, the broad interpretation runs counter to the first objective enumerated by the Law Commission because of the very nature of the legal inquiry which it requires courts to embark on. The vexed question under the broad interpretation is always whether the *interest* sufficiently relates to the occupied land. It seems entirely possible that one interest—such as an easement—might not sufficiently relate to the occupied land, while another interest—such as a beneficial freehold estate—would. This is relevant to the method and the ease with which it is possible to mitigate against the risk of an overriding interest arising by virtue of actual occupation under schedule 3 paragraph 2(1). Under the narrow interpretation of schedule 3 paragraph 2(1), an interest only overrides if the land is actually occupied. Therefore, a purchaser seeking to protect themselves against a potential overriding interest would only have to investigate the physical property. The nature of the interest of any occupier is immaterial. By contrast, properly mitigating the risks of an overriding interest under the broad interpretation of schedule 3 paragraph 2(1) may require not only an investigation of the land itself, but also an investigation into what *kind* of interest is held by any occupier. This requirement is alien to both the *Ashburn* and *Ferrishurst* approaches. In this way the broad interpretation of schedule 3 paragraph 2(1) constitutes an even greater interference with the Law Commission's first stated objective of the LRA 2002 than the *Ferrishurst* interpretation. The Law Commission's rejection of the *Ferrishurst* approach under the LRA 2002 therefore demands, *a fortiori*, that the broad interpretation of schedule 3 paragraph 2(1) also be rejected.

The broad interpretation also runs counter to the second objective of the LRA 2002. Just as with *Ferrishurst's* interpretation of section 70(1)(g) LRA 1925, the broad interpretation discourages registration by making it more likely that an interest will be protected without registration. Indeed, the legal ambiguity described above may contribute to this issue, since the current uncertainty surrounding the phrase 'relating to' might encourage interest-holders to take their chances in the courts. The broad interpretation also continues to perpetuate the 'puzzling' notion that it may be unreasonable to expect persons to register, which the Law Commission sought to eradicate by reducing the number and scope of overriding interests in the LRA 2002.[64] Had the Law Commission been presented with the broad interpretation of schedule 3 paragraph 2(1), it seems likely that it would have rejected this interpretation for the same reasons motivating the rejection of the *Ferrishurst* approach.

D. Policy considerations

Adopting the broad interpretation is also undesirable from a policy perspective. If 'relating to' does not limit the protection afforded by schedule 3 paragraph 2(1) to the land actually occupied (as would be the case under the narrow interpretation), then the limit to protection under schedule 3 paragraph 2(1) must lie elsewhere. This raises two questions, neither of which has a clear answer.

The first is a question of some kind. What sort of relationship does the phrase 'relating to' require? Does the relationship between the occupied and non-occupied land have to be one of purpose? One of use?[65] One of physical proximity? While a multi-factor approach considering all of these factors might be possible, it would do little to

55 Law Com No. 271, para 8.58.

56 ibid.

57 ibid.

58 ibid.

59 ibid.

60 ibid para 8.1.

61 The uncertainty generated by the broad approach is discussed in greater detail below when considering the policy reasons weighing against the adoption of the broad interpretation. In this context, the uncertainty of the broad approach is not being criticised in its own right. Instead, the uncertainty is being raised as evidence in support of the proposition that the Law Commission did not have the broad interpretation of schedule 3 paragraph 2 in mind when drafting the statute.

62 It is true that some ambiguity also exists with respect to what amounts to actual occupation of the 'whole' under the interpretation in *Ashburn* (n 7) (and under the narrow approach). However, if protection is coextensive with actual occupation, this simply becomes a question of whether the whole plot of land is, in fact, occupied. The courts are very experienced in answering this kind of question; indeed, the question whether a plot of land is 'occupied' is the question at the core of schedule 3 paragraph 2. Smith (n 29) notes that it 'remains probable that actual occupation of an entire plot does not require physical occupation of every inch of it': 273.

63 Law Com No 271, para 1.5.

64 ibid para 1.9.

65 Counsel for Chaudhary seemed to suggest that the overlap in purpose and use between the balcony and the stairway brought the interest in the latter within the scope of the protection afforded by schedule 3 paragraph 2(1): *Chaudhary* (n 19) [35].

introduce certainty. Any court trying to delimit the scope of 'relating to' must also be careful not to interpret the provision too broadly, lest it incorporate the *Ferrishurst* approach through the back door. If it were accepted that in some (not-so-remote) way every area of land 'relates to' the other land in the same registered plot, then it would follow that occupation of part of the land would protect interests in the whole.

Once the relevant kind of relationship is established, the second question is one of degree. How close must the relationship be in order for one part of land to 'relate to' another? For example, if a holistic approach to the meaning of 'relating' were adopted, would it suffice if two parts of the plot generally served a single purpose, even if the interest-holder only ever used the two parts separately? What if the two parts had virtually no characteristics in common, but happened to be used together by a particular interest-holder?

As was demonstrated above, the Law Commission did not have the broad interpretation of 'relating to' in mind when drafting the statute. Therefore, no guidance on answering the above questions can be gleaned from schedule 3 paragraph 2 or the accompanying preparatory material. Moreover, the term 'relating to' is not used in a similar context elsewhere in the LRA 2002 or the LRA 1925. This leaves little in the way of analogous case law which might assist judicial decision-making. In short, under the broad interpretation, the judiciary would be left in the dark regarding the proper application of schedule 3 paragraph 2(1). Actual occupation is already a context-dependent and volatile area of the law. Adopting the broad interpretation of 'relating to' would compound this uncertainty, severely inhibiting the reliability of commercial transactions and encouraging costly litigation.

Conclusion

In this article I have considered the forgotten question of whether the extent of protection afforded by actual occupation under schedule 3 paragraph 2 LRA 2002 is coextensive with the land actually occupied. Under the broad interpretation of schedule 3 paragraph 2, the protection afforded by actual occupation also encompasses an interest land which 'relates to' occupied land, even if that land is not itself occupied. Under the narrow interpretation, the protection afforded by actual occupation does not extend beyond the actual occupation itself. I have argued that, although Parliament could have adopted more precise wording for schedule 3 paragraph 2(1), the narrow interpretation is more convincing. This is because the narrow interpretation better reflects the case law which inspired the statutory provision, is in line with the Law Commission's intention when drafting the Bill, and is more defensible from a policy perspective. Therefore, the Court of Appeal's suggestion in *Chaudhary* that there is 'force' in the broad interpretation should not be followed. Only an interest in land which is actually occupied by the interest-holder is protected as an overriding interest under schedule 3 paragraph 2(1).

The implications of this conclusion are particularly important for the protection of unregistered easements, because the purportedly overriding interest does not infrequently affect only part of the land. However, the rejection of the broad interpretation has more far-reaching consequences. In any context where only part of a registered plot is occupied, the broad interpretation had kept open the possibility that this occupation might protect an interest in another unoccupied part of the land, or even in the plot of land as a whole (as the *Ferrishurst* approach would have). Such an occupier has now lost this argument to fall back on.

The Problem of Sieving Related Party Transactions in India and the UK

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NB July 2022: This article was originally written in January 2022. The sixth amendment to SEBI LODR Guidelines has now been enforced.

Introduction

The rise of family-owned businesses has resulted in the clustering of several companies and their subsidiaries under the control of one family or shareholder.[1] Such concentration of companies, in one hand, has the potential to cause conflicts of interest between promoter entities and minority investors.[2] If the company were to profit, the same would be shared with the minority investors. But if the director/controlling shareholder syphons off the profits to themself or their relative, or to a company where they are a controlling shareholder, they would be able to consume a larger share of the profits. This is undertaken by shifting value from one company to another through self-dealing transactions within the company management.[3]

An atmosphere where RPTs are imbued could be challenging even when they are undertaken in good faith.[4] The corporate governance structure could be negatively impacted by the existence of relationships amongst companies which could impact transactions and disclosure obligations.[5] The existence of such an atmosphere could warrant the presence of expropriation, which means that the profits of a company are either in a position of or are actually being accrued by another entity.[6] For real expropriation to occur, the assets, profits or property should be owned by an entity, but another person or entity would be in possession of them or would be unjustly benefited by them.[7] Such expropriation has the potential to cause huge losses to shareholders, management and beneficiaries of the entity and can also negatively impact the capital market regime of the industry.[8] However, mere appearance or the presence of conditions that enable expropriation could cause damage even without the actual harm, as it would affect inter-personal relationships in the governance structure. These negative perceptions could also negatively impact the country's capital markets regime and further the deterioration of equity markets.[9] Therefore, it is imperative to enforce strong disclosure regulations and transparency requirements to avoid even the pre-supposition of abuse.

The Securities and Exchange Board of India ('SEBI') issued the Sixth Amendment in the LODR Regulations,[10] which has been discussed in the paper. The paper illustrates how the partial transplantation of the English corporate regulation regime in India[11] has resulted in dissonance and inconsistencies, which could cause disinvestment

1 Marianne Bertrand, Paras Mehta, and Sendhil Mullainathan, 'Ferreting Out Tunnelling: An Application to Indian Business Groups' (2002) 117 Q. J. Eco. N. 121, 126.

2 Ami Galani & Nathan Rehn, 'Related Party Transactions: Empowering Boards and Minority Shareholders to Prevent Abuses' (2010) 22 Nat'l L Sch India Rev 29, 32.

3 See Lucian A. Bebchuk & Assaf Hamdani, 'The Elusive Quest for Global Governance Standards' (2009) 157 U. PA. L. REV. 1263, 1307.

4 Zohar Goshen, 'The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality' (2003) 91 Cal L Rev 393, 402.

5 Indian Accounting Standard 18: Related Party Disclosures [17].

6 K. S. Thorburn, 'Corporate Governance and Financial Distress' in Hans Sjögren and Göran Skogh (eds), *New Perspectives on Economic Crime* (Edward Elgar 2004).

7 ibid.

8 ibid.

9 OECD, *Guide on Fighting Abusive Related Party Transactions in Asia* (2009) 11-12.

10 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021 <https://www.sebi.gov.in/legal/regulations/nov-2021/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-sixth-amendment-regulations-2021_53851.html>.

11 Afra Asharipour, 'Corporate Governance Convergence: Lessons from the Indian Experience' (2009) 29 Nw. J. INT'L L. & Bus. 335, 354.

and challenges in the cross-border transactional market. Through the analysis presented herein, the author intends to demonstrate how the current RPT regulation could prove to be insufficient in entrapping RPTs even after the expansion of the scope of related parties and an increase in the materiality threshold. The article examines the genus of RPTs by traversing through the fiduciary duty of directors in both jurisdictions and unjust enrichment whilst presenting the need for the inclusion of more variables whilst computing the materiality threshold of RPTs in India.

I. Tracing the History of Related Party Transactions

The English law on RPTs emerged through equitable precedents, which aligned with the modern statutory rules for company incorporation in the 1840s and 1850s.[12] These principles were instilled only in 2006 when the Companies Act was enforced based on a 'high level' restatement of the precedents which had evolved through history.[13] These precedential rules were based on three essential concepts through which the equitable principles on RPTs evolved: conflict of interest, consent of the beneficiary,[14] and procedural management of the conflict.[15] The concept of conflict of interest helped identify the risk involved in RPTs and transactions between the company and a director directly or indirectly.[16] The genesis of this doctrine rests in the duty to avoid conflicts of interest due to a fiduciary duty that one party owes to the other.[17] English law emphasised the director's fiduciary duty towards the company.[18] However, the duties of shareholders and directors who were also shareholders were regulated later.[19]

Secondly, the beneficiary in such transactions, which is the company, could provide consent to such transactions. This would help in discharging the liability of the director.[20] The board members could give this consent through the procedure laid down in the articles of the company prior to the transaction being effectuated.[21] This feature is inter-linked with the last feature, i.e., procedural management of the conflict.[22] In case the procedure laid in the articles was not followed, the claimant need not bother about the favourability of the terms. However, if the procedure was followed, the court wouldn't interfere with the terms of the transaction.[23]

12 Paul Davies, 'Related Party Transactions: UK Model' in Luca Enriques and Tobias Tröger (eds), *The Law and Finance of Related Party Transactions* (Cambridge University Press 2018) 361-399.

13 ibid.

14 John H. Farrar and Susan Watson, 'Self-Dealing, Fair Dealing and Related Party Transactions—History, Policy and Reform' (2011) 11(2) Journal of Corporate Law Studies 506.

15 Davies (n 12) 362-3.

16 Elizabeth A. Gordon, Elaine Henry and Darius Palia, 'Related Party Transactions and Corporate Governance' (2004) 9 Advances in Financial Economics 1.

17 Robert Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 Law Quarterly Review 449, 453.

18 See *Aberdeen Railway Co v. Blaikie Brothers* (1854) 1 Macq. 461; [1843-60] All ER Rep 249.

19 Companies Act, 2006, ch. 2.

20 Blair Leahy and Andrew Feld, 'Directors' Liabilities: Exemption, Indemnification, and Ratification' in *Company Directors: Duties, Liabilities, and Remedies* (OUP 2017).

21 The National Archives, *Relationship Between the Duties and the Detailed Rules Requiring Member Approval of Conflicts of Interest, Companies Act 2006* (Explanatory Notes) <https://www.legislation.gov.uk/ukpga/2006/46/notes>.

22 ibid.

23 Davies (n 12) 368.

The requirement for voting was also inherent in the Indian Company laws on RPTs, which were modelled in response to the accounting fraud revealed at Satyam Computer Services[24] in an attempt to acquire two companies that were related to the company's founder chairman.[25] The old Indian Companies Act of 1956, which was replaced by the new Companies Act of 2013, provided for restrictions on RPTs where transactions were directly or indirectly related to the director of a company. [26] It is essential to traverse through the scheme of the old Act in order to truly understand the progress in RPT regulations and the bedrock on which they reside. Further, such analysis demonstrates the presence of loopholes that haven't been satisfactorily rectified in the new scheme.

Section 299 of the 1956 Act required the disclosure of the director's interest to the board of directors,[27] and Section 300 required the director to abstain from voting on such a transaction.[28] However, the requirements in the Act allowed significant loopholes. For example, Section 300 was not applicable on a contract with a public company or its subsidiary if the director was only related to the company in the capacity of a director but did not hold any shares, which made him eligible for a directorship,[29] or he held not more than 2% of its paid-up share capital.[30] Hence, these provisions essentially exempted some transactions where the director or his family had a significant stake due to complicated ownership structures.

Further, Section 295, 301 and 297 also included provisions on RPTs alongside Accounting Standard 18 ('AS 18') issued by the Institute of Chartered Accountants of India.[31] RPTs were defined in AS 18, but they were limited to relationships where one party was controlled by the other.[32] Hence, the disclosure requirements under Clause 49 of the Disclosure and Investor Protection Guidelines, 2000 were not applicable on several RPTs occurring amongst sibling companies within the promoter entity.[33] However, the scope of RPTs has significantly expanded both in India and the UK after the introduction of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021[34] and Financial Conduct Authority's Policy Statement PS19/13.[35]

II. Extent of Fiduciary Duty in India and UK

The director's fiduciary duty in both jurisdictions has been to avoid situations where their duty towards the company conflicted with their personal interests.[36] For example, Lord Cranworth in *Aberdeen*

24 Ajaz Ul. Islam, 'Do Shareholder Activism Effect Corporate Governance and Related Party Transactions: Evidences from India?' (2020) 13(2) Indian Journal of Corporate Governance 173.

25 P. C. Rasheed and T. Mallikarjunappa, 'Related Party Transactions and Earnings Management: An Empirical Examination of Selected Companies in India.' (2018) 17(2) IUP Journal of Accounting Research & Audit Practices.

26 The Companies Act, 1956, No. 1 of 1956, s. 299-300.

27 ibid s. 299.

28 ibid s. 300.

29 ibid s. 300(d)(i).

30 ibid s. 300(d)(ii).

31 Bombay Securities Exchange, Listing Agreement Clause 49, § II(D), Explanation (ii).

32 Accounting Standard 18 (n 5) para 10-11.

33 SEBI (DIP) Guidelines of 2000, s. 6.8.3.2, Explanation I.

34 SEBI LODR (n 10).

35 Financial Conduct Authority, Improving Shareholder Engagement and Increasing Transparency around Stewardship, Policy Statement PS19/13.

36 Companies Act, 2006 (n 19) s. 175 (for United Kingdom) and Companies Act, 2013, s. 184 (for India).

Railway v. Blaikie Bros[37] stated, 'no one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or even can have, a personal interest conflicting, or which possibly may conflict, with the interests those whom he is bound to protect.' Similarly, in the case of Newgate Stud Co. v. Penfold,[38] it was observed that the self-dealing rule wouldn't apply if the purchase of a corporate asset were made without full disclosure by the director's relative, in their own name and not as a nominee of the director. However, the fair-dealing rule would be applicable. The director would have to demonstrate that the transaction furthered the company's success, and this test wouldn't be complete just by 'equating it with the lowest non-negligent valuation'[39]. This duty is enshrined within Section 117 of the 2006 Act, where the director is supposed to disclose to the board if he is in any way interested in a transaction with the company.[40]

The consequences of breaching the fiduciary duty are that the contract would become binding on the company only if it is ratified by the shareholders ex ante or ex post.[41] Further, the director is supposed to account for all the profits accrued by him through the transaction and compensate the company for the damages caused.[42] The Report of the Expert Committee on Company Law in India effectively relayed the fiduciary duties of the directors with respect to RPTs.[43] They include the duty of good faith, fair dealing, and no conflict.[44] The duties include the duty to abstain from voting on conflicted transactions and require adherence to the LODR Regulations, which specify the time and manner of disclosure.[45] The duty to disclose shareholdings in all companies are mentioned under Section 184 of the Companies Act, 2013.[46]

Considering that the directors' fiduciary duties in India correspond to those in the UK, the effective fulfilment of this duty would require effective identification and approval of RPTs. However, the gaps in the Indian framework make identification of such transactions difficult, which in turn causes a disadvantage to the company.

III. The Ambit of RPTs in Both Jurisdictions

The recent amendments in the Indian LODR Regulations have vastly increased the scope of transactions that are now considered RPTs and have come closure to those in the UK. After the sixth amendment in the LODR Regulations, related parties in India include the following:

> '(a) any person or entity forming a part of the promoter or promoter group of the listed entity; or
> (b) any person or any entity, holding equity shares:
> (i) of twenty per cent or more; or
> (ii) of ten per cent or more, with effect from April 1, 2023; in the listed entity either directly or on a beneficial interest basis as provided under Section 89 of the Companies Act, 2013, at any time, during the immediate preceding financial year; shall be deemed to be a related party:'[47]

Further, related parties are also defined under Section 2(76) of the Companies Act, 2013, which include the director's relatives, key managerial person and their relative, firms where the director, manager or their relatives are partner(s), companies where director, manager or their relatives hold positions or own more than 2% of its paid-up share capital.[48] Lastly, any company which is influenced by the directions of said director, manager or relative.[49]

However, the definition of related parties as mentioned in DTR 7.3 and LR 11.1.4, in addition to the above-mentioned categories, also includes a person who was a substantial shareholder,[50] director, shadow director of a listed company within 12 months before the transaction,[51] associates of related parties and persons exercising significant control.[52] Further, these guidelines also mention who qualifies as a 'relative' and detail several human relationships.[53] The laxity that can be noticed in the Indian framework is inherent in the aspect of 'control'. The English concept of Persons with Significant Control[54] is a better tool for assessing which entity exercises control over the body corporate instead of the Indian concept of a promoter and controlling shareholder.[55] This is because a promoter is usually labelled as a person exercising control over the company in the prospectus irrespective of their shareholding as against the role of a promoter in the UK, which is company incorporation.[56] Due to this labelling, persons who aren't in actual control could be held liable for omissions and non-compliance with SEBI LODR Regulations.[57] Therefore, promoters were allowed to re-classify themselves after adhering to the conditions mentioned under Regulation 31A of LODR Regulations, which requires having at least more than 10% of voting rights in the listed company.[58]

This condition prevents the successful reclassification of promoters who have absolutely no control over the body corporate, making

37 (1854) 1 Macq 461 (HL).
38 [2008] 1 BCLC 46.
39 ibid 244.
40 Companies Act, 2006 (n 19) s. 117.
41 *Benson v. Heathorn* (1842) Younge & Coll. Ch. 326; *Great Luxembourg Railway Company v. Magnay* (No. 2) (1858) 25 Beavan 586.
42 *J. J. Harrison (Properties) Ltd v. Harrison* [2002] 1 BCLC 163 (CA).
43 Ministry of Corporate Affairs: India, *Report of the Expert Committee on Company Law* <http://reports.mca.gov.in/MinistryV2/related+party+transactions.html>.
44 ibid 1.
45 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, No. SEBI/LAD-NRO/GN/2015-16/013, reg. 4(2) (f).
46 Companies Act, 2013, s. 184.
47 SEBI LODR (n 10) s. 3 (I) a. (a).
48 Companies Act, 2013 (n 46) s. 2(76).
49 Companies Act, 2013 (n 46) s. 2(76)(vii).
50 Related Party Transactions: Premium Listing Rules, Release 14, 2021, r. LR 11.1.4 (1) <https://www.handbook.fca.org.uk/handbook/LR/11/1.html>.
51 ibid r. LR 11.1.4 (2).
52 ibid r. LR 11.1.4 (4).
53 Disclosure Guidance and Transparency Rules, Corporate Governance, DTR 7, s. 7.3.2 <https://www.handbook.fca.org.uk/handbook/DTR/7/3.html?date=2022-01-14#D50025>.
54 Companies House, Guidance: People with Significant Control, Department for Business, Energy, and Industrial Strategy <https://www.gov.uk/guidance/people-with-significant-control-pscs>.
55 Securities and Exchange Board of India, *Review of the regulatory framework of promoter, promoter group and group companies as per Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018* <https://www.sebi.gov.in/reports-and-statistics/reports/may-2021/consultation-paper-on-review-of-the-regulatory-framework-of-promoter-promoter-group-and-group-companies-as-per-securities-and-exchange-board-of-india-issue-of-capital-and-disclosure-requirements-re-_50099.html>.
56 *Emma Silver Mining Co. v. Lewis* (1879) 4 C. P. D. 396.
57 SEBI LODR (n 45) reg. 5.
58 ibid. reg. 31A (3)(b)(i).

them liable for acts that should be attributed to controlling shareholders.[59] Section 2 (oo) (ii) of the ICDR Regulations states that control exercised by a director is also considered to be actual control, as against the English Company Statutory Guidance for PSC where directors aren't considered PSCs just because of their role.[60] Therefore, due to the regulatory gap in the Indian concept of 'control', the sieve of RPT Regulations becomes narrow by encompassing a limited number of people as related parties.

IV. Challenges Posed by the Threshold of Materiality

The latest amendment to the LODR Regulations includes a change in the threshold of material related party transactions.[61] Material transactions require shareholder approval to go forward in both Indian and English jurisdictions.[62] Now, transactions exceeding Rs. 1000 Crore or 10% of the annual consolidated turnover (whichever turns out to be lesser) will have to obtain shareholder approval in India.[63] The amendment has been based upon the Working Group Report on RPTs.[64] The Report had recommended the threshold to be 5% of the turnover; however, SEBI increased it to 10%, which would result in the entrapment of lesser transactions as compared to what was originally suggested.

Rule 15 of Meetings of Board and its Powers Rules read with Section 188 of the Companies Act, 2013 propose a test based on a company's 'net worth'.[65] However, Regulation 23(1) of the LODR Regulations did not contain this test post the amendment. The author argues that a test that fails to factor in the net worth, gross assets or profits might fail to provide apt results and, in turn, entrap transactions that either wouldn't have been considered material due to these factors or wouldn't include some transactions which are essentially material.

Hence, a transaction is considered material in the UK if the percentage ratio is 5% or more when one applies the tests detailed in Annex 1 DTR 7 of the Disclosure Guidance and Transparency Rules.[66] There are essentially four tests: the gross assets test, profits test, consideration test, and the gross capital test.[67] These tests are formulas that equip variables like the gross assets of the issuer, profits attributable to the assets, the aggregate market value of all the ordinary shares and the gross capital of the company. The Indian regime only utilises the turnover and the 1000 Crore limit as thresholds for analysing the company's financial standing with respect to the RPT.[68] However, analysis of terms like profitability, sales turnover, asset base, and capital are some of the essentials without which financial capability cannot be aptly assessed.[69] Utilising only one of the factors will not effectively determine the company's performance; hence, at least some of these factors need to be considered whilst computing the materiality threshold in India.[70] Therefore, for an effective and holistic financial analysis, the English related party tests involve variables such as gross assets, indemnities and similar arrangements (which help in comprehending the size of the transaction and using correct data during calculations),[71] the market value of securities,[72] current capital ratio (current liabilities over current assets)[73] amongst others. These variables aid in understanding the capability of a company to meet its financial targets and its general solvency. The importance of factoring in such variables is amply evident in the empirical study conducted by Bărbută-Misu, Madaleno and Ilie, where they demonstrate how swaying financial ratios, could be possible indications of a crisis. For example, the authors analyse the mortgage loan crisis that began in 2006 in the United States and later penetrated into banking networks of the US and European large-credit institutions.[74]

Earlier, the Financial Conduct Authority had proposed to keep the materiality percentage ratio at 25% or more.[75] However, the threshold was lowered due to apparent disagreement in the investment market.[76] This is because FCA concurred with the argument that the issuer's listing category shouldn't adjudicate materiality; rather, it would be better to apply a single formula to all RPTs. Now, the 5% percentage ratio is set, which is consistent with LR 11 for premium listed issuers.[77] Further, the rules also provide for aggregation of all transactions which were effectuated within a twelve-month period of the RPT whilst assessing materiality.[78] When a material RPT undergoes a significant change after getting approved, the change will have to be approved by the board.[79] It will have to comply with disclosure and approval obligations separately. The FCA would regard a 10% increase in the consideration payable as a material change.[80]

The problem of the non-inclusion of different financial factors whilst deciding on the materiality of RPTs works against the principles of unjust enrichment and corrective justice. Furthermore, this results in ignorance of the repercussions of breaching the requirement of gaining shareholder approval under the fiduciary duty. Hence, in

59 Rukshad Davar, Kritika Agarwal and Rahul Datta, 'Should Indian securities law shift focus from promoters to persons in control?' <https://www.majmudarindia.com/insight/indian-securities-law-shift-focus-promoters-persons-in-control/>.

60 Companies House, Statutory Guidance on the Meaning of 'Significant Influence or Control' Over Companies in the Context of the Register of People with Significant Control (2017) r 4.6, 4.10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/675104/psc-statutory-guidance-companies.pdf>.

61 SEBI LODR (n 10) reg. 3(II)(b) 6th.

62 SEBI LODR (n 10) reg. 3(II)(c) for India and DTR (n 53) s. DTR 7.3.8 (2) for UK.

63 SEBI LODR (n 58).

64 Securities and Exchange Board of India, *Report of the Working Group on Related Party Transactions* (2020) <https://www.sebi.gov.in/reports-and-statistics/reports/jan-2020/report-of-the-working-group-on-related-party-transactions_45805.html>.

65 Companies (Meetings of Board and its Powers) Rules, 2014, r. 15(3)(a)(ii) (India).

66 DTR (n 53) Annex 1 DTR 7.

67 ibid.

68 SEBI (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021, w.e.f. 1.4.2022.

69 Panagiotis Liargovas and Konstantinos Skandalis, *Factors affecting Firms' Financial Performance: The Case of Greece* (University of Peloponnese Press 2008).

70 Willy Muturi and Maleya M. Omondi 'Factors affecting the financial performance of listed companies at the Nairobi Securities Exchange in Kenya' (2013) 4(15) Research journal of finance and accounting 99-104.

71 DTR 7 (n 53) Annex 3 DTR 7.

72 DTR 7 (n 53) Annex 6.

73 DTR 7 (n 53) Annex 8.

74 Nicoleta Bărbuță-Mișu, Mara Madaleno, and Vasile Ilie, 'Analysis of risk factors affecting firms' financial performance—Support for managerial decision-making' (2019) 11(18) Sustainability 4838.

75 Financial Conduct Authority, *Proposals to Promote Shareholder Engagement: Feedback to CP19/7 and Final Rules*, Policy Statement PS19/13 (2019) [1.37] <https://www.fca.org.uk/publication/policy/ps19-13.pdf>.

76 ibid.

77 LR (n 50) r. LR 11.1.10.

78 ibid. r. LR 11.1.11.

79 ibid. r. LR 11.1.7.

80 ibid. r. LR 10.5.3.

essence, the director would be liable to return the profits made in the course of an RPT and indemnify the company but would go undetected. Instead, the profit accrued should be returned due to principles of corrective justice which influences the transactions between individuals and requires the fulfilment of the duty of restitution.[81]

Corrective justice exists without external rules of dissemination of equality.[82] It proposes the existence of equality between parties to a transaction.[83] Unjust enrichment in both jurisdictions involves the term 'unjust' to be supplemented by an act of duress, undue influence, coercion, mistake, or lack of consideration.[84] This essentially means that the lack of the plaintiff's consent or vitiation of the same is the primary contributing factor in the principle of unjust enrichment.[85] Hence, ignorance could also be interpreted as a contributing factor because it depicts the absence and not just vitiation of consent. Therefore, considering the failure to disclose material RPTs, either intentionally or due to regulatory gaps, aids the director or manager or profit on account of the corporate entity, the lack of consent of shareholders fulfils the requirement for unjust enrichment. According to Weinrib,[86] the defendant should undo the unjust transaction and obey the defendant's duty of restitution, which has also been modelled into the Indian and English Laws. This can only be done by creating an effective sieve to filter out material transactions by considering the various financial factors whilst computing materiality.

The number of listed companies trading in the National Stock Exchange in India was 2005 in September 2021,[87] whilst those trading in the London Stock Exchange were 2009 in November 2021.[88] Therefore, the number of companies subjected to RPT regulations in both jurisdictions is approximately similar, making the assessment goal comparable. Hence, the sieve of regulation that would strain out material RPTs should be of a common nature. However, due to the ignorance of various financial factors highlighted above, the orifices in the sieve seem comparably larger, resulting in the non-entrapment of certain material RPTs.

V. Ramifications of the Indian Amendment

Apart from the inconsistencies related to materiality, there are some concerns that can be attributed to the sixth amendment in the Indian LODR Regulations. The amendment now includes transactions undertaken between the listed company and related parties of its subsidiary or related parties of the listed company and the subsidiary, which will come into effect from April 2023.[89] However, there could be ramifications on ongoing transactions, which will now have to be re-classified as material or non-material and would have to repeat the process of prior shareholder approval. Hence, Regulation 23(8) of the LODR Regulations causes the concern of retrospective application of the materiality threshold as it states that, 'All existing material related party contracts or arrangements entered into prior to the date of notification of these regulations and which may continue beyond such date shall be placed for approval of the shareholders in the first General Meeting subsequent to notification of these regulations'.[90] The consequences of this retrospectivity might cause an excess monetary burden to the company as in cases where the shareholders would withhold their approval; the company will have to terminate the transaction. Hence, the agreement which would have given rise to the transaction might penalise the company for breaching the terms of the agreement.

Related party transactions occurring between a listed entity/its subsidiaries and any other entity will have to qualify the purpose and effect test from April 1, 2023.[91] The test states that whichever transaction between the above-mentioned entities has the purpose and effect of causing benefit to the related party will be construed as an RPT.[92] Even though the UK Premium Listing Rules have influenced this provision, the threshold for determining the 'purpose and effect' has not been elucidated by SEBI. Hence, SEBI should purposefully clarify this threshold to avoid practical obstacles.

Additionally, the amendment requires obtaining the approval of the Audit Committee of the listed company to approve transactions between subsidiaries of the company which exceed or equal the Indian materiality threshold.[93] However, as per Section 2(87) of the Companies Act, 2013, these subsidiaries will include foreign subsidiaries.[94] Hence, a problem would arise when the approval of the Indian holding company is needed for effectuating a transaction between several overseas subsidiaries. For example, suppose two English subsidiaries of a company incorporated in India wish to transact, and the deal exceeds the 10% threshold. In that case, the transaction cannot be legally effectuated without the Audit Committee of the holding company's approval.

Further, there would arise a situation of conflict with the English laws if legal rules were to be imposed which are inconsistent with the Indian regime. Hence, complying with the fiduciary duty under Sections 173 and 174 of the English Companies Act, 2006 wouldn't be sufficient. The directors will also have to adhere to the Indian guidelines and the Audit Committee's approval. Therefore, they might lose their independence when their decisions are contrary to the approval/disapproval of the Committee. This, in turn, would stand contrary to the independent legal existence of the English subsidiary who would have a separate board of directors from the holding company, and those directors would have a duty towards the subsidiary only and not the holding company.[95]

Further, in the case of *Vodafone International Holdings v. Union of India*, it was highlighted that 'the legal position of any company

81 Andrew Botterell, 'Property, Corrective Justice and the Nature of the Cause of Action in Unjust Enrichment' (2007) 20 Canadian J L & Jurisprudence 275.

82 Zoë Sinel, 'Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment' (2011) 31(3) Oxford Journal of Legal Studies 553-554.

83 Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa L Rev 515, 540–41.

84 *Lipkin Gorman v. Karpnale Ltd.* [1988] UKHL 12; Indian Contract Act, 1872, s. 68-72.

85 Sinel (n 82) 555.

86 Ernest Weinrib, 'The Normative Structure of Unjust Enrichment' in Ross Grantham and Charles Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing 2008) 42.

87 'Business Growth in CM Segment' (*National Stock Exchange*) <https://www1.nseindia.com/products/content/equities/equities/historical_equity_businessgrowth.htm>.

88 Number of companies on London Stock Exchange 2015-2021 (*Statista Research Department*, 11 Jan 2022) <https://www.statista.com/statistics/324547/uk-number-of-companies-lse/>.

89 SEBI LODR (n 10).

90 SEBI LODR (n 45) reg. 23(8).

91 SEBI LODR (n 10).

92 SEBI LODR (n 10) reg. 3(I)(b)(ii).

93 ibid reg. 3(II)(c)(b).

94 Companies Act, 2013 (n 46) s. 2(87).

95 A Guide to Directors' Responsibilities under the Companies Act 2006 [2.15] <https://www.accaglobal.com/content/dam/acca/global/PDF-technical/business-law/tech-tp-cdd.pdf>.

incorporated abroad is that its powers, functions and responsibilities are governed by the law of its incorporation.'[96] The Court also clarified that the control of the parent company's shareholders could not overpower the subsidiary's board of directors as the board owes a fiduciary duty towards the subsidiary only and not the holding company.[97] Therefore, this inconsistency in the application of the Audit Committee's approval would stand contrary to the precedent established in both jurisdictions and might expose Regulation 23 of the LODR Regulations to judicial review due to its extraterritorial application.[98]

The same far-reaching effects on foreign subsidiaries will also be noticed in case of material modifications which will have to be approved by the Committee. Considering SEBI has not clearly defined what would constitute material modifications in RPTs,[99] the Audit Committee might exercise their opinion on the same and reject the material modifications approved in the English jurisdiction, creating another inconsistency. Moreover, SEBI has not excluded transactions that might be the customary business for certain companies and transactions done at an arm's length from the ambit of Regulation 23,[100] increasing the burden on the foreign subsidiary.

Conclusion

Construing the sixth amendment in the LODR Regulations to be applicable only on future contracts and not existing ones could provide a loophole to controlling shareholders who might unjustly enrich themselves before the amendment is enforced. Treating transactions under future contracts and those under pre-existing contracts differently might lead to inequality and discrepancies. Hence, the obligation to gain approval should be applicable on all contracts after the amendment is enforced. The amendment also goes on to include the promoter entity into the ambit of 'related parties'.[101] However, this might prove burdensome for promoters who have been subjugated by this 'permanent labelling' and are not actually influencing investment decisions.[102]

Even though this problem of labelling still subsists, the ambit of related parties has now been expanded. It governs persons holding equity shares amounting to 20% or more (with effect from April 1, 2022) or 10% or more (from April 1, 2023). These include shares held directly or on a beneficial interest basis as per Section 89 of the Companies Act, 2013 and might prove to be a positive step towards inculcating the 'Persons with Significant Control' regime and defining bright lines of control in India. However, the analysis undertaken delves into the cervices of RPT disclosure obligations that are analogous to a sieve. When strained through the sieve, some of these transactions would easily pass without shareholder approval due to gaps in regulations. Therefore, there is a need to reduce the sieve size and ensure adequate filtering and transparency to avoid illegitimate expropriation and unjust enrichment.

96 *Vodafone International Holdings v. Union of India* (2012) 6 SCC 613.

97 ibid.

98 *GVK Industries v. Income Tax Officer* (2011) 4 SCC 36.

99 SEBI LODR (n 45) part C, schedule II, cl. 8.

100 SEBI LODR (n 45) reg. 23(5).

101 SEBI LODR (n 10) reg. 3(I)(a)(a).

102 Twenty First Report of the Standing Committee on Finance (2009-2010) on the Companies Bill, 2009, presented to the Lok Sabha and Rajya Sabha (31 August 2010).

Animal Law and Ireland: More Questions Than Answers

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Introduction

The human–animal relationship, as a concept of study, spans multiple disciplines and indeed has been an area of interest across both time and geography. At its core are historic and cultural norms which often go unchecked and unquestioned. The set of legal rules governing human–animal relationships is known as animal law.[1] This area of law is a complex web of rules that govern many relationship types and situations related to animals. At an academic level this area of law is divided across ideological lines—welfare versus rights. The two schools converge in some areas of thought but are largely at odds in relation to their respective positions. The ideological position of those in the animal welfare school of thought is that animals can be utilised by humans for their daily living needs but that it must be done in a manner that upholds certain welfare standards in terms of the animals' experience of life.[2] Whereas, the animal rights ideological position perceives animals as sentient beings who should have certain rights to uphold their place in society as living creatures.[3]

This ideological division is not the only problem evident in the animal law field. Additional critiques include: it being static;[4] selective in terms of application; lacking in legal and transnational protection regimes; and primarily contained in secondary law, which is typically not legally binding.[5] Peters has argued that the current top-down approach runs the risk of lacking cultural sensitivities and imposing cultural and imperial standards.[6] Thus, she suggests that animal law will only positively contribute to society when it grows from the bottom up.[7] Finally, little has been done to align animal law and human rights law in a complementary manner (ie exploring and accounting for human cultural variation when designing and applying the laws).

Animal law, like environmental law, is central to population health, environmental sustainability, and biodiversity. Zoonotic diseases are a real risk to the world's population; soil erosion due to overgrazing is a serious environmental risk; and deforestation is detrimental to the planet's biodiversity. As such, animal law has global reach and impact and thus its fractured nature needs urgent attention. The COVID-19 crisis has focused experts' and indeed citizens' minds on the area and yet discussions remain largely restricted to discipline-specific debates and traditional approaches to regulations and guiding practices.

It may be argued that animal law is following a similar trajectory to environmental law, which only recently became a key legal speciality. Environmental law is now a rapidly growing area with over 1200 courts and tribunals operating across 44 countries.[8] It has become a legitimised legal speciality as a result of a number of facilitators: its alignment with human rights, public support for environmental issues, scientific support for a need for action, and a public health/survival debate.[9] Animal law has not had the benefit of these key drivers heretofore. However, there is now increasing public support for ethical produce and the recent COVID-19 pandemic has brought the human–animal relationship into mainstream discourse.[10] This discourse is now underpinned by scientific arguments about public

1 Anne Peters, *Studies in Global Animal Law* (Springer Nature 2020) 183; John CV Pezzey and Michael A Toman, *The Economics of Sustainability* (Routledge 2017).

2 Angus Nurse, 'Beyond the Property Debate: Animal welfare as a public good' (2016) 19(2) Contemporary Justice Review 174.

3 Anne Peters, 'Global Animal Law: What it is and why we need it' (2016) 5(1) Transnational Environmental Law 9.

4 Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, 'When Structures become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) European Journal of International Law 733.

5 Caley Otter, Siobhan O'Sullivan, and Sandy Ross, 'Laying the foundations for an international animal protection regime' (2012) 2(1) Journal of Animal Ethics 53; Peters (n 3); Steven White, 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4(4) Global Policy 391.

6 Anne Peters, 'COVID-19 Shows the Need for a Global Animal Law' (2020) 11(4) dA Derecho Animal: Forum of Animal Law Studies 86.

7 ibid.

8 Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart Publishing 2020).

9 ibid.

10 Dimitris Potoglou et al, 'To what extent do people value sustainable-resourced materials? A choice experiment with cars and mobile phones across six countries' (2020) 246 Journal of Cleaner Production 118957.

health, providing the green shoots that drove the legitimisation of environmental law. As such it may be an ideal time to revisit animal law using an empirical lens.

The aim of this article is not to answer comprehensively any of the complex questions raised but rather to open a space for intellectual debate and to stimulate interest in the area in Ireland. The article will commence with a discussion on some of the core areas of the human–animal relationship and why it is an important area to consider. The paper will then look at the diverging schools of thought that have emerged, namely the animal welfare and animal rights field, and how these debates align with law and more particularly animal law. Finally, the paper will move on to explore how a more therapeutic approach to law and legal frameworks may assist with progression in the animal law field, particularly if we wish to move beyond solely exploring this area from a human-centred approach as has occurred within the environmental law space.

The Human Animal Relationship

Humans and animals have had, and indeed continue to have, a long and complex relationship. This relationship has largely been characterised by various forms of interaction primarily underpinned by exploitation, with economic need and resource generation being driving factors.[11] This relationship has changed over time and varies across jurisdictions. Moreover, it takes multiple and varied forms—food, medicinal, companionship, and collectables. As outlined above, the relationship often has an economic aspect to its existence—people making a living through farming, by selling animal body parts for medicinal purposes, people supporting their family's survival through poaching for food, and people making vast profits from trafficking rare animals, to name but a few.[12] The rise in interest in the area of human–animal studies, particularly in the US,[13] has led to increased questioning of this complex relationship and the presuppositions surrounding its framing.[14] Moreover, the arrival of the COVID-19 pandemic has magnified such questions.[15] The likes of intensive farming in the West and cramped conditions at animal/meat markets in the East have been associated with zoonotic diseases, whereby infectious diseases such as swine flu and COVID-19 have the potential to emerge and mutate, thereby infecting humans.[16]

This has reframed the human–animal relationship, moving it from a largely private and personal issue to a public health and societal issue. Interestingly, much emphasis has been placed on the East's practice of wet markets being the source of such problems.[17] However, intensive farming in the West, which is largely hidden behind closed doors, is not as emphasised as the wet market traditions, and yet research suggests that this form of farming is potentially equally as harmful to public health and the environment, despite the higher levels of biosecurity adopted.[18] The human–animal relationship also impacts the climate and biodiversity. For example, reports suggest that livestock produce 14.5% of the total anthropogenic GHG emissions globally and clearing pastures for cattle ranching has been attributed with being one of the leading causes of deforestation.[19] A problem identifiable in the literature is how to utilise laws and regulations in this complex space in which cultural sensitivities, cultural diversity, sustainability issues, and economic norms interact.[20]

Animal Law: A Fractured and Stagnant Area

Those working in the animal law field have traditionally been divided along ideological lines. One school of thought views the animal law field through a pure animal rights lens, in that animals should have intrinsic rights regardless of human activity; the other school of thought views animal law from an animal welfare perspective in that animals' welfare is important but only insofar as it aligns with human activity. The abolitionist movement, aligned with the pure animal rights movement, believes that any animal welfare approach only entrenches ideas around animals being used by humans and therefore prolongs the problem. Many of those aligned with the animal welfare movement believe that, whilst the welfare approach is currently not sufficiently working to provide adequate protections for animals, it is a step along the road to achieve a better solution to the problem. Whilst there has been and indeed is a longstanding divide between the two schools of thought, there is also another body of literature that views them as more alike than different.[21] Therefore, it has been suggested that the philosophical approaches may be more similar than immediately evident, albeit that the practical solutions proposed may be different.[22] It must be recognised, however, that those in the animal rights field, particularly those who take the abolitionist perspective, perceive animal law as perpetuating the problem. This author suggests that animal law can be part of the solution and aligns more with what might be called a 'radical welfare' approach aimed at establishing core rights that seek out harmony with human rights through a form of therapeutic jurisprudence. We will return to this below. This position will be problematic for some working in the field and indeed my own understanding of my position may change with time, but for now this is where I can best position myself in this busy space.

11 Steven McMullen, *Animals and the Economy* (Palgrave Macmillan 2016).
12 ibid.
13 Simon Brooman, '*A Practical Approach to Animal Welfare Law* by Noel Sweeney' (2021) 11(1) Journal of Animal Ethics 112; Maneesha Deckha, 'Critical Animal Studies and Animal Law' (2011) 18 Animal Law 207.
14 Thomas G Kelch, 'Towards Universal Principles for Global Animal Advocacy' (2016) 5(1) Transnational Environmental Law 81; Peters (n 3); Katie Sykes, 'Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection' (2016) 5(1) Transnational Environmental Law 55.
15 Tauseef Ahmad et al, 'COVID-19: Zoonotic aspects' (2020) 36 Travel Medicine and Infectious Disease.
16 Robert G Webster, 'Wet markets—a continuing source of severe acute respiratory syndrome and influenza?' (2004) 363 The Lancet 234.
17 Mamoona Chaudhry et al, 'Risk Factors for Avian Influenza H9 Infection of Chickens in Live Bird Retail Stalls of Lahore District, Pakistan 2009–2010' (2018) 8 Scientific Reports 1.
18 Elisabeth G Huijskens et al, 'Evaluation of Patients with Community-Acquired Pneumonia Caused by Zoonotic Pathogens in an Area with a High Density of Animal Farms' (2015) 63(2) Zoonoses and Public Health 160.
19 Pierre J Gerber et al, 'Tackling Climate Change through Livestock: A Global Assessment of Emissions and Mitigation Opportunities' (Food and Agriculture Organization of the United Nations 2013); Martha Bonilla-Moheno and T Mitchell Aide, 'Beyond deforestation: Land cover transitions in Mexico' (2020) 178 Agricultural Systems 102734.
20 Peters (n 3); Peters (n 6).
21 Liam O'Driscoll, 'Animal Law: Introduction, Discourse and the Irish Approach' (*Trinity College Law Review Online*) <https://trinitycollegelawreview.org/animal-law-introduction-discourse-irish-approach/> accessed 1 June 2022.
22 Peter Sankoff, 'The Animal Rights Debate and the Expansion of Public Discourse: Is it Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?' (2012) 18 Animal Law Review 281.

Animal law is a difficult area of law as it has significant ambiguities around 'right and wrong'. For example, intensive farming is perceived as a 'wrong' amongst animal welfare and rights-based activists; however, it is also seen as 'right' by others as a result of the ability to produce cheap meat and thus provide food for large numbers of people. Adopting a Millian approach, traditionally law has followed a utilitarian and liberal pathway in terms of the former defining right and wrong and the latter defining rights within that framework. Utilitarianism adopts a philosophical position that prioritises the greatest happiness of the greatest number.[23] Liberalism on the other hand refers to individual rights that are intrinsic to justice and in this respect a rights holder can either align with or limit the utilitarian impact in certain areas of social life.[24] Hedonism, humans' seeking of pleasure and avoidance of pain, is central to this argument. However, hedonism is a complex experience; pleasure through ignorance may not be pleasure. A liberal approach, assuming one has a right to understand pleasurable experiences, may indeed reverse a hedonistic experience.

Aligning this with animal law is tricky as much animal life is hidden from humans' everyday lives. This means that the gaining of pleasure may be done in a manner that, unknown to the pleasure seekers, would actually cause them pain if they were fully aware of the context in which they are experiencing the pleasure. Thus, in this context, the utilitarian argument may fail if people are fully informed of the circumstances under which they are experiencing their pleasure, if not aware, it may be pain disguised as pleasure. An example of this is a self-proclaimed animal lover who enjoys the pleasure of a regular shop-bought sausage sandwich on a Sunday morning after a hard week's work. However, one must assume, with the person being an animal lover, that if they knew the living conditions of the pig and the slaughter mechanisms used to prepare the meat, they would not experience such pleasure from the sausage sandwich.

There is a real dilemma here as to enjoy a non-traditional organic bought sausage, where the animals experience higher standards in living conditions, may in fact cause economic pain due to its cost and thus reduce the pleasure of eating the sausage sandwich. Adding to the complexity and contradictions that appear to often circulate in this area is the acceptance of ignorance and/or indeed the requirement of ignorance to pursue pleasure. This is where the liberal individual right to pleasure, perhaps along with the greatest number in society, dominates the right to, or indeed desire for, information that may alter the pleasure principle in such a scenario. In other words, ignorance may indeed be required and desired to experience pleasure. Thus, the human-centric and individually focused approaches of utilitarianism and liberalism, alongside willingly accepted ignorance, have the potential to entrench the problems around animal law and indeed may be intrinsic to the stagnation in the area. However, adopting a higher form of happiness that relates to happiness for and with the greater good for all, for which Mill argued, might overcome these problems. It is beyond the scope of this paper to unpick these puzzles fully, but it is important to point out the tensions in the traditional legal framework when analysing this area and to consider such dilemmas when thinking about rules and laws in this space.

23 Alan Ryan (ed), *John Stuart Mill and Jeremy Bentham: Utilitarianism and Other Essays* (Penguin 2004).

24 Jonathan Riley, 'Utilitarian Liberalism: Between Gray and Mill' in John Horton and Glen Newey (eds), *The Political Theory of John Gray* (Routledge 2007).

These types of problems in relation to animal laws are not new. In the eighteenth century, when Jeremy Bentham was writing, the question of the position of animals within the world in terms of rights was an ongoing debate.[25] Bentham, a utilitarian, argued that animals should not be made suffer unnecessarily but their suffering was acceptable if it meant the betterment of man.[26] However, he did suggest that:

> It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate…The question is not, Can they reason? nor, Can they talk? but, Can they suffer? [27]

It would seem that Bentham's arguments hold true today; most national laws, EU regulations, and international instruments rely on morals and sentience and the avoidance of unnecessary suffering as their justification.[28] For example, laws that recognise sentience either have it explicitly enshrined in the relevant law or refer to it implicitly through only applying the law to sentient beings.[29] The Treaty on the Functioning of the European Union refers to the welfare of animals in agriculture, fisheries, transport, internal market, research, technological development, and space policies, using the sentient nature of animals as justification.[30] Directive 2010/63/EU of the European Parliament and the Council on the Protection of Animals Used for Scientific Purposes has gone beyond covering vertebrate animals and is inclusive of cyclostomes and cephalopods and refer to scientific evidence of their ability to feel pain, suffering and distress as their justification.[31] Moreover, The European Convention for the Protection of Vertebrate Animals Used for Experimental and other Scientific Purposes explicitly states that man has a moral obligation to respect all animals and be cognisant of their ability to suffer.

This is similarly the case for national laws. The Finnish Animal Welfare Act explicitly outlines the obligation to protect animals from distress and pain in the best possible way (section 1.1).[32] French welfare law (provisions laid down in the Penal Code and the Maritime Fishing and Penal Code) states that all sentient animals shall be placed by the owner in conditions comparable with their biological needs.[33] The German Animal Welfare Act (2006) refers to the responsibility of humans to protect the lives and wellbeing of their fellow creatures and that no one shall cause pain or suffering without good reason.[34] In India, the Prevention of Cruelty to

25 Johannes Kniess, 'Bentham on animal welfare' (2018) 27(3) British Journal for the History of Philosophy 556.

26 ibid.

27 JH Burns and HLA Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1996) chapter 17, footnote b.

28 Charlotte E Blattner, 'The recognition of animal sentience by the law' (2019) 9(2) Journal of Animal Ethics 121.

29 ibid.

30 Treaty on the Functioning of the European Union (Lisbon Treaty) art 13.

31 Council Directive 2010/63/EU of 22 September 2010 [2010] OJ L276/33.

32 Animal Welfare Act 247/1996, amendments up to 1430/2006 included.

33 Loi nº 97-1051 du 18 novembre 1997 d'orientation sur la pêche maritime et sur les cultures marines.

34 Tierschutzgesetz 2006 BGBl I s 1206, 1313 <www.gesetze-im-internet.de/tierschg/BJNR012770972.html> accessed 1 June 2022.

Animals Act (1960) defines animals as any living creature other than humans and in its Preamble explicitly outlines its aim as being to prevent the infliction of unnecessary pain on animals.[35]

In the 1960s, the British Farm Animal Welfare Council developed the five freedoms for animals: namely, freedom from hunger and thirst; freedom from discomfort; freedom from injury, pain, and disease; freedom to express normal behaviour; and freedom from fear and distress.[36] The World Health Organisation for Animal Health recently launched a Global Animal Welfare Strategy which includes four pillars: developments of animal welfare standards; capacity building and education; communication with governments, organisations and the public; and implementation of animal welfare standards and policies.[37]

Ireland relies upon the Animal Health and Welfare Act 2013 (as amended) and takes a similar perspective in terms of the infliction of 'unnecessary suffering'.[38] This type of terminology has been described as too ambiguous to practically enforce as any welfare concerns could be trumped by economic, business, or human health.[39] Indeed, similar arguments could be put forward in relation to the other EU and national regulations or legislation outlined above. The legal and strategic approach outlined above suggests that countries' ideological positions are limited to a basic animal welfare debate and that this is likely as a result of adhering to long standing economic, business, and human health practices. As a result, many scholars are now arguing that a more rights-based approach, although not necessarily to the level of human rights, may be necessary at an international level.[40] This raises more questions and potential barriers, for example, should all animals get equal rights? Or do some get different rights to others? This is evident in the debate related to rights for domestic animals versus non-domestic animals—some scholars argue that the former require fewer rights than the latter, whilst others argue that such rights simply need to be different.[41] Furthermore, it asks questions about motivations for animal rights—whether animal rights are for the sake of human privilege or whether they are for a higher ethical and moral recognition of the position of animals in the world.

The intersection between human rights and animal rights is also an important area to consider. When an animal has a right, can it trump a human's right? And if so, when? For example, does a human's right to cheap meat trump an animal's right to live a more natural life? If a human has access to an alternative protein source is there a moral imperative on the human to take that option so as not to cause harm to an animal? Such changes in human consumption practices would bring about changes to supply and demand chains and thus require farmers to adapt, and this would require significant support to be put in place during a period of transition. Indeed, some changes are already underway as is evidenced in Ireland by the Department of Agriculture, Food and Marine, publication, *A Roadmap Towards Climate Neutrality,* where economic supports for rewilding/foresting and other environmentally friendly farming practices are recognised as key to sustainability moving forward.[42] However, the impact of such initiatives in terms of reducing agricultural area loss has been raised as a growing concern by some UK farmers.[43] Change is also evident in other jurisdictions, for example the UK is moving towards recognising animals, including decapods and cephalopods, as sentient beings, as well as banning live exports and the importation of hunting trophies. Furthermore, Spain has recently recognised animals as sentient beings in their Civil Code, animals already having sentient status in Spanish regional administrative laws and their Criminal Code.

This section has raised big questions and attempting to answer them is beyond the scope of this paper. However, their consideration is important as they are intrinsic to animal law not progressing in terms of stronger welfare/rights based approaches being proposed, supported, and adopted. They point to a current tension between human consumption practices and the ability to advance in a more sustainable and rights-based manner.

Therapeutic Jurisprudence: A Problem-Solving Legal Approach to Complex Socio-Legal Issues

The currently polarised positions and tensions in animal law, as outlined above, are not irreconcilable. Viewing this area as a complex socio-legal area that requires nuanced strategies to develop answers highlights the need for a legal framework that will assist with unpacking these problems and formulating solutions. A correct legal framework can simplify this space and move it forward. The current legal framework, based on utilitarian liberalism, has been questioned in terms of its ability to provide the necessary framework for the animal law field. This questioning has resulted from, alongside the issues listed above, its inability to adjust to and accommodate difference.[44] As such, Kelch has argued for a change in legal policy. For example, he suggests the Feminist Care Theory be utilised to generate universal principles aimed at changing this space.[45] However, to date this has brought about little change. The author of this paper suggests that consideration be given to therapeutic jurisprudence as a means to bring about change in this area. Therapeutic jurisprudence provides a problem solving approach that is applicable to complex socio-legal issues in a manner that upholds due process and rights-based approaches, whilst also connecting to the lived experience of those involved with the law and legal relationships.[46] Therapeutic jurisprudence therefore provides the core moral principles of Feminist Care Theory, compassion, sympathy and empathy, but retains the central pillar of due process, imperative to ensuring that legal rights are upheld to a high standard.

35 Prevention of Cruelty to Animals Act 1960.

36 British Farm Animal Welfare Council, 'Five Freedoms' <https://webarchive.nationalarchives.gov.uk/ukgwa/20121010012427/http://www.fawc.org.uk/freedoms.htm> accessed 1 June 2022.

37 OIE Global Animal Welfare Strategy (May 2017) <www.oie.int/fileadmin/Home/eng/Animal_Welfare/docs/pdf/Others/EN_OIE_AW_Strategy.pdf> accessed 1 June 2022.

38 Animal Health and Welfare Act 2013 <www.irishstatutebook.ie/eli/2013/act/15/> accessed 1 June 2022.

39 O'Driscoll (n 21).

40 Sykes (n 14).

41 Deckha (n 13).

42 Department of Agriculture, Food and the Marine , 'Climate Change, Bioenergy & Biodiversity' (2021) <www.gov.ie/en/publication/a8e47-climate-change-bioenergy-biodiversity/> accessed 1 June 2022.

43 Jonathan Riley, 'How farmers can reverse food self-sufficiency decline' (*Farmers Weekly*, 18 November 2021) <www.fwi.co.uk/news/farm-policy/analysis-how-farmers-can-reverse-food-self-sufficiency-decline> accessed 1 June 2022.

44 One must only look at the gay rights movement which centred around highlighting the sameness of gay people to non-gay people, thus they deserved rights. An animal rights argument cannot use the liberalism cornerstone of the law to uphold its argument, in fact it counters the argument. Deckha (n 13).

45 Kelch (n 14).

46 Etain Quigley and Blanaid Gavin, 'ADHD and the Irish Criminal Justice System: The Question of Inertia' (2018) 15 Irish Probation Journal 84.

Therapeutic jurisprudence is a philosophical approach or paradigm which is often discussed in terms of law and practice being therapeutic for those they affect.[47] The overall aim of therapeutic jurisprudence is to explore the therapeutic and anti-therapeutic nature of the law and to outline more therapeutic approaches: importantly, without breaching due process and/or constitutional rights.[48] The retention of due process and constitutional rights is key to a rights-based therapeutic jurisprudence that is not overly paternalistic, autonomy-depriving and/or punitive. As such, therapeutic jurisprudence is a framework that allows the law to move beyond a rigid rule-imposing approach and move towards a model that can adapt to the complex needs of those it governs whilst retaining due process.

Historically, the legal field has struggled with moving beyond the rule-based model, which is aligned with the classical school; and the rehabilitative based model, which is aligned with the positivist school. The classical school is based on two assumptions, namely, individuals make rational decisions about offending and that an appropriately designed system will result in primary and secondary deterrence. This school of thought is primarily concerned with ensuring equality before the law, proportionate, swift, and consistent responses, clarity of the law, and consistency of sanction. The positivist school, on the other hand, is based on different assumptions, namely, that individuals who offend have underlying problems and need psychosocial interventions to rehabilitate. This school of thought is primarily concerned with meeting the individual needs of the person rather than being concerned solely with the offence. Involvement with the system typically takes the form of rehabilitation rather than punishment and thus a person can be detained until such time as they are deemed rehabilitated, which can result in long and sometimes indeterminate sentences often impacting some of the most vulnerable in society.[49] The problems with applying such philosophies to the area of animal law are twofold: the classical school is rigid, lacks an ability to adapt to individual need, and fails to account for the proposition that the person may be acting in a rational manner as defined; the positivist school lacks due process, overemphasised the psychosocial, and is difficult to apply when pathology is absent. Therapeutic jurisprudence addresses these problems and provides a framework that facilitates an adaptable rule-based approach that meets the complex needs of individuals (including animals) without losing the core pillar of justice, namely due process.

Such problem-solving approaches have been applied to other areas of the legal field (e.g. environmental law, youth justice, and mental health). Although the shift to a problem-solving approach in these areas was hardly a panacea, the faults identified are learnings that can be adopted into the field of animal law. Those working in the animal law space have argued for a global animal law that is culturally sensitive, constructed through a shared and common discourse, empirically based, and theoretically sound.[50] The necessity of a global approach has also been espoused by many influential international agencies such as the World Organisation for Animal Health, the United Nations Food and Agriculture Organisation's One Health Strategy, the European Commission in its European Communities Proposal for Animal Welfare and Trade in Agriculture (2000), and the World Trade Organisation.[51] As outlined above, the proliferation of legal instruments targeted at human–animal relations to date have managed to get us to a point where certain animal welfare concepts have become the norm. However, they fail to provide a more comprehensive solution in this space. As a result, animal law has been described as experiencing a period of stagnation. Therefore, a paradigm shift in terms of how this problem is viewed and addressed is required and it is suggested that a therapeutic jurisprudential approach be considered.

Progressing Animal Law

Preliminary research in Ireland suggests that animal law remains a fractured area, that it relies heavily upon a traditional welfare approach, and that it lacks a firm evidence-based theoretical guiding framework. Moreover, there does not appear to be consensus about the aims and objectives of animal law and indeed this seems to be a moving feast. Exploratory findings further suggest that minimal attention is being paid to how the law, as currently constructed and applied, impacts the lives of those it governs and how human rights law and animal law can align in a complementary rather than contradictory manner. Nor has there been any significant attempt to incorporate the lived experience into the development of legal structures governing this space. This is a complex and nuanced area that requires a complex, nuanced, and thoughtful solution that goes beyond the traditional legal rules-based/rehabilitative approach. Animal law is largely underpinned by historical and cultural norms and presuppositions which have mainly gone unquestioned heretofore. This author suggests that it is time to question these historic and cultural norms with the aim of reconceptualising the legal framework and challenging long standing presuppositions in the field.

It is time to explore this area through a new lens by developing an innovative and evidence-based approach to assist with the advancement of legal instruments and their application in the human–animal relations field in Ireland. Animal law needs to be reimagined in a manner that includes and values stakeholders' needs. The siloed areas of human rights, animal welfare, animal rights, and environmental law schools of thought need to work together with a view to developing shared consensus rather than division. Animal law needs to be brought beyond the traditionally rigid liberal utilitarian approach to adopt a problem-solving framework from which it can thrive. As such, a fundamental shift in the conceptual framework currently underpinning animal law in Ireland needs to occur. This will have the impact of developing a more sustainable approach to the human, animal, and law relationship moving forward.

47 David B Wexler and Bruce J Winick, *Essays in therapeutic jurisprudence* (Carolina Academic Press 1991).

48 David B Wexler, 'Mental health law and the seeds of therapeutic jurisprudence' in Thomas Grisso and Stanley L Brodsky (eds), *The Roots of Modern Psychology and Law: A Narrative History* (OUP 2018).

49 An example of this is Indeterminate Sentences for Public Protection in England, abolished in 2012.

50 Peters (n 3).

51 World Trade Organization, 'European Communities Proposal: Animal Welfare and Trade in Agriculture' G/AG/NG/W/19 (28 June 2000) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DPaspx?language=E&CatalogueIdList=12129&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 1 June 2022.

Warfare's Silent Victim: International Humanitarian Law and the Protection of the Natural Environment during Armed Conflict

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Introduction

Armed conflict changes everything.[1] It is the ultimate human-induced crisis that has devastating consequences for the environment.[2] A report by the Conflict and Environment Observatory has identified how armed conflict affects the environment before, during, and after its conclusion.[3] For example, 'the environmental impacts of wars start long before they do', given that building and sustaining military forces requires vast quantities of resources.[4] A study done by Lancaster University shows that the United States' military is one of the largest polluters in history emitting more carbon dioxide than most countries.[5] Indeed, as war commences, the means and methods of armed conflict, such as the targeting of industrial, oil, and energy facilities and other scorched earth tactics, cause many different forms of environmental harm that can scar a landscape and damage ecosystems for years after a conflict has ended.[6]

The toll taken on the environment fuels a vicious cycle of conflict. A report by the International Committee of the Red Cross ('ICRC') has identified the interconnectedness of climate change and armed conflict, in that the effects of armed conflict contribute to climate change, with climate change, in turn, fuelling further conflict.[7] This is particularly problematic given that the latest instalment of the Intergovernmental Panel on Climate Change's Sixth Assessment Report sets out in clear terms that humanity is at a crossroads in that the decisions made now affect whether or not a liveable future can be secured.[8] As such, it is of critical importance that a concrete set of rules are imposed at the international level to prohibit environmental damage above a certain threshold and hold those responsible for such damage accountable. This can be achieved through a review of the body of law known as International Humanitarian Law ('IHL').

IHL seeks to restrict the means and methods of armed conflict through 'treaties and customs that limit the use of violence in armed conflict and protect civilians and persons who are no longer participating in hostilities'.[9] However, IHL's anthropocentric focus

1 Ángela María Amaya Arias et al., Witnessing the Environmental Impacts of War: Environmental Case Studies from Conflicts around the World (PAX, 2020).
2 ibid.
3 CEOBs, 'How Does War Damage the Environment?' (4 June 2020) <https://ceobs.org/how-does-war-damage-the-environment/> accessed 10 April 2021.
4 ibid.
5 Patrick Bigger, 'The US Military Consumes More Hydrocarbons than Most Countries - With a Massive Hidden Impact on the Environment' (Lancaster University, 20 June 2019) <https://www.lancaster.ac.uk/news/us-military-consumes-more-hydrocarbons-than-most-countries-with-a-massive-hidden-impact-on-the-climate> accessed 10 April 2021.
6 CEOBs (n 3).
7 ICRC, When Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflict and the Climate and Environmental Crisis on People's Lives (2020).
8 IPCC, Climate Change 2022: Impacts, Adaptation, and Vulnerability (Summary for Policymakers) (IPCC WG II 6th Assessment Report, 2022) 36.
9 Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (2nd edn, International Committee of the Red Cross 2006) 81.

has stunted the development of thorough and coherent laws for the protection of the environment during armed conflict, and what has been achieved has been criticised as ineffective.[10]

This article aims to highlight the ways in which IHL fails to protect the environment during armed conflict adequately. Firstly, this article shall look at how the means and methods of armed conflict affect the environment, both directly and indirectly. Secondly, it will provide a detailed analysis of current IHL provisions for the protection of the environment. Thirdly, the article shall look at potential future developments in the law, such as the creation of a new treaty on environmental protection during armed conflict, as well as the wider use of demilitarised zones.

Before these themes are discussed, this article shall look at historical attitudes towards environmental damage during armed conflict.

Historical attitudes

'When you besiege a city for a long time, making war against it in order to take it, you shall not destroy its trees by wielding an axe against them. You may eat from them, but you shall not cut them down'.[11]

Wartime damage to the environment has a history as long as humankind itself, dating back to when homo sapiens first began to organise into groups.[12] From the Peloponnesian Wars, when the Spartans laid waste to Athenian fields, to modern-era conflicts, such as the burning of Romanian oil fields by the Allies during World War II, the environment has been a 'silent victim' of armed conflict.[13]

The origin of the protection of the environment during armed conflict arguably has its roots in the religion-based morals of Judeo-Christian and Islamic traditions.[14] The above quotation, taken from the book of Deuteronomy, is often cited as an early source for restrictions on environmental damage during wartime and may even be an early iteration of the prohibition of the 'wanton' destruction principle,[15] as laid out in the recent *Customary International Humanitarian Law Study* published by the ICRC.[16] Indeed, in Islam, the First Caliph, Abu Bakr al-Saddiq, is recorded as having instructed his military commander on the rules of war: 'stop, O people, that I may give you the rules on the battlefield…do not cut down fruitful trees; do not slaughter the enemy's sheep, cows or camels…do not burn date palms, or inundate them'.[17]

However, attempts to reduce environmental harm during armed conflict based on religious, moral, and philosophical grounds, such as the view that the environment should be protected during the war due to its inherent worth, have been pushed aside in favour of an anthropocentric approach. [18] This approach enables us to do with plants as we 'please' and with animals as we 'desire', given that the natural environment is viewed simply as a raw material to be manipulated at will for the satisfaction of human beings.[19] This is reflected in the Judeo-Christian tradition, which states, 'go out and subdue the earth'.[20] The latter view is one propounded by the founder of the Just War principles, Saint Thomas Aquinas, and has proven to be the 'philosophical justification for the human-centred orientation of the international statutes currently offering protection to the environment in times of armed conflict'.[21]

This explains why war-waging parties turn a blind eye to the harm done to the environment during armed conflict. However, it was not until the morally reproachable tactics of the U.S. Army during the Vietnam War that the history of the relationship between warfare and the environment took a turn, and concrete legal, environmental protections were introduced.

I. How the means and methods of armed conflict affect the environment

Public awareness of the effects of armed conflict on the environment first became manifest during the Vietnam War,[22] which is notorious for the disastrous environmental impact of the United States' counterinsurgency warfare.[23] This can be seen in the U.S. army's bombing campaign that left 'moonlike craters' in the landscape and the bulldozing of 325,000 hectares of forest, decimating the country's rich flora and fauna.[24] However, the most disastrous environmental impact of the Vietnam War was the use of herbicides as part of *Operation Ranch Hand*. This was an 'aggressive' programme of chemical warfare, which involved the U.S army spraying approximately 4.5 million hectares of Vietnamese land with herbicides containing the deadly chemical dioxin.[25]

The environmental warfare tactics deployed by the U.S. 'spawned condemnation across civil society'[26] and prompted the international community to address environmental protection during armed conflict. The results were twofold: the Convention on the Prohibition of Military or Any Other Hostile Uses of Environmental Modification Techniques ('ENMOD')[27] and the inclusion of environmental protections, namely Articles 35(3) and 55, in the

10 Rosemary Rayfuse, 'War and the Environment: International Law and the Protection of the Environment in Relation to Armed Conflict – Introduction to the Special Issue' (2013) 82 Nordic J Int'l L 1.

11 *The Holy Bible*, Deuteronomy: 19-20 (English Standard Version).

12 Margaret MacMillan, *War: How Conflict Shaped Us* (Profile Books, 2020) 5.

13 United Nations Environmental Programme, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law* (UNEP, 2009) 4.

14 Carson Thomas, 'Advancing the Legal Protection of the Environment in Relation to Armed Conflict: Protocol I's Threshold of Impermissible Environmental Damage and Alternatives' (2013) Nordic J Int'l L 85.

15 ibid.

16 Jean-Marie Henckaerts et al., *Customary International Humanitarian Law* (ICRC and CUP 2005) Rule 44.

17 Heba Aly, 'Islamic Law and Rules of War' (*Middle East Eye*, 12 February 2015) <https://www.middleeasteye.net/big-story/islamic-law-and-rules-war> accessed 28 January 2021.

18 Gregory Reichberg and Henrik Syse, 'Protecting the Natural Environment in Wartime: Ethical Considerations for the Just War Tradition' (2000) 37 Journal of Peace Research 449, 445.

19 ibid.

20 *The Bible* (n 11) Genesis 1:28.

21 ibid 457.

22 UNEP (n 13) 8.

23 Eliana Custao, 'From Ecocide to Voluntary Remediation Projects: Legal Responses to Environmental Warfare in Vietnam and the Spectre of Colonialism' (2018) 19 Melb J Int'l L 494.

24 Jay Austin and Carl Bruch (eds) *The Environmental Consequences of War: Legal Economic and Scientific Perspectives* (Cambridge University Press 2000) 1, 48.

25 Trien T Nguyen, 'Environmental Consequences of Dioxin from the War in Vietnam: What Has Been Done and What Else Could be Done?' (2009) 66 Int'l J Environmental Studies 9.

26 Custao (n 23) 500.

27 The Convention on the Prohibition of Military or Any Other Hostile Uses of Environmental Modification Techniques, 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 ('API').[28]

However, ENMOD and API were far less ambitious results than what the legal and scientific communities advocated for, and it was not long after their creation that the adequacy and usefulness of the two conventions were called into question following the Gulf War 1990-1991.[29]

Even though there has not been a return to the scale of the environmental warfare tactics seen during the Vietnam War, modern conflicts continue to have far-reaching effects extending beyond that of human suffering, often causing serious damage to the environment. Unfortunately, the environment is *always* a victim of armed conflict due to the basic nature of the means and methods of warfare.[30] Indeed, one study indicates that over 90% of the major armed conflicts between 1950 and 2000 took place in countries containing biodiversity hotspots.[31]

Environmental damage during wartime occurs both directly and indirectly and may have transboundary and long-lasting effects, persisting for decades after the conflict has ended.[32] The UNGA recognised the 'dire effects' that certain means and methods of warfare have had on the environment in the wake of recent conflicts causing environmental damage and depletion, reinforcing the urgency of these issues at the highest level.[33]

I.I Direct Effects

Environmental damage and degradation occurs as a direct consequence of military operations, not only intentionally but also as unintended 'collateral' damage.[34] Take, for example, the Gulf War 1990-1991, which was an armed campaign waged by a US-led coalition of states in response to Iraq's invasion and annexation of Kuwait.[35] It was during this conflict, only fourteen years after the creation of API and ENMOD, that the world once again witnessed the use of ecological warfare as Saddam Hussein weaponised oil.[36] This conflict clearly illustrated how the 'intentional use of the environment as a means of warfare…may cause severe damage in the form of marine, terrestrial and aerial contamination'.[37]

The Gulf War was the first conflict after the 1970s that brought international attention to the effects that armed conflict has on the environment.[38] During this conflict, the retreating Iraqi army set aflame 613 out of Kuwait's 810 oil wells, burning an estimated one billion gallons of oil.[39] This generated a Florida-sized plume of toxic smoke that hung over Kuwait, drifting into neighbouring countries. It is estimated that these fumes contributed 2% of global carbon emissions in 1991.[40]

On top of this, the wells that did not ignite instead gushed oil into the vulnerable desert landscape creating vast 'oil lakes' up to 10km wide and 13cm deep.[41] It is estimated that 5% of Kuwaiti territory became covered in a thick 'tarcrete' as the oil dried, killing flora and fauna, as well as permanently degrading the soil.[42]

The smoke and oil spills had a catastrophic impact on wildlife: 22-50% of the bird population in Kuwait was killed, the habitat of a population of endangered sea turtles was destroyed, causing unknown numbers to die, and acid rain significantly raised the pH levels in freshwater inlets killing vast numbers of fish, and further threatened the endangered dugong species.[43]

However, the environmental damage inflicted by the Iraqi army did not end there. At the conclusion of the first Gulf War, with Iraq's defeat, a number of minority Shia groups rebelled against the Baathist regime. One such group was the Ma'dan people. The Ma'dan have a rich and ancient culture associated with the Mesopotamian Marshland, which was also used as a safe haven for groups opposed to the government due to its inaccessible and isolated canals and islands.[44] As part of the Iraqi army's counterinsurgency campaign against groups such as the Ma'dan, the Mesopotamian Marshes were drained in what the UN has called an 'ecological catastrophe' on a par with deforestation in the Amazon.[45]

In addition to placing the 5000-year-old culture of these ancient people in 'serious jeopardy of coming to an abrupt end', the impact on the area's wildlife has been devastating.[46] A key site for migratory birds travelling from Siberia, the marshlands' disappearance placed 40 species of waterfowl at risk and caused serious reductions in their numbers.[47] Further, species of fish and mammals unique to the marshes are believed to be extinct, including the smooth-coated otter and the babel fish, with endangered birds, such as the Purple Heron, suffering a 50% mortality rate.[48]

The environmental modification by the Baathist regime to achieve near-total erasure of this marshland also impacted the weather and climate of the country. With the marshland no longer there to act

28 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977.

29 Custao (n 23) 501.

30 Siamak Khorram and X. Long Dai, 'Environmental Impacts of the 1991 Persian Gulf War: A Remote Sensing Perspective' (1999, Centre for Earth Observation, North Carolina State University) 2560.

31 Thor Hanson et al., 'Warfare in Biodiversity hotspots' (2009) 23 Conversation Biology 578.

32 UNEP (n 13) 4.

33 UNGA A/RES/47/37 (9th February 1993) UN Doc A/47/591.

34 Adrian Loets, 'An Old Debate Revisited: Applicability of Environmental Treaties in Times of International Armed Conflict Pursuant to the International Law Commission's 'Draft Articles on the Effects of Armed Conflict on Treaties" (2012) 21(2) Review of European Community and International Law 127.

35 Karen Hulme, 'Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-1991 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment' (1997) 2 Journal of Armed Conflict Law 45, 47.

36 ibid.

37 International Law and Policy Institute, *Protection of the Natural Environment in Armed Conflict: An Empirical Study* (2014) Report 12.

38 ibid 16.

39 Muhammad Sadiq, *The Gulf War Aftermath: An Environmental Tragedy* (Pulwer Academic Press 1993) 52.

40 Kris Hirschmann, *The Kuwaiti Oil Fires* (Facts on File Press 2005) 23.

41 Antoinette Mannion, 'Environmental Impact of War and Terrorism' (University of Reading Press 2003) Geographical Paper no. 169.

42 ibid.

43 John Loretz, 'The Animal Victims of the Gulf War' (1991) Physicians for Social Responsibility 34.

44 ILPI (n 37) 26.

45 UNEP, 'UNEP Releases Report on the Demise of the Mesopotamian Marshes' (Press Release, 13 August 2001) UNEP/98.

46 ibid.

47 ibid.

48 ibid.

as a buffer zone against desert winds, they now blow 'unhindered' at temperatures over 40 degrees Celsius, damaging and eroding arable land on a permanent basis.[49]

At the conclusion of the Gulf War, Iraq formally accepted its state responsibility for 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.[50] The United Nations Compensation Commission was charged with monitoring and assessing the impacts of the Gulf War on the environment and public health in 'victim countries'.[51] Consequently, a total of $243 million was awarded to the governments of Kuwait, Saudi Arabia, Iran, Jordan, and Syria in 2001.[52] A further $8.3 million was issued to six other governments for costs incurred assisting the Gulf countries in the abatement and prevention of environmental damage resulting from the conflict.[53]

Despite the fact that environmental damage arising as a direct result of armed conflict can be severe, far-reaching, and long-lasting, such damage only represents the tip of the iceberg, with the vast majority of instances arising indirectly.

I.II Indirect Effects

The indirect consequences of armed conflict on the natural environment can be as severe, if not more severe, than those directly resulting from a conflict.[54] Indeed, their more hidden nature makes them more subversive and difficult to tackle as they often arise from the complex circumstances of non-international armed conflicts ('NIACs').

A key case study is that of the Democratic Republic of Congo ('DRC'). In June 1960, the DRC gained its independence from Belgium; however, in its transition to independence, the country witnessed a period of political turmoil, which eventually erupted into brutal violence.[55] In 1965, a coup d'état led by Mobutu Sese Seko, which was supported by Belgium and the USA, saw three decades of 'oppression, kleptocracy, and collapse of state institutions'.[56] This laid the groundwork for the two wars that followed in 1996 and 1998. The Second Congo War officially ended in 2003; however, the continued fragility of the state has allowed for continued violence in parts of the country, exacerbating the DRC's effort to build a lasting peace.[57]

The DRC's almost chronic state of armed conflict, from 1996 onwards, has fuelled a melting pot of intersecting issues that contribute to severe environmental damage across the region. The DRC ranks fifth in the world for animal and plant biodiversity and has the highest levels of biodiversity on the continent of Africa.[58] However, the continuing conflict has resulted in three main areas of environmental damage: deforestation, harm to National Parks, and the exploitation of natural resources. Each shall be considered in turn:

Deforestation

Deforestation carried out by refugees in the DCR is an indirect effect of armed conflict, causing severe environmental damage. It is estimated that 2.4 million people have been made refugees by the conflict.[59] Fleeing from danger, refugees set up informal settlements that sprawl over the landscape, with 90% of these being unregulated, which means that they often spread uncontrollably over areas of rich biodiversity.[60]

The consequence of human displacement on the environment is that the refugees cut down swathes of forest for fuel and housing at an unstoppable rate. For example, in just three days in 1994, Mount Goma was completely deforested by refugees who sought out wood to create shelter.[61] Needless to say, deforestation on this scale causes widespread habitat destruction and loss of biodiversity, as well as contributes to global warming, given the fact that the DRC's rainforest is the largest in Africa.[62]

National Parks

The ongoing conflict in the DRC has had severe impacts on the country's National Parks, particularly the heavily protected Virunga National Park, a UNESCO World Heritage site. Home to countless unique species of wildlife, the Park's integrity is under threat by armed groups that use the dense cover of the forest for shelter and to stay hidden. Its threatened status is confirmed by its placement on the list of World Heritage in Danger.[63]

Armed groups, using automatic weapons, have been involved in large-scale poaching of the Park's wildlife for 'food purposes and for war-sustaining trade in ivory and bushmeat'.[64] This has had serious consequences for wildlife, as seen by the hippopotamus population in the DRC, which is now on the brink of extinction.[65] Poaching also has an economic incentive as a means by which armed groups fuel their military campaigns. For example, the Lord's Resistance Army ran the ivory trade in the Congo's Garamba National Park for years to fund its campaigns.[66]

Further, the Park is home to mountain gorillas that are targeted by armed groups, such as the Rugendo family of gorillas that was slaughtered in 2007. Under international law, mountain gorillas are protected by instruments such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (also known

49 Hassan Partow, *The Mesopotamian Marshlands: Demise of an Ecosystem (Early Warning and Assessment Technical Report)* (UNEP 2001) 10.
50 UNSC, Resolution 687 (3 April 1991) paras 16-19.
51 Peter Sand, 'Compensation for Environmental Damage from the 1991 Gulf War. United Nations Activities: UNCC' (2005) 35 Environmental Policy and Law Journal 244, 246.
52 ibid.
53 ibid.
54 Austin and Bruch (n 24) 362.
55 Gwinyayi Dzinesa and Joyce Laker, Post-Conflict Reconstruction in the DRC (2011) Centre for Conflict Resolution.
56 ibid.
57 ibid.
58 ILPI (n 37) 34.
59 UNEP, *The DRC: Post-Conflict Environmental Assessment Synthesis for Policy Makers* (2011) 26.
60 Asit Biswas and Cecilia Tortajada, 'Environmental Impact of the Rwandan Refugees of Zaire' (1996) 25(6) Ambio 405.
61 ibid.
62 UNEP (n 59) 36.
63 Guy Debonnet and Kes Hillman-Smith, 'Supporting Protected Areas in a Time of Political Turmoil: The Case of World Heritage Sites in the DRC' (2004) 14(1) Parks 9.
64 Britta Sjöstedt, 'The Role of MEAs in Armed Conflict: 'Greenkeeping' in Virunga Park. Applying the UNESCO World Heritage Convention in the Armed Conflict of the DRC' (2013) Nordic J' Int'l Law 82, 132.
65 Christopher Day, "Survival Mode': Rebel Resilience and the Lord's Resistance Army' (2019) 31 Terrorism and Political Violence 966.
66 ibid.

as 'CITES')[67] and the Agreement on the Conservation of Gorillas and Their Habitats.[68] Despite the fact that conservation efforts have increased the number of mountain gorillas in the DRC, they still face constant danger. Indeed, the motivation for armed groups to kill the gorillas in the Park is simple: 'kill the gorillas, and there will no longer be a reason to protect the Park'.[69] Without protection from park rangers, Virunga would be open to the pillage of its natural resources in order to fuel military activities.

Exploitation of Natural Resources

In recent years, concern has been raised by the UN about the role of natural resources in generating revenue for the instigation and continuation of armed conflicts.[70] This is particularly prevalent in the DRC, which contains, amongst many other valuable resources, 60-80% of the world's coltan reserves. Coltan is used in the manufacture of electrical components of computers and mobile phones.[71] For $300 per pound, the Rwandan army and the Hutu militia monopolised the DRC's coltan trade, selling it on to the USA in order to finance their military campaigns.[72]

The 2010 Mapping Report on the DRC noted that it was at the start of the first war in 1996 that natural resource exploitation first became militarised.[73] This exploitation became increasingly attractive as the conflicts in the DRC changed shape and dragged on, not just for financing the campaigns of armed groups but also as a means of personal enrichment for political and military leaders. In this sense, natural resources became a driving force behind the war in the DRC.[74]

The exploitation of natural resources in the DRC, enabled by political instability and lack of governance caused by years of conflict, has resulted in mass deforestation, and loss of wildlife and habitat. International corporations such as De Beers and Shell exacerbate this problem by engaging in the trade of 'conflict resources', such as diamonds, timber and oil, from war-torn countries like the DRC.[75] This unregulated and illegal pillage, enabled by conflict, causes a 'chain of extinction' threatening the existence of African wildlife.[76]

Given that every component part of the environment is vulnerable during armed conflict, it is necessary to analyse the applicable law to determine whether IHL adequately protects the environment during wartime.

67 The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1963.

68 The Agreement on the Conservation of Gorillas and Their Habitats, 2007.

69 Sophia Benz and Judith Benz-Schwarzburg, 'Great Apes and New Wars' (2010) 12 Civil Wars 400.

70 International Law Commission, *Second Report on Protection of the Environment in Relation to Armed Conflict by Marja Lehto, Special Rapporteur* (UNGA, 2019) A/CN.4/728.

71 OHCHR, *Report on the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the DRC Between March 1993 and June 2003* (August 2010) 350.

72 ILPI (n 37) 36.

73 OHCHR (n 71).

74 ibid.

75 ILPI (n 37) 36.

76 Benz and Benz-Schwarzburg (n 69).

II. Critical Analysis of Applicable Law

Before 1976, the word 'environment' did not feature in any treaty on the law of war. It was not until the aftermath of the Vietnam War that 'serious attempts were made to impose conventional law limits on the environmental damage resulting from hostilities'.[77] Arising from a surge of anti-war sentiment and with concern for the environment reaching a new high, API and ENMOD were adopted, setting codified standards for environmental protection during armed conflict.

IHL provisions protect the environment during an armed conflict in two ways: direct protection by treaty and indirect protection by the general principles of IHL.[78]

II.I Direct Protection

The direct protection of the environment during armed conflict is provided by two treaties, namely API and ENMOD. We shall look at each in turn before considering issues of conflict classification.

API

API was the first international treaty to provide direct protection of the environment during International Armed Conflicts ('IACSs'), as outlined in Article 35(3) and Article 55. Article 35(3) prohibits means and methods of warfare that are intended to or may be expected to cause 'widespread, long-term and severe damage to the environment'.[79] Article 55 repeats this prohibition and makes note that damage to the natural environment prejudices the health and survival of the human population.[80]

Even though these two key Articles appear similar, they are not duplicates. The International Committee of the Red Cross's ('ICRC') commentary to API explains the differing approaches of Articles 35(3) and 55.[81] Article 35(3) broaches the problem from the point of view of methods and means of warfare, reflecting principles of 'Hague Law', whereas Article 55 focuses on the survival and health of the population and creates a protected object, i.e., the environment, reflecting 'Geneva Law'.[82]

However, the effectiveness of Articles 35(3) and 55 is undermined by the number of States that remain non-parties to API, such as the USA, Israel, Pakistan, Iran, India, and Turkey. This is problematic given the military power and political influence of the likes of the USA, which has not ratified API because it is seen as 'too broad'.[83] Further, the USA opposes the recognition of Articles 35(3) and 55 as international customary law, as stated in Rule 45 of the ICRC's customary IHL study.[84] It is for this reason that McCoubrey

77 Michael Schmitt, 'Humanitarian Law and the Environment' (2000) 28 Denv J Int'l L& Pol'y 265, 267.

78 Michael Bothe et al., 'International Law Protecting the Environment During Armed Conflict' (2010) 92 International Review of the Red Cross 879, 6.

79 API (n 28) art 35.

80 ibid. art 55.

81 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff / International Committee of the Red Cross 1987) 663.

82 Schmitt (n 77) 275.

83 ibid. 277.

84 Henckaerts et al. (n 16) Rule 45.

contends that there should be new calls, preferably by the UNGA, to encourage non-parties to existing instruments, like API and II, to ratify these instruments as 'the primary way forward'.[85]

Furthermore, in the 2009 report, *Protecting the Environment During Armed Conflict*, the UN Environmental Programme ('UNEP') stated that Articles 35(3) and 55 do not adequately protect the environment during armed conflict due to the stringent and imprecise threshold required to demonstrate prohibited damage.[86] The problem with these key Articles is their 'operative core' that imposes a triple and cumulative standard of 'widespread, long-term and severe' that must be met before environmental damage is prohibited.[87]

In both Articles, there is difficulty regarding the quantum of harm prohibited. The requirements of 'widespread, long-term and severe' are not defined by API, or anywhere else, resulting in an 'elevated, uncertain and imprecise threshold that significantly narrows [the Articles'] scope of application'.[88] This is especially troublesome given that each individual requirement must be met in respect of the environmental damage to be prohibited.

The publication of the ICRC's 2020 updated *Guidelines on the Protection of the Natural Environment in Armed Conflict* ('Guidelines') offers some guidance on the interpretation of these Articles.[89] Rule 2 sets out detailed recommendations on how each component of the 'widespread, long-term and severe' requirement should be understood.[90] It states: 'widespread' should be understood as a scale of several hundred square kilometres; 'long-term' should take into account the duration of the indirect effects of the use of a given method or means of warfare; and 'severe' should constitute the disruption or damage to an ecosystem, with normal damage caused by troop movement and artillery fire in conventional warfare falling outside the scope of this prohibition.[91] However, these guidelines are non-binding and rely upon each State adopting the Guidelines at the national level. Given that certain States are yet to ratify API, such as the USA, Pakistan, Turkey, and Israel, the usefulness of these Guidelines is questionable.[92]

From an environmental point of view, Articles 35(3) and 55 are excessively restrictive, rendering it nearly impossible for the extremely high threshold to be reached by conventional warfare. A potential justification for this high threshold is that States did not want to see typical battlefield damage covered.[93] However, it could be argued that not even the environmental damage of the Vietnam War would cross the threshold since nature has largely recovered, therefore failing the 'long-term' requirement. Finally, because of the provisions' lack of practicability given the high threshold and absence of concrete meaning, it must be asked whether these provisions have 'fallen into desuetude', losing their binding force as a result of non-use for a sufficiently long time.[94]

ENMOD

ENMOD also provides direct protections to the environment, albeit from a different angle. ENMOD regulates the use of environmental modification techniques as a means to cause harm to the enemy during armed conflict. In Article 1(1), ENMOD specifically prohibits 'environmental modification techniques having widespread, long-lasting or severe effects as a means of destruction'.[95]

Unlike Articles 35(3) and 55 of API, the requirements to constitute prohibited environmental modification are linked by 'or', which results in a much lower threshold than API's 'and'. Additionally, the travaux of the UN Committee of the Conference of Disarmament, which established ENMOD, provides a working definition of 'long-term' as 'lasting a period of months, or approximately a season'.[96] However, Article 1(1) is criticised as undercutting the ostensible purpose of ENMOD, namely, to prohibit the military or hostile use of ENMOD techniques.[97] Indeed, during its drafting, many diplomats and observers found the wording of Article 1(1) to be too ambiguous, leaving it unclear as to what exactly would be prohibited.[98] Others felt that Article 1(1) was entirely deceptive, given that the use of a threshold requirement might serve to legitimise ENMOD techniques so long as they do not cross the 'widespread, long-term, or severe effects' threshold.[99] Further, ENMOD is less practical than API in a case of armed conflict, given that it deals with the slightly sci-fi-like idea of 'environmental changes produced by deliberate manipulation of natural processes'.[100]

Unfortunately, ENMOD specifies the level of damage that is prohibited, whereas an outright ban on environmental modification, which has certain sinister apocalyptic overtones, would have sent a much stronger message to belligerent parties to an armed conflict.

Issues of Conflict Classification

IHL makes a distinction between the environmental protections during IACs, i.e., armed conflicts between two recognised States, and NIACs, which are intra-state conflicts between non-state armed groups and government forces. IACs benefit from a wide range of albeit inadequate protections, whereas the applicable rules regulating NIACs are limited and are not subject to the direct environmental protection provisions detailed in either API or ENMOD.

Today, the overwhelming majority of armed conflicts are internal.[101] This means that the vast body of IHL is inapplicable or much more

85 H McCoubrey, *Environmental Protection in Armed Conflict: Present Provision and Future Needs* (Manuscript, University of Nottingham, January 1994) 5-6.

86 UNEP (n 13) 4.

87 Thomas (n 14) 83.

88 Liesbeth Lijnzaad and Gerard J Tanja, 'Protection of the Environment in times of Armed Conflict: The Iraq-Kuwait War' (1993) 40 Netherlands Int'l L. Review 180.

89 ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (2020).

90 ibid. rule 2.

91 ibid.

92 ICRC, 'Treaties, States Parties and Commentaries' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470> accessed 3rd May 2021.

93 Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Martinus Nijhoff Publishers 2004) 79.

94 Bothe et al. (n 78) 576.

95 ENMOD (n 28) art 1(1).

96 UNCCD to the General Assembly, Official Records of the General Assembly, 31 Session, Supplement No. 27 (A/31/27).

97 Lawrence Juda, 'Negotiating a Treaty on Environmental Modification Warfare: The Convention on Environmental Warfare and its Impact Upon Arms Control Negotiations' (1978) 32 International Organisation 975, 980.

98 ibid.

99 ibid.

100 ENMOD (n 28) art 2.

101 Department of Peace and Conflict Research, 'Uppsala University Conflict Data Programme' (Uppsala University) <https://ucdp.uu.se> accessed 19 February 2021.

restrictive when applied to NIACs.[102] This is particularly problematic given that NIACs are closely connected to the environment, with recent studies showing that over the past 60 years, at least 40% of NIACs have been linked to natural resources and their exploitation.[103]

Protocol II to the Geneva Conventions (APII), which regulates the protection of victims of non-international conflicts, does not make any reference to the environment.[104] The environment only receives protection indirectly as a cultural object or object indispensable to the civilian population's survival, as well as where aspects of the environment hold dangerous forces such as dams.[105]

Despite this, the International Law Commission's Special Rapporteur has stated, 'it is clear that fundamental principles of distinction and the principle of humanity… reflect customary law and are applicable in NIACs'.[106] When an attack occurs against the environment in a NIAC that does not correctly balance these IHL principles, it is clear that such an attack is prohibited.[107] However, these customary principles offer minimal environmental protection during armed conflict and are often displaced by anthropocentric motives.

The ICRC Guidelines encourage States to apply the same degree of environmental protection to IACs and NIACs, encouraging each party to apply 'all or part' of IHL rules relating to the environment.[108] If this piece of guidance was widely disseminated and incorporated into State practice, it would be of great significance to the environment, given that 'legal explanations of the classification of a conflict do not alter the damage wrought by conflict on the natural environment'.[109]

II.II Indirect Protection

Indirect protection of the environment is provided by the general principles of IHL. The ICRC Guidelines state that the environment is generally recognised as a civilian in character.[110] This means that any part of the environment that is not a military objective is protected by the general principles of IHL that protect civilians and civilian objects and property, as well as those that limit the means and methods of armed conflict,[111] namely distinction, necessity and proportionality. These principles of customary international law[112] safeguard the environment in that they guard against wanton and excessive environmental damage in the absence of explicit provisions protecting it.[113]

102 UNEP (n 13) 10.
103 ibid.
104 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.
105 ibid. arts 14-16.
106 ILC, 'Second Report on the Protection of the Environment in Relation to Armed Conflicts' (28 May 2018) UN Doc A/CN.4/673.
107 Camilo Ramírez Gutiérrez and A Sebastian Saavedra Eslava, 'Protection of the Natural Environment under IHL and International Criminal Law: The Case of the Special Jurisdiction for Peace in Colombia' (2020) 25 UCLA J Int'l L Foreign Aff, 123, 137.
108 ICRC Guidelines (n 89) Recommendation 18.
109 ibid.
110 ICRC Guidelines (n 89) 46.
111 Michael Schmitt, 'War and the Environment: Fault Lines in the Perspective Landscape' (1999) 37 Völkerrechts Archives 32.
112 Henckaerts et al (n 16).
113 Michael Schmitt, 'Green War: An Assessment of the Environmental Laws of Armed Conflict' (1997) 22 Yale J Int'l L 56.

Distinction

Returning to API, Article 48 on Basic Rules codifies the principle of distinction, stating that parties to a conflict must distinguish between civilians and combatants and between civilian objects and military objects.[114] Indeed, precaution requires decision-makers to refrain from indiscriminate acts.[115] Article 52 defines civilian objects negatively as objects that are not military objectives, i.e. 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction… in the circumstances ruling at the time, offers a definite military advantage'.[116] To this extent, the restrictive conditions of Articles 35 and 55 do not apply to the principle of distinction.[117] While Article 52 does not explicitly refer to the environment, Schmitt argues that this definition is broad in scope, applying to 'all components of the environment – land, air, flora, fauna, atmosphere, high seas, etc. – that do not present an advantage… to a military operation'.[118]

However, the indirect protection of the environment as a civilian object is a precarious one since elements of the environment are all too likely to become military objects. For example, the trees that provided cover for the Viet Cong during the Vietnam War meant that their defoliation was a legitimate military objective.[119] This reasoning allowed for the mass use of herbicides on vast swathes of forest. Articles 35 and 55 API could restrain such environmental destruction; however, this brings us full circle to the triple cumulative threshold problem.

Necessity

Necessity dictates that a military commander is only permitted to use the degree of force required to accomplish a military objective. For example, Article 23(g) of the Hague Convention contains certain provisions with substantive (albeit peripheral) impact on military operations affecting the environment.[120] It states that it is forbidden to destroy or seize enemy property unless it is demanded by the necessities of war.[121]

Article 53 of the Fourth Geneva Convention echoes the above and protects property by reference to military necessity.[122] It states that any destruction of civilian property by an occupying power 'is prohibited, except where such destruction is rendered absolutely necessary by military operations'.[123] Accordingly, breaches of this Article constitute 'grave breaches'[124] whenever the damage is extensive, unjustified by military necessity, and carried out wantonly, thereby constituting a war crime under the Rome Statute.[125] There is support for the proposition that the burning of Kuwaiti oil wells during the Gulf War constituted a grave breach.[126]

114 API (n 28) art 48.
115 ibid. art 57.
116 ibid. art 52.
117 Bothe et al (n 78) 576.
118 Schmitt (n 111) 35.
119 ibid.
120 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 23(g).
121 ibid.
122 Thomas (n 14) 92.
123 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art 53.
124 ibid. art 147.
125 Rome Statute of the International Criminal Court 1998, art 8(2)(a)(iv).
126 Schmitt (n 87) 34.

However, due to the subjective nature of military necessity, almost any environmentally harmful action can be given an acceptable justification.[127] Schmitt articulates this problem well, stating, absent any explicit treaty law, 'is the law, therefore, nothing more than an articulation of that fighter pilot adage to 'trust your gut?' Or is it imbued with a meaning more distinct and developed, perhaps in the Martens Clause's dictates of public conscience'.[128] The Marten's Clause dictates that 'until a more complete code of the laws of war is issued… populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience"'.[129] However, as with many other core themes of IHL, there is no one accepted interpretation of the Marten's Clause.[130]

It is likely that neither 'trust your gut' nor the Martens Clause realistically articulates how these decisions are made; rather, it is doubtful whether the environment enters the field of thought at all (save in cases of the famously vulnerable ecosystems such as the Arctic). If the killing of hundreds of civilians is enough to justify attacking a target, then it is unlikely that the environment will be considered. After all, the very name 'International Humanitarian Law' emphasises its anthropocentric focus.

Proportionality

Positive identification of a military objective triggers proportionality in that a military commander must consider the principle of humanitarian concern ('the unwarranted destruction of life, land and property'[131]) and the doctrine of economy of forces ('the minimum force needed to accomplish the military objective'[132]) before acting to achieve the objective. The ICJ has held that 'States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate objectives'.[133] Further, the destruction of the environment, as an end in itself, without consideration for the closely linked principles of necessity and proportionality, is a violation of international law.[134]

Additionally, the International Criminal Tribunal for the Former Yugoslavia, in the *Tadić* case, found that violations of customary IHL could be considered war crimes, and by extension, therefore, violations of customary IHL relating to the protection of the environment could also be considered as such.[135] This highlights that when aspects of the environment as civilian objects become military objectives, the attack must be weighed against the effect it will have on the environment.[136]

Proportionality, like necessity, is 'subjective and value based', making it difficult to determine when a proportionate attack becomes disproportionate.[137] During armed conflict, determinations of proportionality are almost always self-serving. Indeed, where a military unit is at risk, a commander may use the prescriptive vagueness of proportionality to legitimise environmentally destructive actions. As Schmitt states, 'given the nature of war and human motivations, legitimate doubt will be resolved in favour of destroying the environment to further the mission'.[138] The hard truth is that the brutality of war does not naturally lend itself to mercy towards the environment.

This chapter has identified that IHL provisions on environmental protection are vague, ambiguous and abused to further anthropocentric motives and suggests that more must be done to secure the protection of the environment during armed conflict.

III. The Way Forward

IHL on the protection of the environment in relation to armed conflict contains a significant number of gaps and deficiencies, which continue to allow the environment to be unjustifiably damaged. This section shall look at two possible solutions to better protect the environment during armed conflict, namely the potential for a new treaty and the use of demilitarised zones.

New Treaty

Schmitt states that 'a convention on protecting the environment during armed conflict, assuming it was carefully drafted to avoid the pitfalls, would be responsive in placing Parties on notice of what is clearly expected of them', as well as providing an effective basis for enforcement.[139] This approach was first advocated in response to the Gulf War when IHL's environmental protections failed to regulate and prevent the environmental damage done by the Iraqi army. It was following this war that legal practitioners and environmentalists called for a fifth Geneva Convention to cater specifically for the protection of the environment during armed conflict.[140]

Bothe notes that a solution to the deficiencies of IHL could involve the codification of the provisions of environmental protection during armed conflict into a 'coherent and practical instrument that considers both IAC and NIAC'.[141] Indeed, a new treaty could model itself on the International Law Commission's ('ILC') *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*, which would infuse IHL protections with an ecocentric quality.[142] These principles, which are due to be adopted on second

127 Richard Falk, 'The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime' in Austin and Bruch (n 24) 144.

128 Schmitt (n 113) 56.

129 Vladimir Pustogarov, 'Fyodor Fyodorovich Martens (1845-1909) – A Humanist of Modern Times' (1996) 312 International Review of the Red Cross 300.

130 Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 317 International Review of the Red Cross <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm> accessed 27 May 2021.

131 Christopher Joyner and James Kirkhope, 'The Persian Gulf War Oil Spill: Reassessing the Law of Environmental Protection and the Law of Armed Conflict' (1992) 24 Case Western J Int'l L, 61.

132 Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, NWP 9 (REV.A)/FMFM 1-10 (1989) 6.

133 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ 679, 242.

134 *US v List* (1950) 11 TWC 759, 1253.

135 *Prosecutor v Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (International Criminal Tribunal for the Former Yugoslavia, 2 October 1995) Case No.IT-94-1-AR72, 70.

136 Louise Doswald-Beck, 'International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons' (1997) 316 Int'l Rev. Red Cross.

137 Michaela Halpern, 'Protecting Vulnerable Environments in Armed Conflict: Deficiencies in IHL' (2015) 51 Stan J Int'l L 119, 139.

138 Schmitt (n 111) 47.

139 Schmitt (n 113) 64.

140 Glen Plant, *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict* (Wiley-Blackwell 1991) 37.

141 UNEP (n 13) 28.

142 ILC, *Protection of the Environment in Relation to Armed Conflicts: Text and*

reading by the UNGA later this year, approach the problem of environmental damage during armed conflict holistically with their scope applying to the protection of the environment before, during and after an armed conflict.[143] This mature view acknowledges that environmental destruction is a barrier to long-lasting peace, as the 'destruction of the environment can remove natural resources which may have provided a potential platform for cooperation… [and] limit the possibility of enjoying natural features that cross-sectarian divides'.[144]

Today, Schmitt argues that although a new treaty would be the 'cleanest way to generate a fresh normative architecture… unfortunately, the time is not ripe for such an effort'.[145] This is especially true given that any effort to create binding law would likely fall victim to 'politicisation and infighting'.[146] Indeed, Szasz believes a new treaty would be useless, something that would result in an unhelpful agreement resembling the lowest common denominator due to the need to achieve consensus.[147] To avoid the stillbirth of a new treaty, it is first necessary to clarify the existing IHL provisions relating to environmental protections. If these provisions were to be clarified, with the help of the aforementioned ICRC Guidelines, and developed from an ecocentric viewpoint, a new legal instrument might not be necessary.[148]

Demilitarised and Protected Zones

One way to mitigate the effects and reach of wartime environmental damage is to put in place concrete demilitarised zones, which would allow safe spaces for nature and civilians alike. This would be less confusing and complex than having wordy legal provisions regulating belligerents' conduct. Further, discussions over clarifying or creating new laws are, arguably, too time-consuming when the environment is in urgent need of protection now.

The UNEP Report highlights the need to grant place-based protection to areas of ecological importance and critical natural resources due to the fact that IHL does not go far enough to place these areas under protection during armed conflict.[149] UNEP proposes that at the outset of any conflict, these aspects of the environment should be 'delineated and distinguished as demilitarised zones', whereby parties to an armed conflict would be prohibited from conducting military operations there.[150]

Indeed, there is evidence to show that demilitarised zones become havens for wildlife and ecological conservation. For example, wildlife is thriving in the demilitarised zone between North and South Korea, where endangered animals, such as the amur goral and Asiatic black bear, are making a comeback.[151] Even tigers, believed to be extinct along the peninsula, have been sighted.[152]

Demilitarised zones are already provided for by Article 15 of the Geneva Convention IV,[153] as well as Articles 59 and 60 of API,[154] which specify that demilitarised zones are to be agreed upon by parties to the conflict. Despite this, belligerent parties rarely (if ever) agree upon demilitarised zones in order to protect the natural environment.

Previous attempts at mandatorily establishing demilitarised zones through a new treaty had been advocated for by the IUCN.[155] However, the draft treaty failed since it did not have UNSC support due to the fact that States insist on their right to self-defence in every circumstance, no matter if demilitarised zones are compromised.[156] This was seen during the Bosnia-Herzegovina conflict, where the UNSC acknowledged the need to have designated 'safe zones' or demilitarised zones,[157] but the UN troops were unable (or unwilling) to enforce them with some of the worst atrocities taking place within them.[158]

Despite this, there is hope for the future. The ILC's Draft Principles, if adopted, would bolster environmental protection during armed conflict through demilitarised zones. Draft Principles 4 and 17 outline that States should designate areas of major environmental and cultural importance as protected zones protected against any attack, so long as they do not contain a military objective.[159] These principles are intended to apply to both IACs and NIACs, and make an interesting link between environmental and cultural importance, which highlights the significance of the environment for indigenous peoples, enabling a stronger case to be made for the cultural value of biodiversity.[160]

In addition, the relatively new realm of International Environmental Law ('IEL') may be of some assistance to States in identifying and establishing demilitarised zones. For instance, the World Heritage Convention ('WHC')[161] establishes 'area-based' protection for natural and cultural heritage sites of 'outstanding universal value'[162] by obligating states to protect them 'to the utmost of [their] own resources'.[163] For example, the WHC has played a significant role in protecting the DRC's Virunga National Park. Congolese State authorities and the UN, as well as other NGOs operating in the area, have created a coalition of forces to ensure that basic protection of the Park is maintained by international law, even during armed conflicts.[164]

Although it is uncertain whether the WHC applies during armed conflict, academics such as Hulme argue that it continues to apply, as the WHC seems to require its 'continuation in conflict of a 'protected area' regime alongside IHL rules'.[165] The WHC could

Titles of the Draft Principles Provisionally Adopted by the Draft Committee on First Reading (UNGA, 6 June 2019) A/CN.4/L.937.

143 ibid. Draft Principle 1.

144 Rachel Killean, 'From Ecocide to eco-sensitivity: 'Greening' reparations at the ICC' (2021) 25 Int'l J Human Rights 323, 326.

145 Schmitt (n 113) 64.

146 ibid. 66.

147 Paul Szasz, 'Comment: The Existing Legal Framework, Protecting the Environment During International Armed Conflict' 69 Int'l Law Studies 278.

148 Halpern (n 137) 146.

149 UNEP (n 13) 20.

150 ibid.

151 Iain Watson, 'Rethinking Peace Parks in Korea' (2014) 26 Peace Review 102.

152 ibid.

153 Convention (IV) (n 122) art 15.

154 API (n 28) arts 59 and 60.

155 Draft Convention on the Prohibition of Hostile Military Action in Protected Areas 1995.

156 Wolfgang Burhenne, 'The Prohibition of Hostile Military Action in Protected Areas' (1997) 27 Environmental Policy and Law 373.

157 UNSC Resolution 844 (June 18, 1993) UN Doc. S/Res/844.

158 Burhenne (n 156).

159 ILC (n 142) Draft Principles 4 and 17.

160 Stavros Pantazopoulos, 'Conflict and Conservation – The Promise and Perils of Protected Zones' (Conflict and Environment Observatory, 8th October 2020) <https://ceobs.org/conflicts-and-conservation-the-promise-and-perils-of-protected-zones/> accessed 30th March 2021.

161 The World Heritage Convention 1972.

162 ibid. art 11(2).

163 ibid. art 4.

164 Sjöstedt (n 64) 143.

165 Karen Hulme, 'Armed Conflict and Biodiversity' in Michael Bowman,

therefore complement the ILC's Draft Principles and 'set up systems of international cooperation and assistance to protect natural heritage areas' during armed conflicts,[166] and its clear and concrete obligations could provide real guidance to military commanders on the battlefield.[167]

However, there is a shortcoming with this approach. It is one thing for belligerent parties to agree to adhere to demilitarised zones during IACs; it is a different matter to secure such agreements from non-state armed groups during NIACs. This issue is sorely felt in other areas of IHL. Despite the increasing role of non-state armed groups in armed conflict, 'IHL remains state-centric and provides limited opportunities for armed groups to comply with its provisions or engage in its development'.[168]

Answering questions on how IHL could be developed to better protect the environment during armed conflict is not easy. However, hope may be garnered from the attempts of the ILC to seek more thorough, clear, and more easily enforceable protections for the environment, which apply to both IACs and NIACs.

Conclusion

This article has shown that armed conflict takes a significant toll on the environment and has demonstrated how environmental protection within IHL is inadequate in upholding minimum environmental safeguards during times of conflict. The failings of these provisions are compounded by the rapidly deteriorating climate crisis that is worsened by armed conflict; 12 out of the 20 countries most vulnerable to climate change are also sites of conflict.[169] Peter Maurer, President of the ICRC, states that all the present facts and statistics 'attest to the maelstrom of stress that the environment endures during armed conflict'.[170]

Although IHL provisions on the protection of the environment during armed conflict are flawed, 'the sky is not falling' - yet.[171] As we have seen, some have argued that the time is not right for a new treaty given the lack of political will, but that does not prevent other advances from being made. IHL provisions should be clarified with the help of the ICRC's Updated Guidelines and the ILC's Draft Principles. In addition, States should urgently be encouraged to identify and establish demilitarised zones in areas of environmental importance, as well as those containing natural resources.

These measures are essential if the international community is to ensure the future viability of the environment for generations to come. After all, if we continue to destroy the environment needlessly, whether it be in peacetime or wartime, 'we will not thrive or even survive'.[172]

Peter Davies, and Edward Goodwin (eds) *Research Handbook on Biodiversity and Law* (Elgar Publishing 2016) 245.

166 Pantozapoulos (n 160).

167 Alice Bunker, 'Protection of the Environment during Armed Conflict: One Gulf, Two Wars' (2004) 23 Review of Europeans Community and Int'l Environmental Law 201.

168 Orla Buckley, 'Unregulated Armed Conflict: Non-State Armed Groups, IHL, and Violence in Western Sahara' (2012) 37 North Carolina J Int'l L 793, 795.

169 ND-GAIN, 'Country Index' (July 2020, Uni of Notre Dame) <https://gain-new.crc.nd.edu/> accessed 26 February 2021.

170 ICRC (n 89) 4.

171 Schmitt (n 81) 65.

172 UNEP, 'Climate, Biodiversity Loss and Pollution: Alarming Report on Earth's Triple Environmental Emergencies' (YouTube, 18 February 2021) <https://www.youtube.com/watch?v=ISNu8W4xig8> accessed 10 April 2021.

Re Toner [2017] NIQB 49

Dr Lillian Pollack

Dr Lillian Pollack, a recent graduate of Queen's University Belfast, successfully defended her doctoral thesis concerning the intersection of equality legislation and cultural policy in Northern Ireland this past spring. She recently won the best paper prize at the Leicester Law School Postgraduate Research Conference, and will commence a training contract with a commercial law firm in 2023.

In Northern Ireland, one of the most significant human rights instruments resulting from the Good Friday/Belfast Agreement in 1998 is Section 75 (s. 75) of the Northern Ireland Act 1998. It legally binds public authorities to not only have due regard to the promotion of equality of opportunity amongst nine protected categories of persons (those of differing religious belief, political opinion, racial group, age, marital status, sexual orientation, gender, those with dependents and those without, those with a disability and those without) but also to have regard to the desirability of promoting good relations amongst those of differing political opinion, religious belief or racial group. As part of s. 75, public authorities are required to assess through policy screenings and equality impact assessments (EQIAs) whether their policies would have any adverse impact on the protected categories of persons.[1]

Whilst s. 75 has been praised for its innovation,[2] the breadth and magnitude of what it seeks to accomplish provides a challenge in terms of its enforceability. Traditionally, s. 75 could only be enforced by its accompanying monitoring body, the Equality Commission for Northern Ireland (ECNI). However, a recent decision in the case of *Re Toner,*[3] where a complaint was brought by a blind woman against Lisburn City Council on a number of grounds for failing to consider the needs of blind persons in the development of a Public Realm Scheme (PRS),[4] has changed this. It very significantly opened the door for complaints of 'substantive' breaches of s. 75 to be brought under judicial review,[5] an idea put forward in *Re Neill's Application*[6] that had previously yet to gain traction. Although not clearly defined in the dicta of *Re Toner*, a 'substantive' breach in this particular case would seem to constitute a failure on the part of public authorities greater than 'some simple technical omission or procedural failing' as well as a failure to take action when concerns arose earlier in the implementation of the PRS.[7] Additionally, the court specifies that the breach was longstanding in nature and must be weighed against the benefits there might have been if the proper s. 75 considerations had been made.[8] Allowing complaints of substantive breaches invites questions about the extent to which the court should get involved in determining the legality of a public authority's decision under *Wednesbury* unreasonableness.[9] In *Re Toner,* the issue centred not on the legality of the final decision made by the public authority but rather on whether the correct process had been taken to reach that decision, as the court maintained a pre-existing principle derived from *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills*[10] that it is for the public authority to make the final decision.[11]

Nevertheless, by giving s. 75 complaints access to judicial review; *Re Toner* opens the door to the possible scrutiny of decisions under *Wednesbury*. I foreshadow there will be increased scrutiny of public authorities' decisions under *Wednesbury,* given the complexities that arise due to Northern Ireland's history of conflict. This is because the current principles underpinning 'due regard', which I will shortly discuss, largely derive from England and Wales and do not account for the difficulties in ascertaining what adverse impact looks like for the groups of 'political opinion' and 'religious belief', which require unique considerations in a context such as Northern Ireland. Additionally, it is difficult for public authorities with limited resources to extract the evidence necessary to measure the adverse impact within these groups. This can be attributed in part to a lack of funding for public authorities to carry out meaningful consultations

1 ECNI, 'Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities' (ECNI, April 2010) 29, 41, 51.
2 Colin Harvey, 'Democracy in Transition: Mainstreaming Human Rights and Equality in Northern Ireland' (1999) 4 Journal of Civil Liberties 307.
3 [2017] NIQB 49.
4 ibid [1].
5 See [161]-[164].
6 [2006] NICA 5.
7 *Re Toner* (n 3) [163].
8 ibid [163]-[164].
9 Briefly described, *Wednesbury* is a standard of judicial review to hold public authorities to account on the decisions they have reached, the test being 'that a decision was so unreasonable that no reasonable decision-maker could have come to it'. It is also known as 'irrationality'. See Justin Leslie and Gavin McLeod, 'Judicial review: Wednesbury unreasonableness' (Westlaw, last reviewed in 2015). The test is derived from the case, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).
10 [2012] EWHC 201 (Admin) (Divisional Court) [77]. The principle states that it is for the decision-maker to weigh all of the relevant factors in making a decision.
11 Although the court in *Re Toner* does not explicitly state that they are upholding this principle, it can be inferred through their statement at [164], '…it is far from clear that if the section 75 duty had been rigorously performed even at that date that councillors would have reached the same conclusions as those which, in fact, they did reach'. Their lack of challenging the issue indicates their maintenance of the principle.

with those from the s. 75 groups on how a policy may impact them.[12] With little evidence to draw on, public authorities are arguably more susceptible to complaints of a 'substantive breach' and, therefore, subject to the possibility of both an ECNI investigation *and* judicial review. Decisions made on 'political opinion' and 'religious belief' are therefore more likely to be questioned because public authorities will have had to make them on the basis of their own judgement and personal experience due to lack of evidence. Because such decisions would be highly politicised, the courts may need to intervene through *Wednesbury* to ensure impartiality.

To demonstrate how the new possibility of judicial review may influence public authorities, I consider how the Arts Council of Northern Ireland (ACNI), Northern Ireland's leading arts and cultural development agency, may be affected. Although quite a niche public authority, it serves as an interesting example of a public authority that may be more susceptible to committing a 'substantial' breach of s. 75, given the complex nature of obtaining evidence and measuring impact in relation to the arts.[13] Before turning to a more detailed discussion of how the issues may play out in practice, I will firstly discuss *Re Toner's* facts, issues, and reasoning.

Facts

Joanna Toner (the applicant) was a blind woman who utilised both a guide dog and a cane to walk.[14] In 2008, Lisburn City Council (hereafter 'Council') commissioned a report on how Lisburn's central area could be regenerated through a Public Realm Scheme (PRS).[15] The height of kerbs in the new PRS had been lowered from the standard 100-130mm to a mere 30mm, which caused Joanna to lose confidence in getting around, subsequently leading her to make a complaint.[16] Despite lobbying attempts during the planning stages to change the kerb height from 30mm to at least 60mm, the Economic Development Committee (EDC) of the Council decided not to change the heights, a decision supported by the broader Council in 2014.[17] Leave to apply for judicial review was granted in 2015; however, at this stage, it was too late to reverse the kerb heights of 30mm, which had already been implemented.[18]

Another key figure, in this case, is a landscape architect, Mr Watkiss, who was appointed to come up with concept design work for the purpose of economic appraisal in the report.[19] He was later appointed as the lead consultant for the scheme.[20] Crucial to this case is research made available to Mr Watkiss from the University College London (UCL) conducted in 2009[21] that suggested kerb heights of 40mm or less should be avoided and that 60mm kerbs 'induced the greatest confidence'.[22] However, Mr Watkiss deemed that there was no clear conclusion on kerbs less than 60mm being dangerous and that there were methodological issues with the study.[23] This research was not made aware to the Lisburn City Council until 2014,[24] despite Mr Watkiss having received it in 2010.[25]

The remaining facts of this case are mostly concerned with whether or not the issue of a 30mm kerb height had been mentioned during presentations, whether it had been disputed during the consultation, and if this was taken into account prior to the approval of the planning scheme by the Lisburn City Council. For the sake of brevity, the chronological timeline of consultation events will not be recounted here. I will instead highlight the most significant conclusions the court has made with respect to the findings of fact.

The court was satisfied that the issue of 30mm kerb heights was flagged by Mr Watkiss in consultation presentations and that there was no opposition expressed during the consultation process. Lisburn City Council, therefore, went forward with planning permission in January of 2013, assuming that there was no opposition to the kerb height. No issues were raised until *after* work had already begun,[26] with controversy emerging after a seminar held in October of 2013, the main issue being the UCL research. The EDC, the body that ultimately decides on any change in the scheme,[27] became involved in 2014 and, after hearing varying viewpoints, maintained its position with no discussion. After another raising of the issue later in 2014, the EDC declined to go through another consultation process and decided not to take action on the issue any further. This decision was ratified by Lisburn City Council as well without debate.[28]

Issues

This case flags up two broad sets of issues. The first set of issues under consideration are procedural, related to s. 75 and its consultation process. These are reflected under [101] and concern issues of procedural fairness,[29] whether the consultation process was flawed,[30] the fettering of discretion both by the Committee and the Council, [31] and failure to conduct an Equality Impact Assessment (EQIA)[32] that considered the potential impact of the scheme on disabled persons (especially those that are blind),[33] as well as failure to give reasons for the decisions made.[34] It also considers more substantive issues of human rights violations, such as whether the decisions were in breach of ECHR Articles 8, 11 and 14,[35] as well as whether the actions of the respondent (Lisburn City Council) acted in opposition to the Disability Discrimination Act 1995.[36] However, although peripheral to s. 75, these issues will not be discussed in detail here, given my primary concern with s. 75. The issue most

12 Tahnya Barnett Donaghy, 'Mainstreaming: Northern Ireland's participative-democratic approach' (2004) 32 The Policy Press 49, 57.
13 See Eleonora Belfiore, ''Impact', 'value' and 'bad economics': Making sense of the problem of value in the arts and humanities' (2015) 14 Arts & Humanities in Higher Education 95; Victoria D. Alexander, 'Heteronomy in the arts field: state funding and British arts organisations' (2018) 69 The British Journal of Sociology 23; Clive Gray, 'Part 1: Intellectual and political landscape – Instrumental policies: causes, consequences, museums and galleries' (2008) 17 Cultural Trends 209.
14 *Re Toner* (n 3) [1].
15 ibid [3].
16 ibid [2].
17 ibid [6].
18 ibid [7].
19 ibid [14].
20 ibid [26].
21 ibid [80].
22 ibid [85].
23 ibid [89]-[90].
24 ibid [92].
25 ibid [89].
26 ibid [79].
27 ibid [54].
28 ibid [79].
29 ibid [101b].
30 ibid [101a].
31 ibid [101d] [101f].
32 Please note that in the official case, the court refers to Equality Impact Assessments as EIAs, however ECNI refers to them as EQIAs – therefore, I will also be referring to them as EQIAs.
33 ibid [101e].
34 ibid [101j].
35 ibid [101g].
36 ibid [101h].

relevant to s. 75 is whether there was a breach of s. 75 in failing to conduct an EQIA and will therefore be my primary focus. This raises questions about the meaning and application of 'due regard' in a judicial setting.

The second substantive issue concerns what the broader role of judicial review should be in relation to the already existing statutory compliance mechanism within ECNI. One of the grounds considered is whether the Council's actions met the *Wednesbury* standard.[37] This portion of the case clarifies the difference between what constitutes a 'procedural' versus 'substantive' breach of s. 75 duties.

Rules and application

I. The issue of s75 compliance

In respect to whether Lisburn City Council was in compliance with its s. 75 duty, the court draws on some of the guidance provided by the Equality Commission on the meaning of 'due regard'.[38] This guidance includes the point that due regard is not a final outcome but rather the process of giving the 'appropriate level of consideration' to statutory goals.[39] What constitutes appropriate consideration is variable, depending on the case and the public authority involved.[40] A high level of relevance must be proportionate to a high level of consideration and vice versa.[41] Although the court does not clarify what is meant by 'high level of relevance', the Equality Commission guidance states that 'having 'due regard' or 'regard' entails taking a proportionate approach in determining the relevance of equality of opportunity and/or good relations to a particular function or policy'.[42]

The Council, in its approved Equality Scheme, set out a process for screening policies for any potential impact on equality of opportunity. This subsequently leads to a decision on whether an equality impact assessment will be conducted, depending on whether the screening of the policy has determined that there will be either major, minor or no impact.[43]

The court took stock of principles highlighted by the Court of Appeal of England and Wales in *Bracking and Others v Secretary of State for Work and Pensions*.[44] One such principle is that a decision-maker or Minister has a responsibility to ensure that they record the steps taken to fulfil their statutory requirements as established in *R (BAPIO Action Ltd) v Secretary of State for the Home Department*[45] and that the duty falls upon the Minister making the decision, what matters being 'what he or she took into account and what he or she knew',[46] regardless of what their officials know or offered in the way of advice, a principle derived from *R (National Association of Health Stores) v Department of Health*.[47] Ministers must also assess the adverse impact *before* (emphasis added) adopting a policy and not after a decision has been made, following *Kaur & Shah v LB Ealing*.[48]

Bracking also draws on the dicta of *R (Brown) v Secretary of State for Work and Pensions,* which reviewed and contributed to a number of points concerning 'due regard' specifically.[49] In sum, the public authority must be aware of the duty to have 'due regard', the duty must be fulfilled before and when a policy is under consideration, as well as 'exercised in substance, with rigour and with an open mind'.[50] There is, however, no duty for a public authority to expressly refer to the regard paid; however, if they do, the 'scope for argument as to whether the duty has been performed will be reduced', a principle derived from *Baker*.[51] Finally, the duty is non-delegable and continuous, and it is considered good practice for the decision-maker to keep records of their consideration.[52] Further, as established in *R (Meany) v Harlow DC*,[53] regard cannot be general – it must be specific and conscious of the statutory criteria.[54]

Officials reporting to the Minister should be rigorous both in their enquiry of them and also in reporting to them, as per *R (Domb) v Hammersmith & Fulham LBC*.[55] Finally, yet another few principles under consideration, in this case, are derived from Elias LJ's judgement in *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills*.[56] Firstly, the decision-maker is responsible for weighing the factors that influence a decision, a principle derived from *Baker*.[57] Expanding on this, Elias LJ argues that if the decision-maker has taken the statutory criteria into account, the court cannot interfere in the decision-maker's balancing of factors.[58] Secondly, there is a principle establishing that public authorities be informed before making any decision[59] – and that they must acquire the relevant information if they do not have it, 'frequently meaning that some further consultation with appropriate groups is required.[60]

The court, in this case, acknowledges the importance of separating the fulfilment of the s. 75 duty from the management of the PRS, as the duty, falls on Lisburn City Council and not Mr Watkiss.[61] There is little evidence in this case that the Council performed its s. 75 duties,[62] as no documentation of the Council's fulfilment of the s. 75 duties were presented to the court.[63] Although Mr Watkiss performed a consultation exercise, the court is of the view that the Council should have conducted consultations themselves.[64]

The Council argued that a need for an EQIA was screened out due to the lack of material signifying the impact of the PRS on disabled persons during the consultation exercise – however, this was found unacceptable by the court, as the court does not understand how the PRS was screened out, stating that:

37 ibid [101i].
38 They do not specify which guidance, but it is assumed they are referring to the ECNI (n 1).
39 *Re Toner* [135].
40 ibid.
41 ibid.
42 ECNI (n 1) 27.
43 *Re Toner* (n 3) [137].
44 [2013] EWCA Civ 1345 [25].
45 [2007] EWHC 199 (QB). See [69] per Stanley Burnton J.
46 *Bracking* (n 44) [26(3)].
47 [2005] EWCA Civ 154 at [26] – [27] per Sedley LJ.
48 [2008] EWHC 2062 (Admin). [23] – [24] as per Moses LJ.
49 [2008] EWHC 3158 (Admin).
50 ibid [92].
51 This principle is quoted from *Baker & Ors, R (on the application of) v Secretary of State for Communities & Local Government & Ors* [2008] EWCA Civ 141, [38] but cited in *Brown* (n 49) at [93].
52 These duties are discussed in *Bracking* (n 44) [25 (6)] but originated from Aikens LJ in *Brown* (n 49), paragraphs [90]-[96].
53 [2009] EWHC 559 (Admin).
54 ibid [84] per Davis J.
55 [2009] EWCA Civ 941 [79] per Sedley LJ.
56 (n 10).
57 (n 51) [34] per Dyson LJ.
58 *Hurley & Moore* (n 10) [78] per Elias LJ.
59 Also informed by *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.
60 *Hurley & Moore* (n 10) [89] per Elias LJ.
61 *Re Toner* (n 3) [141].
62 ibid [142].
63 ibid [143].
64 ibid [144].

> If the right question had been asked *viz* in relation to the impact of the proposals on the position of the blind and partially sighted, it is difficult to see how this would not have led to a consideration by the Council of the UCL research…[65]

Although the UCL research had not been seen by the Council until 2014, 'unmistakable concern' had been expressed regarding the kerb heights on the basis of the UCL research prior to 2014.[66] The Council did react to the kerb height opposition at this stage, but the court found that '[the Council] does not seem to have been alive to its continuing duty under section 75'. There was no evidence to suggest that, when the issue was raised, the Council associated the issue with s. 75 – rather, the Council associated the issue with the expenses involved in adjusting kerb heights as well as the project timeline.[67] While the matter did go to the agenda of the EDC and Council, only a reminder of the consultation with specific disability groups was given by the Equality Officer, which does *not* equate to the Council's performance of equality duties.[68] The court was not satisfied that the s. 75 duty had been given rigorous enough attention, requiring a 'conscious approach' at this stage, inclusive of consideration of the UCL research and an EQIA.[69]

The court, therefore, found a clear breach of the s. 75 duty, given the lack of enquiry throughout the entirety of the process. Although the decision ultimately reached by the Council is still theirs to make, the court ruled that the appropriate steps in the process of making this decision were not taken. In other words, if they had taken the appropriate steps to enquire and still reached the same decision, they would not have been in breach of their s. 75 duty.[70]

The court, in their analysis, does not apply any of the previously discussed principles directly as they come to reach this decision – but it would seem that their *ratio decidendi* falls directly in line with that of the principles taken stock of in *Bracking*.[71] For example, they are not refuting the principle established in *Hurley* regarding the decision maker's discretion in balancing factors[72] - rather, they acknowledge that the Council's lack of consideration and enquiry is a breach of s. 75 duties, corresponding to the principles established in *Brown,* particularly the requirement that the duty 'must be exercised in substance, with rigour and with an open mind'.[73] What the court in *Re Toner* seems to be arguing is that there was a lack of rigour and substance in exercising the duty, although they do not explicitly draw this connection themselves.

II. The issue of s. 75's enforceability

The respondent (Lisburn City Council) also sought to argue that s. 75 cannot be remedied by judicial review – however, the court argues that similar cases have been brought in England and Wales, such as *Bracking*.[74] The respondent argued that in Northern Ireland, recourse is sought through the Equality Commission for Northern Ireland (ECNI) under s. 75(4) and Schedule 9 of the 1998 Act.[75] *Re Neill's Application*[76] sheds some light on these issues. The court ultimately decided that parliament intended consequences arising from a failure to comply with s. 75 are political,[77] with judicial review not being the default. However, they are not suggesting that the jurisdiction of the court can never be relied on in relation to s. 75 breaches and must be taken on a case-by-case basis.[78] A distinction was also made between procedural and substantive breaches of s. 75 – it was suggested that substantive breaches might be dealt with in a judicial review setting, with procedural breaches dealt with through the Equality Commission complaints procedure.[79] This was left open for development, as 'the Court of Appeal studiously did not identify the circumstances in which judicial review may be available'.[80]

In the instant case, the court believes the correct approach is one that relies on the specific facts of a case.[81] They have found that the Council's failure to consider blind persons constitutes a substantive breach rather than merely a procedural one, as the failure constitutes something 'far greater' than a 'technical omission or procedural failing'.

They state,

> In this case, the failure appears to the court to have been longstanding in nature, as at no stage in the PRS's development, was the issue of the public sector equality duty subjected to a s. 75 compliant process. Most particularly, when the matter came before the EDC and the Council (twice) in 2014 the opportunity was not taken to rectify the situation, notwithstanding that the matter had by this stage become one of high controversy.[82]

Thus, judicial review as an enforcement mechanism was found to be acceptable in this particular case.[83] Their decision turns in part on the Council's lack of awareness of the UCL research at an earlier date, where consideration of the research may have led to a different outcome.[84] The court also accepted the applicant's view that the remedy sought through the Equality Commission would be 'unlikely to achieve a potential change of view [of the Council]', whereas if the Council had performed their s. 75 duty properly in the first instance or even at the time the judicial review was sought, they may change their view.[85]

Analysis

This case was hugely significant in allowing s. 75 complaints to be brought by way of judicial review, albeit apprehensively. The court was careful to say that judicial review was appropriate in this instance 'due to the exceptional circumstances of this particular case',[86] emphasising the 'case by case' principle upheld in *Neill*.[87] It

65 ibid [145].
66 ibid [146].
67 ibid [147].
68 ibid [148].
69 ibid [149].
70 ibid [151].
71 *Bracking* (n 44) [25].
72 *Hurley & Moore* (n 10) [78] per Elias LJ.
73 *Brown* (n 49) [92] per Aikens LJ.
74 *Re Toner* (n 3) [153]-[154].
75 ibid [155].
76 (n 6).
77 ibid [28].
78 ibid [30].
79 ibid.
80 *Re Toner* (n 3) [158].
81 ibid [163].
82 ibid.
83 ibid [166].
84 ibid [164].
85 ibid [165].
86 ibid [166].
87 See (n 77).

is important to bear in mind that s. 75 and ECNI were established with a view to avoid litigation,[88] making *Re Toner* significant in that it marked a shift towards breaches of s. 75 being more litigious. McCrudden foresaw this shift, arguing that judicial review 'should be seen as part of the armoury of weapons available to both the Equality Commission and non-governmental organisations in seeking compliance with s75 in the future'.[89]

The shift brings a number of complex questions to light when considered in the context of public authorities, where the nature of work might not be as easily quantifiable, making it harder to recognise when there has been a failure to comply with s. 75. Take, for example, the Arts Council of Northern Ireland (ACNI), Northern Ireland's leading arts and cultural development agency. In *Re Toner*, the applicant sought to remedy an adverse impact that was specific and measurable and for which there was supporting research - the height of kerbs. However, ACNI's work in disseminating funds and supporting arts and cultural policy initiatives in accordance with necessarily expert and niche judgement perhaps makes pinpointing adverse impact on any one group more difficult, despite the amount of funding given to a particular policy initiative being a quantifiable action.

This difficulty is compounded when trying to conceive of how a complaint of adverse impact on the basis of political opinion or religious belief might be raised. The criteria that such a claim would rely on would almost certainly be less quantifiable – and if it is at all quantifiable, experience to date would suggest that the level of non-response around issues concerning political and religious belief would render measurement of adverse impact extremely difficult.[90] Additionally, within the arts, the adverse impact of a policy decision would appear to centre on an opportunity lost or never had to begin with because of a specific funding call or a specific funding decision.

Take, for instance, a politically controversial decision made by Paul Givan, previous Department for Communities (DfC) minister, to provide £98,000 more than originally planned for band instruments (most of which went towards Protestant marching bands) in July 2016.[91] ACNI was provided with the funding to administer the scheme. Colum Eastwood, SDLP leader and chair of the Assembly's communities committee, drew attention to the fact that in December 2016, the DfC also decided it could not continue funding the Líofa Gaeltacht Bursary Scheme (a scheme to help those who want to learn the Irish language financially) because of 'efficiency savings'.[92] In this instance, it would be difficult for those opposing the decision to fund band instruments to make a case as to why this decision led to an adverse impact – or alternatively, it would be difficult for them to argue how the decision not to fund the Líofa Gaeltacht Bursary Scheme causes an adverse impact. Whilst there are quantifiable funding figures, it is far more difficult to argue why such funding decisions bear such significant weight, as there are cultural and political undertones to consider. The effect is that arguments of the adverse impact made in relation to 'political opinion' or 'religious belief' pose a unique set of challenges that the court at present is not equipped to handle.

Decisions such as this, which stoke community tensions, present unique challenges for public authorities (such as ACNI) under the Minister's direction. When a government minister makes a decision that is perceived to give preferential treatment to one political/religious group over another group, there may be potential to argue that there was no due regard to equality of opportunity, s. 75's primary legislative purpose. The meaning of 'equality of opportunity' within s. 75 encapsulates a more substantive approach to equality given that it is a positive obligation and can be understood as the fair distribution of society's benefits, including 'access to facilities, education, training and services'.[93] Did the Minister, in this instance, have 'due regard' to equality of opportunity? Even if he had taken all of the relevant information into consideration when reaching his decision, his own political preferences, and any minister's preferences for that matter – can dictate the final decision. Additionally, questions are raised as to what role ACNI played in administering the scheme and whether they can also be held to account in the same way for simply taking direction. ACNI thus needs to be careful when making certain funding decisions so as not to prioritise one programme with a certain political undertone over another.

The court in *Re Toner* was careful to uphold the principle cited in *Hurley*[94] (originating from *Baker*[95]) that it is for the public authority to weigh the factors influencing a decision and *not* the court.[96] Quoting Lord Justice Elias in *Hurley*,

> In short, the decision-maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, *but ultimately it is for him to decide what weight they should be given in the light of all relevant factors* [emphasis added]. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.[97]

This raises interesting issues around *Wednesbury* unreasonableness that were largely avoided throughout *Re Toner*. I anticipate that with the opening up of judicial review for substantive s. 75 breaches, a need to question the decisions of public authorities more deeply under *Wednesbury* may arise in situations where substantive breaches of 'due regard' have been found, and a decision clearly advantages one side of the community more than the other. This would seem to apply to the s. 75 groupings of 'political opinion' and 'religious belief' the most. However, there is debate as to how much the court should step into the role of being what Laws LJ has termed 'arbiters

88 Christopher McCrudden, 'Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998' in Eithne McLaughlin and Neil Faris, 'Section 75 Review – The Section 75 Equality Duty – An Operational Review' (Volume 2, 2004) Annex B, 10.

89 ibid 74.

90 For instance, in ACNI's 2017 Audit of Inequalities (which is not available to the public), in relation to religion, there was a high level of non-returned data in both the Annual Funding Survey and the Support for Individual Artists Programme. The same was true of political opinion in the latter (p. 4-6).

91 Robbie Meredith, 'Eastwood criticises decision to fund band scheme but cut Irish language bursary' (BBC News, 4 January 2017) < https://www.bbc.co.uk/news/uk-northern-ireland-38513338> accessed 20 June 2022.

92 ibid.

93 Katherine E Zappone, 'Charting the Equality Agenda: A Coherent Framework for Equality Strategies in Ireland North and South' (Commissioned by the Equality Authority and the Equality Commission for Northern Ireland, no publication date) 36-37 <https://www.ihrec.ie/download/pdf/charting_the_equality_agenda.pdf> accessed 23 June 2022.

94 *Hurley & Moore* (n 10) [77].

95 *Baker* (n 51) [34].

96 *Re Toner* (n 3) [151].

97 *Hurley & Moore* (n 10) [78].

of political controversy'.[98] Decisions that would adversely impact the s. 75 groups of political opinion and religious belief (such as Paul Givan's, for instance) may warrant the court to step more into the territory of being a political arbiter, given the highly politicised nature of some decisions.

The court's reasoning in finding that the Council did not have 'due regard' also played a part in their finding of a 'substantive' breach, as the court argues that the failure was 'longstanding' due to the lack of a s. 75 compliant process throughout the Public Realm Scheme's (PRS) development.[99] In other words, if it were found that the Council had proper 'due regard', it would be unlikely that the court should find a 'substantive breach'. The court did not take care to apply the specific principles it relied on to the facts of the case directly, as there were no paragraph pinpoints to the relevant case law. Although the list of authorities found in *Bracking* was referred to, the court did not expand on these in a direct sense.

It would seem that the lack of assessment on the part of the Council in the form of an equality impact assessment (EQIA) was a major deciding factor for the court. They argue that despite 'unmistakable concern being expressed based on the UCL research' and the Council finally catching sight of the research in 2014, the Council still opted to neglect the issue.[100] In moving forward, public authorities should take care to follow the *Brown* principles discussed earlier underpinning *Bracking*, which were also applied in the instant case. The initial consultation undertaken on behalf of Mr Watkiss was not enough to satisfy the obligation to have 'due regard'.[101] Therefore, public authorities such as ACNI should take care to ensure a number of things in moving forward.

One such lesson includes that public authorities should be attuned to what the officials acting on their behalf are doing in relation to a proposed policy *at all times*, as the s. 75 duty is non-delegable,[102] with the sole responsibility of the duty resting with the public authority. Lisburn City Council could have enquired at any point more deeply into the information drawn on by Mr Watkiss– had they done so, they may have discovered the UCL research sooner, leading to a more rigorous enquiry at an earlier stage before the PRS work began. Policy screenings and EQIAs should also be conducted at the earliest stage possible, *before* and *during*[103] a policy's implementation, which is also indicative of 'due regard'. The consistent application of these principles from the earliest stages of a policy's development is therefore necessary in order for a public authority to avoid a 'substantive' breach of s. 75. The case also established that it is not enough for public authorities to think vaguely about one s. 75 groups, such as those who are disabled – 'a high level of consideration of the position of the blind and partially sighted ought to have flowed from the relevancy of the issue to this group'.[104] Therefore, public authorities must take into consideration how their policies will impact specific sub-groups within the broader nine s. 75 categories.

This brings us back to the difficulty of measuring potential adverse impact within certain s. 75 groups, such as political opinion and religious belief, where, within ACNI's data collection, there is a high level of non-response in quantitative survey results (as evidenced in their Audit of Inequalities). This is something the case law from England and Wales has not developed, as Northern Ireland's public sector equality duty differs from England's significantly in this respect. Imagine a hypothetical scenario where a complaint was brought against ACNI for not having had 'due regard' to the s. 75 categories of political opinion or religious belief. How can a public authority be at fault for not having 'due regard' when, despite attempts to collect this data, they are left with little to nothing to work with evidentially? Unless the decision-maker draws on their own personal experience or can devise a strategy for collecting meaningful qualitative evidence that better informs their judgement, evidence will continue to be ill-informed. These are barriers that I imagine affect other public authorities as well and would face significant challenges if tested in the courts. In the instance of a complaint of this nature being brought forward, the court may find that the only way to handle such complaints is to scrutinise the public authority's final decision under *Wednesbury* unreasonableness.

Conclusion

The decision in *Re Toner* to allow for 'substantive' breaches to be brought forward under judicial review significantly expands the opportunity to seek accountability for breaches of s. 75. Previously, complaints could only be brought through ECNI, as legislated. The decision raises a number of interesting issues around what constitutes a 'substantive' versus 'procedural' breach and was careful to maintain that cases should be dealt with on a case-by-case basis. The case also relied extensively on case law principles in relation to the 'due regard' standard and maintained that so long as the correct process is applied in making a decision, the decision is for the public authority to make.

However, with the door now open for judicial review complaints, it can be anticipated that courts will step more into the territory of being a 'political arbiter' by subjecting decisions of public authorities to the *Wednesbury* test. This is because I anticipate that the current principles relied on from case law in England and Wales when determining whether an authority has had 'due regard' will not be sufficient in the unique political context of Northern Ireland, particularly in cases involved with the s. 75 categories of 'political opinion' and 'religious belief', as it is much harder to measure adverse impact in these categories. Therefore, if a complaint is brought against a public authority under these two groups, it will be harder to pinpoint how a decisionmaker rationalised their decision – therefore, scrutiny of their actual decision may be warranted.

With more avenues for complaints to be brought against public authorities, extra care should be taken to abide by all the principles established in relation to 'due regard', – such as conducting an EQIA early and being attuned to the activity of any public officials acting on their behalf (as their duty is non-delegable). Additionally, knowing that scrutiny under *Wednesbury* is not necessarily ruled out, solutions as to how to measure adverse impact within the groups of 'political opinion' and 'religious belief' need to be sought in order to mitigate any potentially controversial decisions. It will be interesting to see how any claim brought forward on the grounds of political opinion or religious belief will play out and whether the decision of the public authority will be subjected to the *Wednesbury* test.

98 *R (on the application of MA & Ors) v Secretary of State for Work and Pensions & Ors* [2013] EWHC 2213 (QB) [74] (Laws LJ).
99 *Re Toner* (n 3) [163].
100 ibid [146] [150].
101 ibid [152].
102 *Brown* (n 49) [94] (Aikens LJ).
103 ibid [91] (Aikens LJ).
104 *Re Toner* (n 3) [163].

Holding War Criminals to Account: The Challenges Presented by Information Warfare

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Mishcon de Reya is an independent law firm, which now employs more than 1200 people with over 600 lawyers offering a wide range of legal services to companies and individuals. With presence in London, Singapore and Hong Kong (through its association with Karas LLP), the firm services an international community of clients and provides advice in situations where the constraints of geography often do not apply. This article was written in May 2022.

The physical battlefield of the ongoing war between Ukraine and Russia is being closely scrutinised by the global community: each day, media platforms present their audience with maps, specked with shading and arrows, depicting the land lost or gained and troop movements of recent days. Behind the scenes, however, a shadowy battlefield of disinformation and political warfare rages just as strongly.

The history of disinformation and political warfare

Russia and the West are no strangers to information warfare and its potential to shift the balance of power in a conflict, turn the tide of an election, or destabilise a political regime.

The most obvious recent example of this was Russian interference in the US Presidential Elections in 2016. Less well documented are the multitude of cyber-attacks perpetrated against Ukraine during the course of the past eight years. In 2014, Ukraine fell victim to Russian interference in its election as the Russian army simultaneously invaded and annexed Crimea. In 2015, suspected Russian cyber-operatives caused blackouts across the country. In 2017, a swathe of Ukrainian businesses and public services fell victim to Russian ransomware attacks, with hackers sharing the chilling message 'We Do Not Forgive. We Do Not Forget. Expect Us.'

Colonel Rolf Wagenbreth, head of the East German Secret Police Active Measures Department X, described the significance of disinformation in warfare. He explained that 'a powerful adversary can only be defeated through…a sophisticated, methodical, careful and shrewd effort to exploit even the smallest "cracks" between our enemies…and within their elites.' This is precisely what we saw in the rhetoric adopted by Russia in the run up to its annexation of Crimea and more recently in its justification for the invasion into Ukraine. The more polarised a country is, the more vulnerable it is to attack. Today, Russia seeks to pit Ukrainian against Ukrainian by defining the current war as a 'special military operation' to 'protect people who… have been facing humiliation and genocide perpetrated by the Kiev regime.' By characterising the current Ukrainian leadership as 'far right nationalists and neo-Nazis' perpetrating crimes against humanity on their own people, President Putin plays on existing national division.

Ukraine is waging its own form of information warfare. It is of note that media coverage, particularly in Western outlets, has picked up Ukraine's messaging and sought to amplify the success of Ukraine's military forces whilst depicting the Russians as ill-prepared and Russian soldiers as disenchanted, reluctant to turn on Ukrainians whom they regard as their brothers.

A significant challenge arises, however, sorting facts from the propaganda of either side. Whilst the Kremlin has been widely criticised for blocking access to pro-West media in Russia—thereby allegedly restricting the flow of accurate reporting of the war to the Russian population—it is equally clear that Western media sources are not impartial. Indeed, Western officials have conceded that 'while they cannot independently verify information that Kyiv puts out about the evolving battlefield situation, including casualty figures for both sides, it nonetheless represents highly effective stratcom.'[1]

1 Missy Ryan, Ellen Nakashima, Michael Birnbaum, and David L. Stern, 'Outmatched in military might, Ukraine has excelled in the information war' *The Washington Post* (Washington, 16 March 2022).

According to Sean McFate, a senior fellow at the Atlantic Council, the Ukrainian communication strategy highlights 'a shift taking place in modern conflicts, from a focus on munitions dropped to one centred in large part on messaging, media and persuasion.'[2]

There are regular reports from both sides of the conflict of disinformation, including allegedly falsified records or accounts of incidents. An early example of this was reports of the attack on Snake Island.[3] More recently, a falsified BBC news report published by Russian News outlets asserted that the deadly attack on the train station in Kramatorsk was, in fact, perpetrated by the Ukrainian military.[4]

In circumstances where nuggets of truth are disguised by layers of disinformation, the challenge of identifying and proving facts is clearly exacerbated. Establishing the facts is essential if we are to effectively hold perpetrators of war crimes to account.

The International Criminal Court (the 'ICC')—prosecuting war crimes

The ICC has a long—and somewhat chequered—history of prosecuting war crimes. Founded in 2002, it is governed by the Rome Statute and boasts 123 member states. Whilst its objectives are laudable, its practical success at holding perpetrators of war crimes to account is underwhelming. A key reason cited for this is limitations experienced by the court's investigators when it comes to evidence gathering, often rendering it impossible to secure convictions. The ICC's Prosecutor, Karim AA Khan QC, acknowledged this issue in his first speech to the Court when he took office in June 2021. He noted that 'We cannot invest so much, we cannot raise expectations so high and achieve so little, so often in the courtroom. As an office, we need a greater realisation of what is required by the burden of proof and the obligation to prove the case beyond reasonable doubt.'[5]

Historically, the ICC's investigators have faced difficulties arising out of the Court's relatively low funding for investigations, the unreliability of witness evidence, and the inaccessibility of areas in which the alleged crimes took place.[6]

Article 61 of the Rome Statute requires that 'the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence...'.[7] It is here that the ICC has historically fallen short. Indeed, on a number of occasions, the Prosecutor has failed to clear the evidentiary threshold set out above that there is 'substantial grounds to believe' that the individual is responsible for the crimes for which they are charged.[8] It has been widely acknowledged by the ICC's Pre-Trial Chamber that the evidentiary burden of 'substantial grounds to believe' requires the Prosecutor to 'offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations.'[9] Further, in cases that have proceeded beyond the decision to charge an individual, judges have on several occasions dropped—or the Prosecutor has withdrawn—charges due to insufficient evidence.[10]

The recent case against Laurent Gbagbo and Charles Blé Goudé

On 31 March 2021, the Appeals Chamber of the ICC upheld the acquittal of the former Ivorian President Laurent Gbagbo (who held office from 2000 until his arrest in April 2011) and a former student union leader and minister of youth in Gbagbo's government, Charles Blé Goudé.[11] It is of note that the Pre-Trial Chamber originally adjourned the case in 2013 so as to give the Prosecutor more time to gather evidence.

In its decision to adjourn, the Pre-Trial Chamber provided a helpful explanation of its role:

> … it is the Chamber's duty to evaluate whether there is sufficient evidence for each of the "facts and circumstances" advanced by the Prosecutor in order to satisfy all of the legal elements of the crime(s) and mode(s) of liability charged. The standard by which the Chamber scrutinizes the evidence is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the suspect.[12]

The Chamber explained that, at each stage of proceedings, there is higher evidentiary threshold that needs to be met. The Pre-Trial Chamber went on to clarify the ICC's expectations when it comes to the quality of evidence gathered:

> …the Chamber considers that it would be unhelpful to formulate rigid formal rules, as each exhibit and every witness is unique and must be evaluated on its own merits. Nevertheless, the Chamber does consider it useful to express its general disposition towards certain types of evidence. As a general matter, it is preferable for the Chamber to have as much forensic and other material evidence as possible. Such evidence should be duly authenticated and have clear and unbroken chains of custody. Whenever testimonial evidence is offered, it should, to the extent possible, be based on the first-hand and personal observations of the witnesses.[13]

2 ibid.

3 Zoya Sheftalovich, 'Go fuck yourself,' Ukrainian soldiers on Snake Island tell Russian ship before being killed' *Politico* (Arlington, 25 February 2022).

4 Pip Cook, 'Putin hijacks BBC: Russia spreads terrifying video blaming Ukraine for missile attack' *Daily Express* (London, 13 April 2022).

5 Susan Kendi, 'Karim Khan's first speech as ICC Prosecutor' (*Journalists for Justice,* 16 June 2021) <jfjustice.net/karim-khans-first-speech-as-icc-prosecutor/>.

6 Christian M De Vos, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26 Leiden Journal of International Law 1009.

7 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2022) 2187 UNTS 38544 (Rome Statute) art 51.

8 Patryk Labuda, 'The ICC's "evidence problem": The future of international criminal investigations after the Gbagbo acquittal' (*Völkerrechtsblog,* 18 January 2019) <voelkerrechtsblog.org/the-iccs-evidence-problem/>.

9 *Prosecutor v Laurent Gbagbo* (Pre-Trial Chamber, Decision adjourning the hearing on confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11 (3 June 2013).

10 International Criminal Court, Cases <www.icc-cpi.int/cases?f%5B0%5D=accused_states_cases%3A356>.

11 'ICC Appeals Chamber confirms Trial Chamber I's decision acquitting Laurent Gbagbo and Charles Blé Goudé of all charges of crime against humanity' (International Criminal Court, 31 March 2021) <www.icc-cpi.int/news/icc-appeals-chamber-confirms-trial-chamber-decision-acquitting-laurent-gbagbo-and-charles-ble>.

12 *Prosecutor v Laurent Gbagbo* (n 9) [19].

13 ibid [26-27].

The Prosecutor in this case was criticised by the Chamber for their heavy reliance on NGO reports and press articles when seeking to establish key elements of the case. The Court was clear that whilst reports and articles can provide valuable historical context, they are not a valid substitute for the type of evidence required to meet the evidentiary threshold for the confirmation of charges.[14]

What does this mean for the current conflict?

On 2 March 2022, Mr Khan QC announced that he was opening an investigation into the situation in Ukraine. Under Article 53 of the Rome Statute, prior to opening an investigation, a Prosecutor must consider whether the information available provides reasonable grounds to believe a crime is being, or has been, perpetrated within the jurisdiction and whether an investigation would serve the interest of the victims.[15] Mr Khan QC confirmed that the court had received referrals from 39 ICC member states and that the investigation would encompass events from 21 November 2013 onwards, including allegations of war crimes, crimes against humanity, and genocide committed on any part of the territory of Ukraine by any person. It is of note that the scope of the investigation is sufficiently broad to cover aggression perpetrated by the Ukrainian military or Ukrainian civilians as well as Russian forces.[16]

Mr Khan QC is evidently aware of the ICC's reputation and appears determined to ensure that the failings of previous prosecutions do not apply to the current conflict.

Whilst visiting Bucha, Ukraine on 13 April 2022, Mr Khan noted that 'Truth is very often the first casualty of war.' With this in mind, the ICC has already installed an investigation team on the ground in Ukraine, including forensic scientists, forensic anthropologists, analysts, investigators, and lawyers, 'so that [the ICC] can really make sure that we separate truth from fiction and go forward to insist on the rights of every individual, every child, every woman and every man to have their lives protected and not wantonly targeted.' Mr Khan QC has promised that 'a truth [will emerge] in the end… in the courtroom, there is no place to hide and the truth ultimately emerges, whatever the tactics that may be employed or whatever the difficulties and hurdles that exist.'[17]

Documenting war crimes

The international community, cognisant of the historic failures of the ICC to secure convictions as a result of insufficiently robust evidence, has established various services to assist with the collection and storage of evidence. By way of example, the Ukrainian Office of the Prosecutor General has created a site facilitating the proper documentation of war crimes and crimes against humanity perpetrated by the Russian army in Ukraine. Evidence uploaded to the site 'will be used to prosecute those involved in crimes in accordance with Ukrainian law, as well as in the International Criminal Court in the Hague and in a special tribunal after its creation.'[18] In addition, tech giants such as Google have created apps, such as the eyeWitness to Atrocities App, aimed at humanitarian organisations, investigators, and journalists documenting atrocities in conflict zones or other troubled regions around the world. The app's software enables users to encrypt and anonymously report incidents.

Under the ICC's Rules of Procedure and Evidence it is within the Chamber's discretion to 'assess freely all evidence in order to determine its relevance or admissibility'; further, either party can make an application to challenge the admissibility of evidence submitted by the other side. The Chamber has broad powers in determining whether evidence meets the standards required to be admissible in Court. That said, it is not permitted to "impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court."[19]

The impact of disinformation on prosecution

The ultimate impact of disinformation warfare on the prosecution of war criminals—or indeed, the outcome of the current war in Ukraine—will remain unknown for the foreseeable future. That said, it is of serious concern that the expansion of disinformation warfare (and technical prowess with which it is perpetrated) creates real difficulties for reaching safe prosecutions. Mr Khan QC has noted that 'We have to pierce the fog of war to get to the truth', however, with increasingly sophisticated modes of deception this challenge should not be overlooked.[20]

Recent reports from the Russian Ministry of Finance indicate that Russia has tripled its 'mass media' budget over the past year. Between January and March this year, the Russian government spent 17.4 billion roubles on 'mass media' in comparison with only 5.4 billion roubles during the same period last year, with reports suggesting this has been directed towards propaganda efforts.[21]

Research indicates that repeated exposure to online falsehoods, even if those falsehoods have low levels of credibility, increases perceptions of veracity over time.[22] A concerning example of this is that a survey in the US revealed that almost one in five Americans believe in QAnon conspiracy theories, including that 'the government, media and financial words in the US are controlled by a group of Satan-worshipping paedophiles who run a global child sex-trafficking operation.'[23]

Disinformation warfare is inconspicuous but insidious. It is clear, however, that the international community must recognise that a parallel war is underway and that it must arm itself to guard against disinformation in order to ensure proper and fair administration of justice in the years to come.

14 ibid [35].

15 Rome Statue (n 7) art 53.

16 'Statement of ICC Prosecutor, Karim AA Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (International Criminal Court, 2 March 2022) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

17 Catherine Philp, 'Truth will out about Russian war crimes in Ukraine, says British prosecutor' *The Times* (London, 13 April 2022).

18 'Criminal liability for #RussianWarCrimes!' < https://warcrimes.gov.ua/>.

19 'Rules of Procedure and Evidence', Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (Rules 63-64).

20 Philp (n 17).

21 Tom Ball, 'Russians create fake BBC news video to blame Ukraine for bombing' *The Times* (London, 13 April 2022).

22 Gordon Pennycook, Tyrone D Cannon, and David G Rand, 'Prior exposure increases perceived accuracy of fake news' (2018) 147 Journal of Experimental Psychology 1865.

23 'The Persistence of QAnon in the Post-Trump Era: An Analysis of Who Believes the Conspiracies' (PRRI, 24 February 2022) <www.prri.org/research/the-persistence-of-qanon-in-the-post-trump-era-an-analysis-of-who-believes-the-conspiracies/>.

In Conversation with **Professor Vernon Bogdanor**

Teresa Turkheimer

Currently Professor of Government at King's College London, Professor Vernon Bogdanor is a leading expert in British constitutional politics and history and has received a CBE in recognition of his extensive contribution to the field. In his most recent book titled Britain and Europe in a Troubled World *published in 2020, Professor Bogdanor traces Britain's historical relationship with the European Union in order to understand how Brexit came to be. In this interview, Professor Bogdanor tackles the constitutional issues that the United Kingdom is likely to face in a post-Brexit era, the different lessons learnt as a result of the referendum vote in 2016, and the role that the monarchy has to play in the current British parliamentary democracy.*

This interview was conducted across 28 and 29 April 2022.

***CJLPA*: What brought you to research and understand British politics? What fascinated you the most about British politics or the British political system?**

Professor Vernon Bogdanor: Our very strange constitution. The Queen once said that the British constitution has always been a puzzle and always will be. I have tried to elucidate that puzzle. We are in fact one of just three democracies in the world which do not have constitutions. The other two are New Zealand - whose population is half that of Greater London - and Israel, although the Israelis are working towards a constitution. Now, some people in Britain ask, 'Should we have a constitution?' But in a sense, that is an absurd question. The real question is: 'What is there about the air in Britain that means we should not have a constitution, not do what every other country does?' This problem has become more acute since we left the European Union (EU). In my view, when we were in the EU, we were in fact living under a constitution, namely the treaties of the EU, which provide for a division of power both at the centre between the Commission, the Council of Ministers, the Court of Justice, and the Parliament, but also territorially between the EU itself and the member states. Also, in recent years, the EU has yielded the protection of rights in the European Charter of Fundamental Rights which was enacted in 2009. That led to a remarkable episode in British constitutional history which has not been very much noticed. In *Benkharbouche v. Secretary of State for Foreign Affairs*[1], Ms. Benkharbouche claimed against the Sudanese embassy unfair dismissal, failure to pay her the national minimum wage and holiday pay, as well as breaches of the Working Time Regulations. The Sudanese embassy claimed immunity under the provisions of the 1978 State Immunity Act. But the Supreme Court ruled that sections of the Act were incompatible with Article 6 of the European Convention providing for a fair trial. The remedy for this would be a declaration of incompatibility which is not a strictly legal remedy, since it has no legal effect. But Article 47 of the EU Charter of Fundamental Rights provides that if rights had been violated by the Convention, they have also been violated by the Charter. So, the relevant parts of the State Immunity Act were disapplied. For the first time in British history, the Court disapplied part of an Act of Parliament because it conflicted with human rights. That, I think, would have Dicey turning in his grave. It was something new and unprecedented. As we have now left the EU, the Charter no longer applies, but Benkharbouche, nevertheless, is an important precedent.

The European Charter protects a far wider range of rights than the European Convention. The Convention was enacted in the early 1950s and human rights are, in my view, a dynamic phenomenon. For example, in those days there was no thought of the right to protect the environment which is in the European Charter. Few thought of the right to academic freedom which is in the European Charter. But the most important right is the right to equality in terms of gender, sexual orientation, race, religion and so on which is not in the European Convention. There is also a right to healthcare in the European Charter but not in the Convention. The Convention provides a right to education but not healthcare.

Leaving the EU took us out of a constitutional system. We have incorporated almost all EU law into our own law, so that the government and parliament can decide what they want to keep, what they want to modify, and what they want to repeal. That is, of course, a huge task. Incorporation itself is nothing new. For example, our ex-colonies incorporated British law so that they could decide which British laws they wanted to keep. But when they did that, it was because they wanted to develop a constitution of their own. We have done something perhaps unique in the democratic world and instead of entrenching we have been dis-entrenching. We have moved away from a constitutional system to an unprotected

1 [2017] UKSC 62.

constitution. This is emphasised by the fact that one part, almost the only part I think, of EU law that we have not incorporated is the European Charter of Fundamental Rights. This means we have moved from a system which protects rights, to one which does not protect rights. We do have the European Convention, but the way we have adopted it is rather different from almost every other country because judges are not given the right by the Human Rights Act to disapply legislation conflicting with the Convention. All they can do is to issue a declaration of incompatibility. That is just a statement which has no legal effect, and it is then up to Parliament to decide whether to take action. Parliament has a special fast track procedure by which it can take action if it so wishes, but courts in other European countries have much greater powers because they can disapply legislature. This raises a very interesting question because the other 27 member states of the EU do, of course, retain the European Charter. So, I would ask this question: Are our Members of Parliament (MPs) so much more sensitive to human rights than the legislators of other countries in Europe that they can be entrusted with this very important function? I will leave the answer to this question to those reading the interview!

It is worth stressing that rights are not solely for nice people like ourselves, but also for very small minorities who may not necessarily be very nice, for example, prisoners, suspected terrorists, suspected paedophiles, and so on - also, asylum seekers, a very small minority not effectively represented in Parliament, also have rights. Brexit raises this issue of whether we should continue to live under an unprotected constitution which does not effectively protect human rights.

And there is a further question arising from Brexit. Does the devolution settlement need further protection in Scotland, Wales, and particularly in Northern Ireland? I will discuss devolution a little later.

With our strange constitution, law and politics are closely intertwined. Much more of our constitution than in other countries is based on convention. These conventions, in turn, often depend upon popular feeling. For example, we have the case now of Boris Johnson and Partygate. A Prime Minister who has deliberately misled Parliament must, so the Ministerial Code declares, resign. But this convention depends in large part on popular feeling. Are people angry enough to protest to their MPs or do they say that it does not matter too much? A great writer on the constitution, not as well-known as Bagehot, but well worth reading, Sidney Low, author of *The Governance of England* first published in 1904, said, 'We live under a system of tacit understandings, but the understandings are not always understood'. That seems to me a very perceptive point about the British constitution.

***CJLPA*: I am assuming on the basis of the points you have just mentioned, do correct me if I am wrong, you are a supporter of a codified constitution in the UK. In light of this, has this been received or acknowledged by figures in the political system? Are there supporters for a constitution at the moment? I can imagine that the current opposition might not be keen on that idea.**

VB: When we had a Labour government, Gordon Brown who was Prime Minister from 2007 to 2010 - and I think it no accident that he came from Scotland - favoured a constitution. If he had been re-elected in 2010, he would have tried to enact one in 2015 which was the 800th anniversary of the Magna Carta - but he was not re-elected. The Liberal Democrats have long been in favour of a constitution, and I think some in the Labour Party are. Perhaps the longer Labour is in opposition, the more likely it is to support a constitution. But the Conservatives are, in general, not in favour, partly because they are the natural party of government in the sense that they tend to be in power most of the time.

I mentioned that it was not an accident that Gordon Brown, being Scottish, was in favour of a constitution, for many Scots have never accepted the idea of the sovereignty of Parliament. They say that it is the Scottish people who are sovereign, and that point has been tacitly accepted by Westminster. There was a referendum in Scotland on independence in 2014. The Scots voted against it, but had they voted for it, they would have become independent. There was also a referendum before devolution was introduced. In both cases it was accepted that it was for the Scots to decide, even if their decision went against the wishes of Westminster. So, for the Scots, the central principle is perhaps less the sovereignty of the Westminster parliament than the sovereignty of the Scottish people. That is also accepted in Northern Ireland. If a majority in Northern Ireland were to decide that it wished to join with Ireland, that would be accepted by Westminster. An American once said that in politics where you stand depends upon where you sit. Perhaps that is true in Britain because it may be that the sovereignty of parliament is primarily an English concept. The Welsh government favours a quasi-federal system for the United Kingdom (UK). The Scots believe in the sovereignty of the Scottish people. In Northern Ireland there is a divided community, but there also, the principle of the sovereignty of parliament is overtaken by the principle of the sovereignty of the people. There are, however, two different views about the Northern Ireland constitution depending on whether you are a unionist or a nationalist.

***CJLPA*: Say Gordon Brown is attempting to get re-elected again and he has the idea of codifying the constitution within his manifesto. What is the extent of the risk of the codification of the constitution becoming a politicised issue in the media?**

VB: I doubt if there is much risk. Enacting a constitution would be a long process because it would require popular consent. Most people in England do not think much about the constitution, although they do in Scotland and Northern Ireland. We would first have to have a body to draw up an agenda; then you would need a Royal Commission which would have to travel around the country having evidence sessions. That would be a kind of learning exercise for the public. Then the government would draw up a constitution and then there would have to be a referendum, probably with a majority needed in all parts of the UK, unlike the Brexit referendum. So, it would be a long process. I do not think it would necessarily be party political. I think, however, that it will be a long time before we get a constitution. It is not an immediate issue, and it is very low on most people's priorities. Human rights also are very low on most people priorities, though one lawyer, former MP and former attorney general Dominic Grieve, has made the interesting suggestion that the European Convention should include a right to healthcare as the European Charter does, in addition to the right to education. The reason is that the right to healthcare would affect large numbers of people, and therefore it would be more likely that more people would feel they own the Convention, which they do not at present now because they think of it as defending disreputables such as criminals. But they would then own it and there would be more respect for human rights. Otherwise, constitutional issues are a minority concern. There are no mass meetings in Trafalgar Square with crowds clamouring for a constitution!

***CJLPA*: If a human rights issue is quite prominent and has a lot of media following, perhaps it could grab some attention?**

VB: Only amongst a small group of the intelligentsia, the academics - the chattering classes if you like, not amongst the people as a whole. I do not think academics are very representative of public opinion in general or necessarily have much insight into public opinion. Opinion polls show that enacting a constitution is not a priority.

***CJLPA*: I think you would agree with me that there have been many British politicians who have been out of touch with the citizens that they are trying to represent: take the recent Partygate scandal that you mentioned earlier and the fact that it is currently difficult to punish a misbehaving government, or Brexit where even though the referendum was a close result, MPs were evidently not representative of the UK because a majority of them actually wanted to remain. In light of that, to what extent is the current UK political system truly a representative democracy?**

VB: I think your introduction of the referendum is very important. For, as you say, the majority of MPs were against Brexit, and the government was against Brexit. For the first time in British history, Parliament was enacting legislation in which it did not believe. Legally, Parliament is still sovereign, it could have ignored the referendum, it would not have been unlawful to do so. But, in practice, it was not possible to ignore the referendum. So, Brexit is a milestone in our constitutional history. Not only was Parliament no longer in practice sovereign, it was shown not to be representative of the people.

As you know, many in the British political elite were fervent Remainers and did not want to accept the result. The EU does not like referendums either. In 1974, shortly before we were to have our first referendum, the ex-President of the European Commission Monsieur Jean Rey said these matters should be left to trained people. "You cannot", he said, "have a system in which housewives should be allowed to decide the future of Britain!" A lot of the arguments against referendums, in my opinion, are similar to the arguments used against extending the suffrage - that the people are ignorant, that they do not understand the issues, and that political decisions are best left to elites. A French reactionary, Joseph de Maistre, declared that the principle of the sovereignty of the people - which is now a part of our constitution I believe - is so dangerous that even if it were true, it would be best to conceal it! Not only is the referendum now part of our constitution, but there are, what we might call, 'shadow referendums', referendums which were not held because of fear of the result, but which nevertheless influenced the political agenda. For example, when Tony Blair was Prime Minister from 1997 to 2007, he very much wanted Britain to join the Euro, but he believed that this required a referendum. However, he never put the issue to referendum because there was not one single opinion poll which showed a majority in favour of the Euro. You may say looking at the experience of continental countries, particularly Mediterranean countries such as Spain, Portugal, Italy, and Greece, that we were lucky not to join the Euro!

***CJLPA*: On the topic of democracy, I would like to ask a question specifically about the role of the British monarchy because monarchs by now are the exception, not the rule. Especially now, in Britain, it is quite difficult to support the monarchy when its role in the UK constitution might be minimal but its influence, as we have seen, has proven to be plenty. What role, if any, does the monarchy have to play in a democratic system?**

VB: The main role of the monarchy is not constitutional. Its constitutional powers are almost nil. But as well as being head of state, the Queen is head of the nation. She can, as it were, represent the whole country to itself. By contrast, if you have a president, you either have a president such as Macron in France or Biden in America who is head of the executive. They represent not the whole country, but just half of the country. Or you can have a constitutional president without political power which, for example, Italy and Germany have. I suspect that very few people could name the presidents of Italy and Germany, I certainly could not, and the position is usually given to a harmless retired politician who is put out to grass. Do we want that here? President Cameron or President Blair? They could not represent the whole country. This is particularly important with the devolution settlement because any elected person would be either English, Scottish, Welsh, or Northern Irish. The Queen is none of these and all of them at the same time. We are lucky in the Queen because she instinctively understands, what you might call, 'the soul of the British people', which it would be very difficult for a politician to do. Unlike a politician, she has no party-political history. No one knows whether she is Labour, Liberal Democrat, or Conservative, or what her views are on politically controversial matters. I think we are fortunate to have a constitutional monarchy.

The constitutional monarchies in Europe are very stable, moderate countries: some Scandinavian countries, Britain, the Benelux countries, and Spain. We are lucky that we have never had a revolution because revolutions or defeat in war tend to get rid of monarchies. For example, in Italy the monarchy was removed after the defeat in the Second World War because the king was thought to be associated with fascism, in Germany after the First World War, and in France after the revolution. We are lucky, perhaps because we are an island, that we have never been involved in revolutions or upheavals. In 1945, when we had the first Labour majority government, the American president Harry Truman was visiting Britain and he said to King George VI, 'I see you've had a revolution here', and the King said 'Oh no we don't have things like that'.

***CJLPA*: You say that the monarchy is the 'soul of the British people'. I would perhaps counter that. You mentioned the Nordic countries and the role that their monarchy has to play. I would say that the level of influence is completely unparalleled. It is true that the power is minimal, but the influence and the presence is not.**

VB: I do not know if the Queen has much political influence. When has she exerted political influence? I do not think that is right.

***CJLPA*: I was thinking more of the case of Prince Charles.**

VB: Yes, that is interesting. He has had influence, but not on party political matters. His technique is to raise an issue which he thinks has been hitherto ignored by politicians, for example, the environment and climate change. When the politicians do take up the issue, he steps back. He has also spoken on a number of other issues that he thinks important which are not party political, for example architecture, teaching Shakespeare in schools, and so on. He has said controversial things, but they are not controversial in the party-political sense. He has never spoken publicly about Brexit or whether we should have a Conservative government or Labour government. He is very careful in all his speeches not to appear partisan. He does not speak on advice like the Queen but, out of courtesy, he shows his speeches to ministers. I suspect that if ministers said, 'Well, look, this does entrench on government

policy', he would back down. He has known since birth what his role will be, and he has been trained and brought up in the constitutional tradition. He has not been party-political, but he has influenced opinion in other ways. I agree with you on that.

***CJLPA*: With race and identity coming up a lot, regarding the institution itself and its imperialist past, rather than the Queen more specifically or the members of the family, I think people disagree that it is representative of the British people.**

VB: The monarchy in Britain is unlike the other monarchies I have mentioned because it has an international dimension thanks to the existence of the British empire, now the Commonwealth. Of the 54 countries which are members - around a third of the world's population - 15 of them, now that Barbados is a Republic, are Commonwealth monarchies. The rest are republics. The Commonwealth is a voluntary organisation of equals, while the empire was based on domination. But the empire cannot have been quite as terrible as some suggest if almost all of the colonies have voluntarily agreed to join the Commonwealth. The only former countries ruled by Britain that have voluntarily left the Commonwealth are Burma, now Myanmar, and Ireland. Two counties which were not part of the empire - Mozambique and Rwanda - have joined. The Commonwealth gives the monarchy an international dimension. The majority of people in the Commonwealth are not white and not Christian. This means that the monarchy must stand and does stand for racial and religious equality. In her Diamond Jubilee in 2012, the Queen's first visit was to Leicester which is an example of a multiracial city where integration has proved successful. And in 2004 she made a particularly interesting Christmas broadcast. She spoke of the parable of the Good Samaritan, the implication of which was clear. "Everyone is our neighbour, no matter what race, creed or colour. The need to look after a fellow human being is far more important than any cultural or religious differences. Most of us have learned to acknowledge and respect the ways of other cultures and religions, but what matters even more is the way in which those from different backgrounds behave towards each other in everyday life." She then went on to say, "It was for this reason that I particularly enjoyed a story I heard the other day about an overseas visitor to Britain who said the best part of his visit had been travelling from Heathrow and into central London on the tube. His British friends, as you can imagine, were somewhat surprised, particularly as the visitor had been to some of the great attractions of the country. "What do you mean?" They asked. "Because", he replied, "I boarded the train just as schools were coming out. At each stop children were getting on and off - they were of every ethnic and religious background, some with scarves or turbans, some talking quietly, others playing and occasionally misbehaving together, completely at ease and trusting one another." "How lucky you are", said the visitor, to live in a country where your children can grow up in this way"." We can also see the influence of the monarchy in the Queen's broadcasts on COVID and in broadcasts commemorating D day and VE day where she was able to speak for the whole country. In my opinion, the case for constitutional monarchy is unanswerable.

***CJLPA*: To what extent did the countries in the Commonwealth remain within the Commonwealth for economic reasons?**

VB: That is part of the argument, but one should not exaggerate it because, after all, when countries become independent, they do not ask whether they will be better off or worse off. If you had said to the Nigerians in the 1960s, 'You will be economically worse off outside when you are no longer a British colony, when you are no longer ruled from Westminster', they would have said 'That's completely irrelevant. We want to govern ourselves'. The Indians and other newly independent countries would have said the same. So, I would not overstress that argument. The Commonwealth is in a way a sentimental organisation which does a great deal of good because one of the main problems in the world is the relationship between people of different ethnic groups and religions. It is often forgotten that the Queen's Christmas broadcast is not delivered in her role as Queen of Britain but as Head of the Commonwealth in which a majority are neither white nor Christian. I think it must be valuable to bring together people of different countries and different ethnic groups.

***CJLPA*: We know that the Northern Ireland protocol is a particularly precarious issue, and a very delicate part of the Brexit process. We know it has been ruled by the High Court and the Court of Appeal in Northern Ireland as legal. If it is not constitutional, on the other hand, what does that mean for Brexit as a whole, or even just the UK constitution in general?**

VB: What it means is that at the very least the Protocol must be radically amended. The Protocol may or may not be constitutional. But the courts were asked to pronounce on whether it is lawful - a different matter. They have said that it is lawful, but it does not follow that it is constitutional. After all, a statute that is incompatible with the Human Rights Act is lawful, but it is not constitutional. It would be lawful for the government to have ignored the Brexit referendum, which was an advisory referendum. But most of us think it would not have been constitutional.

***CJLPA*: What is likely to happen from here on in with the Northern Ireland protocol? What are we likely to see?**

VB: The Northern Ireland Protocol is a consequence of Brexit. Northern Ireland is the only part of the UK with a land border with an EU country. That has become of greater importance since Brexit because Britain will probably diverge from EU rules and regulations. The question is whether the regulatory and customs border should be on the island of Ireland or in the North Sea. Wherever it is, there is going to be trouble because if it is in the island of Ireland, the Irish nationalists are going to be annoyed. If, as is the case, it is in the Irish Sea, the unionists will be annoyed. Brexit goes against the spirit of the Good Friday Agreement or Belfast Agreement - I should say that there is no agreement on what it is to be called. If you are unionist you will call it the Belfast Agreement, if you are nationalist you will call it the Good Friday Agreement. But whatever it is called, the Agreement was an attempt to resolve the Irish problem. It enabled residents of Northern Ireland to identify as British, Irish, or both, and to enjoy Irish citizenship as well as British citizenship. But, with Brexit, if someone decides on Irish citizenship, she cannot access in Northern Ireland the rights of an EU citizen. She cannot, for example, access the European Charter for Fundamental Rights. So, Brexit does complicate the Irish problem. Both John Major and Tony Blair said in Northern Ireland that this would be a consequence of Brexit. Northern Ireland, as it happens, did not vote for Brexit: 56% voted to stay in the EU. But Britain is not a federal state and so Northern Ireland was overruled by the rest of the country.

The Northern Ireland courts have been considering the contention by the unionists that the Protocol is unlawful because it goes against the Act of Union of 1800 which provided that there should be no customs barriers between Britain and Ireland. The courts have said that the relevant part of the Act of Union was overridden by the Withdrawal Act which is also a constitutional statute. Parliament

well knew what it was doing when it enacted the Protocol, and in so doing, it implicitly repealed the relevant part of the Act of Union. The argument against the constitutionality of the Protocol would be that the Act of Union is absolutely fundamental because it is constitutive of the UK itself. So, it cannot be implicitly repealed but has to be explicitly repealed. That issue may go to the Supreme Court, I do not know whether leave to appeal to the Supreme Court has been given but the unionists are seeking it.

***CJLPA*: Because of the fact that it was brought by staunch unionists to the courts, is conflict almost inevitable?**

VB: Yes. The withdrawal agreement is a victory for the Irish nationalists. It is a zero-sum game. The Good Friday Agreement, or the Belfast Agreement, tried to avoid the zero-sum game. Both unionists and nationalists could win, one could be both British and Irish. But, in relation to the Protocol, one can understand the unionist position, since the Protocol divides the UK economically.

***CJLPA*: Regardless of how the Northern Ireland protocol is likely to turnout, are we likely to see a chain reaction of similar, but more sovereignty-related, issues in the other devolved nations?**

VB: Yes, Brexit has caused renewed conflict between Westminster on the one hand and Scotland and Wales on the other, for this reason. When the devolution settlement was made in the late 1990s the assumption was that Britain would stay in the EU. The devolution of some functions, for example, agriculture and fisheries, was fairly meaningless because almost all policy in those areas was determined by Brussels, so there was no real scope for an independent policy in these areas from Edinburgh or Cardiff or, indeed, Westminster. In theory, with the incorporation of EU law back into Britain, all EU powers relating to devolved matters should go to Scotland and Wales. But this raises a problem since we cannot have, for example, four different systems of agricultural subsidies in the UK, especially when agriculture will almost certainly be the subject of trade negotiations. Suppose we seek an agreement with America. The Americans would want to ensure that they had access to the whole of the UK market, not just England. So, in the Internal Market bill, the government reserved some powers which had been devolved. There has been much annoyance in Scotland and Wales and their governments have tried to amend the law through the courts. They have, however, not succeeded since we do not have a federal system. So, Parliament can still legislate on matters devolved to Scotland and Wales. But in Scotland and Wales many say, 'This may be lawful but it's unconstitutional, you shouldn't be legislating on devolved matters without our consent.' So, Brexit has raised problems in Scotland and Wales as well as in Northern Ireland.

***CJLPA*: On a similar note, there is the looming possibility of a second independence referendum. In Scotland, Nicola Sturgeon has promised the Scottish people that in a stable post-COVID era she would propose to them the question of independence.**

VB: That is possible, but contrary to what many think, Brexit makes independence more of a gamble because there would then be a hard border between Scotland and the rest of the UK. The rest of the UK is Scotland's largest trading partner: almost all its exports go to the rest of the UK, not to the Continent. So, independence could be economically catastrophic for Scotland.

In addition, Scotland gets more per head in public spending than England thanks to the Barnett formula. And she would face the same problem she faced in 2014 of what her currency should be. If it were to be the pound, she would have her monetary policy controlled from London. A similar arrangement caused Greece and Italy many problems with the EU. They were restricted in their economic policy since they had no control of monetary policy which lay with the European Central Bank. If Scotland had her own currency, interest rates might rocket sky high, since the new currency would be such an uncertain quantity. If Scotland joined the Euro, she would have to reduce her budget deficit to around 3%. Her budget deficit is now at around 7 or 8%. The cuts in public expenditure or increases in taxation would need to be huge. They would make George Osborne, the austerity Chancellor, look like Santa Claus! Scotland would not get the benefit of Margaret Thatcher's EU rebate either, I suspect. So, independence is a less viable project than when Britain was in the EU, but, as I mentioned a moment ago, it might be argued that these economic factors are not really fundamental when it comes to independence. When India and Nigeria became independent, they did not ask whether they would be better off of or worse off. Nor did Ireland when she became independent. Pressure for independence seems to be receding a little at the moment, though it is stronger amongst younger voters than older ones. The current Conservative government will not grant a second referendum but if there is a Labour government dependent on the Scottish National Party (SNP), the SNP might insist on a second referendum as a price for supporting that government.

So far, we have been talking about the British problem, but I think Brexit gives rise to great EU problems as well. Donald Tusk, the President of the European Council, said it was a mistake to believe that the factors leading to Brexit are not also present in other EU countries. Brexit, he said, should be a warning signal for the EU. President Macron of France - on the Andrew Marr Show in early 2017 - could not guarantee that if a referendum were held in France that it would not yield the same result as in Britain - Frexit. The EU faces problems and I think the main problem is that the original model - the Jean Monnet model, the Jacques Delors model - has reached its limit. As the EU comes to entrench upon national sensitivities, it encourages a populist reaction, particularly in areas such as immigration and control of economic policy. I think it would be better for Europe to develop along Gaullist lines, as a Europe *des etats*, a Europe of states (De Gaulle has often been mistakenly accused of using the phrase *Europe des Patries*). The Commission remains the only body that can initiate legislation. Many find that odd since it is not elected and cannot be dismissed by the voters. Some Gaullists have said that it should become a secretariat of the Council, and that seems to me sensible. The federalists, Jean Monnet and Jacques Delors, wanted the Commission to be eventually responsible to the European Parliament and the Council of Ministers to become the upper house of member states. But Europeans do not regard the European Parliament as their primary legislature. Their primary allegiance is to their domestic legislatures and the European Parliament is seen as part of an alienated superstructure – representing them not us. There is a conflict, exacerbated by the EU, between the political class and the rest. The political class favours integration but the people are sceptical. This is particularly so in France. It was first revealed 30 years ago when the French, thought to be at the centre of European integration, only narrowly accepted the Maastricht treaty. Then, in 2005, they rejected the European constitution. Nevertheless, the elites go ahead regardless and that seems to me foolish. They need to take account of popular feeling. The EU was founded in a different age, the early 50s, when there

was much greater deference, and I am not sure it works as well today when there is a demand for greater accountability. So, Brexit contains important lessons for the EU as well as for Britain.

***CJLPA*: What lessons have the member states themselves learnt? And do they have a responsibility for how Brexit played out?**

VB: I think they need to look at how to combat populism and I have tried to suggest how that might be done. What is remarkable in Britain, contrary to many predictions - and I was myself a Remainer – is that Brexit, paradoxically, has liberated Britain's liberal political culture. Survey after survey has shown that the public is more sympathetic to immigration than it was. We have developed more liberal attitudes to immigration than most EU member states, and immigrants have more of a chance of finding employment here than in many other European countries. The present government contains six members from non-white ethnic minorities. Angela Merkel's last government in 2017 had none at all. When we left the European Parliament, we took a large percentage of ethnic minority Members of the European Parliament with us. A number of European countries have none at all. Contrary to what many predicted, we have not become a more insular racist country, we have become a more liberal country. Populist forces seem to have been weakened. The EU must itself learn how to combat populism.

***CJLPA*: After Brexit we saw many far-right parties recoil very quickly from their own plans to exit from the EU. What has the far-right learnt with regards to Brexit?**

VB: The far-right benefits from general alienation from government, particularly on immigration and on the fact that the EU makes it very difficult for national governments to control economic policy. In the Mediterranean countries - not so much in Italy but in Spain and Portugal and possibly Greece - the far-left has gained more. The far-left has gained in France as well. It is the entrenching by the EU on national sensitivities that is so worrying. If you look at past federal states, many have been built after war - the American Civil War, the German wars under Bismarck, the Swiss war in 1848 - and took a long time to form, even in America where everyone speaks the same language. There is not going to be any sort of federation in a Europe comprising so many different national traditions, languages and cultures for a long time. One might have got it and might possibly still get it if an inner core of the original six got together - Germany, Italy, France and the Benelux. But there is very unlikely to be a federation of the 27 member states.

***CJLPA*: In light of some of the negotiations being postponed to a later date, when will we see a post-Brexit life? Will we be seeing it anytime soon?**

VB: Brexit is a process not an event. I think the process will continue for a long time. And it will be some time before we can judge the economic and constitutional effects of Brexit. On these matters the jury is still out on whether Brexit will prove beneficial or not. The jury is also still out on the future of theUK . Will Scotland remain part of it? Will Northern Ireland? No one knows, and I am not going to predict. It is difficult enough for the historian to find out what has happened in the past let alone what will happen in the future.

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Should Terrorism be Regarded as an International Crime? An Examination of the Theoretical Benefits and the Practical Reality

Eoin Campbell

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Introduction

An international crime is 'an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances'.[1] This essay will firstly examine whether proposed definitions of terrorism as a crime under customary international law should be accepted, and then discuss whether terrorism should fall within the jurisdiction of the International Criminal Court (ICC). It will examine the arguments for and against, including the potential to politicise the Court, the effect on the war on terror, the benefits to defendants and the impact on the role of the Security Council. Ultimately, this essay will conclude that whilst adding terrorism to the ICC's jurisdiction could have an overall benefit, the practical reality renders this difficult to accomplish.

Terrorism in Customary International Law

To determine whether terrorism should be an international crime, it is important to establish a definition of terrorism. Traditionally, terrorism has been criminalised via a series of transnational treaties, which criminalise the *modus operandi* used by terrorists.[2] However, these treaties do not provide a general definition of terrorism. Therefore, it is important to focus on treaties which seek to create a general definition of terrorism, as the specific definitions would criminalise that specific act, such as the hijacking of an aeroplane, rather than the broader concept of terrorist acts, which may take many different forms.[3] Therefore, the two most important definitions to consider are found in The Convention for the Suppression of the Financing of Terrorism, as it is the most widely ratified treaty containing a general definition of terrorism, and the *Interlocutory Decision on the Applicable Law*, as this decision argued that terrorism already existed as a crime under customary international law.[4]

The Convention for the Suppression of the Financing of Terrorism includes a close generic definition of terrorism,[5] however, it only applies in situations of armed conflict, and acts of terrorism can already be categorised as war crimes in this context.[6] It is important to note that this definition did not have widespread consensus at its creation.[7] Instead, most states ratified the Convention in response to United Nations Security Council Resolution 1373, which imposed an obligation on states to ratify it following 9/11.[8] Therefore, this definition is unlikely to have strong support from states for the basis

1 *Re List and Others (US Military Tribunal at Nuremburg)* [1948] Case No 7, 1241.

2 Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, Cambridge University Press 2019) 324.

3 Alan Greene, 'Defining Terrorism: One Size Fits All?' (2017) 66 ICLQ 411, 415-16.

4 STL-11-01/1/AC/R176bis [85].

5 (adopted 10 January 2000, entered into force 10 April 2002) art 2(1).

6 Michael P Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects' (2004) 36 Case Western Reserve JIL 359, 363.

7 Naomi Norberg, 'Terrorism and International Criminal Justice: Dim Prospects for a Future Together' (2010) 8 Santa Clara JIL 11, 24.

8 UN Doc S/RES/1373, 3(d).

of a crime of terrorism in international criminal law. Considering that states opted against including a crime of terrorism in the Rome Statute, it seems unlikely that they would agree on including a definition that they were largely required to ratify. Furthermore, the ICC already has jurisdiction over attacks aimed at civilians during armed conflict.[9] As such, this definition should not be used to form the basis of defining terrorism as an international crime.

It has been argued that terrorism is already a crime under customary international law. The Appeals Chamber of the Special Tribunal for Lebanon (STL) concluded that the international crime of terrorism consisted of the perpetration or threatening of a criminal act, the intent to spread fear amongst the population or to coerce a government to take an action or refrain from taking one, and the involving of a transnational element.[10] However, the Rome Statute does not allow the ICC to rely on customary international law,[11] and so this definition would still need to be transposed into the Statute. This essay argues that the STL definition should not be transposed as it is overinclusive and may encompass acts that are not within the understanding of terrorism. For example, a protest at another state's embassy where damage to property occurs may be included under this definition if the protest is to influence the embassy state's actions. Protests in Germany regarding Israel's actions towards Palestine have turned violent, with flags burned and stones thrown towards police officers.[12] In this case, there is the perpetration of a criminal act in the stone throwing, the intent to coerce a government to refrain from taking action, and arguably a transnational element should any of the offenders not be German nationals. These actions should not be labelled as 'terrorism' under international criminal law, as they are politically legitimate. Broadening the definition this wide could see all manners of protest included under international criminal law if the protest turned violent. These situations should instead be dealt with under domestic criminal law. The role of the ICC is to prosecute and deter the most serious crimes of concern to the international community.[13] If terrorism is to be added to its jurisdiction, it must meet a threshold requirement of some kind to ensure that situations like protests turning violent are not on the same level as war crimes, crimes against humanity, and genocide.

Cassese claimed that terrorism was a crime under customary international law if: the act committed is already criminalised under domestic law; the conduct is transnational in nature; the goal of the act is to spread terror; the act is based on political, religious, or ideological motivations; and the act is carried out with the toleration or support of another state.[14] However, this definition may be underinclusive, as it only encompasses terrorist acts which are carried out by the support or tolerance of another state. This excludes much of the actions of contemporary terrorism, where attacks by lone actors have higher fatalities than those committed by members of terrorist organisations.[15] However, should this definition be regarded as encompassing customary international law, instead of merely an ICC definition, it could allow for universal jurisdiction to be exercised when attacks are carried out with the support of a host state that is not willing to prosecute the perpetrators. This could potentially deter states from aiding terrorist organisations to carry out proxy wars, such as the conflict between Iran and Saudi Arabia.[16] It would not remove the surrounding debate regarding national liberation movements,[17] particularly where movements are supported by external states, such as Libya supplying arms to the Irish Republican Army,[18] or China training members of the uMkhonto we Sizwe during apartheid in South Africa.[19] As such, this definition would be preferable to the STL one as a crime under the Rome Statute, as it could allow prosecutions of instances of state-sponsored terrorism. However, it does not solve the disagreement amongst states as to whether national liberation movements should be regarded as terrorists.[20]

Terrorism under the ICC

The previous section discussed two definitions of terrorism argued to have the status of customary international law and examined specific arguments for whether these two definitions should be incorporated into the Rome Statute. This section will appraise the merits of ICC jurisdiction over terrorism, notwithstanding disagreements over a precise definition.

One of the main issues regarding incorporating terrorism as an international crime is that the ICC has no enforcement body and relies on state co-operation to prosecute individuals.[21] Furthermore, it has no intelligence service. Therefore, it would need to rely on intelligence gathered from domestic intelligence agencies as evidence for its prosecution. Governments may be reluctant to hand over this information, as the defendant would likely be granted access to it to build their defence.[22] However, this problem may be overstated. States which have extensively gathered evidence regarding terrorism are likely to be able to prosecute terrorists after an attack has occurred. Indeed, the goal of intelligence gathering is to prevent an attack occurring in the first place.[23] If a state has the resources to focus on the prevention of attacks, it likely also has the resources to prosecute an attack in its domestic jurisdiction. This does not render the ICC irrelevant—the Court is one of last resort that acts complimentary to domestic legal systems.[24] Furthermore, the role of the Court is not to prevent attacks, but to prosecute after they occur. Therefore, should there be evidence that the attack took place, it may not need access to intelligence gathered before the commission of the act to aid in its prosecution.

9 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (Rome Statute) art 8(b), art 8(c).

10 *Interlocutory Decision on the Applicable Law* STL-11-01/1/AC/R176bis [85].

11 (n 9) art 21.

12 Kate Connolly, 'Anti-Israel protests in Germany prompt calls for antisemitism crackdown' *The Guardian* (London, 17 May 2021).

13 Rome Statute, Preamble.

14 Antonio Cassese and Paulo Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 150–51.

15 Noah Turner, Steven Chermak, and Joshua Freilich, 'Attacks from lone terrorists in the US are more severe than those who are affiliated with groups' (*LSE US Centre*, 25 June 2021) <https://blogs.lse.ac.uk/usappblog/2021/06/25/attacks-from-lone-terrorists-in-the-us-are-more-severe-than-those-who-are-affiliated-with-groups/> accessed 26 December 2021.

16 Jonathan Marcus, 'Why Saudi Arabia and Iran are bitter rivals' *BBC News* (16 September 2019).

17 Sami Zeidan, 'Desperately Seeking Definition: The International Community's Quest for Identifying the Spectre of Terrorism' (2003) 36 Cornell ILJ 491, 492.

18 David McCullagh, Conor McMorrow, and Justin McCarthy, 'Extent of Libyan backing for IRA "shocked" British' *RTÉ News* (28 December 2021).

19 Stephen Ellis, 'The Genesis of the ANC's Armed Struggle in South Africa 1948-1961' (2011) 37 JSAS 657, 672.

20 *US v Yousef* 327 F.3d 56 C.A.2(NY) 2003, 84.

21 Rome Statute (n 9) art 86.

22 Jonathan Hafetz, 'Terrorism as an International Crime?: Mediating between Justice and Legality' (2015) 109 ASIL Proceedings 158, 161.

23 Andrew Ashworth and Lucia Zedner, *Preventative Justice* (Oxford University Press 2014) 171.

24 Rome Statute (n 9) Preamble.

A second reason as to why the Court would not be best placed to adopt jurisdiction for a crime of terrorism is because the Court has faced criticism that it is politically motivated,[25] and terrorism is an inherently political label.[26] However, it has equally been argued that incorporating a crime of terrorism would remove contentious cases from domestic courts, and the ICC could be seen as a more impartial institution than a domestic court.[27] When considering the extent of the critiques directed towards the Court, the argument that adding terrorism to its jurisdiction would result in the Court being perceived in a more favourable manner is not a convincing one. As the ICC has faced numerous criticisms of being a political court and one that is dominated by powerful states,[28] it seems unlikely that adding a new crime of terrorism could help alleviate these fears. Indeed, as the Court is one of last resort, it is likely that its prosecutions would focus on individuals who commit terrorist acts in states that do not have the ability to prosecute for these crimes.[29] This would again steer the Court's focus towards Global South states, further adding fuel to the claims that the Court targets African states.[30] Thus, should the Court adopt jurisdiction over terrorism, it is extremely unlikely to help end the view that terrorism prosecutions can be politically motivated, as the exact opposite accusations have been directed at the Court since its inception. The extent to which these accusations are true is for another discussion, but they are there and cannot be ignored by international criminal law. As such, this points to evidence that terrorism should not be considered under the Court's jurisdiction.

Nevertheless, there are four clear benefits in allowing the ICC to prosecute terrorism. First, it could help end impunity for acts of state-sponsored terrorism. For instance, the British Army helped loyalist paramilitaries in Northern Ireland to kill civilians during the Troubles.[31] Despite UK courts finding that there was a breach of the European Convention of Human Rights through the state's failure to adequately investigate certain instances during the Troubles,[32] the UK has yet to begin a public inquiry into the matter. Allowing the ICC to have jurisdiction over terrorism would permit the Court to intervene where the domestic state fails to hold its actors accountable for such crimes.[33] This complies with the objectives of the ICC, which seeks to end impunity for the perpetrators of serious violations of international criminal law, including those in senior positions within states.[34] Thus, incorporating terrorism into the Rome Statute could ensure that there is no impunity for acts of state-sponsored terrorism which the state refuses to investigate for its own political agenda.

Secondly, incorporating terrorism into international criminal law could help restrain the growing military response in the current war on terror.[35] The current military approach has seen mass human rights violations against suspected terrorists and civilians alike, with legal advisors stating that George W Bush had unlimited power to respond to 9/11,[36] and potentially issuing warrants to torture suspects if required.[37] Furthermore, innumerable civilians have been killed in the war on terror, with no prosecutions for any instance of wrongful death.[38] Including the crime of terrorism within the ICC's jurisdiction could encourage states to seek accountability through legal means, as opposed to the current route where *jus ad bellum* concepts are being stretched beyond recognition. Whilst the US is not a party to the Rome Statute, and has a history of opposing the Court,[39] it has also offered rewards for information leading to the capture of people subject to arrest warrants by the ICC, such as Joseph Kony.[40] Thus, the US still may choose to engage with the ICC on this issue in order to preserve an image of a law-abiding nation. In addition, whilst the US is not party to the Rome Statute, many states engaging in militaristic responses to the war on terror are, such as the UK, France, Germany, Australia, Canada, and the Netherlands. Therefore, adding terrorism to the ICC's jurisdiction would perhaps reduce the military response on terrorism, and encourage a legal response instead.

Thirdly, the ICC would ensure that the rights of people accused of terrorism would still be upheld. The accused is entitled to the presumption of innocence,[41] guilt must be proven beyond reasonable doubt, and a range of other measures exist to protect their rights.[42] In contrast, the UK has introduced crimes that allow for prosecution where articles are possessed in circumstances giving rise to a reasonable suspicion that it is for the purpose of the commission, preparation, or instigation of an act of terrorism,[43] or impose highly restrictive measures on individuals not convicted of a crime.[44] These instances can create feelings of injustice and exclusion, which in turn trigger some people to support terrorist causes.[45] Human rights must apply to all individuals equally, and it is important to ensure that these rights extend to those people who have committed heinous acts, or to whom it would be undeniably convenient to revoke rights in the name of national security.

25 Kevin Jon Heller, 'Poor ICC Outreach – Uganda Edition' (*Opinio Juris*, 22 September 2015) <http://opiniojuris.org/2015/09/22/poor-icc-outreach-uganda-edition/> accessed 30 December 2021.

26 Jørgen Staun, 'When, how and why elites frame terrorists: a Wittgensteinian analysis of terror and radicalisation' (2010) 3 Crit Stud Terror 403, 411.

27 Tim Stevens, 'International Criminal Law and the Response to International Terrorism' (2004) 27 UNSW LJ 454, 480–81.

28 Steven Roach, 'How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy' (2013) 19 Global Governance 507, 514.

29 Jonathan Hafetz, *Punishing Atrocities through a Fair Trial: International Criminal Law from Nuremburg to the Age of Global Terrorism* (Cambridge University Press 2018) 179.

30 Benson Chinedu Olugbuo, 'The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa' (2014) 7 African J Leg Stu 351, 353.

31 John Stevens, 'Stevens Enquiry 3: Overview and Recommendations' (17 April 2003) [4.7].

32 *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7.

33 Rome Statute (n 9) Preamble.

34 *The Prosecutor v Kenyatta* (ICC-01/09-02/11), Partially Dissenting Opinion of Judge Ozaki [11].

35 Kathleen Maloney-Dunn, 'Humanising Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and Fundamental Human Rights at the ICC' (2010) 8 Santa Clara J Int L 69, 72.

36 Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021) 240.

37 Alan Dershowitz, 'Want to Torture? Get a Warrant' (*San Francisco Chronicle*, 22 January 2002).

38 Azmat Khan, 'Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes' *The New York Times* (New York, 18 December 2021).

39 Lilian Faulhaber, 'American Servicemembers' Protection Act of 2002' (2003) 40 Harv J on Legis 537.

40 Office of Global Criminal Justice <https://2009-2017.state.gov/j/gcj/wcrp/206078.htm> accessed 1 January 2022.

41 Rome Statute (n 9) art 66.

42 ibid art 67.

43 Terrorism Act 2000, s 57.

44 Terrorism Prevention and Investigation Measures Act 2011.

45 Press Conference by Special Rapporteur on Human Rights and Countering Terrorism (22 October 2008) <https://www.un.org/press/en/2008/081022_Scheinin.doc.htm> accessed 1 January 2022.

Finally, incorporating terrorism under the Rome Statute could help to rein in the UNSC's quasi-legislative actions regarding counter terrorism measures.[46] UNSC resolutions combatting terrorism originally had no concern for human rights,[47] which was challenged by regional courts seeking to uphold their own human rights standards.[48] The UNSC is the body responsible for the maintenance of international peace and security,[49] however it is debateable as to whether global terrorism is truly a threat to international peace. The UNSC was formulated to prevent a nuclear conflict between the world's superpowers, and terrorism does not pose the same level of existential threat, save for perhaps ISIS to Syria and Iraq. However, this has been the exception rather than the norm. As such, granting the ICC jurisdiction over terrorism would help to wrestle power away from the UNSC.

Of course, the above points are all hypothetical benefits to adding terrorism to the ICC's jurisdiction. The reality is far more complicated than that. Considering that the Kampala Review Conference decided against considering the crime of terrorism, it seems unlikely that sufficient political will is there to grant the ICC jurisdiction over this matter. As such, it is better not to adopt the crime into the Rome Statute at this current time, as it will inevitably fail without the support of states.

Conclusion

This essay has examined current proposed definitions of terrorism as an international crime, namely the decision of the STL and Cassese's academic definition. Neither of these definitions should form the basis for an international crime of terrorism, although the academic definition would be preferable to the one formulated by the STL. Ultimately, whilst there are numerous valid reasons for including terrorism within the Court's jurisdiction, it should not, and indeed cannot, be done until there is sufficient enthusiasm from state parties to the Rome Statute. As there is currently very little, it would be better to leave the matter until the Court can effectively combat and prosecute terrorism.

46 *A v Secretary of State for the Home Department* [2004] UKHL 56 [96].

47 Rosemary Foot, 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaption and Embedded Ideas' (2007) 29 HRQ 489, 496.

48 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] C-402/05.

49 UN Charter, art 24(1).

The Claim of Judicial Finality in the United States: A Popular Theory that Lacks Evidence

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In law schools as well as political science and history classes, students are generally taught that when the Supreme Court decides a constitutional issue it delivers the final word unless the Court changes its position. That is the prominent theory. In 1953, Justice Robert Jackson promoted the doctrine of judicial finality by making a statement that is often cited: 'We are not final because we are infallible, but we are infallible only because we are final'.[1] Perhaps a clever and witty turn of phrase but it advances a claim unsupported by facts.

What has occurred from 1789 to the present time is not judicial finality but an ongoing dialogue among all three branches of the national government, the states, scholars, and the general public. On occasion, members of the Supreme Court will acknowledge that errors and misconceptions can occur in the judicial process. Chief Justice William Rehnquist spoke bluntly in 1993: 'It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible'.[2]

The person who should have understood that point is Robert Jackson. In 1940 the Court upheld a compulsory flag-salute with a strong majority of 8 to 1.[3] The final word? No. The decision was subject to such criticism from the public and scholars that three Justices in the majority (Hugo Black, William Douglas. and Frank Murphy) announced two years later that the decision was wrongly decided.[4] That reduced the majority to 5-4. Two of the Justices in the 8-1 majority retired and their replacements joined the four Justices to produce a 6-3 decision in 1943 reversing the 1940 decision.[5] Who wrote the majority opinion in 1943? It was Robert Jackson.

Early Precedents

The claim of judicial finality appears in a unanimous decision by Chief Justice John Marshall in *McCulloch v. Maryland* (1819), which held that Congress possessed an implied power to create a national bank. He said if the case had to be decided 'by this tribunal alone can the decision be made'. On the Supreme Court 'has the constitution of our country devolved this important duty'.[6] He concluded that the statute to create the Bank of the United States 'is a law made in pursuance of the constitution, and is a part of the supreme law of the land'.[7] The fact that Congress created the Bank and the Supreme Court upheld it did not prevent the elected branches from reaching a different conclusion a few decades later.

On July 10, 1832, President Andrew Jackson vetoed a bill to restore the U.S. Bank. While admitting that the bill had some positive features and had gained support from the Supreme Court, he noted the mixed history of the Bank: Congress favoring it in 1791, voting against it in 1811 and 1815, but supporting it in 1816.[8] As to

1 Brown v. Allen, 344 U.S. 443, 540 (1953).
2 Herrera v. Collins, 506 U.S. 390, 415 (1993).
3 Minersville School District v. Gobitis, 310 U.S. 586 (1940).
4 Jones v. Opelika, 316 U.S. 584, 624 (1942).
5 West Virginia State Board of Education v. Barnette, 319 U.S. 614 (1943).
6 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).
7 ibid 424.
8 James D Richardson (ed), *A Compilation of the Messages and Papers of the*

the decision in *McCulloch*, he denied that the Court's ruling, even if it 'covered the whole ground of this act', ought 'to control the coordinate authorities of this government'. Congress, the President, and the Supreme Court 'must each for itself be guided by its own opinion of the Constitution'. A public officer who takes an oath to support the Constitution 'swears that he will support it as he understands it, and not as it is understood by others'. The opinion of judges 'has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both'.[9]

Congress did not override Jackson's veto. Aware of Jackson's action, John Marshall had full appreciation of the degree to which the elected branches could reverse constitutional decisions by the Supreme Court. The overriding picture was a broad and open dialogue among the three branches of government, the general public, and scholars. Marshall passed away on July 6, 1835.

Three-Branch Interpretations

The pattern of all three branches sharing constitutional interpretation continued in subsequent years. An interesting example is the effort of Congress in 1916 to pass legislation to regulate child labor. The statute prohibited the shipment in interstate or foreign commerce of any article produced by children within specified age ranges: under the age of sixteen for products from a mine or quarry, and under the age of fourteen from any mill, cannery, workshop, factory, or manufacturing establishment.[10] Two years later the Supreme Court, divided 5-4, struck down the statute as unconstitutional.[11] The Court claimed that the steps of 'production' and 'manufacture' of goods were local in origin and therefore not part of the 'commerce' among the states that would be subject to regulation by Congress. To the Court, although child labor might be harmful the goods produced from their labor 'are of themselves harmless'.[12] The last word? Not at all.

Members of Congress did not accept the Court's ruling as final. Instead, they decided to pass legislation to regulate child labor through the taxing power. A federal excise tax would be levied on the net profit of persons employing child labor within prohibited ages. By a vote of 8 to 1, the Court struck down the new child labor law.[13] The end of this dispute? No. Congress passed a constitutional amendment in 1924 to support its power to regulate child labor but by 1937 only twenty-eight of the necessary thirty-six states had ratified it.[14]

Although the Supreme Court had twice struck down child-labor statutes, Congress in 1938 again passed legislation to regulate this issue. During debate, lawmakers did not bow down to the doctrine of judicial finality.[15] In 1940, a federal district court in Georgia held the child-labor statute unconstitutional because the activity within the state was not 'interstate commerce' subject to the control of Congress. The court accepted the Supreme Court's position in *Hammer v. Dagenhart* that the 'manufacture' of goods is not commerce.[16]

In 1941, a thoroughly reconstituted (and chastened) Supreme Court not only upheld the new statute governing child labor but did so unanimously. A brief opinion by Justice Harlan Fiske Stone noted that while manufacture 'is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce'.[17] He proceeded to say that *Dagenhart* was 'novel when made and unsupported by any provision of the Constitution'.[18] Quite extraordinary language! A Supreme Court opinion issued without any support in the Constitution. In using this language, Stone repudiated not only the doctrine of judicial supremacy but the assertion of judicial infallibility. To him, judgments on what goods to exclude from interstate commerce – considered injurious to the public health, morals, or welfare – are reserved to the elected branches, not to the judiciary.[19] The motive and purpose of a regulation on interstate commerce 'are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control'.[20]

Judicial Errors that Inflate Presidential Power

In its decisions, the Supreme Court has often promoted independent presidential power in external affairs by relying on serious misconceptions. A prime example is the *Curtiss-Wright* case of 1936. The core issue was whether Congress could delegate to the President certain powers in the field of international relations. In 1934, Congress authorized the President to prohibit the sale of arms in the Chaco region in South America whenever he found 'it may contribute to the reestablishment of peace' between belligerents.[21] The issue was legislative, not executive, power. When President Franklin D. Roosevelt imposed the embargo he relied exclusively on statutory authority. His proclamation prohibiting the sale of arms and munitions began: 'NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting and by virtue of the authority conferred in me by the said joint resolution of Congress…'.[22]

On what possible grounds could the Supreme Court two years later discover exclusive and independent powers for the President? The answer: a total misconception of a speech delivered by John Marshall when he served in the House of Representatives in 1800. At no time in the speech did he claim for the President some type of exclusive and independent power over external affairs. The year 1800 marked an election contest between President John Adams and Thomas Jefferson. In the House, supporters of Jefferson argued that Adams be either impeached or censured for turning over to England an individual charged with murder. Because the case was already pending in an American court, some lawmakers wanted to

Presidents vol 3 1145.

9 ibid.

10 Public Law No. 64-249, 39 Stat. 675 (1916).

11 Hammer v. Dagenhart, 247 U.S. 251 (1918).

12 ibid 271-72.

13 Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

14 John Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002* (ABC-CLIO 2003) 63.

15 For details on this legislation, see John Fliter, *Child Labor in America: The Epic Legal Struggle to Protect Children* (University Press of Kansas 2018) 191-214; Louis Fisher, *Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution* (University Press of Kansas 2019) 98-99.

16 United States v. F.W. Darby Lumber Co., 32 F. Supp. 734, 736 (S.D. Ga. 1940).

17 United States v. Darby, 312 U.S. 100, 113 (1941).

18 ibid 116.

19 ibid 114.

20 ibid 115.

21 48 Stat. 811 (1934).

22 ibid 1745.

sanction Adams for encroaching upon the judiciary and violating the doctrine of separation of powers. A House resolution rebuked Adams for interfering with judicial decisions.[23]

Much of the issue depended on the nationality of the person released to the British. The House resolution stated: 'it appears to this House that a person, calling himself Jonathan Robbins, and claiming to be a citizen of the United States', was held on a British ship and committed to trial in the United States 'for the alleged crime of piracy and murder, committed on the high seas, on board the British frigate Hermione'.[24] Notice the vague language: 'it appears', 'calling himself', and 'claiming to be'. In fact, Robbins was an assumed name. The individual was actually Thomas Nash, a native Irishman.[25]

Marshall took the floor to methodically shred the move for impeachment or censure. He pointed out that the Jay Treaty with England contained an extradition provision in Article 27, directing each country to deliver up to each other 'all persons' charged with murder or forgery.[26] Nash, being British, would be turned over to England for trial. President Adams was not attempting to make foreign policy unilaterally. He was carrying out a treaty and fulfilling his Article II, Section 3, authority to take care that the laws, including treaties, be faithfully executed. Under Article VI of the Constitution, all treaties 'shall be the supreme Law of the Land'.

In the course of delivering his speech, Marshall added this sentence: 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations'.[27] The phrase 'sole organ' is ambiguous. 'Sole' means exclusive but what is 'organ'? To Marshall, it is simply the President's duty to communicate to other nations U.S. policy decided by the elected branches, including provisions in treaties. Marshall was merely defending Adams for carrying out the extradition provision in the Jay Treaty. After Marshall completed his presentation, Jeffersonians found his argument so tightly reasoned that they decided to cease any effort to punish Adams.

Despite the clarity of this issue regarding Marshall's intent to defend Adams, the Supreme Court completely misread Marshall's reference to the President as 'sole organ'. Writing for the Court, Justice George Sutherland added pages of dicta (judicial comments that have no bearing on the issue before a court) that not only misrepresented Marshall's speech but offered judicial support for independent presidential power in external affairs. Although President Roosevelt explained that he carried out the 1934 statute by relying solely on authority delegated to him, Sutherland announced that the President in the field of international relations possessed 'plenary and exclusive power over external affairs', an argument that not only exceeds what Marshall argued in his speech but violates express language in the Constitution. Anyone reading the Constitution would understand that the Framers did not concentrate all powers of external affairs in the President. Sutherland added not only dicta but erroneous dicta. Sutherland inserted another error in *Curtiss-Wright* by claiming that the Constitution commits treaty negotiation exclusively to the President: 'He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress is powerless to invade it'.[28]

23 10 Annals of Cong. 533 (1800).
24 ibid 532.
25 ibid 515.
26 8 Stat. 129 (1794).
27 10 Annals of Cong. 613 (1800).
28 Curtiss-Wright Corp., 299 U.S. at 319, emphasis in original.

That was pure dicta. Nothing in the case before the Supreme Court had anything to do with treaties or treaty negotiation. It was not merely dicta. It was erroneous.

To cite persuasive evidence for this error would be a book published in 1919 by someone who had served in the U.S. Senate. He explained how Senators regularly participated in treaty negotiation and that Presidents acceded to this 'practical construction'. As the book notes, the right of Senators to participate in treaty negotiation 'has been again and again recognized and acted upon by the Executive'. How would Sutherland be aware of this book? He was the author.[29] Moreover, Presidents have invited members of the House of Representatives to participate in treaty negotiation as a means of building political support for authorization and appropriation bills needed to implement treaties.[30] Here is another example of Supreme Court Justices adding not only dicta to their decisions but erroneous dicta.

A Broad Dialogue

Corrections in constitutional positions are often required to take account of shifts in public attitudes. In a book published in 1962, Alexander Bickel noted that the process of developing constitutional values in a democratic society 'is evolved conversationally not perfected unilaterally'.[31] A study published in 1989 by Thomas Marshall analyzed the impact of public opinion on the Supreme Court and concluded that the Court 'appears to enjoy an enviable position as a policy maker' because overriding the Court by constitutional amendment 'requires cumbersome, time-consuming efforts, and very few attempts have ever succeeded'.[32]

In a book published by Princeton University Press in 1988, I offered my views on *Constitutional Dialogues: Interpretation as Political Process.* I concluded that the belief in judicial supremacy 'imposes a burden that the Court cannot carry. It sets up expectations that invite disappointment if not disaster'.[33] Court decisions 'are entitled to respect, not adoration. When the Court issues its judgment we should not suspend ours'.[34] Judicial review fits our constitutional system because we like to fragment power through a system of checks and balances. This 'very preference for fragmented power denies the Supreme Court an authoritative and final voice for deciding constitutional questions'.[35]

On the back cover of this book are three statements promoting my book. One is by Ruth Bader Ginsburg when she served on the D.C. Circuit Court. She agreed that constitutional law 'neither begins nor ends with Supreme Court decisions'. Multiple actors in the political system participate, underscoring 'the colloquy or interplay constantly at work among the people, their elected representatives, and appointed judges in the joint enterprise of constitutional interpretation'. After her nomination to the Supreme Court, she offered this statement on July 20, 1993 to the Senate Judiciary

29 George Sutherland, *Constitutional Power and World Affairs* (Columbia University Press 1919) 123.
30 Louis Fisher, 'Congressional Participation in the Treaty Process' (1989) 137 U. Pa. L. Rev. 1511, 1517.
31 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962) 244.
32 Thomas Marshall, *Public Opinion and the Supreme Court* (Unwin Hyman 1989) 167.
33 Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press 1988) 278.
34 ibid 279.
35 ibid.

Committee: 'Justices do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the states, and the people'.[36]

After being confirmed as a Supreme Court Justice, Ginsburg often underscored how willing she was to reject the notion of judicial finality. In 2007 the Court decided the case of Lilly Ledbetter who had filed a lawsuit against Goodyear Tire after learning that she was being paid less than men for doing the same work. It took her two decades to learn that fact. In July 1998, she filed a formal charge of sex discrimination under Title VII and also a claim under the Equal Pay Act of 1963. Writing for a 5-4 Court, Justice Samuel Alito agreed with the Eleventh Circuit in rejecting Ledbetter's complaint.[37] The Court said she should have file her case within 180 days of each alleged discriminatory pay action, but she did not know of Goodyear's actions against her until two decades later.

In a dissent joined by Stevens, Souter, and Breyer, Ginsburg noted the disparity between Ledbetter's monthly salary as area manager and those of male counterparts at the end of 1997. The latter group ranged from a high of $5,236 to a low of $4,286. Her monthly salary for that time period was $3,727. As for the failure of Ledbetter to file discriminatory charges before 1998, Ginsburg explained that Goodyear Tire had withheld comparative pay information from her. Recalling the Civil Rights Act of 1991 that overturned in whole or part nine decisions of the Supreme Court, Ginsburg remarked: 'Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII'. She made clear that a decision by the Supreme Court was not necessarily the final word. The elected branches could now enter the picture to reverse the Court.

The Court issued its decision on May 29, 2007. In response, Senator Ted Kennedy said the Court had 'undermined a core protection' of Title VII of the Civil Rights Act of 1964.[38] In late July, the House of Representatives debated the Lilly Ledbetter Fair Pay Act to reverse the Court's decision. Representative Jerrold Nadler of New York, objecting that Goodyear could pay her less just because she was a woman, offered this response: 'Once again, Congress must correct the Supreme Court and instruct it that when we said discrimination in employment was illegal, we meant it, and we meant for the court to enforce it'.[39] By a vote of 225 to 199, the House passed the Ledbetter bill.[40]

After the Senate filibustered the bill, no further action was taken until early 2009 when President-elect Barack Obama was poised to occupy the White House. This time the House passed the Ledbetter bill by a vote of 247-171.[41] The Senate debated the bill on January 22 after Obama had taken office. The bill passed the Senate 61-36. The House voted 250-177 to support the Senate bill. As enacted, the bill provides that an unlawful employment practice occurs when a discriminatory compensation decision is adopted. Nothing in the statute limits an employee's right to challenge an unlawful employment practice.[42] Discriminatory actions carry forth in each paycheck, allowing women to file a complaint in a timely manner for relief. A congressional statute overrode a Supreme Court decision.

36 Ruth Bader Ginsburg, *My Own Words* (Simon & Schuster 2016) 183.
37 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). For further details on this case, see Fisher (n 15) 75-78.
38 153 Cong. Rec. 14530 (2007).
39 ibid 21432.
40 ibid 21929.
41 155 Cong. Rec. 458-59 (2009).
42 Public Law No. 111-2, 123 Stat. 5 (2009).

Japanese-American Cases

In its decisions in *Hirabayashi* (1943) and *Korematsu* (1944), the Supreme Court upheld actions against Japanese-Americans to prosecute them for violating a curfew order and to place them in detention camps because of their race. Although deficiencies were discovered with both decisions, not until *Trump v. Hawaii* in 2018 did the Supreme Court announce that *Korematsu* was 'gravely wrong the day it was decided'. If *Korematsu* was that deficient, why did it take the Court 74 years to admit it? And what of *Hirabayashi*? Is that still good law? The record demonstrates not only a capacity of the Supreme Court to issue erroneous decisions but an unwillingness to correct them.

On February 25, 1942, President Franklin D. Roosevelt issued Executive Order 9066, leading to a military curfew that covered all persons of Japanese descent within a designated military area.[43] A month later, Congress passed legislation to ratify the executive order.[44] Gordon Hirabayashi, a U.S. citizen of Japanese descent, was prosecuted in federal district court for violating the curfew order. A unanimous Supreme Court upheld the government's policy.[45] The Court stated that a decision by General John L. DeWitt, who established the curfew, 'involved the exercise of his informed judgment'.[46] In fact, his judgment was not professionally informed. He believed that all Japanese-Americans, by race alone, are disloyal.[47] Judicial deference to military judgments might be acceptable but not deference to pure racism.

Roosevelt's executive order led to the transfer of Americans of Japanese descent to a number of relocation centers, imprisoned solely for reasons of race. Divided 6-3, the Supreme Court supported these detention camps in various parts of the western states. Writing for the majority, Justice Black offered this judgment: 'In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did'.[48] What 'principles' were announced in *Hirabayashi*? Answer: the Court should defer to whatever the elected branches decided to do. The guiding value was not protection of constitutional principles but judicial deference to Congress and the President.

This decision did yield three dissents. Justice Murphy objected that the exclusion order was based on an 'erroneous assumption of racial guilt' included in General DeWitt's report, which described all individuals of Japanese descent as 'subversives' who belonged to 'an enemy race' and whose 'racial strains are undiluted'. Murphy refused to accept this 'legalization of racism'. The dissent by Justice Jackson described the administration's position as 'an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents to which he had no choice, and belongs to a race from which there is no way to resign'.

Those two decisions produced a number of critical reviews. In an article published in 1945, Eugene Rostow objected that the treatment of Japanese Americans had been 'hasty, unnecessary, and mistaken',

43 7 Fed. Reg. 1407 (1942).
44 56 Stat. 173 (1942).
45 Hirabayashi v. United States, 320 U.S. 81 (1943).
46 ibid 103.
47 Hirabayashi v. United States, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986).
48 Korematsu v. United States, 323 U.S. 214, 217-18 (1944).

leading to actions that produced 'both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind'.[49] In making his recommendations to the Secretary of War on February 14, 1942, General DeWitt referred to the Japanese as 'an enemy race' whose 'racial strains are undiluted'.[50] An article published in 1945 by Nanette Dembitz objected to the Court's deference to military judgments over civilians. Automatic judicial acceptance of military judgment 'will stand as an insidious precedent, unless corrected, for the emergencies of peace as well as of war'.[51]

On December 18, 1944, the Supreme Court issued an interesting decision involving Mitsuye Endo, an American citizen of Japanese descent. She was 'relocated' to the Tule Lake Center and later transferred to Utah Center. A unanimous Court noted that the Justice Department and the War Relocation Authority conceded she was 'a loyal and law-abiding citizen',[52] thereby rejecting the claim that all Japanese-Americans are by race disloyal. The Court noted: 'A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or saboteur'.[53] Although that judgment undermined both *Hirabayashi* and *Korematsu,* the Supreme Court chose to leave those decisions untouched. The belief in judicial finality allowed two unprincipled decisions to remain in place.

On February 20, 1976, President Gerald Ford issued a proclamation that apologized for the treatment of Japanese Americans during World War II, resulting in the 'uprooting of loyal Americans'.[54] A clear message that repudiated President Roosevelt's actions and invited the Supreme Court to reconsider *Hirabayashi* and *Korematsu.* No such steps were taken. In 1980, Congress established a commission to determine the wrong done by Roosevelt's order. The commission's report, issued in December 1982, stated that the order was not justified by military necessity. Instead, the factors that led to the decisions 'were race prejudice, war hysteria, and a failure of political leadership'. In the commission's judgment, 'the decision in *Korematsu* lies overruled in the court of history'.[55] Yet the Supreme Court took no steps to overrule either *Hirabayashi* or *Korematsu.*

Results in the lower courts were more promising. In the 1980s, both Hirabayashi and Korematsu returned to court after newly discovered documents revealed the extent to which executive officials had deceived federal courts and the general public. Both of their convictions were overturned in the lower courts.[56] The Justice Department chose not to appeal either case. By 1988, the Supreme Court had abundant evidence that its decisions in the two cases had lost any credibility. Yet the Court chose not to offer any public reevaluation of those rulings.

A step toward correcting the errors in *Hirabayashi* and *Korematsu* was taken on May 20, 2011, when Acting Solicitor General Neal Katyal publicly stated that Solicitor General Fahy in the two Japanese-American cases failed to inform the Supreme Court of evidence that undermined the rationale for internment.[57] Among other defects, Fahy did not acknowledge that the Federal Bureau of Investigation and the Federal Communications Commission had already discredited reports that Japanese Americans had used radio transmitters to communicate with enemy submarines off the West Coast.

Korematsu was finally the subject of Supreme Court rebuke in 2018. No mention was made of *Hirabayashi.* Why did the Court take more than seven decades to partly correct its record? In *Trump v. Hawaii*, issued on June 26, 2018, the Court split 5-4 in upholding a travel ban ordered by President Trump in September 2017. Writing for the majority, Chief Justice John Roberts concluded that the executive branch had offered sufficient national security justification for its actions.[58] Toward the end of his opinion, he noted that the dissent by Justice Sotomayor, joined by Justice Ginsburg, had repudiated *Korematsu.* To Roberts, whatever 'rhetorical advantage the dissent may see in doing so, *Korematsu* had nothing to do with this case'. After having apparently excluded any consideration of that decision, Roberts proceeded to find serious flaws with it.

In his judgment, the forcible relocation of Japanese Americans 'to concentration camps, solely and explicitly on the basis of race' lacked any application to 'a facially neutral policy denying certain foreign nationals the privilege of admission'. Yet he regarded Trump's travel ban as 'well within executive authority'. After explaining the difference between *Korematsu* and the travel ban case, he stated the following: 'The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution', 323 U.S., at 248 (Jackson, J., dissenting)'.

If *Korematsu* was wrong 'the day it was decided', why did it take the Court until 2018 to make that admission? Interestingly, Roberts said the decision was overruled long ago 'in the court of history'. Indeed, *Hirabayashi* and *Korematsu* were repudiated by Presidents Ford and Carter, Congress, scholars, and the lower courts in the 1980s that reversed the convictions of Hirabayashi and Korematsu. From 1944 forward, the Supreme Court had abundant evidence from presidential statements, a congressional commission, the 1988 statute that supported the commission's findings, and lower court rulings in the 1980s that the executive branch had deceived the judiciary and withheld vital documents.

After the Supreme Court in 2018 decided to discredit *Korematsu*, why did it not also repudiate *Hirabayashi*? Is the latter still 'good law'? It was evident that both rulings were defective because the executive branch relied on the belief that all Japanese Americans, including those who were U.S. citizens, were disloyal solely on grounds of race. Moreover, it appears that the Court in 2018 might not

49 Eugene V. Rostow, 'The Japanese American Cases – A Disaster' (1945) 54 Yale L. J. 489, 489.
50 ibid 520-21.
51 Nanette Dembitz, 'Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions' (1945) 45 Columbia L. Rev. 175, 239.
52 Ex parte Endo, 323 U.S. 283, 294 (1944).
53 ibid 302.
54 Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).
55 Personal Justice Denied, Report of the Commission on Wartime Relocation and Internment of Citizens, December 1982, at 238.
56 Korematsu v. United States, 584 F. Supp. 1406 (D. Cal. 1984); Hirabayashi v. United States, 627 F. Supp. 1447 (W.D. Wash. 1986); Korematsu v. United States, 828 F.2d 591 (9th Cir. 1987).
57 Neal Katyal, 'Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases' *The United States Department of Justice Archives* (20 May 2011) <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment> accessed 6 June 2022.
58 Trump v. Hawaii, No. 17-965, argued April 25, 2018 and decided on June 26, 2018.

have admitted error in *Korematsu* had Justice Sotomayor made no mention of that case in her dissent. It is remarkable that the Court could finally repudiate *Korematsu* but say nothing about *Hirabayashi*.

Legislative Vetoes: Invalidated, They Continue

Even though we associate the word 'veto' with the President, the two elected branches have developed a process that allowed agencies to seek permission from the Appropriations Committees (usually its subcommittees) whenever they felt a need to move funds from one area to a more pressing need. This process is called 'reprogramming' and a 'legislative veto'. As a staff member of the Library of Congress, I learned a lot about this arrangement by working closely with the Appropriations Committees. The legislative veto served the needs of both branches.

In the early 1980s, the Supreme Court considered a case called *INS v. Chadha*, which involved a legislative veto available to either house of Congress. With this decision pending, I published an article in the *Washington Post* called 'Congress Can't Lose on Its Veto Power'. It predicted that if the Court attempted to strike down the legislative veto, Congress would nevertheless remain 'knee deep in administrative decisions, and it is inconceivable that any court or any president can prevent it. Call it supervision, intervention, interference, or plain meddling, Congress will find a way'.[59] Members of Congress placed my article in the *Congressional Record* five times, leading to discussion during floor debate.[60] The legislative veto in the reprogramming process would survive any Supreme Court decision because both of the elected branches understood the benefits of the process, something the Supreme Court failed to comprehend.[61]

In what was widely considered a major separation of powers decision, the Supreme Court on June 23, 1983, struck down a one-house veto over the decision of the Attorney General to allow a deportable alien, Jagdish Rai Chadha, to remain in the United States. The breadth of the 7-2 decision appeared to invalidate all versions of the legislative veto. Writing for the Court, Chief Justice Burger regarded the legislative veto as unconstitutional because it violated both the principle of bicameralism and the Presentation Clause of the Constitution, which requires all bills to be submitted to the President. In his judgment, whenever congressional action has the 'purpose and effect of altering the legal rights, duties, and relations of persons' outside the legislative branch, Congress must act through both houses in a bill presented to the President.[62]

This position by Burger was far too broad. As the Justice Department has acknowledged in a memo prepared by the Office of Legal Counsel, each house of Congress may alter the legal rights and duties of individuals outside the legislative branch without resorting to bicameralism and presentment. One example is issuance of committee subpoenas to testify and bring requested documents to a hearing.[63] Neither agency officials nor lawmakers would be satisfied with the model of separation of powers presented in *Chadha*. Deficiencies in the Court's ruling were pointed out by Justice Lewis F. Powell, Jr. in his concurrence and in dissenting opinions by Justices Byron White and William Rehnquist.[64] Despite the Court's ruling, the elected branches agreed to continue various types of legislative veto.

The Court's theory of government was unacceptable to the elected branches. Agency officials and lawmakers found the Court's reasoning in *Chadha* far too static and artificial. The conditions that spawned the committee veto over reprogramming had not changed. Executive officials still wanted substantial latitude to administer delegated authority. Lawmakers were determined to maintain control without having to pass another statute. An article in the *New York Times* in 1989 explained how the legislative veto 'goes on and on' in the years following *Chadha*, underscoring the degree to which the Court lacked an understanding of the legislative process.[65]

Regardless of the Court's decision in *Chadha*, the reprogramming process continues as before. Agency officials seek approval from designated committees and subcommittees before funds can be shifted to another purpose. In a book published in 2015, former Secretary of Defense Robert Gates describes a situation he faced in 2011, wanting to reprogram money to an urgent need. To carry out that purpose, he needed approval from four committees in the House and Senate. He was able to reach a compromise to move the funds.[66] In another memoir from the Obama administration, Leon Panetta reflected on his years as CIA Director. He explained how he met with congressional committees and legislative leaders to gain support for reprogramming funds from one purpose to another.[67]

In the years following *Chadha*, Presidents would at times in signing a bill object to the presence of committee vetoes. In signing a bill on December 21, 2000, President Bill Clinton offered this comment about provisions in the legislation 'that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees'. He said he would treat such provisions 'to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*'.[68] Do we take that as evidence that the Clinton administration refused to abide by the reprogramming process followed decade after decade? No. Someone with no understanding of how agency officials and committees of jurisdiction jointly agree to move funds to meet emerging needs placed that language in a signing statement and Clinton failed to understand that no administration bowed down to *Chadha*. Presidents say many foolish things in signing statements. In point of fact, executive agencies continued to seek committee approval to reprogram funds. Reprogramming instructions released by federal agencies are explicit about the need to obtain committee approval.[69]

Just because the Supreme Court in *Chadha* did not understand how government operates does not require executive agencies to embrace judicial ignorance. Neither Congress nor executive agencies want the artificial model announced by the Court. Important accommodations need to be fashioned by committees and agency

59 Louis Fisher, 'Congress Can't Lose on Its Veto Power: If the Supreme Court Blocks Its Use, the President is Likely to Be the One Hurt' *Washington Post* (Washington, 21 Feb 1982) <www.loufisher.org/docs/lv/legveto82.pdf> accessed 6 June 2022.

60 Fisher (n 15) 204.

61 For details on the growth of legislative vetoes, see ibid 204-15.

62 INS v. Chadha, 462 U.S. 919, 952 (1983).

63 'Constitutional Separation of Powers between Cong. and the President' (1996) 20 Op. O.L.C. 138.

64 Fisher (n 15) 216-17.

65 Martin Tolchin, 'The Legislative Veto: An Accommodation That Goes On and On' *New York Times* (New York, 31 March 1989) A11.

66 Robert Michael Gates, *Duty: Memoirs of a Secretary at War* (WH Allen 2015) 513-14.

67 Leon Panetta, *Worthy Fights: A Memoir of Leadership in War and Peace* (Penguin 2015) 298-99.

68 Public Papers of the Presidents, 2000-2001, Book III, 2776.

69 Fisher (n 15) 220-21.

officials. In one form or another, legislative vetoes will remain an important process for reconciling legislative and executive interests.[70]

The 'Sole Organ' Doctrine Returns

Litigation starting in the George W. Bush administration prompted the Supreme Court to review some of the erroneous dicta about presidential power found in the *Curtiss-Wright* case of 1936. The story begins with legislation passed by Congress in 2002 that involved issuance of a passport to a U.S. citizen born in the city of Jerusalem. Under that statute, the Secretary of State 'shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel'.[71] In signing the bill, President Bush objected that several provisions 'impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy that are of significant concern'. Three times he referred to 'the unitary executive branch'. He expressed particular constitutional concern about Section 214 of the bill.[72] By referring to the President's constitutional authority to 'speak for the Nation in international affairs', he implicitly, if not explicitly, relied on *Curtiss-Wright* dicta, much of it erroneous.

According to Bush, Section 214 would 'impermissibly interfere with the President's constitutional authority to formulate the position of the United States'. However, the process of creating public policy, in both internal and external affairs, is a constitutional duty assigned to both of the elected branches. In his signing statement, Bush asserted that Section 214 interfered with the President's authority to 'determine the terms on which recognition is given to foreign states', suggesting that the recognition power is vested solely in the President under Article II of the Constitution. Scholars have pointed out that there is no evidence that the Framers placed the recognition power in the President and 'certainly not a power that is plenary in nature'.[73] Instead, Congress has also exercised the recognition power and Presidents have acquiesced in that legislative judgment. Executive recognition decisions 'are not exclusive but are subject to laws enacted by Congress'.[74] Those issues were explored in a number of federal cases from 2006 to 2012.[75]

In a decision issued on July 23, 2013, the D.C. Circuit concluded that the President 'exclusively holds the constitutional power to determine whether to recognize a foreign government' and that Section 214(d) of the 2002 statute 'impermissibly intrudes on the President's recognition power and is therefore unconstitutional'.[76] In seeking legal and historical precedents, the court turned to Supreme Court decisions, relying heavily on the sole-organ doctrine in the *Curtiss-Wright* case. The D.C. Circuit said the Supreme Court in that case 'echoed' the words of Congressman John Marshall by describing the President as the 'sole organ of the nation in its external relations, and its sole representative with foreign nations'.[77] The court echoed the words of John Marshall but not his meaning. The D.C. Circuit demonstrated no understanding that the sole-organ doctrine was not merely dicta but *erroneous* dicta. The court said that 'carefully considered' language of the Supreme Court, 'even if technically dictum, generally must be treated as authoritative'.[78] Nothing in *Curtiss-Wright* about the sole-organ doctrine was carefully considered. It wholly distorted what Marshall said.

This decision by the D.C. Circuit about the sole-organ doctrine prompted me to file an amicus brief with the Supreme Court on July 17, 2014. The summary to the brief explained that the purpose of John Marshall's speech in 1800 was to defend President Adams for carrying out a treaty provision and that nothing in the speech promoted independent and exclusive presidential authority in external affairs.[79] I pointed out that scholars had regularly identified defects in the dicta that Justice Sutherland had added to *Curtiss-Wright* 'but the Supreme Court has yet to correct his errors. It is time to do so'.[80] Erroneous dicta in *Curtiss-Wright* 'have misguided federal courts, the Justice Department, Congress, some scholarly studies, and the general public'.[81]

While the Supreme Court is in session, the *National Law Journal* runs a column called 'Brief of the Week', selecting a particular brief out of the thousands filed each year. On November 3, 2014, it selected my brief in *Zivotofsky*. The column carried a provocative but accurate title: 'Can the Supreme Court Correct Erroneous Dicta?'[82] On June 8, 2015, the Supreme Court reviewed the brief submitted by Secretary of State John Kerry, who urged the Court to define executive power over foreign affairs in broad terms, relying on *Curtiss-Wright* language that described the President as 'the sole organ of the federal government in the field of international relations'.[83] In response, the Court said it 'declines to acknowledge that unbounded power', stating that *Curtiss-Wright* 'does not extend so far as the Secretary suggests'.[84]

In its brief rejection of Kerry's position, the Court never clarified how the statutory issue at question had anything to do with the President's recognition power. Moreover, it did not acknowledge that when the D.C. Circuit upheld the administration it relied five times on the erroneous sole-organ dicta in *Curtiss-Wright*. Readers would not understand the legal significance of the sole-organ doctrine in this case. Also, the Court did not explain at all how Justice Sutherland flagrantly misinterpreted John Marshall's speech.

70 For additional studies on how the legislative veto continued after *Chadha*, see Daniel Paul Franklin, 'Why the Legislative Veto Isn't Dead' (1986) 16 Pres. Stud. Q. 491; Louis Fisher, 'The Legislative Veto: Invalidated, It Survives' (1993) 56 Law & Contemporary Prob. 273; Darren A. Wheeler, 'Implementing INS v. Chadha: Communication Breakdown?' (2006) 52 Wayne L. Rev. 1185; Michael J. Berry, *The Modern Legislative Veto: Macropolitical Conflict and the Legacy of* Chadha (University of Michigan Press 2016); Louis Fisher, *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (University Press of Kansas 2017) 182-98.

71 116 Stat. 1366, sec. 214(d) (2002).

72 Public Papers of the President, 2002, II, 1697-99.

73 Robert J. Reinstein, 'Recognition: A Case Study on the Original Understanding of Executive Power' (2011) 45 U. Rich. L. Rev. 801, 802.

74 Robert J. Reinstein, 'Is the President's Recognition Power Exclusive?' (2013) 86 Temp. L. Rev. 1, 60.

75 Fisher (n 15) 112.

76 Zivotofsky v. Secretary of State, 725 F.3d 197, 220 (D.C. Cir. 2013).

77 ibid 211.

78 ibid 212, citing Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010).

79 Brief Amicus Curiae of Louis Fisher in Support of Petitioner, Zivotofsky v. Kerry, No. 13-628, U.S. Supreme Court, July 17, 2014, 2 <www.loufisher.org/docs/pip/Zivotofsky.pdf> accessed 6 June 2022.

80 ibid 2-3

81 ibid 35.

82 Jamie Schuman, 'Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?' (2014) Nat'l L. J., Nov. 3 <www.loufisher.org/docs/pip/fisherbrief.pdf> accessed 6 June 2020.

83 Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. 2076, 2089 (2015).

84 ibid.

Why ignore such basic and important questions? Was it considered inappropriate to point an accusing finger at Justice Sutherland and how he and his colleagues failed to properly understand Marshall's speech? Would that explanation discredit the Supreme Court as an institution capable of constitutional analysis? A frank discussion of Sutherland's error would have properly alerted the D.C. Circuit and other courts to take special care when relying on dicta, particularly when the sole-organ doctrine had been repudiated by scholars for more than seven decades.

Furthermore, the Court left in place Sutherland's erroneous dicta about the President possessing sole power to negotiate treaties. It even added its blessing to that misconception, stating that the President 'has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255 (1936)'.[85] Not only can the Justice Department, reporters, and others continue to cite this erroneous dicta from *Curtiss-Wright* but they can refer to the Court's fresh endorsement of a misconception.

The Court failed to cite scholarly articles from 1938 to the present time that regularly attacked *Curtiss-Wright* for its errors about presidential power. The Court did cite a fine law review article by Michael Glennon on *Curtiss-Wright* published in 1988. However, it failed to mention what Glennon said about that case. In an extensive critique, he detailed the many errors and serious misconceptions, calling the decision an 'extravagant scheme concocted by Justice George Sutherland'.[86] He proceeded to describe Sutherland's opinion as 'a muddled law review article wedged with considerable difficulty between the pages of United States Reports'.[87]

Having rejected the sole-organ doctrine from *Curtiss-Wright*, the Court proceeded to create a substitute that promotes independent presidential power in external affairs. It began by stating that the recognition of foreign nations is a topic on which the federal government must 'speak . . . with one voice' and that voice 'must be the President's'.[88] According to the Court, between the two branches 'only the Executive has the characteristic of unity at all times'.[89] Obviously that is an abstraction that has little to do with the record of Presidents. Various administrations regularly display inconsistency, conflict, disorder, and confusion. That is evident not only by studying particular Presidents but by reading memoirs published by top officials who highlight the infighting and disagreements within an administration, including in foreign affairs.

To the quality of unity the Court identified four other qualities of the President: decision, activity, secrecy, and dispatch. It borrowed those four qualities from Alexander Hamilton's Federalist No. 70.[90] On what grounds would the Court assume that unity plus those four qualities are inherently positive, justifying support for broad presidential power in external affairs? The quality of decision, activity, secrecy, and dispatch can certainly have negative consequences. One need only recall presidential initiatives from 1950 forward: Truman allowing U.S. troops in Korea to travel northward, provoking the Chinese to introduce their military forces in large numbers and resulting heavy casualties on both sides; Johnson's decision to escalate the war in Vietnam; Nixon involved with Watergate and his eventual resignation; Reagan's involvement in Iran-Contra that led to the prosecution of many officials and nearly to his impeachment; Bush in 2003 using military force against Iraq on the basis of six claims that Saddam Hussein possessed nuclear weapons, with all six claims found to be entirely empty; and Obama ordering military action against Libya in 2011, leaving behind a country broken legally, economically, and politically.[91]

In an article published in 2015, Jack Goldsmith evaluated the Court's decision in *Zivotofsky*, noting that until the Court released its opinion on Section 214(d) executive branch lawyers had to rely on 'shards of judicial dicta, in addition to executive branch precedents and practices, in assessing the validity of foreign relations statutes thought to intrude on executive power'. But now these lawyers 'have a Supreme Court precedent with broad arguments for presidential exclusivity in a case that holds that the President can ignore a foreign relations statute'.[92] Ironically, although the Court presumably dismissed the *Curtiss-Wright* sole-organ doctrine, it created a new model that strongly endorses independent presidential power in external affairs.

Goldsmith points out that although the Court appeared to 'distance itself' from some parts of *Curtiss-Wright* by making statements about 'presidential exclusivity' and judicial 'dicta', it would be wrong to assume that *Zivotofsky* 'expressly repudiates the *Curtiss-Wright* dicta'.[93] In various parts of the opinion, the Court affirmed '*Curtiss-Wright*'s functional approach to exclusive presidential power'.[94] Those who favor independent presidential power in external affairs will seek to exploit the Court's 'untidy reasoning'.[95]

In another analysis of *Zivotofsky*, Esam Ibrahim points out that executive branch lawyers sought to exploit various dicta in *Curtiss-Wright*, including the sole-organ doctrine. Yet in supposedly raising questions about those dicta, the Court now added other dicta that have the potential for promoting independent presidential power in external affairs, such as attributing to the President such qualities as unity, decision, activity, secrecy, and dispatch. As Ibrahim notes. the dicta in *Zivotofsky* 'may be even stronger precedent than *Curtiss-Wright* ever was'.[96] The Court's ruling in 2015 is 'probably going to replace *Curtiss-Wright* as support for broad inherent executive power' in opinions issued by the Office of Legal Counsel.[97]

In an article published in *Constitutional Commentary* in 2016, I discuss how erroneous dicta in both *Curtiss-Wright* and *Zivotofsky* have broadened presidential power in external affairs.[98] I begin by explaining how careless and mistaken judicial dicta can undermine constitutional government. I then focus on how *Curtiss-Wright* involved legislative, not presidential, power, and how scholars who studied *Curtiss-Wright* thoroughly repudiated Justice Sutherland for his 'careless and erroneous understanding of the process of treaty

85 ibid 2086.

86 Michael J. Glennon, 'Two Views of Presidential Foreign Affairs Power: *Little v. Barreme* or *Curtiss-Wright*?' (1988) 13 Yale J. Int'l L. 5, 11.

87 ibid 13.

88 Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. at 2086.

89 ibid.

90 ibid.

91 Louis Fisher, *Presidential War Power* (3rd edn, University Press of Kansas 2013) 100-03, 132-37, 209-32, 238-47.

92 Jack Goldsmith, '*Zivotofsky II* as Precedent in the Executive Branch' (2015) 129 Harv. L. Rev. 112, 114.

93 ibid 129.

94 ibid 130.

95 ibid 146.

96 Esam Ibrahim, 'The Dangers of Zivotofsky II: A Blueprint for Category III Action in National Security and War Powers' (2017) 11 Harv. L. & Policy Rev. 585, 592.

97 ibid 593.

98 Louis Fisher, 'The Staying Power of Erroneous Dicta: From *Curtiss-Wright* to *Zivotofsky*' (2016) 31 Const. Commentary 149.

negotiation'.[99] In a section on how the executive branch relies heavily on dicta in *Curtiss-Wright* to expand presidential power, I point out how Attorney General Robert Jackson in a book published in 1941 described *Curtiss-Wright* as 'a Christmas present to the President'.[100] Although the Supreme Court in *Zivotofsky* seemed to discard the sole-organ doctrine, it allowed 'other erroneous dicta' in *Curtiss-Wright* to continue.[101] I conclude with this observation: 'Because the majority opinion in *Zivotofsky* is in many areas carelessly drafted and analyzed, it will add unnecessary and unwanted confusion about the role of the two elected branches in foreign affairs, most likely advancing presidential power over that of Congress'.[102]

Conclusions

Scholars, attorneys, and reporters continue to endorse the doctrine of judicial finality, insisting that on constitutional matters the Supreme Court must have the last word. In a book published in 2012, Jeffrey Toobin concluded that a Supreme Court decision 'interpreting the Constitution can be overturned only by a new decision or a constitutional amendment'.[103] Reporters for major newspapers often promote judicial finality. Adam Liptak, writing for the *New York Times* on August 21, 2012, concluded that 'only a constitutional amendment can change things after the justices have acted in a constitutional case'.[104] Offering his views in the *Washington Post* on October 25, 2014, Robert Barnes wrote that *Marbury v. Madison* 'established the court as the final word on the Constitution'.[105]

The examples offered in this article promote a much broader dialogue in shaping constitutional values. The Court's decision in *McCulloch v. Maryland*, upholding the U.S. Bank, was later reversed by President Jackson's veto of a bill attempting to restore the U.S. Bank. The 'last word' on this constitutional matter came when Congress failed to override his veto. The fact that the Supreme Court in 1918 and 1922 twice struck down child labor legislation passed by Congress did not stop Congress from trying again in 1938. On that occasion a unanimous Court upheld the statute. What those cases underscore is not judicial finality but rather a broad public dialogue on constitutional issues. That view was underscored by Alexander Bickel's book in 1962, stating that the process of developing constitutional values in a democratic society 'is evolved conversationally not perfected unilaterally'.[106]

During her appearance before the Senate Judiciary Committee on July 20, 1993, seeking confirmation as a Justice of the Supreme Court, Ruth Bader Ginsburg reinforced that point: 'Justices do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the states, and the people'.[107] A clear example of that position came in 2007 when the Supreme Court decided the Lilly Ledbetter case, blocking her right to seek justice in the courts. As explained earlier in this article, Ginsburg's dissent urged Congress to pass legislation 'to correct this Court's parsimonious reading' of sex discrimination policy. Within a few years Congress did precisely that.

The doctrine of judicial finality is undermined by other examples in this article, including the Court's record on the erroneous 'sole organ' doctrine in *Curtiss-Wright* and the Japanese-American cases. The record demonstrates that all three branches of government, at both the federal and state level, are capable of serious error. What is needed is a broad dialogue that continues to press for improvements and better understanding. The Supreme Court is not the Constitution. To treat the two as equivalent is to abandon individual responsibility, the system of checks and balances, and America's quest for self-government. Supreme Court opinions are entitled to respect, not adoration. Just because the Court issues its judgment does not mean we should suspend ours. The record makes clear how often the Supreme Court commits errors.[108]

J. Harvie Wilkinson III, a federal judge on the Fourth Circuit, published a book in 2012 that analyzes various doctrines used to interpret the Constitution: Originalism, Textualism, Minimalism, and the Living Constitution. He warned that these 'cosmic' theories produced a harmful effect by encouraging judicial activism, 'taking us down the road to judicial hegemony where the self-governance at the heart of our political order cannot thrive'.[109] The 'great casualty' of those theories 'has been our inalienable right of self-governance', encouraging an increase in 'judicial misadventures' in the years to come.[110] The Constitution, he stressed, 'is not the courts' exclusive property. It belongs in fact to all three branches and ultimately to the people themselves'.[111] He concluded that courts 'are less adept than legislatures at assessing the precise content of society's values'.[112]

99 ibid 186.
100 ibid 201.
101 ibid 218.
102 ibid 219.
103 Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (Random House International 2012) 194.
104 Adam Liptak, 'In Congress's Paralysis, A Mightier Supreme Court' *New York Times* (New York, 21 August 2012) A10.
105 Robert Barnes, 'Addressing the Supreme Court with Fun' *Washington Post* (Washington, 25 October 2014) A1.
106 Bickel (n 31) 244.
107 Ginsburg (n 36) 183.
108 Louis Fisher, 'Correcting Judicial Errors: Lessons From History' (2020) 72 Maine L. Rev. 1.
109 J. Harvie Wilkinson III, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* (Oxford University Press 2012) 4.
110 ibid 9.
111 ibid 22.
112 ibid.

Given the Court at Strasbourg's Jurisprudence, Are Fair Trials Achievable Under the ECHR?

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Introduction

> 'The Court of Strasbourg is a lighthouse, a lookout'
> - Jean-Paul Costa[1]

The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR), is the 'essential reference point for the protection of human rights in Europe'.[2] Concluded by the Council of Europe on 4 November 1950, the ECHR defines rights and freedoms which the contracting parties 'shall secure to everyone within their jurisdiction' under Article 1 of the ECHR and sets up the mechanisms for controlling contracting parties' compliance with the obligations to secure these rights and freedoms.[3]

This paper will explore Article 6 of the ECHR, not in terms of its practical guidance, but from the point of view of its jurisprudence in achieving fair trial rights in the Member States. Given the remit of such analysis, this paper will not seek to explore all aspects of the jurisprudence of the Court given all the rights and guarantees incumbent within the said Article, but instead concentrate on specific rights to focus on whether or not the Court has been effective in those areas in achieving fair trial rights. Firstly, it will provide an outline study of the jurisprudence of the Court and the tools available to it in reaching its decisions and consider such issues as the Court's teleological effectiveness, its autonomous approach, the exercise of balancing involving the principle of proportionality and the controversial doctrine of the margin of appreciation. Secondly, and in a closer examination of some of the rights granted under Article 6, the paper will further explore the concept of 'overall fairness', and its development within the jurisprudence of the Court and how it has been applied when considering the right to legal advice, the right to an interpreter and the right to examine witnesses so far as securing fair trial rights, and in doing so will also examine some dissenting judgements. Finally, it will assess the overall effectiveness of the Court's approach and whether or not it has, in fact, achieved 'fair trial rights'.

Understanding the Jurisprudence of the Court

As a treaty, the Convention must be interpreted according to the international law rules in the interpretation of treaties.[4] They are to be found in the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).[5]

Article 31(1) of the Vienna Convention states that the basic rule is that a treaty

1 Jean-Paul Costa, *La Cour Européenne Des Droits De L'Homme: Des Juges Pour La Liberté* (Dalloz 2013) 257. Costa is a former President of the ECtHR (2007-2011). Translation from Marie-Luce Paris, 'The European Convention on Human Rights: Implementation Mechanisms and Compliance' in Suzanne Egan (ed), *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 91.

2 Recommendation Rec. (2004) 4 of the Committee of Ministers to Members States on the European Convention on Human Rights in university Education and Professional Training [2004] 114th Session.

3 Paris (n 1) 91.

4 See e.g. *Golder v UK* A 18 (1975); 1 EHRR 524 PC [29] and *Johnston and Other v Ireland* A 112 (1986); 9 EHRR 203 [51].

5 David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley (eds), *Law of the European Convention on Human Rights* (4th edn, OUP 2018) 6.

> 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

In accordance with the Vienna Convention, considerable emphasis has been placed on a teleological interpretation[6] of the Convention, i.e. 'one that seeks to realise its object and purpose'. This has been identified in general terms as 'the protection of individual human rights'[7] and the maintenance and promotion of 'the ideals and values of a democratic society'.[8] Both of these considerations are confirmed by the Convention Preamble, which also identifies 'the achievement of greater unity between its Members' as the aim of the Council of Europe.[9]

In its *Soering* judgement, the Court connected this principle of effectiveness to the nature and objectives of the Convention and to its own work in interpreting its provisions:

> In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms [*effectiveness principle*]... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ... In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.[10]

Thus, Gerards confirms,[11] with reference to the *Belgian Linguistics* case of 1968, where the Court emphasised that the 'general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights'[12] and the *Airey* case in 1979 where the Court rephrased the principle of effectiveness in a formula that it still uses today that 'the convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[13] It was highlighted that the notion of effectiveness provides the Court with important guidance in interpreting the Convention and in assessing the reasonableness and acceptability of interferences with the Convention rights.

According to Article 1 of the Convention, the primary responsibility for offering effective protection of the Convention rights lies with the national authorities, who must 'secure the Convention rights to everyone within their jurisdiction'. This has been called the principle of 'primarity'.[14] The Court's task is mainly one of checking whether the national authorities have complied with the obligations they have undertaken under the Convention. This is referred to as the principle of 'subsidiarity'.[15] While not previously mentioned in the Convention, it has long been established in the Court's jurisprudence, and as of August 2021, together with the margin of appreciation doctrine, it is now included as a principle within the Convention's Preamble, pursuant to Protocol 15.[16] The principle of subsidiarity provides a theoretical basis for deference by the Strasbourg Court when considering compliance by State parties with their Convention obligations.[17] It also underlies the Strasbourg Court's view that,

> ...in line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention...[18]

and that the Court is not a fourth instance court of appeal from national courts. In the words of the Court, 'it is not its function to deal with errors of fact or law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention'.[19] Therefore, a claim that an error involves a breach of the right to a fair hearing in Article 6 will not succeed, as Article 6 provides a procedural guarantee only; it does not guarantee that the outcome of the proceedings will be correct on the facts or in law.[20]

An important consideration which lies at the heart of the Court's interpretation of the Convention and which is key to realising its 'object and purpose' is the need to ensure the effective protection of the rights guaranteed.[21] In *Artico v Italy,*[22] the Court stated that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'. In that case, the Court found a breach of the right to legal aid in Article 6(3)(c) because the legal aid lawyer appointed by the state proved totally ineffective.[23]

A potential stumbling block in a coherent jurisprudence lies within the Court's approach to the principle of consistency in interpretation which is limited by the text of the Convention. In *Stec and Others v*

6 Nikos Vogiatizis, 'Interpreting the Right to Interpretation under Article 6(3) € ECHR: A Cautious Evolution in the Jurisprudence of the European Court of Human Rights?' (2021) 00 Human Rights Review 7.

7 *Soering v UK* A 161 (1989); 11 EHRR 439 [87].

8 *Kjeldsen, Busk Madsen, and Pedersen v Denmark* A 23 (1976); 11 EHRR 439 [87].

9 Harris et al (n 5) 7.

10 *Soering v UK* (n 7).

11 Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 4.

12 *Belgian Linguistics Case* (1968) 1474/62, I.B. 5.

13 *Airey v Ireland*, ECtHR 9 October 1979, 6289/73 [24].

14 J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009).

15 Explanatory report: Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (coe.int) [9]. For an explanation as to the term 'subsidiary'—Harris et al (n 5) 17-18.

16 European Convention on Human Rights - Official texts, Convention and Protocols (coe.int)– Entry in force since 01.08.2021 – Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) - 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

17 Harris et al (n 5) 17.

18 *Varnava and Others v Turkey* hudoc (2009) 164.

19 *Garcia Ruiz v Spain* 1999-I; 31 EHRR 589 [28], cited in Harris et al (n 5) 18.

20 Harris et al (n 5) 18.

21 ibid.

22 *Artico v Italy* A 37 (1980; 3 EHRR 1 [33]. Cf. *Airey v Ireland* A 32 (1979); 2 EHRR 305 [24].

23 Harris et al (n 5) 18.

UK the Court stated that the 'Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions'.[24] Harris (*et al.*) note that although the Court relies heavily upon the 'object and purpose' of the Convention, it has occasionally found its freedom to do so is limited by the clear meaning of the text.[25] For example, in *Wemhoff v Germany*[26] it was held that Article 5(3) does not apply to appeal proceedings because of the wording of Article 5(1)(a). Exceptionally, in *Pretto and Others v Italy*, the Court went against the clear working of the Convention in order to achieve a restrictive result by acknowledging 'that members States have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts…for example deposit in a registry accessible to the public'. There it held:

> The Court, therefore, does not feel bound to adopt a literal interpretation. It considers that in each case, the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1.[27]

In essence, the unqualified requirement in Article 6(1) that judgements be 'pronounced publicly' does not apply to a Court of Cassation. The Court considered that it must have been the intention of the drafting states to respect the long-standing tradition of the Council of Europe, despite no clear evidence in the *travaux préparatoires*.[28] Harris (*et al.*) considers that the Court's approach may have been influenced by the fact that the text of Article 6 was probably drafted with only trial proceedings in mind.[29] In another decision of the Court, it adopted the position that the text of the Convention may be amended by state practice. The Court in *Soering v UK*[30] at, paragraph 103 said as follows:

> The Convention is to be read as a whole, and Article 3 should therefore be construed in harmony with the provisions of Article 2. On this basis, Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1.

It then considered the law in the United Kingdom with respect to capital punishment, and in finding that the death penalty cannot be imposed for murder (Murder (Abolition of the Death Penalty) Act 1965, section 1) the

> …subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence to remove a textual limit on the scope for evolutive interpretation of Article 3.[31]

At the time of the ***Soering*** judgement, the Court highlighted that 'de Facto the death penalty no longer exists in the time of peace in the Contracting States to the Convention', and in those where it did, it was not carried out. It interpreted this 'virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice…is reflected in Protocol No. 6 to the Convention, which provides for the abolition of the death penalty in time of peace… has been ratified by thirteen Contracting States to the Convention'.[32]

The Court has emphasised that a European, autonomous definition for such notions and concepts that are also used in national constitutions and legislation should prevail.[33] The Court has expressly stated that the integrity of the objectives of the Convention would be endangered if the Court were to take the national level of protection, or the national definition of certain notions, as a point of departure for its own case law. In particular, as Gerards highlights, this would pose the risk that the States might try to evade the Court's supervision by narrowly defining the terms and notions that determine the Convention's applicability.[34] However, despite this, the Court in *Engel*[35] left the decision as to whether effective protection of the right to a fair trial would be at risk by moving parts of the criminal law to disciplinary law to the national authority. Similarly, in *Vo,* the Court deliberately decided to avoid having to make the decision of when 'life' can be held to begin by leaving it within the margin of appreciation doctrine,[36] justifying its position by stating that

> …firstly…such protection has not been resolved within the majority of the Contracting States…and secondly, that there is no European consensus on the scientific and legal definition of the beginning of life…[37]

In principle, the Court's methodology was the opposite of an autonomous approach adopted in *Engel,* namely that the autonomous concepts of the Convention enjoy a status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law.[38]

A similar concern recently arose in the case of *R v Brecani*[39] in the United Kingdom (UK) concerning a 17-year-old defendant in a conspiracy to supply cocaine. The defendant relied on the two-limb statutory defence under the Modern Slavery Act (MSA) 2015, s.45(4).[40] The appeal concerned the status of a Victim of Trafficking

24 *Stec and Others v UK (*2006)-V: 43 EHRR 1027 [48] GC. Cf *Klass and Others v Germany* A 28 *(*1978); 2 EHRR 214 PC.

25 Harris et al (n 5) 19.

26 *Wemhoff v Germany A 7 (1968)*; 1 EHRR 55.

27 *Pretto and Others v Italy A 71 (1983)*; 6 EHRR 182 [26].

28 Harris et al (n 5) 19.

29 ibid 19.

30 *Soering v UK* (n 7).

31 While state practice had not reached this point by the time of the *Soering* case, in the *Al-Saadoon and Mufdhi v UK (2010) 61498/08* case the Court later concluded that it had, so that the numbers of ratification of the Thriteenth Protocol prohibiting capital punishment and other state practice were '*stongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances'* [120].

32 *Soering v UK* (n 7) 103.

33 H.C.K. Senden, *Interpretation of Fundamental rights in a Multilevel Legal System. An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011) 169, 298, cited in Gerards (n 11) 67.

34 *G.I.E.M. S.R.L and Others v Italy* (2018), ECtHR (GC) 1826/06, 216 cited in (n 11) 67-68.

35 *Engel and Others v the Netherlands,* ECHtHR 24 June 2010, 30141/04.

36 An explanation is provided at page 11.

37 *Vo v France,* ECtHR (GC) 8 July 2004, 53924/00, 82-84 cited in (n 11) 71-72.

38 George Letsas 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 European Journal of International Law 2, 279, 282.

39 [2021] EWCA Crim 731.

40 *R v. Brecani* [2021] EWCA Crim 731 - MSA 2015 s.45(4) – (i) that the defendant was a child who had been trafficked from Albania and this his

as determined by 'a competent authority'. In *VCL and AN v UK* the ECtHR stated that 'Evidence concerning an accused's status as a victim of trafficking is…a 'fundamental aspect' of the defence which he or she should be able to secure without restriction'.[41] By contrast, the 'status' which the ECtHR afforded appeared to mean that as determined by the competent authority. However, the Court of Appeal in *Brecani,* in providing a broad formulation of the ratio, stated that 'caseworkers in the 'competent authority' are not experts in human trafficking or modern slavery and for that fundamental reason cannot give opinion evidence in a trial…'.[42] This decision has the potential to cause injustice and put the UK in breach of its international obligations, such as whether it was appropriate for the UK to prosecute a victim of trafficking following a determination by a single competent authority in line with the Council of Europe Convention and the Palermo Protocol to the UN Convention on Transnational Organised Crime rather than on domestic legislation alone.[43] As Mennim and Ward suggest, if the ECtHR reaffirms or clarifies its view in *VCL,* the Court of Appeal or the Supreme Court will need to (re-) consider the same point.[44] The *Brecani* case highlights the concern raised by Gerards' earlier, that can result in narrowed interpretations to circumvent compliance with a Contracting Party's Article 6 obligations.

How Proportionality is Employed

Stein argues that balancing is central to the reasoning process of the ECtHR, yet it is considered by many to be in tension with the Court's chief aim of protecting fundamental rights.[45] Balancing in the jurisprudence of the ECtHR is essentially synonymous with proportionality assessment, the adjudication method used by the Court in the vast majority of its cases, this is despite its absence from the text of the ECHR. The use of proportionality in assessing violations of Convention rights has become the norm in the Court's adjudication process.[46] However, while this may be the case, Stein argues that far from the textbook structured proportionality review, which is generally a constructed test made up of three independent, yet interrelated sub-stages (suitability, necessity/least restrictive means and proportionality in the strict sense/balancing test), proportionality as adopted by the ECtHR, is a flexible, open-ended balancing test in which competing claims of individual rights and collective goals are weighed against each other on a case-by-case basis.[47] The principle is often employed under the second paragraphs of Articles 8-11, where a state may restrict the protected right to the extent that this is 'necessary in a democratic society'. This formula has been interpreted as meaning that the restriction must be 'proportionate to the legitimate aim pursued'.[48] Similarly, proportionality has been invoked when setting the limits to an implied restriction that has been read into a Convention guarantee[49] and, in some cases, in determining whether a positive obligation has been satisfied. It has also been employed in considering non-discrimination under Article 14[50] and derogation from the Convention under Article 15.[51]

Stein further contends that the resort to an all-inclusive balancing test carries controversial side effects that impact the review stages preceding the proportionality assessment, namely the 'definitional' stage and the 'legitimate aim' stage.[52] In respect of the former stage, Stein cites Gerards and Senden,[53] who argue that the ECtHR often completely skips this stage or pays lip service to it by accepting that the case falls within a Convention right without providing an explanation. When the Court does address the definition of the right, it often merges this analysis with the assessment of the justification for its limitation, thus avoiding the need to draw the scope of the right independent of competing policy considerations.[54]

The second notable side effect, Stein identifies,[55] concerns the 'legitimate aim' in which illegitimate policy aims are filtered out. At times, quoting Šušnjar, the legitimacy of the aim is assumed, explicitly or implicitly.[56] Further, Gerards notes that although mentioned in each case, the Court has rarely found an aim to be illegitimate and has refrained from developing sub-requirements to help to elucidate the requirements entailed in the different prescribed aims.[57] Sadurski holds that even in the rare instances in which the Court expresses mild doubts concerning the aim, it brackets or disregards these doubts and proceeds to assess the proportionality of the application of the challenged measure/law.[58] The result of this process is that the illegitimacy of the aim is integrated into the proportionality assessment and is not the outcome of independent scrutiny.[59] The failure to articulate unjustified aims elevates collective goals, regardless of their incompatibility with what we value as essential to a given right.[60]

When deciding on the proportionality of a 'general measure' enacted by a legislature, the Court has taken into account the quality of the parliamentary review in the respondent state that requires the measure. In the *Animal Defenders International v UK* case, the dissenting judgements expressed unease at the Court's approach, stating their concern that the 'double standard within the context of a Convention whose minimum standards should be equally

involvement in a conspiracy to supply cocaine was a direct consequence of his having been a victim of slavery or relevant exploitation; and (ii) that reasonable person in the same situation as he was and having his relevant characteristics would have acted as he did.

41 *VCL and AN v UK*, App. No's 77587/12 and 74603/12, 161.

42 ibid 54.

43 Sean Mennim and Tony Ward, 'Expert Evidence, Hearsay and Victims of Trafficking: *R v Brecani* [2021] EWCA Crim 731' (2021) 85(6) The Journal of Criminal Law 471, 474.

44 ibid 475-476.

45 Shlomit Stein, 'In Search of Red Lines in the Jurisprudence of the ECtHR on Fail Trial Rights' (2017) 50 Isr. L. Rev. 177, 182.

46 ibid citing (n 31) - Marc-Andre Eissen, 'The Principle of Proportionality in the Case Law of the European Court of Human Rights' in Ronald St J Macdonald, Herbert Petzold and Franz Matscher (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 125, 146.

47 (n 43) and (n 30).

48 *Handyside v UK A* 24 (1976); 1 EHRR 737 PC [49].

49 *Fayed v UK* A 294-B (1994); 18 EHRR 393,71 (Article 6(1)).

50 *Belgian Linguistics;* case A 6 (1968); 1 EHRR 241 [284].

51 *Lawless v Ireland* (Merits) A 3 (1961); 1 EHRR 15 & *Ireland v UK* A 25 (1978); 2 EHRR 25 PC.

52 *VCL* (n 43) 183.

53 ibid 184, citing Janneke Gerrard, and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 International Journal of Constitutional Law 619, 632-634.

54 *VCL* (n 43) 184, citing ibid 639.

55 ibid 184.

56 Davor Šušnjar, *Proportionality, Fundamental Rights, and Balance of Powers* (Brill 2010) 90.

57 Janneke Gerards, 'Judicial Deliberations in the European Court of Human Rights' in Nick Huls, Naruice Adams and Jacco Bomhoff (eds), *The Legitimacy of highest Courts' Rulings: Judicial Deliberations and Beyond* (TMC Asser Press 2009) 407, 417, 62.

58 *VCL* (n 43) 184, citing Wojciech Sadurski, 'Is There Public Reason in Strasbourg?', research paper, Sydney Law School, 6 May 2015, 15/46 3-5.

59 ibid 10.

60 *VCL* (n 43) 185, citing Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468, 488.

applicable through all the States parties to it…very difficult to understand'.[61] The dissenting judges expressed their concern that the 'fact that a general measure was enacted in a fair and careful manner by Parliament does not alter the duty incumbent upon the court to apply the established standards that serve for the protection of fundamental human rights'. They went further and stated:

> 'It is immaterial for a fundamental human right, and for that reason for the Court, whether an interference with that right originates in legislation or in a judicial or administrative act or omission. Taken to its extreme, such an approach risks limiting the commitment of State authorities to secure to everyone within their jurisdiction the rights and freedoms guaranteed by the Convention. Where the determination of the public interest and its best pursuit are left solely and exclusively to the national legislator, this may have the effect of sweeping away the commitments of High Contracting Parties under Article 1 of the Convention read in conjunction with Article 19, and of re-asserting the absolute sovereignty of Parliament in the best pre-Convention traditions of Bagehot and Dicey. The doctrine of the margin of appreciation, which was developed to facilitate the proportionality analysis, should not be used for such purpose'.[62]

As evidenced above, a further doctrine, which plays a crucial role in the interpretation of the Convention, is the margin of appreciation. The essence of this doctrine is that a state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative or judicial action bearing on a Convention right.[63] The doctrine was first explained by the Court in *Handyside v UK*.[64] As Harris (et al.) highlight, the doctrine is a controversial one.[65] When applied widely, for example, to tolerate questionable national practices or decisions, for example, *Barfod v Denmark*,[66] it may be argued that the Court has abdicated its responsibilities.[67] However, underlying the doctrine is the understanding that the legislative, executive, and judicial organs of a state to the Convention basically operate in conformity with the rule of law and human rights and that their assessment and presentation of the national situation can be relied upon in cases that go to Strasbourg.[68] Given this premise, Harris (et al.) suggest that the doctrine can be justified and accords with the principle of subsidiarity, albeit not used in other human rights systems globally.[69]

In the next part of the paper, I will consider how the court's jurisprudence is employed within the ambit of Article 6, in particular, Article 6(1), Article (2) and Article 6(3)(c) and (d) of the Convention and reflect on whether or not the concept of 'overall fairness' has been applied before assessing the overall effectiveness of the Court's approach and whether or not it has, in fact, achieved 'fair trial rights'.

61 *Animal Defenders International v UK* Hudoc (2013) [1] – Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano.
62 ibid 10.
63 Harris et al (n 5) 14 and (n 15) as to the amendments to the Preamble under Protocol 15.
64 Stein (n 46) 48-49.
65 Harris et al (n 5) 16.
66 *Barford v Denmark* A 149 (1989) 13 EHRR 493 [28-36].
67 Harris et al (n 5) 16-17.
68 ibid 17.
69 ibid and (n 122).

Article 6 Jurisprudence

Article 6[70] does not contain a limitation clause. It does however enshrine the right to a fair trial, a broad term which includes a cluster of correlated procedural rights, starting from the more abstract, such as the right to an independent and impartial tribunal (Article 6(1)[71] and the presumption of innocence (Article 6(2)[72] to something more concrete, such as the right to legal assistance and the right to examine witnesses (Articles 6(3)(c) and (d).[73] The Court has also read into Article 6(1) certain implied rights, such as the right to effective participation[74] and equality of arms[75] which Samrartzis states can be similarly pinned on a sliding scale of abstraction.[76] However, according to Hoyano, despite the idiosyncratic list, it failed to include the privilege against self-incrimination and pre-trial disclosure of evidence possessed by the prosecution, which the ECtHR had to read into Article 6 to give it instrumental content.[77]

The text of Article 6 does not provide a method by which to determine whether the infringement of a right protected under Article 6 is justified. This ambiguity is amplified by the fact that Article 6 is not an absolute right.[78] Further and more intriguing is the fact that parties may derogate from it under Article 15. Article 6(1) provides a generalised right to a 'fair and public hearing'; Article 6(2) guarantees the presumption of innocence of all accused of a criminal offence; and Article 6(3) particularises five 'minimum rights' (see Annex I for the full text of Article 6). A fair trial guarantee does not require providing the most favourable circumstances imaginable for the defence, according to Hoyano.[79]

'Fairness' within the Concept of a Fair Trial

In the context of rights relating to a fair trial, Goss holds that the ECtHR has displayed a tendency to refer to the 'standards of proportionality' and 'very essence' practically interchangeably, as in *Goth v France (2002)*,[80] so there is hardly any significant distinction

70 See Annex I for the full transcript of Article 6.
71 Article 6(1) - In the determination of his civil rights and obligation or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of moral, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.
72 Article 6(2) - Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
73 Article 6(3) - Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
74 *Stafford v UK* Application No 16757/90, Merits and Just Satisfaction, 23 February 1994.
75 *Neumeister v Austria* Application No 1936/63, Merits, 27 June 1968.
76 Andreas Samartzis, 'Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the European convention on Human Rights' (2021) 21 Human Rights Law Review (2012) 2, 410.
77 Laura Hoyano, 'What is balanced on the scales of justice? In search of the essence of the right to a fair trial;' (2014) Criminal Law Review 1, 8.
78 Samartzis (n 76) 410.
79 Hoyano (n 77) 6.
80 *Goth v France* (2002) App No. 56316/99 – See Mennim (n 43) 186 and

between what constitutes a disproportionate infringement and what constitutes an impairment of the very essence of the right.[81] Goss's condemnation goes further:

> This irrational flexibility means that the Court can approach an individual application in an unpredictable multitude of ways: the Court may be deferential or not; the relevant test may be said to be one part of Article 6 or several; the relevant basis for the implied rights may be said to be one thing or another; and the alleged violation may be assessed using any one of a number of incoherent approaches … If the Court wished to deploy different approaches in similar situations, or different approaches in different situations, the interests of predictability and consistency simply demand that it adequately explain itself'[82]

Hoyano takes the view that Strasbourg's conception of the *purpose* of the fair trial guarantee is restrictive in that it is only designed to secure justice from national courts in the overall procedure afforded by their legal system rather than justice in the result.[83] According to Samartzis,[84] overall fairness is the unifying standard by which the Court has come to determine the relation of the rights. For example, to access a lawyer and examine witnesses under Article 6(3)(c) and (d), respectively, and the general right to a fair trial under Article 6(1).[85] Overall fairness, Samartzis submits, is an open-ended concept that emerged early on in Strasbourg jurisprudence and initially was conceived as an additional guarantee to the minimum rights of Article 6(3) ECHR.[86] In recent years, overall fairness has evolved into a distinct stage of the test[87] by which the Court finds a violation of Article 6(3)(c) and (d). However, Samartzis concludes that its meaning remains elusive or, as Hoyano describes it's: a 'protean and multidimensional term'.[88]

(n 63) – where the court ruled that the requirement of surrendering to custody as a requirement of admissibility of appeal deprived the petitioner of liberty, and 'undermined the very essence of the right to appeal by placing a disproportionate burden on the appellant that upset the fair balance that had to be maintained between the need to enforce judicial decisions and the need to ensure access to the Court of Cassation and that the defence was able to exercise its rights'.

81 Mennim (n 43) 186, citing Ryan Goss, *Criminal Fair Trial Rights* (Hart, 2014) 198-201.

82 Ryan Goss, *Criminal Fair Trial Rights* (Hart 2014) 206-207, cited in 'Criminal fair Trial Rights: Article 6 of the European Convention on Human Rights' Crim. L R., 2015, 3, 243-246, 243.

83 Hoyano (n 77) 8.

84 Samartzis (n 76) 410.

85 For example, *Atlan v United Kingdom (2002)* 34 EHRR 33, 39.

86 Samartzis (n 76) 413, citing *Nielsen v Denmark* where the European Commission of Human Rights held that, irrespective of whether there has been a violation of the minimum rights of Article 6(3), 'the question whether the trial conforms to the standard laid down by paragraph 1 much be decided on the basis of the consideration of the trial as a whole..'. – *Nielsen -v Denmark* Application No 343/57, Commission (Plenary) Report, 15 March 1960 [52].

87 As to the second stage of the *Salduz v Turkey* case (n 87) following an analysis in the first stage of where access to a lawyer can be restricted for compelling reasons. This second stage does not presuppose the presence of compelling reasons, instead the Court recognised that the restriction may, in exceptional circumstances, be permissible even in their absence.

88 ibid 413 citing Hoyano (n 58) 4.

In the cases of *Salduz v Turkey*[89] and *Ibrahim and Others v UK*[90], the ambiguous meaning given to 'overall fairness' by the Court serves, according to Samartzis,[91] to undermine the rule of law and facilitate judgements that misconceive the nature of the right. The *Salduz* test was generally understood to expand the protection afforded under Article 6(3)(c): the accused was to have a near-absolute right to access a lawyer before the trial, subject to a robust 'compelling reasons' test. Incriminating statements given without the benefit of legal advice and assistance should not be used for a conviction. In *Ibrahim and Others,* the Court reiterated the *Salduz* rule, specifying that it involved two stages. Firstly, the right to access a lawyer at the pre-trial stage can be restricted if there are compelling reasons to that effect. This is a stringent test:[92] factors relevant to its satisfaction are (a) whether the restriction has a statutory basis, (b) the quality of the legal provisions, and (c) the exceptional character of the restriction. Secondly, the Court examines the impact of the restriction on the overall fairness of the proceedings. This stage, Samartzis maintains, does not presuppose the presence of competing reasons. Instead, the Court recognised that the restriction might, in exceptional circumstances, be permissible even in their absence.[93] Thus, it rendered overall fairness the overriding consideration in finding a violation of Article 6 ECHR, of which the 'compelling reasons' test is but an aspect. Similarly, the Court conceived Article 6(3)(c) as an aspect of the fair trial stipulated by Article 6(1) rather than as an independent procedural right.[94]

Samartzis further examines 'overall fairness' in the case of *Schatschashwili v Germany*.[95] The case questioned the compatibility with Article 6(1) and Article 6(3)(d) ECHR concerning trial statements of absent witnesses whom neither the accused nor his counsel had the opportunity to examine in the preliminary proceedings. Like *Ibrahim and Others,* the Court adopted a similar approach and formulated its methodology as a three-stage test[96] in accordance with the principles developed in *Al-Khawaja and Tahery v UK*.[97] The first part of the test considered whether there was a good reason for the witnesses' absence. The second part was to determine whether the statements were the sole or decisive evidence for the conviction of the accused, and in the final part, the Court reviewed the overall fairness of the proceedings. From the assessment, the presence of counterbalancing measures was considered crucial, with the 'sole or decisive rule' under the second limb being no longer absolute. While the Court made a finding of a violation of Article 6 in this particular case, it noted that the absence of good reasons for non-attendance alone did not itself render the trial unfair even if the untested evidence was neither sole nor decisive and was possibly even irrelevant for the outcome of the case as this would amount to the creation of a new indiscriminate rule.[98] Samartzis emphasises that once again, the Court reduces one of the stages into the overall fairness assessment instead of being replaced with a concrete rule.[99]

89 *Salduz v Turkey [GC]* Application No. 36391/02, Merits and Just Satisfaction, 27 November 2008.

90 *Ibrahim and Others v UK [GC]* Application Nos 50, 541/08, 50, 571/08, 50, 573/08 and 40, 351/09, Merits and Just Satisfaction, 13 September 2016.

91 Samartzis (n 76) 412.

92 ibid 414.

93 ibid 415, citing from the *Ibrahim* judgement (n 70) 265.

94 ibid 415.

95 *Schatschashwili v Germany [GC]* Application No. 9154/08, Merits and Just Satisfaction, 15 December 2015 cited by Samartzis (n 76) 415-416.

96 ibid 107.

97 *Al-Khawaja and Tahery v UK [GC]* Application No.'s 26766/05 and 22228/06.

98 *Schatschashwili v Germany* (n 95) 111-113.

99 Samartzis (n 76) 416.

In further consideration of the overall fairness in the assessment of proceedings the court in *Murtazaliyeva v Russia*[100] insisted that its preservation ensured that the three-pronged test that it introduced did not become excessively rigid or mechanical in its application.[101] The Court asserted that the significance of the testimony that is sought must be weighed against its ability to influence the outcome of the trial. Owen points out that the three-part test: (a) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (b) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and (c) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings, is problematic. He highlights that its introduction continues to place the burden upon the defendant to justify why the witness must be heard as opposed to the prosecution showing why the witness should not.[102] He further identifies that what is of particular relevance is that the requirement is now imposed upon defendants to be able to show that evidence that a witness would provide can reasonably be expected to strengthen the case for the defence. This concept, as noted by Judge Pinto de Albuquerque, who, in his dissenting opinion, commented that the three-pronged test is a prima facie liberal test that is applied in an illiberal manner.[103] Further, Judge Bošnjak, in his partly dissenting opinion, expressed concern about the fact that it is often 'impossible' to determine what effect the testimony of a witness will have upon a court before that testimony is heard.[104]

In 2017, the Grand Chamber applied the two-stage test analysis under *Ibrahim and Others* in *Simeonovi v Bulgaria* and found no violation of Article 6(3)(c), although the applicant, in that case, was denied access to a lawyer without any compelling reason.[105] In a further decision of the Court in November 2018 in *Beuze v Belgium*[106] where the applicant was subject to a systematic and mandatory restriction on his right to access his lawyer at the investigation stage, the Court had to explain:

> whether a clarification [as to the two stage test of analysis made in *Ibrahim*] is of general application or whether, as claimed by the applicant in the said case, the finding of a statutory restriction is in itself, sufficient to have been a breach of the requirements of Article 6(1) and Article 6(3)(c).[107]

In the majority of the Court's opinion,[108] the mere existence of a systematically applied general and mandatory restriction on the right to access to a lawyer does not in itself result in a violation of Article 6(3)(c). However, in the joint concurring opinion of Judges Yudkivska, Vučinić, Turković and Hüseynov, they highlighted that the *Salduz* type of case, of which *Beuze* was one, and *Ibrahim and Others* case were two very different cases.[109] The Grand Chamber acknowledged this in the judgement in *Beuze*,[110] yet it decided to view such 'fundamentally different situations through the same lens without ever analysing those differences in any depth'. The concurring judges believed that

> …these two situations, when it comes to guaranteeing minimum rights to the assistance of a lawyer during pre-trial proceedings, deserve to be treated differently and were treated differently before the present judgement.[111]

The concurring judges took the view that the judgement in *Beuze* departed from the standards of a fair trial as determined in *Salduz* and *Ibrahim and Others*, taken together. They went further and took the view that the judgement distorted and changed the *Salduz* principle and devalued the right that the Court established previously.[112] They considered

> That moreover, the present judgment also weakens, if not overrules, the jurisprudence in which the Court has laid down several other conditions which the domestic authorities must respect in restricting the Article 6 safeguards, including the right of access to a lawyer: first, that no restriction should be such as to destroy or extinguish the very essence of the relevant Article 6 right; second, that the restrictions may, in general, be imposed if they pursue a legitimate aim; third, that the restriction should be reasonably proportionate to the aim sought to be achieved.[113]

Celiksoy takes the view that the *Beuze* judgement presented a dilemma in terms of whether the *Salduz* test or the *Ibrahim and Others* test had to be followed by the ECtHR.[114] If it followed the former approach and found an automatic violation of Article 6(3)(c) due to the restriction on the right to access a lawyer in the absence of compelling reasons, it would have contradicted the *Ibrahim and Others* test, which always requires a two-stage analysis.[115] In adopting the latter test, it was at the cost of the principles in the *Salduz* case and therein 'devaluing' the jurisprudence of the court over a period of ten years.[116] The real problem, Celiksoy contends, arose from the majority's methodology and reasoning by insisting that both tests under both cases were the same when in fact, as cited supra, the Court acknowledged that they were separate.[117] The majority had missed an opportunity to re-establish both the *Salduz* and *Ibrahim and Others* tests as two separate but complementary principles.[118] In *Doyle v Ireland*[119] the dissenting judgement of Judge Yudkivska highlighted that the decision in *Beuze*[120] was based on a misguided interpretation of the Court's own jurisprudence. In *Doyle,* the Court, relying on *Ibrahim and Others* and *Beuze*[121] in applying the overall

100 *Murtazaliyeva v Russia* [2018] ECHR 1047.

101 Samartzis (n 76) 416-417.

102 Jordan Owen, 'Questioning of Witnesses' (2019) E.H.R.L.R. 2019, 2, 217-221, 220.

103 ibid 221 citing Judge Pinto de Albuquerque at para 18 of his dissenting judgment in *Murtazaliyeva v Russia* (n 98)

104 *Murtazaliyeva v Russia* (n 100) 220-221.

105 *Simeonovi v Bulgaria* [2017] ECHR 438.

106 *Beuze v Belgium* [2018] ECHR 925.

107 Ergul Celiksoy, 'Overruling '*the Salduz Doctrine*' in *Beuze v Belgium*: The ECtHR's further retreat from the *Salduz* principles on the right to access to lawyer' [2019] 10 New Journal of European Criminal Law 2019 4, 342-362, 343, citing *Beuze* ibid 116.

108 See judgement of the majority in *Beuze v Belgium* (n 106) in its findings at the conclusion of the judgements (after para. 200).

109 See dissenting judgement [2] under 'Introduction' heading.

110 *Beuze v Belgium* (n 106) 116 and Cf. [2] of Concurring Opinion.

111 ibid.

112 ibid 19.

113 ibid 20 of the Concurring Opinion.

114 Celiksoy (n 107) 352.

115 ibid.

116 ibid.

117 *Beuze v Belgium* (n 106).

118 Celiksoy (n 116).

119 *Doyle v Ireland* [2019] ECHR 377.

120 ibid under heading 'B. *Beuze's* unfortunate legacy'.

121 ibid under heading 'C Overall fairness in the present case – 1. The applicant's severely restricted communication with his solicitor'.

fairness assessment, concluded that its strict scrutiny revealed that the proceedings were fair as a whole and there was no violation under Articles 6(1) and Article 6(3)(c) of the ECHR. Remarkably, in his dissenting judgement Judge Yudkivska concluded:

> …the overall fairness of the proceedings in the present case was irreparably compromised.[122]

These are, without doubt, strong words when compared to the majority decision.

Celiksoy submits that in his assessment of the *Beuze* judgement the case sends an implied message to the states that there is no need to recognise the right of access to a lawyer as a rule since even the application of a systematic statutory restriction of a general and mandatory note will not in itself constitute a violation of Article 6(3)(c).[123] Samartzis surmises that the novelty of the overall fairness line of authority lies in that overall fairness may override the meaning of Article 6, not only to expand but, surprisingly also, to negate the minimum fair trial guarantees of Article 6(3).[124] He argues further that, on one account, the Court's overall fairness jurisprudence focuses on the accuracy of the trial's outcome, which is indicated by the fact that the result of the overall fairness assessment coincides with whether or not the Court is convinced that the applicant was in fact guilty.[125] With the exception of *Schatschaschwili v Germany*, every relativisation of the Court's bright-line tests has come with a finding of no violation of Article 6 in cases where the guilt of the accused appears indisputable.[126] One has to question whether or not the high bar required of successfully challenging Article rights 6 in light of the ***Doyle*** judgement[127] is capable of being met given the propensity of the ECtHR to rely on (properly considered) reasoning of domestic courts in its decision-making process.

Vogiatzis argues that every violation of the right to interpretation undermines the overall fairness of the proceedings[128] and gives effect to the requirement of the rule of law. In its first judgement on Article 6(3)(e), the Court found that paying for interpretation costs 'may have repercussions for [the accused person's] exercise of the right to a fair trial as safeguarded by Article 6.[129] But, as Vogiatzis highlights, it was in *Kamasinski*[130] where the link between interpretation rights and fairness was solidified: the 'guarantees in paragraphs 2 and 3 of Article 6…represent constituent elements of the general concept of a fair trial embodied in paragraph 1'. Placing the guarantee in the context of a fair trial under Article 6(1) enabled the ECtHR to deduce the principle that the right to interpretation applied not only to oral statements at the trial hearing but also to 'documentary material and pre-trial proceedings'.[131] In *Amer*,[132] the Court reiterated that the interpretation right at the pre-trial stage ensures a *fair trial*, and a key consideration for the interpretation of this right is the defendant's linguistic knowledge and the nature of the offence.[133] Despite this positive development of the link between the right to an interpreter and a fair trial, in *Panasenko,*[134] the Court appeared to unduly focus on the conduct of the accused at trial as opposed to thoroughly scrutinising states for failing to meet their positive obligations. It relied on the fact that the applicant did not specify the extent of the problems with interpretation at the trial, which impaired his broader right to a fair trial.[135] While *Vizgirda*[136] may have accentuated states' positive obligations, *Panasenko*[137] highlights the extent to which the Court will go to undermine the applicant's rights. The Court, further, having drawn inspiration from EU law, has not gone as far, Vogiatzis suggests, as duplicating the provisions/standards prescribed by Directive 2010/64 EU.[138]

Conclusions

As highlighted above, in the *Animal Defenders'* case, the dissenting judgement of the Court raises a fundamental issue concerning the Court's approach generally within the context of the Convention, and that is that a minimum standard should be equally applicable to all the States' parties. States which seek to interfere in those fundamental rights, whether legislated upon or judicially decided, as evidenced in the recent decision of *R v Brecani*, have the effect of States avoiding their obligations under Article 1 and giving solace to the pre-Convention pervasive view that Parliament is sovereign. The Doctrine of Appreciation, which is used frequently in connection with the principle of proportionality, has the effect of weakening the Court's role and, therein, the rights afforded to individuals under the Convention. A reliance on States compliance with the rule of law and its obligations under the Convention borders on collective naivety if the Court does not wish to appear to be abrogating its responsibilities and instead should seek to impose consistency and compliance across the board.

Goss' evaluation of the indistinctive assessment adopted by the Court has its merits, while the language used by the Court in its jurisprudence of 'overall fairness', as summarised by Samartzis, equally does not provide sufficient clarity to its meaning, as evidenced in *Ibrahim and Others* and *Beuze*. Equally, the Court in *Murtazaliyeva* introduced a reversal of the burden onto the defendant on why a witness must be heard, a fact highlighted by Judge Bošnjak in his partly dissenting opinion. It is difficult at times to reconcile the reasoning of the Court, particularly in these cases wherein it sought to undermine its own jurisprudence by compromising the 'overall fairness' of proceedings, as Judge Yudkivska emphasised in *Doyle*. The impact of these decisions is enormous and has the effect of eroding or extinguishing basic fundamental rights as well as encouraging, at the very least, attempts by national governments or national courts to implement laws and/or interpret judgements that can undermine rights and freedoms guaranteed under the Convention, thereby upsetting the harmony first sought and advanced in *Stec and Others v UK*.

122 ibid D – Conclusion of the dissenting judgement of Judge Yudkivska.
123 Samartzis (n 84) 359.
124 Harris et al (n 5) 471.
125 Samartzis cites *Al-Khawaja* (n 97) 155-158*; Ibrahim and Others* (n 90) 277-279; *Murtazaliyeva* (n 100) 169-176 and *Simeonovi* (n 105) 132-145.
126 Samartiz (n 76) 471.
127 Judge Yudkivska (n 122).
128 Nikos Vogiatizis, 'Interpreting the Right to Interpretation under Article 6(3)(e) ECHR: A Cautious Evolution in the Jurisprudence of the European Court of Human Rights?' (2021) Human Rights Law Review 2021, 00, 1-25, 12.
129 ibid 14 citing *Luedicke, Belkacem and Koc v Germany*, Applications 6210/73, 6877/75 and 7132/75, 28 November 1978, 42.
130 *Kamasinski v Austria*, Application 9783/82, 19 December 1989 [62].
131 ibid 76; Judge Yudkivska (n 127) 14-15.
132 *Amer v Turkey*, Application 25,720/02, 13 January 2009, 77-78.
133 *Soering v UK* (n 7) 15.
134 *Panasenko v Portugal*, Application 10,418/03, 22 July 2008.
135 *Soering v UK* (n 7) – the court in that case found that the claim was 'manifestly ill-founded' and was rejected; ibid 60-64.
136 *Vizgirda v Slovenia* (2018) 59868/08, 3 of the dissenting opinion of judges Kucsko-Stadlmayer and Bošnjak.
137 *Soering v UK* (n 7) 60-64.
138 Judge Yudkivska (n 127) 22.

Annex I

Article 6: Right to a fair trial

1. In the determination of his civil rights and obligation or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of moral, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
    a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    b. to have adequate time and facilities for the preparation of his defence;
    c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
    d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[139]

139 The text of the ECHR is available on the website of the Treaty Office of the Council of Europe at <http://conventions.coe.int/> under 'Full List of Treaties of the Council of Europe' (ETS no. 005) accessed 7 December 2021.

The Fight for Survival Fifty Years On: A Brief Synopsis on Law Centres in the UK

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Introduction

Law centres are providers of legal aid and have been in existence since the early 1970s. Their main role has been to assist those that reside within their local communities. They specialise predominantly in social welfare or 'poverty' law as their legal representatives possess detailed knowledge about the problems their local residents face.

This article is divided into timeframes and will consider the development of law centres in the UK from 1945 to 2021. Between 1945 and 1970, the Labour Party under Clement Atlee passed the Legal Aid and Advice Act 1949, which enabled legal aid to be funded by the State. The first law centre was created in 1970. Between 1970 and 1986, there was an exponential growth in law centres in the UK; however, the Law Society (of England and Wales) and the State were not supportive of them. Between 1986 and 1997, this article considers the further funding cuts that were made to law centres by the Conservative Party under Margaret Thatcher and John Major. Between 1997 and 2010, the New Labour Party (under Tony Blair) was slightly flexible as they attempted to introduce the Community Legal Partnership Scheme (CLPS), which lacked a clear policy and coordinated funding method, so it failed. Between 2010 and 2021, the Conservative Government decided to further cut funding for law centres, but they have survived through mobilising their efforts in seeking funding from other organisations.

The article submits that it was not just the State but also the Law Society's lack of support for law centres that thwarted their development. This lack of continuity in their development can be traced back to the specific antagonistic relationships between the State, the Law Society on the one hand and the law centres on the other. The Law Society was more concerned about protecting the profession for financial reasons than the public throughout this movement. Secondly, there has never been a clear policy on law centres which has been exacerbated by the lack of a coordinated method of funding throughout the history of this movement. Having a policy would have aided their development as there would have been a clearer funding mechanism in place from the very beginning, which could have also led to uniformity in their operations. It is remarkable how far law centres have developed in terms of the services they offer to the most marginalised section of society despite the insurmountable challenges they have faced over the years due to a lack of funding, policy, and their antagonistic relationship with the State.

1945-1970: Prioritising Poverty Law

The Labour Government, led by Clement Atlee, passed the Legal Aid and Advice Act 1949 to add to the social welfare of the State.[1] As a result of this Act, legal aid was funded by the State.[2] The Law Society administered the legal aid scheme alongside the Lord Chancellor for approximately forty years.[3] The Law Society was created in 1845,[4] and it was entrusted by Parliament and awarded ever-widening powers of administration and control over the solicitors' profession.[5]

Around 1948, solicitors in private practice successfully prevented the legal aid scheme from being extended to salaried law centres as they feared losing clients.[6] Further, the Atlee government considered

1 HC, 15 December 1948, vol 459, col 1261.

2 Peter Christopher Alcock, 'A Study of Legal Aid and Advice in England and Wales' (Masters thesis, Sheffield Hallam University 1976) 25 <https://shura.shu.ac.uk/19235/1/10694115.pdf> accessed 1 June 2022.

3 Henry Brooke, *The History of Legal Aid 1945 to 2010* (Bach Commission on Access to Justice 2017) 5; Sarah Moore and Alex Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform* (Bristol University Press 2017) 17.

4 Catherine Shephard, Judith Embley, Peter Goodchild, and Scott Slorach, *Legal Systems & Skills* (OUP 2015) 162.

5 ibid

6 Tamara Goriely, 'Law for the Poor: The Relationship Between Advice Agencies and Solicitors in the Development of Poverty Law' (1996) 3(1/2) International Journal of the Legal Profession 225.

legal advice centres to be a luxury rather than essentiality.[7] This marked the beginning of the antagonistic relationship between the State and law centres.

In the USA, President Lydon Johnson had implemented a 'War on Poverty' scheme, which led to the creation of neighbourhood law offices and community-based legal advice centres that were run by paid lawyers.[8] Its aim was to ensure that those from impoverished and hard-to-reach communities were provided with social and legal support.[9] In the UK, at that time, poverty was deemed as being a matter needing administrative action, whereas new ideas emerging from the USA suggested that the poor had rights.[10] Faced with this new thinking, both the Law Society and the Lord Chancellor's Legal Aid Advisory Committee were forced to concede that the legal aid scheme was underused and that its limitation to oral advice was unfortunate.[11]

Thus, from the late 1960s, the focus was to address the 'unmet need' for support.[12] A powerfully worded pamphlet entitled 'Justice for All' was published by the Society of Labour Lawyers in 1968.[13] This pamphlet (which received approval from politicians from the left and the right) reformed the legal advisory system.[14] Even the Conservative Party published a leaflet entitled 'Rough Justice', advancing the notion that further planning for legal services was needed through the introduction of grants so that solicitors could work within poorer communities.[15]

Impressed by the USA, the Government in the UK started to change its perception towards the needs of the poor. The North Kensington Neighbourhood Law Centre was the first law centre to be established in 1970—its aim was to serve a deprived part of London.[16] It was funded by charitable trusts (the City Parochial Foundation and the Pilgrim Trust) and local authorities to provide holistic assistance, addressing the socio-legal problems the individuals faced.[17] From the very beginning, the idea behind this movement was to help the most impoverished section of society and to empower local residents by educating them about their rights. The Lord Chancellor's Legal Aid Advisory Committee recommended that the Law Society should possess the right to run law centres, preferring the Law Society's argument that the provision of State-funded legal services should fall under single management.[18]

By 1971-1972, the Law Society argued that public funds should not be scattered amongst differing legal aid enterprises and unless law centres were subject to the same controls as private practices, the cause of justice was in danger of being betrayed.[19] The State/Conservative Government (under Sir Edward Heath) should have availed this perfect opportunity to extend the legal aid scheme fully to law centres, and devised an appropriate policy on their functionality and funding mechanisms given that the latter possessed expertise in poverty law.

1970-1986: Expansion of the Law Centre Movement and Law Society's Lack of Support for Law Centres

Due to the expansion of the law centres movement, the Legal Advice and Assistance Act 1972 was introduced to extend the publicly funded advisory scheme, making legal advice and assistance more readily available.[20] Part II of the Act empowered the Law Society to employ salaried solicitors for the purposes of giving legal advice/assistance under legal aid and to assist advisory agencies in providing legal assistance to clients. However, the Law Society was never provided adequate funds to set up an advisory liaison service, other than to appoint a liaison officer.[21]

As the Conservative Government was providing some financial assistance, by 1973, there were seven law centres that were reliant on legal aid and charitable funds.[22] One of the characteristics of the early law centre movement was its diversity.[23] North Kensington operated an 'open door' policy, which enabled them to tackle a multitude of problems.[24] Others, such as Brent, protected themselves against the deluge of casework by working with other groups.[25] The concept of local justice has always been a central feature of this movement, so law centres established strong links with the community they were serving.

Law Centres grew over time to provide community-level support to the extent that in 1974 there were 15 such centres, and by 1976, this figure increased to 24.[26] Some were set up by local authorities; some were set up via the Urban Aid Programme, which was administered by the Home Office and 75 percent of its funding derived from central funds and the remaining 25 percent from local authority funds.[27]

The Law Society was losing control over the developments, and so it decided to bring the new centres into line.[28] Thus in March 1974, for the first time, it issued guidelines stipulating that law centres should only be able to work on cases that local firms were unable/unwilling to undertake, warning that waivers would be revoked 'at will' if they retained cases that could be referred to private practice.[29] So the leftover cases were granted to law centres as solicitors were very rigorous in ensuring that law centres were prohibited from handling cases that were profitable for the former. The Conservative Government (under Harold Wilson) stated that law centres that were in receipt of public funds should be answerable for using those funds.[30] The Law Society and the Government/State showed

7 ibid.
8 Steve Hynes and Jonathan Robins, *The Justice Gap: Whatever Happened to Legal Aid?* (Legal Action Group 2009) 22.
9 Moore and Newbury (n 3) 18.
10 Goriely (n 6) 229.
11 ibid.
12 Seton Pollock, *Legal Aid: The first 25 years* (Oyez Publishing 1975) 86.
13 Moore and Newbury (n 3) 18.
14 Pollock (n 12) 91-3.
15 Brooke (n 3) 7.
16 Bryant G Garth, *Neighbourhood Law Firms for the Poor: A comparative study of recent development in legal aid and in the legal profession* (Springer 1980) 58.
17 ibid.
18 UK Government, *Report of the Advisory Committee on the better provision of Legal Advice and Assistance, 1970* (2020) Cmnd.4249 7.
19 Goriely (n 6) 232-233.
20 Moore and Newbury (n 3) 19.
21 Michael Zander, *Law Centres – The Early History* (Law Centres Annual Meeting, 6 November 2020) 4.
22 Goriely (n 6) 232.
23 ibid.
24 ibid.
25 ibid.
26 Garth (n 16) 61-3.
27 Zander (n 21) 4.
28 Goriely (n 6) 233.
29 ibid.
30 *Legal Aid, 30th Annual Reports of the Law Society and of the Lord Chancellor's Advisory Committee* (House of Commons 1981) 103 <https://parlipapers.proquest.com/parlipapers/result/pqpdocumentview?accountid=9851&groupid=107397&pgId=97c6d364-b642-42ab-b4fc-881d2dc2943b&rsId=18176E64A4D> accessed 30 August 2021.

their lack of trust in law centres, and thereby restricted their work by giving priority to private practices, even though law centres possessed expertise in poverty law.

The law centres movement reacted strongly to the above-mentioned proposals, which compelled the Labour Lord Chancellor, Lord Elwyn Jones to intervene. In July 1974, Lord Elwyn Jones announced that he had obtained £50,000 (the budget of law centres with two to three lawyers amounted to £50,000) for law centres which was increased in 1975 to £100,000 and in 1976 to £150,000.[31] In July 1974, Lord Elwyn Jones announced that as an interim measure, the Law Society would work closely with his office in deciding waiver issues.[32] Law centres needed a waiver from the Practice Rules to offer free legal services. So, the Law Society treated the waiver system as a measure to control the work that law centres were permitted to do. Zander states that '[t]he Law Society's attitude altered from time to time, was applied inconsistently and for the first few years was based on an analysis of the problem which has since been conceded to be unacceptable'.[33]

The waiver was granted without any difficulty when North Kensington Law Centre was established. By 1973, however, more stringent conditions were imposed as law centres were obligated to sign contracts stipulating that they would not deal in areas such as conveyancing cases, commercial cases, company law cases , probate and divorce law cases, personal injury cases or certain criminal cases.[34] By February 1974, the Law Society decided that waivers would only be granted if 'a defined and apparent' need was demonstrated that could not be met by the legal profession, yet ironically law centres operated under the law of the Law Society.[35] Law centres were required to submit their records to the Law Society at six-monthly intervals demonstrating the number of referrals that they had made to private practitioners.[36] There was a furious reaction to these proposals by the Law Centres Working Group, so the Law Society withdrew these proposals, and Lord Elwyn-Jones announced that the waiver issue was dealt with unsatisfactorily by the Law Society.[37] Thus, it was decided that as an interim measure, the Law Society would work closely with the Lord Chancellor's office to decide the terms and conditions on which waivers would be granted.[38] In a document drafted by the Law Society and the Lord Chancellor's Department on how the law centres would operate in the future, it was noted that the Law Society could firstly impose conditions depending on the needs of the area; secondly, that the Law Society would share responsibility for deciding whether a law centre was needed and thirdly that the Lord Chancellor would act as a referee/ Court of Appeal.[39] This agreement was rejected by the voluntary agencies during a meeting that took place on 6 May because it was noted that the Law Society was not a suitable body to undertake such tasks as it did not possess the requisite knowledge on measuring unmet needs, and also because there was a conflict of interest as the Law Society represented private practitioners.[40]

31 Zander (n 21) 4.
32 HL Hansard, vol 353, 30 July 1974, cols 2294-2295.
33 Michael Zander, *Legal Services for the Community* (Zander 1978) 403.
34 Zander (n 21) 5.
35 ibid.
36 ibid.
37 ibid.
38 ibid.
39 ibid.
40 ibid.

Hillingdon Law Centre was set up in 1976 by the local council and various community organisations.[41] The Law Society opposed the development of this law centre because it believed that local firms could handle the work and that the Law Society favoured the interests of local solicitors.[42] However, Hillingdon Law Centre appealed to Lord Elwyn Jones, and the waiver was eventually granted.[43] Lord Elwyn Jones stated that the question of need rested solely with the funding agency (and not the Law Society), and so the test for granting waivers ensured that the services of law centres did not duplicate those provided by private practitioners.[44] It appears that there were specific antagonistic relationships within the sector (Law Society and the State versus law centres) that had a devastating impact on the development of law centres.

In 1976, 15 law centres were surveyed, and the results of these surveys revealed that although the waivers took a long time to obtain, the staff of the Law Society were 'helpful' and 'friendly', so the relations between the Society and law centres were somewhat harmonised.[45] By 1977, the Law Society and law centres reached an agreement stipulating that if law centres did not compete with solicitors in areas such as crime (where the accused is over the age of 21), commercial matters, matrimonial work, certain personal injury cases, probate/conveyancing, then the Society would grant them waivers.[46] The work of law centres could proceed uninterrupted (in strictly defined areas) without the threat of Law Society's interference. However, the revocation of the waivers would be considered in exceptional circumstances.[47]

By 1978, there were 27 law centres.[48] This may have been because of the establishment of the Law Centres' Federation ('LCF', changed from Law Centre Working Group) in the 1970s and the Law Society's standard waiver.[49] The Labour Government (under James Callaghan) funded law centres and published a set of guidelines for them.[50] At that time, the provision of legal aid was being re-examined,[51] and so this presented a perfect opportunity for the State to formulate a clear policy on the way forward for law centres—another missed opportunity from the State.

Law centres also started to circulate a new internal publication entitled 'Law Centre News' that year, following the formation of the LCF.[52] They further unified in 1978 to form the Law Centres Network (LCN) to support/develop law centres/networks.[53] There was growth in both the number and variety of organisations that provided advice and assistance to the poor.[54] Law centres demonstrated their growing importance by collaboratively

41 ibid.
42 ibid 5-6.
43 Goriely (n 6) 233.
44 Zander (n 21) 6.
45 Michael Zander and Peter Russell, 'Law Centres Survey' (1976) 73(10) The Law Society's Gazette 210.
46 Law Centres Federation (LCF), *LCF Thirty Years On: Annual Report 2007/08* 3 <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/annual-reviews accessed 30 July 2021> accessed 1 September 2021.
47 Zander (n 31) 6-7. As of 2019, law centres no longer need waivers.
48 LCF (n 46) 3.
49 ibid.
50 ibid.
51 ibid.
52 ibid.
53 Law Centres Network, *2017/2018 Report: Looking Forward at Forty* (2018) 4 <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/annual-reviews> accessed 1 June 2022.
54 Goriely (n 6) 231.

working together in an effort to sustain themselves despite the insurmountable challenges they faced from the Government/State, the Law Society and the profession.

At the beginning of 1979, there were 32 law centres.[55] When the Conservative Party won the General Elections in 1979 under Margaret Thatcher, it was decided that local authorities should fund law centres in the future.[56] Law centres went from being funded partially through legal aid and charitable donations to receiving local authority funding and funding from charities. As soon as the Conservative Party returned to power in 1979 under Margaret Thatcher, they cut the already limited funding for law centres, thereby shifting responsibility to the local authorities—another display of the antagonistic relationship between the State and law centres.

Those that supported the law centre movement, like Hynes, argued that by having salaried legal aid lawyers, law centres could carry out a wide range of legal aid work, including social welfare law that had been ignored by private solicitors.[57] The others, like Pollock, however, argued that it was imperative for publicly funded lawyers to retain their professional independence and to provide a service that was akin to privately paying clients.[58] Some of the problems associated with solicitors in private practice (utilising State-funded legal aid) were that there were not many solicitors who were willing to undertake poverty-related work because of the low financial return; secondly, those solicitors were not initially allowed to advertise their services, so they were unable to reach those that were in need; and thirdly, many poor people did not regard solicitors as being within their social range and thus dismissed the idea of consulting them.[59] So this presented another perfect opportunity for the Law Society and the State to allow law centres to have exclusive domain over this area—another missed opportunity.

By the end of 1980, there were 39 law centres. Most centres were funded by the Urban Aid Scheme (discussed above) to serve a geographical area, given that they enjoyed formal links with their communities.[60] At first, most of their casework related to housing which changed to welfare and juvenile crime as time progressed.[61] Later, social security and immigration became prominent.[62] Open door law centres such as North Kensington were unable to deal with a high caseload; thus, they attempted to decrease this by focusing on project work.[63] It is a pity that despite their continued success, Margaret Thatcher's Government and the Law Society did not prioritise the work of law centres, so they lacked direction, which led to their haphazard nature of functioning. These changes affected those that were the most marginalised/vulnerable as they predominantly utilised the services of law centres.

There was also a lack of funding yet demand for law centres skyrocketed.[64] Law centres were highly dependent on the political whim of the local authority and were vulnerable to funding threats due to their increased running costs. Thus, the first set of closures were made in the 1980s when local authorities withdrew support from Hillingdon and Wandsworth law centres.[65] By 1982, the crisis deepened as law centres were no longer a priority under the Urban Aid programme, so they started to increasingly depend on local authorities (which were highly unpredictable) in line with the Conservative Party's plan.[66] In 1986, the Greater London Council and metropolitan councils were abolished by the Conservative Government, which once again placed law centres funding into disarray.[67] Nevertheless, law centres continued to grow as they attracted funding from other organisations due to the lobbying efforts of the LCF.[68]

Clients were reluctant to use the services of other lawyers owing to a high number of complaints they received, not to mention their lack of knowledge about areas impacting poverty-related law.[69] The Government/State, Law Society and the profession should have seized this opportunity to enable law centres to deal exclusively with poverty law or asked them to take the lead, given that there was an appetite for growth here—another missed opportunity. Thus, law centres became more bullish for the first time in the 1980s when they strongly believed that they had a better understanding of social security law than most solicitors in private practice.[70] They started working collaboratively with the profession as stronger and more equal partners for the very first time.[71] So, firms that dealt with poverty law enjoyed a close relationship with law centres.[72] Law centres pioneered the future of legal work, provided training for poverty law and supplied private practice with a new clientele.[73] As law centres expanded definitions of the services solicitors could provide, this presented financial challenges to the State that they may have sought to minimise in the face of increasing legal aid costs. As law centres expanded private practices' client base, opposition to them within the profession waned.[74] For the first time in the late 1980s, the Law Society became an avid supporter of law centres. Despite the lack of a clear policy and a coordinated method of funding, law centres and private practice developed their work so that there was minimalistic overlap.

There was a rapid increase in poverty law issues for private practitioners, so between 1975-6, it accounted for 11 percent, increasing to 13 percent between 1980-1, 17 percent in 1985-6, 23 percent in 1990-1 and an astonishing 30 percent between 1995-6.[75] Legal aid remained an insufficient way of tackling poverty law issues because the service was limited to advice and assistance through the green form scheme.[76] The green form scheme involved a simple procedure that was undertaken by the solicitor (prior to giving advice and assistance) with a simple means test but no merits test. Representation at tribunals was excluded, thereby restricting access to justice to those that needed it most.[77] The number of people who received advice and assistance from solicitors was incredibly low even in the 1980s, in comparison to the numbers utilising advice

55 (n 30) 102-3.
56 Brooke (n 3) 9-10.
57 Steve Hynes, *Austerity Justice* (Legal Action Group 2012) 26-7.
58 Pollock (n 12) 6-7.
59 John R Spencer, 'Legal Aid' in *Jackson's Machinery of Justice* (Cambridge University Press 1989) 466.
60 Goriely (n 6) 232.
61 ibid.
62 ibid.
63 ibid.
64 ibid 234.
65 ibid.
66 ibid.
67 ibid 234.
68 ibid.
69 ibid 235.
70 ibid.
71 ibid.
72 ibid 236.
73 ibid.
74 ibid 237.
75 ibid 236.
76 ibid.
77 ibid.

centres.[78] So those leftover finances could have been transferred to law centres—another missed opportunity by the State. The private sector dealing with poverty law had to meet high financial billing and chargeable targets, whereas those working for law centres were not set such high targets and could therefore spend more time on their clients' substantive cases. Given that the green form scheme was underused and poverty law-related issues were on the rise, the Conservative Government (under John Major) should have seized this opportunity to prioritise funding for law centres—another missed opportunity.

1986-1997: The Conservative Party's Abysmal Record on Access to Justice

Given the Conservative Government's reluctance to fund law centres, it was rumoured that during Thatcher's years (1979-1997), law centres would close, which did not happen.[79] The number of law centres increased in correlation with increased demand and growth of poverty due to the LCF's resilience in bringing more funding for this movement.[80] By the mid-1980s, for the first time, the Legal Aid Advisory Committee acknowledged that law centres/other advice agencies could no longer be considered as being peripheral to the statutory schemes, as they provided legal services that were complementary to the statutory schemes and they thus believed that law centres played a pivotal role in the development of their legal services policy.[81] So gradually, the Conservative Government/State started taking law centres more seriously.

The first official Government report to consider advice centres as part of the legal aid provision was entitled the 'Legal Aid Efficiency Scrutiny Report' and it was published in June 1986—it recommended that a new Legal Services Board (LAB) should administer the legal aid scheme.[82] It took the Conservative Government 16 years since the creation of the first law centre to consider this movement's significance. Contrary to the political consensus of the late 1960s and 1970s, by the 1980s, legal aid was being overused and subjected to minimal governmental scrutiny, and so Thatcher's Conservative Government used this opportunity to reform the legal aid system radically.[83] It passed the Legal Aid Act 1988 to control the money that was being spent on legal aid, although it failed quite miserably to tackle this problem as spending continued to increase up until the 1990s.[84] Simultaneously, the Cabinet Office's Efficiency Scrutiny of Legal Aid transferred the administrative side of legal aid from the Law Society to the LAB in light of the differing roles of the Government and the profession, which marked the beginning of a new era as it loosened the professional's control over the legal aid scheme.[85] As a result of the implementation of this Act, the harmonious relations between the law centres and solicitors were threatened.[86] The Conservative Government also proposed that the green form scheme cases should be abolished.[87] Advice centres and private practitioners combined to protest against this proposal.[88] The Law Society rushed to support the existing green form market.[89] As advice agencies were chronically underfunded, the money from the green form scheme was unable to meet the new demands placed on them.[90] Previously, the report could have exploited divisions between law centres and the profession. Now both sectors found common cause against a government perceived as attacking the welfare State.

The Law Society and the profession form a powerful force when they work cohesively. Thus, although the Government legislated for the LAB, it distanced itself from the green form proposals.[91] The 1987 White Paper did not contain any information on advice agencies and the green form scheme, leaving it for LAB to consider.[92] If the Law Society, profession, and law centres had worked together harmoniously from the very beginning, then law centres would not have experienced the innumerable obstacles that they had along the way. Poverty law would be better suited to advice agencies as they were more accessible, possessed greater expertise and were cheaper, as opposed to being reliant on legal aid where resources were placed in terms of need.

As discussed above, given the Conservative Government's lack of choice to fund law centres, one could safely presume that it could not build a national advice service. With additional funds, it could seek to improve the advice provision to meet the escalating demand for advice. Compared to other provisions, advice was relatively cheap, as the National Consumer Council of 1989 calculated that it would cost £188 million.[93]

From the late 1980s, Margaret Thatcher's Conservative Government tried to reduce the legal aid budget by increasing eligibility thresholds.[94] The profession had increased in numbers, and thus heavy burdens were placed on legal aid revenues.[95] The Government was being criticised, and so it considered ways of addressing the problem.[96] The Thatcher Government's strategy had been to force reforms to reduce the legal profession's market control.[97] The Labour Government (in opposition at that time) wanted to encourage the advice sector to compete with lawyers', building upon what had become recognised as superior expertise in many areas of welfare law.[98] After a very long time, it appears that for the first time, the Labour Party realised the significance of law centres in combating poverty-related issues.

By now, law centres offered bespoke advice and were staffed by local lawyers and students.[99] The sector was thriving. During this time, they enjoyed several achievements as they expanded their network, reaching 60 centres by 1990. They also held successful lobbying activities, bringing more funding from the Conservative Government (under John Major), Greater London Council and the Law Society.[100] Needless to say, it was the other funding mechanisms that helped law centres to thrive at this stage.

78 ibid.
79 ibid 216.
80 LCF (n 46) 3.
81 Goriely (n 6) 237-8.
82 ibid 238.
83 Moore and Newbury (n 3) 21.
84 ibid 22.
85 ibid.
86 J Baldwin, 'The Role of Citizens Advice Bureau and Law Centres in the Provision of Legal Advice and Assistance' (1989) 8 Civil Justice Quarterly 42.
87 Goriely (n 6) 238.
88 ibid.
89 ibid.
90 ibid.
91 ibid 238-9.
92 ibid 239.
93 ibid.
94 Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing 2014) 544.
95 ibid.
96 ibid.
97 ibid.
98 ibid.
99 ibid.
100 LCF (n 46) 3.

Law centres became a cornerstone of the Conservative Government's plan for a Community Legal Service and they were invited to bid for legal aid franchises.[101] In 1994, the LAB tried to systematically control legal aid work by expanding the legal aid budget and encouraging providers of legal aid to 'franchise'—this scheme became compulsory in 1998.[102] The Legal Aid Act 1988 was amended to add these proposals.[103] Those that met certain quality criteria would receive faster payments. Concerns were predominantly heard from private practices as they started to dominate the discussion so much so that the problems of advice agencies hardly featured in the debate. Franchising offered incentives to solicitors who became specialists in poverty law.[104] Ironically, franchising arose from proposals to reduce solicitors' involvement in poverty law so that such work was transferred to law centres. In fact, it entrenched the profession's involvement in such work. The LAB was then aiming for a second franchising scheme which specifically aimed at advice agencies that operated without solicitors. It would have been cost-efficient if a single franchising scheme applied to both advice agencies and law firms—another missed opportunity from the State/Conservative Government.

There were several problems at that time, as even now, there was no standardised meaning of the term 'advice' given that the advice sector covered a wide range of Citizens Advice Bureaux, law, and specialist centres.[105] The green form eligibility limits also constituted a major problem. Although advice centres were underfunded, the green form means test excluded all those in work, debt and employment advice, and so a significant proportion of clients did not qualify for legal aid as they were over the limit.[106] Such cases could have been awarded to law centres—the State had a tendency of availing itself of opportunities to further the work of law centres by failing to devise appropriate policies or examining appropriate funding possibilities. Many firms were facing an economic recession, and the Law Society as ever, defended the professions' interests, so it was unlikely that solicitors would give up existing markets without a struggle.[107]

1997-2010: Slight Flexibility from the New Labour Government

Due to the problems associated with increased spending, the LAB enacted stringent rules in relation to income and capital, and by the end of the decade, it was applicable to 'largely a sink service for people on means-tested benefits', which prompted the Government to enact the Access to Justice Bill 1999.[108]

Following the implementation of the Access to Justice Act 1999 for the very first time, some of the new areas of law were no longer in the scope of legal aid, such as conveyancing, personal injury (except in clinical negligence cases), boundary disputes, making of wills, matters relating to trusts law, company and partnerships and many different types of proceedings in the Magistrates Court.[109] It was estimated that the New Labour Government (under Tony Blair) would save £35 million.[110] The governing body was no longer the LAB, as the Legal Services Commission (LSC) had taken over, and as usual, the Lord Chancellor was responsible for the composition of the board.[111]

Amongst other recommendations, as mentioned above, the New Labour Party's manifesto commitment included a promise to create a new Community Legal Service Partnership (CLSP) Scheme which aimed to provide the public with a comprehensive level of legal support that would be dependent on local demands to facilitate better regional planning of services in the provision of legal aid.[112] This scheme empowered local areas to deliver poverty services through partnering with the legal profession, advice centres, local authorities and the LSC.[113] As part of this scheme, Community Legal Advice Networks (CLANs) were supposed to cover larger geographical areas that served less dense populations than Community Legal Advice Centres (CLACs).[114] CLACs were predominantly placed in urban areas where there were more than 50,000 claimants.[115] It was envisaged that CLANs would undertake outreach work at community centres, GP surgeries or schools so that clients no longer had to travel.[116] It was decided that for the first three years, the LSC would provide funding for these partnerships, and thereafter they would form partnerships with local authorities to form CLACs; however, the former would have to fund the advice.[117] The problem was that their role was never defined, and they had no identifiable minimum standards, yet they were expected to cover specialist advice. The LSC lacked the political force to compel the local government to share its vision of forming a holistic advice and assistance provision. Once again, the same problems persisted; problems were rooted in their reliance on public funding coupled with a lack of a clear thought through plan which led to the downfall of this project that could have been a huge success. Law centres' lack of continuity can be traced back to their antagonistic relationship with the State.

There were also problems with the expenditure on criminal legal aid, and so a review was conducted by Lord Carter in 2006 on both civil and criminal legal aid.[118] Carter's recommendation that solicitors' hourly fees should be replaced by fixed fees was successful and duly implemented in 2007.[119] The hourly rate system allows legal aid providers to claim for the actual work done rather than a predetermined fixed fee which is very low. Some argued that franchising and the introduction of fixed fees made legal aid work financially inviable for small providers/law centres.[120] Law centres objected to the introduction of fixed fees and competitive tendering, which compelled them to operate as firms/agencies, constituting an act of social vandalism. This problem was compounded by the fact that law centres did not receive the same funding as private practices under legal aid, yet the former were placed under the same restrictions as legal aid practices—this shows that the State thwarted the development of law centres.

101 Boon (n 55).
102 Sheona York, 'The End of Legal Aid in Immigration: A Barrier to Access to Justice for Migrants and a Decline in the Rule of Law' (2013) 27(2) Journal of Immigration, Asylum and Nationality Law 117.
103 Legal Aid Act 1988, Part II.
104 Goriely (n 6) 240.
105 ibid 241.
106 ibid.
107 ibid.
108 Hynes and Robins (n 8) 22.
109 Brooke (n 3) 16.
110 ibid 18.
111 Moore and Newbury (n 3) 24.
112 Brooke (n 3) 14.
113 ibid 15.
114 ibid 26.
115 ibid 27.
116 ibid.
117 ibid.
118 ibid 26.
119 Hynes (n 57) 65-7.
120 Moore and Newbury (n 3) 27-8.

At this stage, due to the efforts of the LCF, law centres undertook a range of work that helped combat social exclusion. They housed 13 disability workers, undertook 544 cases, reached 1875 young people needing assistance and raised £1.2 million to develop the LCN.[121] In line with developing their focus on equality, law centres worked on a disability rights project, provided advice on sexual orientation to raise awareness, secondly on religion and belief, and thirdly on age employment equality legislation, thereby expanding their advice provision.[122] Law centres were successful because of their own and LCF's efforts. If they had received even some support from the State, their campaign to help the most impoverished residents would have had greater reach. By 2006, the Conservative administration of Hammersmith and Fulham had decreased the grant of law centres by 60 percent without any explanation.[123] Such unstable footing has left several law centres constantly hamstrung by the threat of political sea change and funding cuts.

As demonstrated in this article, law centres were highly vulnerable to funding cuts by the State/Government over the years, so they started to prove their financial worth for the first time. A study on law centres from 2007 revealed that for every pound spent on providing a casework service, the Government generated a profit of £10.[124] By this time, law centres were being funded by the LSC, local councils and other organisations through the continuous efforts of the LCF.[125] Projects targeted at young people were highly successful.[126] Law centres clearly generate significant additional value over and above the amount of public money spent, yet the State/New Labour Government failed to capitalise on this.

By 2008, there were 56 law centres.[127] The impact of fixed fees proved to be a challenge in stripping centres of their cash reserves.[128] The important work they did in tackling social exclusion, helping local communities, and giving voice to the powerless was now even more apparent. In 2008, 73 percent of law centre users reported an improvement in their housing matter, 70 percent's peace of mind had improved with similar figures for improvement in ability to deal with problems (68), improvement in financial affairs (45) and education, training and employment (41).[129]

By 2009, there were 52 law centres left in the UK that were conducting individual casework, dealing with public education and developing policy/test cases in addition to the areas discussed above.[130] Once again, a study revealed that there was a significant socio-economic return on the work of law centres.[131] As law centres dealt with homelessness matters, this served as a high-cost saving measure to the State.[132] Despite their victories and financial benefits, the State had not produced a strategy/policy for law centres. This shows that the State/New Labour Party did not consider the significance of law centres and slashed their budget drastically. This also demonstrates the antagonistic relationship between the State and law centres, and crucially the reluctance of the State to prioritise the rights of the most impoverished/vulnerable people in society.

2010-2021: The Austerity Drive by the Conservative Party

In 2010, the Liberal Democrat Party formed a coalition government with the Conservative Party.[133] The then Lord Chancellor, Kenneth Clarke, shared the opinion of his predecessors, as he wanted to reform the legal aid sector, which involved heavy cuts to social welfare services.[134] The Coalition Government's aim was to cut £2 billion per annum from 2014-15 as a part of its austerity drive.[135]

The Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012 was passed despite the efforts of the legal profession, advice sector, senior politicians and members of the judiciary.[136] Just like the previous Acts, its aim was to cut costs to combat the unpredictable growth in public spending, restricting it to those that needed it the most. The Coalition Government's aim was to save £350 million from the legal aid budget.[137] A third of the savings would derive from cutting lawyers' fees, with a 10 percent cut to all civil legal aid and an astonishing 17 percent cut in fees for the majority of suppliers of criminal legal aid.[138] The biggest saving totalling £279 million, derived from taking many matters out of the scope of civil legal aid.[139] From 1 April 2013, the matters that went out of the scope included most private family cases (apart from where there was evidence to suggest that there was domestic violence, child abuse, or abduction), welfare benefits, clinical negligence, employment, housing disputes (apart from serious disrepair, homelessness, or anti-social behaviour), debt, immigration, and education (apart from special needs cases).[140] This had the effect of removing advice from a staggering 650,000 people.[141] A limited exception was made in order to prevent violation of the UK's obligations under the ECHR procedural requirements, so the coalition government incorporated the 'exceptional case funding' caveat.[142] Despite their wider social benefits, law centres faced insurmountable challenges from the Coalition Government due to the funding environment as LASPO 2012 hit them hard, whilst simultaneously demand for them continued to increase.[143] By slashing the legal aid budget, one can infer that the Coalition Government did not wish for the most vulnerable to have access to justice or to be made aware of their rights: a further depiction of the antagonistic relationship between the State and law centres.

121 LCF, *Equality Through Justice: Annual Report 2006/07* (2007) 4 <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/annual-reviews> accessed 6 September 2021.
122 ibid 6-7.
123 ibid 4.
124 LCF (n 46) 2, 17.
125 ibid.
126 ibid 11.
127 LCN, *Delivering Justice: Transforming Lives* (2009) <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/annual-reviews> accessed 15 September 2021.
128 ibid.
129 ibid 4.
130 NEF Consulting, *The Socio-Economic Value of Law Centres* (2009) 5 <https://www.lawcentres.org.uk/policy-and-media/the-case-for-law-centres> accessed 31 September 2021.
131 ibid 21.
132 ibid.
133 Moore and Newbury (n 3) 28.
134 ibid.
135 Graham Cookson, *Unintended Consequences: The Cost of the Government's Legal Aid Reforms* (King's College London 2011) 6.
136 Hazel Genn, 'Do-it-Yourself Law: Access to Justice and the Challenge of Self-Representation' (2013) 32(4) Civil Justice Quarterly 416.
137 Hynes (n 57) 90.
138 Terry McGuinness, *Changes to Criminal Legal Aid, House of Commons Briefing Paper* (2016, No. 6628) 11.
139 Hynes (n 57) 90.
140 LASPO, 2012, Part 1, Sch 1.
141 Catherine Baksi, 'Civil Legal Aid: Access Denied' (*The Law Society Gazette*, 7 April 2014) <https://www.lawgazette.co.uk/law/civil-legal-aid-access-denied/5040722.article> accessed 13 July 2020.
142 LASPO, 2012, s.10.
143 ICF International, *Funding for Law Centres: Law Centres Network* (2014) 1 <https://www.lawcentres.org.uk/policy-and-media/the-case-for-law-centres> accessed 31 July 2021.

Due to the funding cuts implemented as a result of LASPO 2012, the LCN partnered with several other organisations in a bid to increase their funding efforts.[144] Changes to the Equality and Human Right Commission (EHRC) led to the removal of funding from frontline advice organisations, including 27 law centres which provided legal casework and representation to the public on behalf of the EHRC.[145] Several local authorities also made cuts to their services including funding for law centres amongst other agencies, which left law centres with significantly reduced income.[146]

In 2011, there were 60 law centres, with three that were established that year.[147] Law centres had been awarded legal aid contracts, which increased their case starts by 30 percent.[148] If the State had increased law centres' funding incrementally, they would have been in a better position to meet the demands of those that resided within their localities. The remaining firms/advice centres were massively overstretched. This is corroborated by statistics that demonstrate that between 2007-8 and 2012-13, the level of funding that law centres received decreased from £21.2 to £17.5 million (not all of which came from the Government).[149] The Legal Aid Agency (replacement of the LSC), which remains the current main funder of law centres, provided just £9 million in funding.[150] When considering the fiscal benefits of law centres, it is noteworthy that they deliver benefits worth more than twice the amount for which they are funded (as discussed earlier).[151]

Local authority funding halted most of their grants to law centres following the Comprehensive Funding Review that took place in October 2011.[152] The Labour Party used this opportunity to attack the Conservatives on their abysmal record on access to justice.[153] However, even the New Labour Party's record on access to justice was far from perfect, as discussed in this article. This hostility from the State thwarted the development of law centres.

As law centres dealt with 120,000 cases in 2012-13, demand for them skyrocketed due to cuts in legal aid, reform of local welfare benefits services, an increase in immigration/asylum related problems and an increase in people facing rent arrears and debt.[154] Ironic that demand for them was increasing, yet funding by the State was being cut drastically. By 2013-14, in line with the demands of LASPO 2012 to cut the costs in social welfare law, there was a reduction of 75 percent from the law centre's budget.[155] The Coalition Government's plan was to remove the law centre's reliance on legal aid and to shift this responsibility to charitable trusts, local authorities and other organisations.[156] They were never serious about helping the marginalised/vulnerable/powerless section of the community, and by this time, they had attempted to thwart the development of law centres completely. Yet despite the Conservative Government's plan to withdraw funding, by 2013-14, there were 94 law centres; due to the efforts of the LCF in gaining funding from various organisations-an amazing achievement.[157]

According to a report dated 2014, law centres continued to deliver significant economic impacts and their financial benefits were repeatedly echoed-something that the Conservative Government seems to have ignored.[158] So, the State saved around £500 million in annual costs associated with debt and temporary accommodation. £450 million was saved in costs related to homelessness, etc.[159] £99.8 million was added to tax revenues through creating employment.[160] The importance of the work that law centres did/do has never been doubted. As the years progressed, law centres became increasingly engaged in undertaking work for the most vulnerable section of society and their local communities. In LCN's 2017 report, it was noted that law centres were doing important work for the Grenfell fire tragedy that engulfed the nation.[161] The tragedy took place just on the doorstep of the North Kensington Law Centre, which led to a sharp rise in urgent need from traumatised survivors and the LCF and attracted pro bono support from city law firms.[162] As assistance from legal aid had dropped by 60 percent because of the implementation of LASPO 2012,[163] the role of social justice lawyers became increasingly important in supporting their communities.

A recent article by Bowcott (2019) reported that law centres have halved since 2013-14.[164] A report from LCN dated 2018-19 stipulated that several law centres representing Windrush clients were mainly funded by the National Lottery fund.[165] At such a crucial time, law centres are being compelled to obtain funding from other organisations, given that the State has totally abandoned them. So, by 2019, there were just 47 law centres left in the UK.[166] Only six new law centres have opened since the implementation of LASPO 2012 despite the drastic increase in demand for them.[167]

A report from Law Centres Network dated 2019-20 stipulated that law centres have not decreased dramatically in number despite the difficulties law centres faced over the years.[168] Due to the loss of legal aid income, many expected law centres to close down at a rapid pace, but a fundraising campaign initiated by the LCF raised £4 million

144 LCN, *Forging Lasting Networks: LCN Annual Review 2011-12* (2012) 1 <https://www.lawcentres.org.uk/asset/download/202> accessed 31 July 2021.
145 ibid.
146 LCN (n 145) 1.
147 LCN, *Annual Report 2010/11: Weathering the Storm* (2011) 3, 9 <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/annual-reviews> accessed 31 July 2021.
148 ibid 10.
149 ICF International (n 143) 6-7.
150 ibid.
151 ibid 1.
152 PWC, *Law Centre Report Social Impact Study* (2013) 5 <https://www.lawcentres.org.uk/policy-and-media/the-case-for-law-centres> accessed 18 October 2021.
153 The Low Commission, *Getting it Right in Social Welfare Law: The Low Commission's follow-up report* (2015) 15-6 <https://www.lag.org.uk/about-us/policy/the-low-commission-200551> accessed 12 July 2021.
154 Joseph Rowntree Foundation, *Monitoring Poverty and Social Exclusion* (2013) <https://www.jrf.org.uk/report/monitoring-poverty-and-social-exclusion-2013> accessed 19 October 2021.
155 ICF International (n 143) 7.
156 ibid 13.
157 Owen Bowcott, 'Legal Advice Centre in England and Wales Halved Since 2013/14' *The Guardian* (London, 15 July 2019) <https://www.theguardian.com/law/2019/jul/15/legal-advice-centres-in-england-and-wales-halved-since-2013-14> accessed 31 July 2021.
158 ICF International (n 143) 1.
159 ibid.
160 ibid.
161 LCN, *Doing Justice: LCN Annual Review 2016-17* (2017) 3 <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/annual-reviews> accessed 8 November 2021.
162 ibid 7.
163 ibid 14.
164 Bowcott (n 157).
165 LCN, *Doing Justice in Dark Times: LCN Annual Review 2018-19* (2019) 1 <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/annual-reviews> accessed 20 September 2021.
166 Bowcott (n 157).
167 LCN (n 165) 7.
168 ibid 3.

in surplus funds.[169] The Conservative Government has also found a way to assist law centres through grant funding to supplement legal aid fees with potential support from the Justice Committees for further grants-in-aid.[170] Law centres have also negotiated a deal with three multi-partner projects with European citizens to support vulnerable European Union citizens following Brexit.[171] In addition, they are also pioneering a new project to address barriers to access to justice for victims of crime whose first language is not English.[172] They have also started paying greater attention to those that have been affected by the COVID-19 pandemic, such as those that may be facing eviction from their homes, workers facing discrimination because of the 'furlough scheme' and redundancy processes, and towards migrants that may need help with healthcare/housing matters.[173] Law centres have expanded their work, demonstrating their resilience to help the most impoverished/vulnerable individuals within their communities. This amazing movement has helped more than 5 million individuals.[174] Law centres are needed more than ever now.

The Importance of Law Centres and Recommendations for the Future

Law Centres have raised the morale of poor people by showing them that the legal system was also their system and by giving them a voice. As they specialise in areas that are neglected, they have had the effect of informing and educating the poorer people about the workings of the legal system, so their existence should be celebrated. They improve the daily lives of the community they work in and defend the legal rights of local people, given the localised knowledge they possess about the difficulties their residents face. They have developed independent, elected management committees, and close links with a range of people and groups in their localities such as children's centres and schools, older people's groups, faith communities, and trade unions with black and Asian minority ethnicities as well as local councils and other agencies.[175] Law centres, most importantly, provide their communities with independent and expert legal assistance that is essential for maintaining the rule of law.[176]

In terms of the recommendations for the future, the State should first devise a clear policy on law centres' functionality and dedicate substantial funds to them. These funds should increase every year in correlation with demand and supply requirements. There should further be some division of work between law centres and solicitors as the former have always possessed expertise in poverty law since the very beginning. Most importantly, the relationship between the various interested parties, such as the State, the Law Society and the law centres, should be harmonious as opposed to being antagonistic/hostile.

Conclusion

From this article, it is apparent that there was never a clear policy on how to fund and operate law centres, despite the influence this movement has had in expanding the definitions of services that solicitors may provide. They are at the peril of the Labour and the Conservative Government as well as the Law Society.

The decrease in funding has impacted those that are marginalised and vulnerable as they will not be able to seek assistance from their local law centres. These individuals will simply not be able to enforce their rights and may have to live with the consequences of being defrauded by the State or other individuals. Such individuals already feel voiceless and powerless, and there are links between unresolved legal problems and the increased likelihood of engaging in criminal activity.

It may also mean that many of these vulnerable and marginalised individuals may have to represent themselves in courts or tribunals. This will not only be an insurmountable challenge for the aggrieved applicant but also for the judiciary, given that lay individuals do not understand much of the legal jargon/rules. The concept of local justice is being eroded because one of the main reasons for establishing these centres was that they would advise their communities on their rights and the law given that such centres would be well informed about the legal problems the residents in their communities' face.

The work of law centres is now more important than ever considering the recent cuts to social welfare law by LASPO 2012 and the COVID-19 pandemic. Communities still need access to justice, yet it appears that the State has ignored the importance of law centres. Law centres have empowered clients to handle their own affairs, and this has been thematic throughout the history of this remarkable movement. Law centres generate significant net benefits to the public purse that would be foregone without the funding made available through the Ministry of Justice, local authorities, trusts, foundations and other sources.

169 LCN, *2019/20 Report: Rising to a Formidable Challenge Together* (2020) 3 <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/annual-reviews> accessed 31 July 2021.
170 ibid 5.
171 ibid.
172 ibid 12.
173 ibid 5.
174 ibid 18-9.
175 LCF (n 46) 4.
176 ibid.

The Dawn of the Digital Age is upon us: Is Artificial Intelligence a Substantial Threat to the Law in the Twenty-First Century?

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Introduction

There has been an epochal shift from the traditional industries established by the Industrial Revolution, including hand production methods in machines[1], to a post-Industrial Revolution economy based upon information technology, widely known as the Digital Age.[2] Lord Sales has referred to computational machines as 'transformational due to their mechanical ability to complete tasks…faster than any human could'.[3] The twenty-first century has seen an enhancement in human innovation, and the world of law is being forced to change. Legal practice has become more technology-centric, allowing for law in theory and in practice to keep abreast of society. This article explores how technology, specifically AI, has evolved through the digital age.

Firstly, it will explore how the evolution of AI has warranted a cataclysmic shift in the law. Then, in chapter two, it will illustrate the challenges which AI has posed and which it has the potential to create for the law. In so doing, it will identify how AI could pose a substantial threat to the law. In chapter three, however, solutions to the issues that AI poses will be addressed and analysed.

Undoubtedly, AI can be a substantial threat to the law. Nonetheless, this article aims to illustrate that human creativity must not be underestimated. If used correctly, AI could change how law functions in the twenty-first century for the better. This article explores various theoretical aspects of how AI and the law interact with society, focusing in particular on Lessig's Law of the Horse[4] and the new revelation of the Law of the Zebra.[5] It further treats the concept of technological exceptionalism and how this theory has allowed for the progressive evolution of AI.

McGinnis and Pearce argue that machine intelligence and AI will cause a 'great disruption' in the market for legal services.[6] This article will explore this concept of disruptive innovation, suggesting that the disruption McGinnis and Pearce allude to will be more significant in scale than initially anticipated. It will explore the ethical, moral, and social issues associated with AI, investigating how AI has the potential to pose a problem to the law. As an extension of the moral, social, and ethical issues presented, this article will offer an

1 Yun Hou, Guoping Li, and Aizhu Wu, 'Fourth Industrial Revolution: technological drivers, impacts and coping methods' (2017) 27 Chin. Geogr. Sci. 626–637.

2 Erik Brynjolfsson and Andrew McAfee, *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies* (2nd edn, W W Norton & Company 2016).

3 Lord Sales, 'Algorithms, Artificial Intelligence and the Law' (2020) 25(1) Judicial Review.

4 Lawrence Lessig, 'The Path of Cyberlaw' (1995) 104(7) The Yale Law Journal 1743-1755.

5 Andrea M Matwyshyn, 'The Law of the Zebra' (2013) 28 Berkely Tech LJ 155.

6 John O McGinnis and Russell G Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in The Delivery of Legal Services' (2014) 82(6) Fordham Law Review. See generally Willem Gravett, 'Is the Dawn of the Robot Lawyer upon us? The Fourth Industrial Revolution and the Future of Lawyers' (2020) 23(1) PER / PELJ.

insight into AI's autonomy as regards the law. Finally, the problems of foreseeability and transparency will be discussed in terms of the substantial issues AI poses to the law.

The idea of the robot judge will be addressed, identifying how this could materialise. Its benefits and challenges will subsequently be critically assessed in terms of the threat to legal practice in the twenty-first century. Additionally, the practicalities of the robot judge will be assessed, suggesting that it is an unnecessary fear and a potential gift. As part of chapter two, the idea of AI systems being granted a more respected legal personality will be explored. The arguments presented will allude to the sophistication of current AI technology and issues surrounding liability. The importance of the concept of legal personality will be stressed, demonstrating that society must be cautious as to who is granted legal rights of personhood.

Chapter three will present innovative solutions to the problems assessed in chapter two. This section will set out a detailed model that allows for the comprehension of the legal disruption caused by AI and its associated technologies.

The practice of law is constantly evolving. A wise solution to combat any threats of AI is for humankind to evolve alongside technology and work in tandem to allow the practice of law to become more effective and modern. Traditional society has shown that technology is one of the most significant enablers of positive change. Picker highlights this in his commentary on the agricultural and industrial revolutions, in which similar evolutions occurred.[7] With regard to these, Picker shows that technology has allowed for the 'creation and modification…of international law throughout history'.[8] In line with this, society must reconcile itself with the inevitable changes AI will bring to both law and broader society.

AI and associated technologies are only a threat to the law if those involved in the practice and creation of law allow it. The twenty-first century has induced a wave of innovation. This article will demonstrate that, whilst AI is not the greatest threat to legal practice in the twenty-first century, as Surden has explained, 'knowing the strengths and limitations of AI technology is crucial for the understanding of AI within the law'.[9] If understood correctly, with respect to its creation and subsequent implementation in legal practice and beyond, AI could potentially be the greatest gift to the law through technical understanding, enhanced education, and a new, more flexible legislative framework.

I. The Revolution of AI in the Law

Kronman suggests that law is a non-autonomous discipline, such that human input is required, but other components are just as essential for its functionality.[10] It has become increasingly apparent that technology and AI are crucial parts of this multi-functional composition. Accordingly, this section will explain the evolution of AI from its origins, and critically assess how technology has been used in the practice of law in the twenty-first century.

The law is influenced by changing social norms in society and contributes to broader social structures. The emergence of AI is undoubtedly changing case predictability and the interpretation of legal data. Technology is evolving, and legal-expert systems can be seen as less valuable than the more advanced technologies available in predictive coding and machine learning. This chapter aims to illustrate the development of AI in law and how the future of law could potentially develop.

I.I. AI—Evolution in Legal Practice

The concept of AI is enigmatic.[11] At present, the term has no official legal definition. Russell and Norvig have rightly linked the speculation concerning its capabilities with its lack of precise definition, particularly concerning for a technology so prevalent in society and the law.[12] Following McCarthy, this article will define AI as 'the science and engineering of making intelligent machines, especially intelligent computer programs', as 'related to the similar task of using computers to understand human intelligence'.[13]

Alarie has commented on the power of AI and its ability to provide financial sustainability and productivity.[14] If technology is available to improve how the law is implemented and practised, then it is only natural for it to be utilised. However, there is much trepidation regarding the changes that AI has brought and will continue to bring. The obscurities of AI and its unpredictable nature have led some, such as Leith, to believe that AI is a substantial threat to the law.[15] However, the evolution of AI has also, by those such as Stoskute, been seen to revolutionise the law for the better in terms of both client satisfaction and practice efficiency.[16]

Sergot has been a particularly prominent commentator on AI and the law. He demonstrated that AI could use computational reasoning to interpret statutes through 'Prolog', a coding language.[17] In doing so, he illustrated the application of technical rules and procedures in the interpretation of rules and laws. Sergot's use of Prolog uses computational reasoning to allow letters and words to be numerically processed and, in turn, allows for the interpretation of statutes and other laws.[18] The relationship between letters and numbers allows for rules to be created and conclusions to be drawn.[19] This early use of basic computational methodology can be understood as a prediction of the future impact of AI. Expanding upon Sergot's findings, Susskind's investigation into technology

7 Colin B Picker, 'A View from 40,000 Feet: International Law and the Invisible Hand of Technology' (2001) 232 Cardozo Law Review 149, 156. See generally Ryan Calo, *Robot Law* (1st edn, Edward Elgar Publishing 2016).

8 Picker (n 7).

9 Harry Surden, 'Artificial Intelligence and Law: An Overview' (2019) 35 Ga St U L Rev 1305.

10 Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press of Harvard University Press 1995).

11 See generally; Vivienne Artz, 'How 'intelligent' is artificial intelligence?' (2019) 20(2) Privacy and Data Protection.

12 Peter Norvig and Stuart Russell, *Artificial Intelligence: A Modern Approach* (1st edn, Prentice Hall 1995).

13 John McCarthy, 'What is Artificial Intelligence' (2007) <http://www-formal.stanford.edu/jmc/whatisai/whatisai.html> accessed 8 September 2021.

14 Chay Brooks, Cristian Gherhes, and Tim Vorley, 'Artificial intelligence in the legal sector: pressures and challenges of transformation' (2020) 13(1) Cambridge Journal of Regions, Economy and Society 135-152.

15 Philip Leith, 'The application of AI to law' (1988) 2(1) AI & Soc.

16 Laura Stoskute, 'How Artificial Intelligence Is Transforming the Legal Profession' in Sophia Bhatti and Susanne Chishti (eds), *The LegalTech Book: The Legal Technology Handbook for Investors, Entrepreneurs and FinTech Visionaries* (John Wiley & Sons Inc 2020) 27.

17 Marek Sergot et al, 'The British Nationality Act as a logic program' (1986) 29(5) Commun ACM 370–386.

18 Laurence White and Samir Chopra, *A Legal Theory for Autonomous Artificial Agents* (1st edn, University of Michigan Press 2011); see also ibid.

19 ibid.

and written law promotes the concept of a symbiotic pathway developing between lawyers and technology, allowing the 'digital lawyer' to be conceived.[20] Susskind and Sergot's research thus proves complementary, both symbiotically positioning law and technology as a foreshadowing of the future of the legal practice.

At present, AI's primary use in the law takes the form of legal-expert systems.[21] A legal-expert system is a domain-specific system that employs a particular branch of AI to mimic human decision-making processes in the form of deductive reasoning.[22] Technology is, however, evolving, and legal-expert systems are becoming less valuable than the more advanced technologies available.

It should be noted that AI has the purpose of assisting lawyers and does not have any form of recognisable legal personhood in the court of law. One of the main benefits of AI in the form of legal technology at present is e-discovery, described by Baker as a means of organising complex information centred around a given legal problem.[23] Recent court rulings have shown progression in allowing the use of AI in the court of law, as seen in *Irish Bank Resolution Corporation Limited and Ors vs Sean Quinn and Ors.*[24] In the Irish Bank Resolution Case, the ruling favoured predictive coding to aid in the e-discovery process, whereby the discovery process of document disclosure and predictive coding reduced the documents to 3.1 million by electronic de-duplication processes.[25] Within the Irish Bank Resolution ruling, Fulham J specifically references the paper 'Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review'.[26] This indicates that AI processes can yield superior results as measured by recall, precision, as well as the f-measure.[27] Similarly, in *Pyrrho Investment Limited v MWB Property Limited*, the decision was made that AI benefits legal services.[28] Lawyers must view this technical progression as bettering the practice of law. Whilst the second part of this article identifies substantial challenges AI poses to the law, the following section explores the concept of technological exceptionalism in the sense that AI is not an option but an unavoidable obligation.

I.II. Technological Exceptionalism and the Law

AI has undoubtedly made a substantial impact on the implementation and practice of law, manifesting practically in terms of contract management and data analysis. However, there are concerns from scholars such as Cowls and Floridi surrounding whether AI is negatively impacting how the law is created and implemented.[29] This takes into consideration the theory of technological exceptionalism. Calo has described technological exceptionalism to be 'when [a technology's] introduction into the mainstream requires a systematic change to the law'.[30] This concept aligns with the idea that AI substantially impacts law more than all other areas of regulation, such as social norms, financial markets, and architecture.[31] The creation of new laws and how society interprets existing laws for the facilitation and control of AI is necessary to ensure the maintenance of the Rule of Law. Calo argues that the law is 'catching up with the internet [and AI]'.[32] For instance, the Electronic Communications Privacy Act passed in 1986 interacts poorly with a post-Internet environment in part because of this legislation's assumptions about how communications work.[33]

If this is true, it is arguable that technology and AI could be seen as a substantial threat to the law in the twenty-first century in terms of case prediction and descriptive ability. Suppose the law is catching up with the internet and technology. In that case, there are inadequacies in our current legislative framework, as mentioned by the Committee of Communications in the UK House of Lords.[34] Nonetheless, Davis has argued that although AI can become better than humans at describing and predicting the law, AI will not be able to address the value of judgement about how the law should be interpreted.[35] Lawyers are still needed and are not in any imminent danger of becoming useless in our current day society. Bues and Matthaei have similarly made the case that 'lawyers are needed to process convoluted sets of facts and circumstances...and to consider moral, legal rights and render reasoned opinions.[36] Of greater concern than AI's possible replacement of human lawyers is its regulation. At present, there is no legislative framework to regulate the use of AI.

20 ibid.

21 Richard Susskind, 'Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning' (1986) 49(2) The Modern Law Review 168-194.

22 Johannes Dimyadi et al, 'Maintainable process model driven online legal expert systems' 2019 (27) Artificial Intelligence and Law 93–111.

23 Jamie J Baker, 'Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society' (2018) 69 S C L Rev 557.

24 [2013] IEHC 175.

25 Olayinka Oluwamuyiwa Ojo, 'The Emergence of Artificial Intelligence in Africa and its Impact on the Enjoyment of Human Rights' (2021) 1(1) African Journal of Legal Studies.

26 Irish Bank Resolution Corporation Limited and Ors vs Sean Quinn and Ors [2016] EWHC 256 (Ch). Maura R Grossman, 'Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review' (2011) 17(3) Richmond Journal of Law and Technology.

27 Irish Bank Resolution Corporation Limited and Ors vs Sean Quinn and Ors [2016] EWHC 256 (Ch).

28 ibid.

29 Josh Cowls and Luciano Floridi, 'Prolegomena to a White Paper on Recommendations for the Ethics of AI' (2018) <https://ssrn.com/abstract=3198732> accessed 9 September 2021. See generally Luciano Floridi et al, 'AI4People—An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations' (2018) 28 Minds & Machines 689–707.

30 Quoted in Meg Leta Jones, 'Does technology drive law: the dilemma of technological exceptionalism in cyberlaw' (2018) Journal of Law, Technology & Policy 249, 251. See also Andrew D Selbst, 'Negligence and AI's Human Users' (2020) 100 BU L Rev 1315.

31 Lawrence Lessig, *Code: Version 2.0* (Basic Books 2006).

32 Summary of argument in Jones (n 30) 255.

33 Orin S Kerr, 'The Next Generation Communications Privacy Act' (2014) 162 U. PA. L. Rev 373, 375, 390. See generally Ryan Calo, 'Artificial Intelligence Policy: A Primer and Roadmap' (2017) 51(399) University of California Journal.

34 House of Lords, Select Committee on Communications, 'Regulating in a digital world' (2019) <https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf> accessed 9 September 2021.

35 Joshua Davis, 'Artificial Wisdom? A Potential Limit on AI in Law (and Elsewhere)' (2019) 72(1) Oklahoma Law Review 51-89. See also Susan Morse, 'When Robots Make Legal Mistakes' (2019) 72(1) Oklahoma Law Review.

36 Micha-Manuel Bues and Emilio Matthaei, 'LegalTech on the Rise: Technology Changes Legal Work Behaviours, But Does Not Replace Its Profession' in Kai Jacob, Dierk Schindler, and Roger Strathausen (eds), *Liquid Legal: Transforming Legal into a Business Savvy, Information Enabled and Performance Driven Industry* (Springer 2017) 94.

II. Accelerated Technology in Law—is AI an Insurmountable Threat?

Lyria Bennett Moses demonstrates how new technologies, including AI, are challenging existing laws and how they are practised.[37] This notion of continuous change is unwelcomed by some in legal practice and other industries.[38] Issues associated with AI and emerging technologies within the legal sphere emerge from lack of foreseeability, opacity, and the human inability to compete with AI technology and its computational ability. Huang and Rust have commented on the ongoing human concern of jobs being replaced by AI and technology.[39] 1This chapter will identify the challenges the Digital Age has induced in the law in the twenty-first century. Additionally, it will explore the social and ethical issues legal systems continue to face concerning AI's regulation in terms of autonomy and potential unpredictability.

II.I. AI and Emerging Technologies—Human Replacement?

As chapter one outlined, there have been many developments in legal technology and AI in the twenty-first century. In 2017, the legal technology industry saw an investment of $233 million across 61 countries.[40] Many technological and legal scholars, such as Moses and Susskind, argue that innovation is of paramount importance and that a revolution of legal technology is essential for increased efficiency and productivity in legal practice.[41]

This technical revolution poses risks to the human aspects of the law. Susskind and Susskind have predicted the inevitability of technological unemployment and replacement to come in the legal profession.[42] They suggest that legal practice is about the provision of knowledge, and the technological capabilities of AI can offer this more efficiently than humans.[43] This notion calls to the fore AI's greater capacity to understand and predict law, as opposed to its lesser capacity to interpret and evaluate it. If the Susskinds are correct, then AI could be the most substantial threat to the practice of law in the twenty-first century. McGinnis and Pearce support this view by stressing the 'high value' placed on legal information; if there is greater importance placed on legal information than other more trivial forms of information, then AI technology could replace humans in information finding and analysis.[44] However, if the legal profession takes heed of AI's lower capacity than humans to interpret, create and evaluate the law, then this appears less of an issue.

Nevertheless, there are also many opposing views suggesting that AI could greatly assist the practice of law in the twenty-first century, such as Brescia's proposals around alternative cost-effective access to justice facilitated by technology and the removal of unnecessary human labour when it comes to document review and contract formation.[45] Similarly, Levine, Park, and McCornack argue that AI technology offers superior lie detection and probability prediction services.[46] The following section will assess the challenges and dangers of AI with more autonomically advanced abilities.

II.II. Autonomy and Artificial Intelligence and the Law

One of the main problems with AI is that it can act as an autonomous system beyond human control.[47] This autonomy sets AI aside from all other earlier technologies and causes moral, social, and legal problems. AI now has the potential to drive cars, diagnose diseases, and design buildings. If AI currently can perform complex tasks autonomously, it poses the question of what is next in terms of the digital capabilities of AI, in particular as concerns the metrics of autonomy, foreseeability, and causation.[48]

Foreseeability is the notion of knowing or being able to guess something before it happens.[49] This concept is deemed important in law as it allows new laws to be created before issues occur. However, AI and autonomous technologies pose a substantial threat to the concept of foreseeability. AI first illustrated its ability to think autonomously through a computer program playing a chess game in 1958 and successfully beating a grandmaster in 1997 with IBM's Deep Blue Computer.[50] This example can be seen as a positive technological breakthrough for AI and its autonomy to make decisions without human input. However, there is also clear risk involved regarding how else this technology could be used.

This notion of autonomy creates barriers in terms of foreseeability. Autonomy is difficult to manage and control. This autonomy could be interpreted as a potential issue in the law if AI is used in the same manner. In law, the issue is not the newly apparent creative nature of AI but the lack of foreseeability. In the aforementioned example, the system's actions were unprecedented and unforeseeable. As Calo notes, 'truly novel affordances tend to invite re-examination of how we live'.[51] AI in the Digital Age is a novel affordance, which promotes high-risk novel affordances. The lack of foreseeability forces a need to look closely at AI from a legal perspective as a preventative measure to protect the Rule of Law. In terms of law, issues could be found in unjust case predictions, as AI systems have

37 Lyria Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep Up With Technological Change' (2007) 21 University of New South Wales Faculty of Law Research Series <http://www.austlii.edu.au/au/journals/UNSWLRS/2007/21.html> accessed 3 July 2018.

38 Adrian Zuckerman, 'Artificial intelligence – implications for the legal profession, adversarial process and rule of law' (2020) 136(1) Law Quarterly Review 427-453.

39 Ming-Hui Huang and Roland T Rust, 'The Service Revolution and the Transformation of Marketing Science' (2014) 33(2) Marketing Science 206–221.

40 The Law Society, 'Horizon Scanning: Artificial Intelligence and the Legal Profession' (2018) <https://www.lawsociety.org.uk/topics/research/ai-artificial-intelligence-and-the-legal-profession> accessed 9 September 2021.

41 Daniel Susskind and Richard Susskind, *The Future of the Professions* (Oxford University Press 2015).

42 ibid.

43 ibid.

44 McGinnis and Pearce (n 6) 3041.

45 Raymond Brescia et al, 'Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice' (2015) 78 Alta. L. Rev. 553.

46 Timothy R Levine, Steven A McCornack, and Hee Sun Park, 'Accuracy in detecting truths and lies: Documenting the 'veracity effect'' (1999) 66(2) Communication Monographs 125.

47 Ozlem Ulgen, 'A 'human-centric and lifecycle approach' to legal responsibility for AI' (2021) 26(2) Communications Law 97-108.

48 Matthew Scherer, 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies and Strategies' (2016) 29(2) Harvard Journal of Law and Technology.

49 Legal Information Institute, 'Foreseeability' (*Cornell Law School Website*, August 2021) <https://www.law.cornell.edu/wex/foreseeability> accessed 6 August 2021.

50 Larry Greenemeier, '20 Years after Deep Blue: How AI Has Advanced Since Conquering Chess' (*Scientific American*, 2 June 2017) <https://www.scientificamerican.com/article/20-years-after-deep-blue-how-ai-has-advanced-since-conquering-chess/> accessed 6 August 2021.

51 Ryan Calo, 'Robots in American Law' (2016) <http://ssrn.com/abstract=2737598> accessed 8 September 2021.

no moral compass, and human replacement in the actual practice of law. Although evidence concerning foreseeability is limited in legal practice, there is a potential foreshadowing of substantial risk to legal practice in the twenty-first century.

The idea that AI and associated technologies pose a substantial threat to legal practice may be valid. However, it is crucial to recognise that AI may also be identified as a risk not exclusive to law. Peter Huber has looked critically at the capabilities of AI and suggested that it can be seen as a 'public risk', defined as a 'centrally or mass-produced [threat]…outside the risk bearers direct understanding or control'.[52] Due to the lack of understanding of the abilities of AI, coupled with the challenge of assigning social, legal, or moral responsibility to AI, it could be considered a 'public risk'. Therefore, all humankind must be cognisant of this threat. This article assesses whether AI is a substantial threat to the law in the twenty-first Century. Whilst it is clear there are many risks to the law, one could conversely view the law as the most substantial threat to AI in the twenty-first century. The law provides safeguards to control and regulate the abilities of AI to safeguard society. Nonetheless, whilst the law can offer safeguards in AI regulation, this also poses many challenges within the realm of law, such as the introduction of the 'robot judge'.

II.III. The Robot Judge—A Threat to Law?

Tasks and activities in which humans are superior to computers are becoming 'vanishingly small'.[53] Today, machines perform manual tasks once performed by humans, but they also perform tasks that require thought. Dworkin has spoken about the concept of computer programmes predicting the outcome of cases more effectively than humans. He poses the question of whether, if this happened in the practice of law, it would render lawyers obsolete.[54] If given greater autonomy, AI could lead to legal obsolescence in terms of legal description and prediction.[55] Sorensen and Stuart and, later, Moses suggest that AI could lead to the obsolescence of human legal functionality due to the cost-effective nature of AI.[56] This poses a moral issue regarding the Universal Declaration of Human Rights and the International Covenant of Economic, Social and Cultural Rights.[57] These internationally recognised laws convey a premise of secure employment for all its signing members. If AI eventually exceeds human capacity, some jobs will inevitably become obsolete. If the political leaders, scientists, and lawyers do not address this situation of opacity and discretion, then the demise of the human lawyer may become a reality. At present, the answer is unknown. However, Dworkin's question will be applied to the idealisation of the permanent presence of the robot lawyer.

In a study carried out in October 2016 regarding the use of a 'Robot Judge', it was seen that an AI Judge was able to reference 584 cases from the European Court of Human Rights on privacy law.[58] Aletras and Prooticus commented regarding this study on the 70% success rate of accuracy (meaning the correct prediction was made) and instant prediction by this algorithm.[59] Barton has also described this technological move toward the robot lawyer as changing from monotonous criminal defence to intelligent defence.[60] Whilst Barton's comment is exclusive to criminal law, it could also be interpolated to other areas such as human rights, family law, or contract law, posing a more dominant issue if AI systems take over. If society believed that a robot lawyer would offer more accurate predictions and more intelligent case analysis, then perhaps this form of technology could pose the greatest threat to the law in the twenty-first century. However, this threat may be restricted to administrative law. AI machine learning technology performs probabilistic analysis of any given legal dispute using case law precedents. This does not take into consideration evaluative and creative input to judicial decision-making.[61] Attention must also be given to the importance of advocacy and the influence it provides with respect to case outcomes. AI systems could be viewed as immune to human creativity (explored in chapter three). Therefore, the threat may not be as substantial as some, like Huber, perceive it to be.[62]

Scholarly opinion suggests that there is more to legal analysis, judgement, and interpretation than swift computational analysis.[63] Additional challenges associated with the robot lawyer include using human morality to make life-changing decisions in the court of law. Many scholars, including Bogosian, note that the unpredictability and ever-changing nature of the law lends itself to a variety of likelihoods with any given legal issue,[64] for example how criminal law should be enforced. These situations require a sense of moral judgement as to how certain laws should be interpreted. Human judgement is required to analyse the context of a particular case. In the UK, for example, Section 25 of the Offences Against the Person Act 1861 speaks to a jury determining whether the Defendant is guilty or not guilty.[65] Currently, there has not been a robot jury implemented in the UK. This implies that this jury must take human form. Henderson comments on the necessity of humans being involved in the court of the law decision-making process, stating that it is 'intrinsically important to retain a human in the loop'.[66] Nonetheless, technological input could be beneficial in certain legal practice areas.

It could be argued that a robot lawyer might be useful in certain situations of non-contentious law. However, there remains a need for a human lawyer and human jury in more complex areas of law. In this scenario, it is possible that AI and humankind could work collaboratively to make the law more extensive and concise in its practice. This supports the idea that AI is not a substantial threat to law but rather a form of assistance.

52 Scherer (n 48). See also Brandon Perry and Risto Uuk, 'AI Governance and the Policymaking Process: Key Considerations for Reducing AI Risk' (2019) 3(2) Big Data and Cognitive Computing 26.

53 Benjamin Alarie, Anthony Niblett, and Albert Yoon, 'Law in the Future' (2016) 66(4) University of Toronto Law Journal 423-428.

54 Ronald Dworkin, 'Hard Cases' (1975) 88(6) Harvard Law Review.

55 Moses (n 37). See also Jesper B Sørensen and Toby E Stuart, 'Ageing, Obsolescence, and Organisational Innovation' (2000) 45(1) Administrative Science Quarterly 81-112.

56 ibid.

57 ibid.

58 Nikolaos Aletras et al, 'Predicting judicial decisions of the European Court of Human Rights: A Natural Language Processing perspective' (2016) 93(2) PeerJ Computer Science.

59 ibid.

60 Benjamin H Barton and Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books 2017) 89–90.

61 Raffaele Giarda, 'Artificial Intelligence in the administration of justice' (*Lexology*, 12 February 2022) <https://www.lexology.com/library/detail.aspx?g=6aa0d4f0-3f67-4bd1-b352-a6d7b700f9e2> accessed 22 March 2022.

62 Perry and Uuk (n 52) 26.

63 Dworkin (n 54).

64 Kyle Bogosian, 'Implementation of Moral Uncertainty in Intelligent Machines' (2017) 27 Minds & Machines 591–608.

65 Offences Against the Person Act 1861, Section 25.

66 Stephen E Henderson, 'Should Robots Prosecute or Defend?' (2019) 72(1) Oklahoma Law Review.

II.IV. Legal Singularity

Legal singularity is defined as 'AI becom[ing] more…sophisticated, [such that] it will reach a point where AI itself becomes capable of recursive self-improvement. Simply put, technology will learn how to learn'.[67] Singularity in law would entail a world where all legal outcomes are perfectly predictable. In 1993, Vinge predicted that super-intelligence would continue to advance at an incomprehensible rate.[68] Although this is considered valid, the concept of super-intelligence is yet to be achieved by AI. If deep-learning technologies could produce artificial super-intelligence, it would make possible one of Dworkin's most controversial and compelling theories: that there is one correct answer to any legal question.[69] If this theory became a reality, it would be accurate to state that AI poses a substantial threat to the law. However, there remain at present many limitations to AI. Machine learning and AI systems cannot know what patterns or predictions exist outside their training data.[70] Transparency is essential in terms of the design and purpose of AI. This problem concerns the human inability to identify how the software functions. However, this could be combated in the pre-design and post-design development of AI. Humans must learn to comprehend and fully understand the inner workings of AI and technology, in order to minimise the threat to society and the practice of law.

II.V. AI's Legal Personality—Legal Ethics

Legal personality is the crux of any legal system in terms of representation and determination of rights. The idea of an AI machine or algorithm possessing its own legal personhood was first presented by Lawrence Solum in 1992.[71] Solum's rationale for granting this official legal personality was to allow for liability when there is any form of wrongdoing.[72] The arguments in favour of granting AI its own legal personality are typically framed in instrumental terms with comparisons to juridical persons, such as corporations. Implicit in those arguments, or explicit in their illustrations, is the idea that as AI systems approach the point of indistinguishability from humans, they should be entitled to a status comparable to natural persons; this can be seen through the Turing Test.[73] Until early 2017 the idea of granting an AI machine its own form of legal personality was speculative.[74] However, in late 2017 the jurisdiction of Saudi Arabia gave citizenship to a 'humanoid robot' named 'Sophia' in terms of personhood.[75] This was widely seen as a step towards granting machines a more autonomous legal personality. Furthermore, the European Parliament brought forward a resolution to contemplate the establishment of 'legal status…so at least the most sophisticated of robots…[would be] responsible for making good any damages that they may cause'.[76]

As seen in this proposal by the European Parliament and the implementation in Saudi Arabia, the transfer of legal personality to AI machines is clearly possible. However, whether it is ethically and morally correct is a different question. If this became a reality, it would contribute to the narrative that AI could pose a substantial threat to law due to the increased legal power that this would allow AI to incur. AI systems cannot be punished as any human would. Edward, First Baron Thurlow observed in the 18th century regarding corporations that there was 'no soul to be damned, nobody to be kicked'; this statement resonates nowadays in the moral and ethical implications of granting AI legal personality.[77] Lawmakers must be cognisant that human qualities may be ascribed to machines with artificial natural language processing capabilities.[78] There are further concerns regarding AI resembling human attributes because of the lack of understanding of how these qualities originate from humans.[79] To avoid AI being granted excessive legal personhood, it may be appropriate to grant a limited juridical personality to AI in certain scenarios, such as contract law. This would allow AI to be limited in what it can do and enable the law to become more transparent and effective concerning work carried out or decisions made by AI machines.

II.VI. Ethical and Social Issues of AI and the Law

According to Gravett, the practice of law has been 'relatively shielded for the past 50 years'.[80] Subsequently, the ethics, morals, and social implications of law have generally been unchanged due to its protected status.[81] However, it is clear from the unique legal personality AI proposes that there may be newfound ethical, moral, and social issues associated with AI. Arguably, the new world of law will differ significantly from traditional law.[82] According to Johnson, AI has the potential to pose issues concerning its hypothetical ability to kill and launch cyber or nuclear attacks.[83] New regulations that respect the Rule of Law and current legal order

67 Wim de Mulder, 'The legal singularity' (*KU Leuven Centre for IT & IP Law*, 19 November 2020) <https://www.law.kuleuven.be/citip/blog/the-legal-singularity/> accessed 10 August 2021.

68 Vernor Vinge, 'Technological Singularity' (1993) <https://frc.ri.cmu.edu/~hpm/book98/com.ch1/vinge.singularity.html> accessed 6 August 2021

69 Daniel Goldsworthy, 'Dworkin's Dream: Towards a Singularity of Law' (2019) 44 ALT. L.J. 286, 289. See also Robert F Weber, 'Will the "Legal Singularity" Hollow out Law's Normative Core?' (2020) 27 Mich Tech L Rev 97.

70 IBM Cloud Education, 'What is Machine Learning?' (*IBM*, 15 July 2020) <https://www.ibm.com/cloud/learn/machine-learning> accessed 25 August 2021.

71 Lawrence B Solum, 'Legal Personhood for Artificial Intelligences' (1992) 70 NC L Rev 1231. See also Simon Chesterman, 'Artificial intelligence and the limits of legal personality' (2020) 69(4) International & Comparative Law Quarterly 819-844.

72 Solum (n 71).

73 Huma Shah and Kelly Warwick, 'Passing the Turing Test Does Not Mean the End of Humanity' (2016) 8 Cognitive Computation 409–419.

74 Ioannis Kougias and Lambrini Seremeti, 'The Legalhood of Artificial Intelligence: AI Applications as Energy Services' (2021) 3 Journal of Artificial Intelligence and Systems 83–92.

75 Ugo Pagallo, 'Vital, Sophia, and Co.—The Quest for the Legal Personhood of Robots' (2018) 9(9) Information 230.

76 European Parliament Resolution with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) (European Parliament, 16 February 2017), para 59(f).

77 Quoted in Mervyn King, *Public Policy and the Corporation* (Chapman and Hall 1977) 1.

78 Cf. Luisa Damiano and Paul Dumouchel, 'Anthropomorphism in Human–Robot Co-evolution' (2018) 9 Frontiers in Psychology 468; Simon Chesterman, 'Artificial intelligence and the limits of legal personality' (2020) 69(4) International & Comparative Law Quarterly 819-844.

79 Eleanor Bird et al, 'The ethics of artificial intelligence: Issues and initiatives' (2020) <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/634452/EPRS_STU(2020)634452_EN.pdf> accessed 25 August 2021.

80 Gravett (n 6).

81 Geoffrey C Hazard Jr, 'The Future of Legal Ethics' (1991) 100 Yale LJ 1239.

82 Arthur J Cockfield, 'Towards a Law and Technology Theory' (2003) 30 Man LJ 383.

83 James Johnson, 'Artificial intelligence & future warfare: implications for international security' (2019) 35(2) Defence & Security Analysis 147-169.

must be implemented. This concept of new laws will be discussed in the next section in terms of the Law of the Horse and the newly suggested Law of the Zebra.

II.VII. The Law of the Horse or the Law of the Zebra?

The late 1970s saw the beginning of the Digital Age. Legal scholars and technical experts debated whether the internet and the use of technology deserved their own regulation. An example of this can be seen in Easterbrook's early discussion concerning the need to regulate technology.[84] Easterbrook suggested that if a law is created, it should simply be applied to the internet and technology, including AI. How, however, would one know if specific features of pre-existing law were ample to regulate technology? This inspired Lessig's argument that the current legislative framework in place in the UK at the time fell short, which saw him conceive of the 'Law of the Horse'.[85] The Law of the Horse allowed for tech-specific laws to be drafted to narrow the gap in pre-existing laws in terms of technology. A primary example is the Controlling the Assault of Non-Solicited Pornography and Marketing Act in the USA. This Act focuses on the regulation of digital communication, making it more difficult for AI algorithms to send emails without human intervention. While this can address certain issues concerning AI in terms of its autonomy, there has been a movement towards the 'Law of the Zebra': a usurpation of this traditional method, especially in contract law.[86]

The Law of the Zebra has been described as 'an undesirable body of law where technological exceptionalism triumphs over traditional legal paradigms'.[87] With the prevalence of technology in law and broader society, lawmakers risk rendering long standing traditional contract law irrelevant due to its inability to regulate AI. This poses a substantial threat to traditional law in that technology and AI take precedence in the engineering of legislation and how it is practised over conventional black letter law that laid the foundations of our global legal society.[88] The cases of *International Airport Center LLC v Citrin*[89] and *Douglas v US District Court*[90] exemplify the incompatibility of existing laws and the courts favouring technology and amending precedence of traditional contract law. However, Andrea Maywyshyn argues for the notion of 'restrained technological exceptionalism'.[91] The 'Law of the Horse' is necessary; it is essential to restrict technology in its dictation of existing laws. As Maywyshyn states, society must 'maintain the status quo of human relations.[92] Suppose society allows AI not only to change how the law is practised but also change how the law is interpreted. In that case, the threat of AI replacing humans and superseding long standing human thought becomes much higher.

Nonetheless, the 'Law of the Zebra' simply poses a *potential* threat. At present, the 'Law of the Horse' is implemented where required. If AI is addressed at its roots in development and through effective solutions such as regulatory legislation and a legal disruption model, then the benefits of AI may outweigh its apparent risks. The next chapter of this article will signpost and explain solutions to the issues of AI and the law. If humanity embraces AI with an open mind, it is arguable that AI does not pose a threat to the law in the twenty-first century but rather a substantial aid.

III. Solutions—AI and the Law, A Better Future

III.I. Innovation—Solutions to AI and the Law

Chesterman has suggested that instead of AI posing a considerable threat to legal practice, legal and technological innovation will progress in tandem, in line with the previously outlined symbiotic relationship between law and technology.[93] This collaboration will lead to an alternative business model that supports both law and technology.[94] This hybrid revolution has arguably already started. Two universities located in Northern Ireland have recently implemented new postgraduate degrees: namely, Queen's University Belfast with their Law and Technology Postgraduate Course;[95] and the University of Ulster with Corporate Law and Computing.[96] Ciaran O'Kelly stated in association with these new programmes that they are 'designed to prepare [one] for a career on the interface of legal practice and technology'.[97] Using education and developing new skills for our future lawyers, Chesterman may be proven correct if the skills taught in these programmes are implemented to facilitate a smooth transition into a new era of law and technology working in collaboration.[98] Dana Remus further supports this notion of collaboration.[99] Remus suggests that technology is changing the practice of law rather than replacing it. She believes that AI will only impact repetitive tasks that require little thought, such as document review or contract formation. However, Remus' findings are based on the current capabilities of AI. Society has seen huge developments in AI and the practice of law. For instance, a 'Law Geex' study showed that an AI programme could review a Non-Disclosure Agreement with 94% accuracy compared to a human lawyer with 85% accuracy.[100] Although this is impressive, the use of AI for such purposes remains, at present, limited.

Innovation and the creativity of the human mind can allow for solutions to be introduced in the practice and formation of law across the globe. Horowitz has compared AI to historically enabling

84 Frank Easterbrook, 'Cyberspace and the Law of the Horse' (1996) 1(1) University of Chicago Legal Forum.

85 Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 11(2) Harvard Law Review 501-549.

86 Andrea M Matwyshyn, 'The Law of the Zebra' (2013) 28 Berkely Tech LJ 155.

87 ibid.

88 Anna Johnston, 'The ethics of artificial intelligence: start with the law' (*Salinger Privacy*, 19 April 2019) <https://www.salingerprivacy.com.au/2019/04/27/ai-ethics/> accessed 6 August 2021.

89 International Airport Center L.L.C v Citrin F.3d 418, 420 (7th Cir. 2006).

90 Douglas v US District Court 495 F.3d 1062 (9th Cit. 2007).

91 Ryan Calo, Robotics and the Lessons of Cyberlaw' (2014) 103(3) California Law Review.

92 Matwyshyn (n 86).

93 Simon Chesterman, *We, the Robots? Regulating Artificial Intelligence and the Limits of the Law* (Cambridge University Press 2021).

94 Frank Levy and Dana Remus, 'Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law' (2017) 30(3) Georgetown Journal of Legal Ethics.

95 Queen's University Belfast, 'Law and Technology' <https://www.qub.ac.uk/courses/postgraduate-taught/law-technology-llm/#overview> accessed 6 August 2021.

96 University of Ulster, 'Corporate Law and Computing' <https://www.ulster.ac.uk/courses/202122/corporate-law-computing-and-innovation-27258#secsummary> accessed 6 August 2021.

97 Quoted (n 95).

98 Chesterman (n 93).

99 Levy and Remus (n 94). See generally Frank Levy, 'Computers and populism: artificial intelligence, jobs, and politics in the near term' (2018) 34(3) Oxford Review of Economic Policy 393–417.

100 'LawGeex Hits 94% Accuracy in NDA Review vs 85% for Human Lawyers' (*The Artificial Lawyer,* 26 February 2018) <https://www.artificiallawyer.com/2018/02/26/lawgeex-hits-94-accuracy-in-nda-review-vs-85-for-human-lawyers/> accessed 6 August 2021.

technologies, such as internal electricity combustion.[101] Society and lawmakers have learned to regulate these vital 'technologies', making it plausible that the same form of continuous regulation could be implemented with AI. This section aims to pose a solution to some of the challenges previously mentioned, with the aim of demonstrating that AI can be the greatest gift to the practice and interpretation of the law rather than a threat. The possibility of introducing a Legal Disruption Model will be suggested as a solution to any challenges AI and associated technologies pose or have the potential to pose in the future in terms of the creation, interpretation, and implementation of laws. This section will further evaluate the best method of introducing a legislative framework to curtail the challenges associated with AI, namely through the channel of legislative means.

III.II. A New Legislative Framework

It is vital to address both legal scholarship and legal, regulatory responses to AI, addressing problems at their core rather than reactively.[102] The concept of the legal disruption model could be a solution to combat the threat that AI poses to law.[103] This model identifies the most fundamental issues in terms of regulation. AI and its ambiguous and unpredictable nature require new sui generis rules to deal with conduct, application, and implementation issues in the present and the future, making this model highly applicable.[104]

AI is still relatively new, meaning that legislators are still coming to terms with understanding its potential implications and how it should be regulated. At present, the European Commission is trying to push through new legislation concerning the regulation of AI.[105] Legal scholars, such as Susskind, believe that laws, by their very nature, must be technology agnostic to ensure that future technology will still be subject to an overarching legal framework.[106] However, to achieve this, a more in-depth understanding must be achieved. This section explores how a legislative framework could be implemented internationally and nationally to regulate and control AI. Margrethe Vestager, Executive Vice-President for a Europe fit for the Digital Age, has commented regarding AI that 'trust is a must'.[107] New legislation is imperative to ensure this trust is in place. The new AI regulation that the European Commission has posed will ensure the safety of its citizens and will offer proportionate and flexible rules to address the specific risks posed by AI systems.[108] If the European Commission were successful with this legislation, it would ensure that its member states combat the challenges AI poses. This would result in assurances that AI is used safely, benefitting society and the law.

Currently, however, laws being made to combat the issue of AI are reactive and not preventative. If preventative legislative measures were put in place to anticipate the issues posed by AI, then problems would never arise. AI and technology would not have the capacity to be seen as a threat and could be used productively. The issue of 'DeepFakes' (a term coined to describe AI-generated face-swaps in pornography)[109] and the legislation imposed to combat this issue provide an illuminating example. 'DeepFakes' is a technology that uses AI-based algorithms to create and produce online content indistinguishable from that created by a human. To combat 'DeepFakes', domestic law was introduced in China and the USA to impose sanctions for the incorrect use of this Generative Adversarial Network-based technique.[110] For example, in Virginia in the USA, the government incorporated this regulation into state law through the 'DeepFake' Civil Harassment Bill. In China, similar rules and regulations have been imposed to combat this AI-based technology.[111] This is a step in the right direction in terms of curtailing the issues that AI poses to society and the law, demonstrating that this type of issue could be solved in a macrocosmic manner. If this problem was addressed at the preliminary stages of creating this technology and the nexus between AI, the law, and regulation were more comprehensively understood, then it would no longer be an issue in law.

Conclusion—An Issue with Manageable Solutions

The use of AI in creating and implementing the law is arguably endless and could completely transform the twenty-first-century legal landscape. Despite the negative speculation from Dworkin and Moses, AI will fortunately not replace most lawyers' jobs, at least in the short term.[112] However, this article has highlighted some of the most substantial threats to legal practice and legal interpretation in the twenty-first century. These challenges include the idea of AI progressing so far ahead of what the human mind can fathom to possess a level of autonomy that cannot be controlled by legal or technological means.

The idea of the robot judge becoming a reality in twenty-first century legal society has been addressed in detail. However, as illustrated, if developed and maintained correctly and within the desired scope of control and manageability, the robot lawyer is a novelty that could prove useful, rather than threatening, in some aspects of law. The complex newfound 'Law of the Zebra', the prospective issue of legal singularity, has been identified as a key issue that lawyers face

101 Matthijs Maas, 'International Law Does Not Compute: Artificial Intelligence and the Development, Displacement or Destruction of the Global Legal' (201) 20(1) MelbJIIntLaw 29-56.

102 See generally Heike Felzmann et al, 'Towards Transparency by Design for Artificial Intelligence' (2020) 26 Sci Eng Ethics 3333–3361.

103 Hin-Yan Liu et al, 'Artificial intelligence and legal disruption: a new model for analysis' (2020) 12(2) Law, Innovation and Technology.

104 Maas (n 101).

105 See generally European Commission, 'Proposal for a Regulation Of The European Parliament And Of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts' (2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1623335154975&uri=CELEX%3A52021PC0206> accessed 25 August 2021.

106 Susskind and Susskind (n 41).

107 European Commission, 'Europe fit for the Digital Age: Commission proposes new rules and actions for excellence and trust in Artificial Intelligence' (21 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1682> accessed 25 August 2021.

108 ibid.

109 Konstantin Pantersev, 'The Malicious Use of AI-Based DeepFake Technology as the New Threat to Psychological Security and Political Stability' in Hamid Jahankhani and Jaime Ibarra (eds), *Cyber Defence in the Age of AI, Smart Societies and Augmented Humanity* (Springer 2020) 37; See also Adi Robertson, 'Virginia's "Revenge Porn" Laws Now Officially Cover Deepfakes' (*The Verge*, 1 July 2019) <https://www.theverge.com/2019/7/1/20677800/virginia-revenge-porn-deepfakes-nonconsensual-photos-videos-ban-goes-into-effect> accessed 29 July 2021.

110 Liu et al (n 103).

111 Edvinas Meskys et al, 'Regulating Deep Fakes: Legal and Ethical Considerations' (2020) 15(1) Journal of Intellectual Property Law & Practice.

112 Patrick Hayes, 'The Frame Problem and Related Problems in Artificial Intelligence' in Nils J Nilsson and Bonnie Lynn Webber (eds), *Readings in Artificial Intelligence* (Morgan Kaufmann 1981) 223-230.

globally.[113] This has led to the conclusion that areas of traditional black letter law must be maintained. Law has layers of complexity that exceed the comprehension of computational comprehension; this necessitates human input, thought and creativity.

The solutions examined in the latter section of this chapter illustrate that legal practitioners can use AI effectively and allow the law to develop alongside AI. This article has recognised a need for a new conceptual model for understanding legal disruption in the twenty-first century. If an innovative legislative framework was developed and implemented, this could combat any challenges posed by new technologies such as AI.

Human society is bound by cognitive limitations, meaning the law could use AI and its 'brute force calculation speed' to better itself.[114] Whilst factual foreseeability and unforeseen functionality pose a substantial threat, these issues can be overcome by human innovation. In the 1940s, writer and futurologist Isaac Asimov laid down his three laws of robotics.[115] These three laws encompass the concept that technology will not replace lawyers. Still, lawyers who can use and understand technology will replace those who do not, lawyers who act like robots will be replaced by robots, and lawyers who can combine technology and the creativity of the human mind to embrace AI in the twenty-first century will allow the law to develop in the future positively. AI should not be feared but embraced. Future lawyers must be proactive, informed, and educated in all areas of AI to optimise how it can improve the law. AI is arguably not a substantial threat to the law in the twenty-first century if handled accordingly by innovative legislation, education, and an open mind.

113 Hanoch Dagan, 'The Realist Conception of Law' (2007) 57(3) The University of Toronto Law Journal.

114 Yavar Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) 31(2) Harvard Journal of Law and Technology 898-927.

115 Lee McCauley, 'AI Armageddon and the Three Laws of Robotics' (2007) 9(1) Ethics Information Technology 153-164. See also 'The Three Laws of Legal Robotics' (*The Lawyer*, 29 July 2021) <https://www.thelawyer.com/knowledge-bank/white-paper/the-3-laws-of-legal-robotics/> accessed 24 August 2021.

The Cis-normativity of Consent **in Deceptive Sexual Relations**

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Introduction

The criminal law continues to grapple with the concept of 'deceptive sex' and struggles to draw the appropriate parameters around the provisions on consent contained within the Sexual Offences Act 2003 (henceforth, 'the SOA'). Particularly notable in this regard have been cases involving 'gender fraud', wherein the defendant (D) is alleged to have deceived the complainant (V) as to their gender in order to procure sexual relations. This was found to be the case in *R v McNally*[1], where the Court of Appeal held that the sexual nature of the acts was different where the complainant was deliberately deceived by the defendant as to her biological sex; V's freedom to exercise preference over the gender of their sexual partner was removed.[2] V's consent was therefore vitiated. The language used in this case effectively characterises D's failure to disclose gender history as a deliberate deception (writing, *inter alia*, that D 'had lied to [V] for four years'[3]), and acutely raises this issue of consent: in what circumstances will D's inaction be elevated to a finding of deception? As a corollary to this, in what circumstances are deceptions are sufficient to vitiate consent for the purposes of sexual offences? These are the questions with which this article seeks to contend.

They will be addressed in several parts. First, it will be found that the conceptual framework deployed by the courts in these cases, namely the distinction between active deception versus non-disclosure, cannot bear the analytical weight imposed upon it by the factual intricacies of the cases that have arisen thus far, and of those that will invariably arise in the future. The inadequacy of this binary is brought to the fore by *McNally*: the gaps in the court's reasoning are haphazardly filled with cis-normative prejudices that cannot stand against conceptual scrutiny. It will be argued that the term 'deception' (that is, the act of deliberately causing (someone) to believe something that is not true, especially for personal gain) is not only inappropriate when applied to transgender defendants for ontological reasons, but also risks legitimising discrimination towards transgender individuals through the forum of the criminal law. The court's prejudices are often clouded in repeated references to the need to protect the right to sexual autonomy. It is not disputed that this protection is a valid pursuit, however, the over-prioritisation of V's sexual autonomy has led to a conflation of two analytically distinct questions, namely: (1) did V consent? and (2) did D possess a reasonable belief in V's consent? These questions must remain separate such that due weight is given to the competing interests of D in privacy and self-preservation (particularly in cases involving transgender defendants).

Having exposed the inadequacies of the current model, Section 3 investigates a new conceptual framework upon which the law on sexual offences may be built. In this regard, the distinctions made by Matthew Gibson when he distinguishes between 'principal sexual offences' and 'deceptive sexual relations' prove highly instructive.[4] He observes that the latter are often criminalised under 'principal sexual offences', namely rape, sexual or indecent assault etc.[5] In his view, however, this poses a problem for fair labelling as, while deceptive sexual relations are *equally harmful* to a victim's right to sexual autonomy as the relations proscribed by the principal sexual offences, they represent a *different wrong*.[6] He therefore advocates for the creation of separate deceptive sexual offences targeting penetrative and non-penetrative sexual relations.[7] Adopting this bifurcation, the model proposed in this article variegates deceptive sexual relations further into a tripartite taxonomy: relations resulting from an active deception, a passive deception, and a unilateral mistake by V. The courts, having already established that the first of these is sufficient to vitiate consent[8], have left the following task for the present enquiry: distinguishing between a passive deception and a unilateral mistake. It is argued that only the former can vitiate consent, arising *either* when D knowingly exploits a unilateral mistake by V to procure sexual relations, *or* when D is

1 [2013] EWCA Crim 1051.
2 ibid [26].
3 ibid [10].
4 Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40(1) Oxford Journal of Legal Studies 82.
5 ibid 86.
6 ibid.
7 ibid.
8 *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

under an obligation to disclose certain information but fails to do so. As to the former, D's knowledge and opportunism elevates V's unilateral mistake to a passive deception. As to the latter, regarding the circumstances in which such an obligation may be generated, several possibilities are canvassed with a brief discussion about how the law may develop in the future. It is suggested that the materiality of certain facts to V's consent should remain subjectively determined by V, but any obligation to make V aware of facts that may conflict with this materiality is contingent upon D's actual knowledge, or a reasonable expectation that D have knowledge, of such materiality. This model departs from the court's current approach in that it ensures that the expectation of D's knowledge is conditioned not by cis-normative biases, but instead by an objective assessment of the facts and an introduction of the concept of 'justifiability'.

I. Deceptive Sexual Relations

I.I. The current law

Section 76 of the SOA makes reference to deceptive sexual relations by outlining a conclusive presumption according to which consent will be vitiated when D intentionally deceives V as to the nature or the purpose of the relevant act, or intentionally induces consent by impersonating a person known personally to V. Conclusive presumptions operate analogously to a rule of law—that is, they cannot be changed or displaced by reference to additional evidence or argument. Through its judicial treatment, it has been interpreted narrowly with the courts opting to determine the question of consent through the route under section 74, according to which 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'.[9] The way this provision has been interpreted in subsequent cases has developed a practice in the courts of criminalising deceptive sexual relations.

It has long been rejected that a consent-vitiating deception can be implied out of D's non-disclosure, even if that non-disclosure was as to D's HIV status;[10] V's consent here is deemed relevant only to the *act* (that is, to sexual intercourse) but not its *consequences* (that is, any sexually transmissible diseases that D may have passed to V).[11] The courts have been careful, however, to delineate cases of mere non-disclosure from those in which a certain set of facts or a particular state of affairs is material to V's consent with D knowing of this materiality but failing, or indeed refusing, to correct V's mistaken belief in the existence of such facts or to ensure that those state of affairs are maintained. In *Assange v Swedish Prosecution Authority*[12], V made clear that her consent was only forthcoming if D used a condom. The materiality of the use of the condom, coupled with D's knowledge of this materiality and subsequent engagement in sexual relations without heeding this condition, was sufficient to ground a finding of active deception that vitiated V's consent. In *R(F) v DPP*[13], V's consent was only forthcoming on the basis that D would ejaculate outside her body. There was 'evidence that he deliberately ignored the basis of her consent',[14] and as such, V's consent was vitiated. These cases have also been explained as instances of 'conditional consent'; V consented on the basis of a premise that, at the time of the consent, was false. When expounding upon this model, the court in *R(F) v DPP*, somewhat unhelpfully, opined that 'evidence relating to 'choice' and 'freedom' to make any particular choice must be approached in a *broad common sense way*' (emphasis added).[15] Precisely how this 'common sense' approach is to be realised in substance was not clarified by the court, regrettably creating a lacuna that has invited more confusion into the question of criminality for deceptive relations. The issue was raised in an acute form in *R v McNally*.

I.II. *R v McNally*

As a preliminary, this article takes as axiomatic that D at the time was living as a transgender boy. However, gender references to D will use 'she' and 'her' pronouns in order to respect D's identification at trial as a female.

D, a thirteen-year-old, met V (a cis-gender girl), a year younger, through a gaming website. The pair developed an online relationship for three and a half years, throughout which D presented herself as a boy named 'Scott Hill' and used male pronouns. This relationship culminated in several in-person visits, during which D wore a strap-on dildo and engaged in sexual relations (orally and digitally) with V. V's mother later confronted D about her birth sex, leading D to admit that she was biologically female. The facts were somewhat contested, with D claiming that V knew of her gender history throughout their relationship while V denied having any such knowledge. The Court of Appeal held that 'while, in a physical sense, acts of assault of penetration of the vagina were the same whether perpetrated by a male or a female, the sexual nature of such acts is, on any common sense view, different where the complainant was deliberately deceived by a defendant into believing that the latter is male'.[16] V's consent was vitiated under section 74, supporting a conviction for sexual assault by penetration. Several noteworthy elements of the judgment require observation. First, D's acts are characterised as a deliberate (or active) deception as opposed to a non-disclosure. Second, the court relies upon the 'common sense view' alluded to in *R(F)* as a fulcrum to advance this characterisation. The significance of these findings ought not to be understated; they spotlight the fragility of the court's current approach, reveal its cis-normative prejudices, and signal the need for a new conceptual framework. These will be discussed in turn.

I.II.I. Active deception as to gender

The court identified the following factors that contributed to the finding of deliberate deception: D's use of a different last name, the claim that D and V discussed 'getting married and having children',[17] D's gender confusion (particularly in witness statements where D used female pronouns when referring to herself), D telling V that she would '[put] it in'[18] (which V took to mean D's 'penis'), and D's purchase of condoms. In a convincing counter by Alex Sharpe, none of these factors ought to be deemed deceptive if we take transgender identity seriously.[19] Gender identity 'confusion' is common, especially among young transgender people, and should be interpreted not as gender inauthenticity but as part of their navigation through a transphobic world.[20] All of these factors could just as easily point to the authenticity with which D presented herself

9 *R v Jheeta* [2007] EWCA Crim 1699 [24].
10 *R v B* [2007] 1 WLR 1567.
11 ibid [17].
12 *Assange* (n 7).
13 [2014] QB 581.
14 ibid [25].

15 ibid [26].
16 ibid [26].
17 ibid [4].
18 ibid [5].
19 Alex Sharpe, 'Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent' (2014) 3 Crim LR 207, 217 (henceforth, 'Criminalising sexual intimacy').
20 ibid.

as a transgender boy at the time of the events and, in any case, are not conclusive (individually or cumulatively) of D's desire to induce a false belief in V. Indeed, again, on D's account of the facts, D did not know that V was mistaken about D's transgender identity; she claimed that V was aware of D's gender history. To characterise D's acts as a *deliberate* deception therefore seems unsustainable. More generally, the rhetoric of deception that pervades these cases implies a preoccupation with the 'truth', prompting a question about what constitutes the 'truth' for these purposes. The state of affairs to which the criminal law seems to attribute the moral significance of the 'truth' is the defendant's gender history; the transgender defendant's gender presentation, no matter how authentically lived, is deemed a pretence through which the law must see. This view of the 'truth' is contestable on two grounds: first, it deflates the importance of self-determination, and second, it runs the risk of legitimising discrimination against transgender individuals through the forum of the criminal law.

The Foucaultian perspective finds that '[e]ach society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true'.[21] Simplifying this view, the truth is not divorced from power but is a product of it; any truths about gender or sexuality which claim universality and objectivity must be viewed as 'part of a 'truth' game'[22] in which the real victor is power. From this, it may be deduced that what is too readily accepted as the 'truth' behind the transgender defendant's 'deception', namely their biological sex, is not *the* truth, but merely *a* created truth that is conditioned by an engagement in a system of power that privileges the cis-gender individual's conformity to the cultural matrix. The truth is therefore *constructed* and *internalised*, as opposed to *pre-determined*. We have been conditioned to accept the gender binary as *the* truth, which renders the transgender person's departure from it deceptive. Applying the constructivist perspective, Judith Butler uses the concept of performance to describe the phenomenon of gender, arguing that gender, in contrast with sex, is socially and relationally constructed, distinct from the body of the subject.[23] Separating these categories allows for gender to be seen as a performance through which the individual may subjectively determine the expression of their identity rather than as a necessarily cohesive expression of their biological sex. She explains this with such clarity that it is worth quoting in full: '[W]hen the constructed status of gender is theorised as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one' (emphasis in original).[24] Naturality is developed through repetition; the rehearsal of the rules of gender serves to reinforce the connection between gender and sex, thus cementing hetero- and cis-normativity. The transgender identity is thought to be 'untruthful' due to its disruption of these rules. It presents an ontological challenge to the taxonomies of gender and sex, 'evoking complex questions about the construction, deconstruction, and ongoing reconstruction'.[25] These performances, however, ought not to be conflated with masquerades in which the performer hides the 'truth' behind their gender expression. 'There is no gender behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results'.[26] As such, gender is not a fixed universal truth that lies behind a performance; it is simply deemed to be universal due to the power structures that animate and repeat its legitimacy. Instead, the truth is *in* the individual's gender performance. This idea is one that has been scientifically recognised and has gained empirically support from the definition of gender provided by the World Health Organization. It defines gender as 'the characteristics of women, men, girls and boys that are socially constructed'.[27] Further, it makes clear that '[g]ender interacts with but is different from sex, which refers to the different biological and physiological characteristics of females, males and intersex persons … Gender identity refers to a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex at birth'.[28] Clarifying the understanding of gender in this way destabilises the very underpinnings of the *McNally* judgment, and the rhetoric of deception in this area more broadly. If there is no ontological referent against which *the* truth is determined (and instead simply a default normative position to biological sex that has garnered societal acceptance due to repetition and powerful discursive influences), there can be no deception. For precision, this proposition does not seek to exclude the possibility of gender fraud *altogether*. There may be instances in which an individual deliberately projects an identity contrary to one's subjective truth, such as the oft-cited 'man' who pretends to be a woman to gain access to women's bathrooms. This may prompt calls for the potential of a test of 'authenticity' to determine the extent to which a person's self-identified gender is to be recognised, as well as the metric against which deceptive versus non-deceptive fact-patterns can be distinguished. At this juncture, an important preface must be made.

When demanding a test of authenticity, we must be acutely aware that the motivations for doing so may subconsciously, almost surreptitiously, resort to the very narratives that this article seeks to resist. It is worth noting that the narrative of the 'man' attempting to gain access to women's bathrooms is premised on 'earlier feminist anxieties that transgender women would—stealthily, deceptively—infiltrate, commandeer, and 'rape' women- and lesbian-only spaces'.[29] Once it is understood that these anxieties are the same as those which mobilised the racist desire to prevent 'blacks entering white-only bathrooms',[30] we are forced to scrutinise our desire to ask for authenticity: is it truly rooted in the practical need and sincere desire for clarity, or is it simply defaulting to the 'long history of [transgender people] being made suspect',[31] once again assumed as 'counterfeit'[32] until they prove otherwise? This question becomes all the more salient when we recognise that the readiness with which we feel able to develop such tests is not easily transposable to other contexts. There is a general discomfort, for example, to demand the authenticity with which someone identifies with a particular religion—there are no such tests to determine whether someone is 'truly' Christian. Our hesitance to intervene in these matters is indicative of our reluctance to impose a yardstick of 'correctness' in matters of great personal significance and of great

21 Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (The Harvester Press Limited 1980) 131.

22 Alex Sharpe, 'The Ethicality of the Demand for (Trans)parency in Sexual Relations' (2017) 43(2) Australian Feminist Law Journal 161, 167 (henceforth, 'Ethicality').

23 Judith Butler, *Gender Trouble: feminism and the subversion of identity* (first published 1990, Routledge 2006).

24 ibid 9.

25 Sally Hines, *TransForming gender: Transgender practices of identity, intimacy and care* (Bristol University Press, Policy Press 2007) 17.

26 Butler (n 23) 34.

27 Anna Kari, 'Gender and Health' (*World Health Organization*, n.d.) <https://www.who.int/health-topics/gender#tab=tab_1> accessed 7 February 2022.

28 ibid.

29 Joseph J Fischel, *Screw Consent: a better politics of sexual justice* (University of California Press 2019) 99.

30 ibid.

31 ibid.

32 ibid 100.

variation and complexity. In light of the exposition above about the legitimacy of transgender identities, it is important to recognise that the lived gender experiences of transgender individuals are no less significant. This recognition means that the criminal law should be slow to develop stringent tests of authenticity, being sensitive to both the cis-normativity that can underlie such tests and the general social climate that is still unaccepting of transgender identities. Such a climate can prevent the formation of a singular, uniform gender identity narrative against which the court can test all lived realities. This article therefore advocates for a presumption in favour of authenticity, unless it can be shown that the gender identity adopted by the defendant was truly for the purposes of procuring sexual relations. The factors outlined here are listed with caution due to the recognition that gender identity can be experienced in different ways, particularly at the intersections of culture, race, and religion. Nevertheless, the court may look to indications of gender expression, the length of time for which the defendant has lived in a particular gender identity, any expressions of a desire for sex/gender reassignment, and other factors pointing to gender dysphoria. When these factors are applied to the case of *McNally*, it is clear that the findings of deception could plausibly be viewed as expressions of D's authentic gender identity. These include D's gender confusion and D's use of the phrase 'putting it in'. As Sharpe argues, gender confusion is neither uncommon nor surprising particularly among young people who need to negotiate through a transphobic world.[33] Further, many transgender men truly consider a prosthetic device to be their penis.[34]

It is stressed that these factors are not exhaustive and should only be used in the event that there is sufficient evidence to rebut the presumption of authenticity. Ethically speaking, Butler argues that authenticity is ultimately found in the individual: 'we are all ethically bound to recognise another person's declared or enacted sense of sex and/or gender'.[35] Any legal system that purports to take assertions of gender identity seriously must therefore recognise that no relevant gap exists between a transgender person's gender identity and the gender identity that cis-gender people assume. A transgender D, presenting as male, is not deceiving V (who assumes or accepts D's male gender identity) because D's gender identity (as opposed to gender history) ought to be the truth that the court identifies. This is particularly relevant in cases like *McNally* where D's anatomy was never relevant to the acts themselves (that is, oral and digital penetration). A conclusion that a transgender man acts deceptively in circumstances where he asserts his masculinity, either through statements or other aspects of his gender performance, is not only unsustainable in light of the ontological challenges highlighted above, but also serves to undermine the individual's self-determination by indirectly prescribing the acceptability of some gender performances, those which are conveniently consonant with biological sex, while labelling others as deceptive.

This labelling, particularly when done through a forum with the finality and gravity of the criminal law, has the effect of legitimising discrimination against transgender individuals in several ways. First, social theory suggests that labelling contains latent judgments about similarity and difference, as well as of inclusion and exclusion, which subsequently affect the way people understand themselves and others in the organisation of society.[36] In this way, labelling becomes a form of segregation and categorisation. Second, this process is almost always socially rooted, constituting an exercise of power that involves some degree of 'symbolic violence'.[37] This links back to the Foucauldian understanding of truth as power—labels imposed through language and practice simply conceal the domination inherent in our systems.[38] Taken together, the label of 'deliberate deception' imposed upon transgender defendants not only underlines their ostracism from the gender conformity matrix, but also connotes a level of humiliation for their supposed transgression from what is deemed to be morally upright (the cis-gender identity). As highlighted by Allison Moore, '[t]erms like… deception and fraud are hardly imbued with moral integrity'.[39] She adds that these labels create an expectation that transgender defendants disclose their gender history, which 'serves to naturalise and reinforce relations of dominance and subordination in the gender hierarchy'.[40] The cumulative effect of this labelling process is to conceive of any truthful transgender or gender nonconforming defendant as a self-loathing individual who has not only registered prejudice but has also internalised it, readily anticipating that they can never legitimately nor convincingly claim to be the object of a cis-gender individual's desire.[41] After all, if their very identity is deemed to be deceptive, the social climate within which the transgender defendant operates is automatically conditioned by cis-normativity; the label of deception pre-determines the *mens rea* question (requiring that D did not reasonably believe that V consented) and renders it redundant by impliedly establishing that D, a liar, cannot reasonably (in most, if not all, cases) expect V to have consented.

It is particularly concerning when this labelling process is done through the criminal law because conduct is not only condemned as a mere *legal* wrong but also 'as [a *moral*] wrong in a way that should concern those to whom it speaks, and that warrants the further consequences (trial, conviction, and punishment) that it attaches to such conduct' (emphasis added).[42] Indeed, its moral potential means that the criminal law cannot, and should not, shy away from condemning behaviour that has been proven to fall within its scope; it is arguably one of the State's most powerful means through which those who have committed wrongs are called to account. However, when used in contexts where the law may have a part to play in creating the social narrative lived by the people to whom it must respond, it is precisely because of its primacy, its thrust, and its finality, that the criminal law should be slow to reinforce prejudices that other parts of the law seek to eliminate. As Brooks and Thompson highlight, 'the harm suffered arises out of the victim's own intolerance and prejudice, something which the criminal courts ought not to vindicate'.[43] There is a public policy concern here: unlike

33 Sharpe, 'Criminalising sexual intimacy' (n 19) 217.

34 Zowie Davy, *Recognising Transsexuals: Personal, Political and Medicolegal Embodiment* (Ashgate 2011).

35 Cristan Williams, 'Gender Performance: The TransAdvocate Interviews Judith Butler' (*TransAdvocate*, 1 May 2014) <http://www.transadvocate.com/gender-performance-the-transadvocate-interviewsjudith-butler_n_13652.htm> accessed 19 December 2020.

36 Howard Becker, *Outsiders: Studies in the Sociology of Deviance* (first published 1963, Free Press 1977).

37 John Thompson, 'Symbolic Violence: Language and Power in the Writings of Pierre Bordieu' in *Studies in the Theory of Ideology* (Polity Press 1984) 42.

38 ibid.

39 Allison Moore, 'Shame on You: The Role of Shame, Disgust and Humiliation in Media Representations of 'Gender-Fraud' Cases' (2016) 21(2) Sociological Research Online 118, [7.5].

40 ibid.

41 Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) J Crim L 415, 434.

42 RA Duff, 'Responsibility Citizenship and Criminal Law' in Stuart P Green and RA Duff (eds) *Philosophical Foundations of Criminal Law* (OUP 2011) 127.

43 Victoria Brooks and Jack Clayton Thompson, 'Dude Looks Like a Lady: Gender Deception, Consent and Ethics' (2019) 83(4) J Crim L 258, 268.

the intolerance that is readily expressed by the law for instances of racism or sexism, 'if you are a transphobe, the legal message is: assume everybody to be cis-gender and if your unreasonable assumption fails to accord with reality, feel free to channel your sense of outrage through the criminal law'.[44] This is not to underplay any sense of 'outrage' on the part of V, flowing from a sense of being 'misled', but simply an argument that this outrage ought not to be vindicated by the criminal law. Understandably, the criminal law's immense moral capacity means that it is an inappropriate outlet for judicial activism: it must *keep pace* with social norms rather than *lead* them, lest the law becomes unduly moralistic and suffocatingly prescriptive. Instead of aspiring towards norm-generation, therefore, we may settle for its capacity for norm-reflection. However, this does not mean that all aspirations for *positive* norms to be reflected ought to be abandoned. The norms reflected ought not to be those rooted in discrimination and prejudice, seeking to delegitimise, through its labels, certain factions of the very society that it is tasked with regulating. To say that one's 'humanity is a pretence' tells them 'that all social norms are suspended in dealings with them because they are not human'.[45]

I.II.II. The 'common sense' approach: a duty to disclose?

The court in *McNally* cites the 'common sense' approach to claim that the sexual nature of the acts was different by virtue of D's deliberate deception. When scrutinised, however, this justification is not analytically robust, when read in either a broad or a narrow sense. A broad understanding of 'sexual nature', which would follow the approach taken to 'nature' under section 76, would mean that D's deliberate deception led V to believe that a sexual act in which they partook was non-sexual. Axiomatically, this reading of the judgment must be rejected given V's knowledge that the acts were of a sexual nature. A narrow reading of 'sexual nature', one that is perhaps more generous to the judgment, would mean that D's deliberate deception altered the nature of the acts (at least from V's point of view) from being 'heterosexual' to 'homosexual' by virtue of D's (undisclosed) biological gender. This seems to imply that the difference in the acts' 'sexual nature' by virtue of D's deliberate deception is important not wholly because of D's culpability, but because of its incompatibility with V's sexuality. The upshot seems to be that a bisexual V, deceived as they may be, may be said to have consented given that the difference in sexual nature would not be incompatible with their sexuality.[46] For several reasons, this model cannot be correct.

First, the analysis on 'sexual nature' charted by the court conflates two analytically distinct questions: (1) did V consent? and (2) did D possess a reasonable belief as to V's consent? (a question about *mens rea*). The court uses the idea that, from V's perspective, the sexual nature of the acts became different upon her realisation of D's biological gender, which in turn grounds the finding of non-consent. While some may suggest that the sexual nature of the act itself never changes (that is, V is performing an act with an individual who possesses a quality with whom they would not want to engage in acts of such nature), this is not how the court approaches the question. The court explicitly finds that 'the sexual nature of the acts *is … different* where the complainant is deliberately deceived by a defendant into believing that the latter is a male' (emphasis added).[47] This privileges V's *subjective* understanding of the act, which is understandable when determining the answer to question (1) given the need to protect sexual autonomy (an interest explored in more detail in Section 3). However, the court continues to prioritise V's subjective reality when answering question (2). Instead of undertaking a meaningful inquiry into the reasonableness of D's belief, the bulk of the court's analytical labour was expended on the finding of non-consent, which was grounded in an *assumption*, rather than a reasoned conclusion, that D's gender identity was deceptive. By making unsupported references to this deception, cloaked in the language of 'common sense' without further elaboration, the *mens rea* question was rendered hollow by reference to V's subjective reality. Yet it must not be forgotten that D was living authentically as a transgender boy and, on the question of sexual nature, could have conceivably deemed the act as heterosexual. When determining the reasonableness of D's belief, the court failed to recognise that there were two subjective realities at play, the normative hierarchy between them being far from self-evident. As Joseph Fischel identifies, '[s]ubjective feeling is no more but no less exhaustive of gender than any other criterion, not least because gender … is made and remade relationally, not individually'.[48] Here, the deficiencies of the court's distinction are brought forward and the true role of deception is revealed; it is used as an analytical tool to prioritise a characterisation of the acts only as *V* understood them, rather than engaging with how *both* parties may have viewed and experienced the events—an exercise that would have been all the more important in this context given the contested nature of the facts. This is not to undermine any feelings of shame or betrayal felt by V, legitimate as they are, but simply to highlight that the difference in sexual nature was only felt by *V*, rather than objectively as the court seems to suggest. The court finds that '[V] chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the defendant's deception'[49], and halts its analysis here, failing to venture into an enquiry about reasonable belief. Again, although this is understandable in the determination of (non)consent, the primacy of V's sexual autonomy must not be extended to the question of reasonable belief. On question (2), the court privileges the reality lived by V, one that is hetero- and cis-normative, without elaborating upon why, conceptually or doctrinally, this is done and instead retreating into the safety of principle by insisting that this privilege is simply part of the 'common sense' approach.

Second, by focusing on its ability to deprive V of the choice to 'have a sexual encounter with a girl',[50] the rhetoric on deception seems to imply an ability to make a 'straight' choice.[51] To characterise the facts as a *deprivation* is to imply that the right held by V to have a specific sexual encounter, and the resulting harm from the infringement thereof, outweighs any interests in non-disclosure that may be possessed by D, and further, is of such significance that it warrants the intervention of the criminal law. Yet it is trite from cases involving deceptive sexual relations that sexual autonomy is *not* an unlimited right; as Schulhofer rightly observes, '[s]exual autonomy, like every other freedom is necessarily limited by the rights of others'.[52] It is submitted that the harm experienced by

44 Alex Sharpe, 'Sexual Intimacy, Gender Variance, and Criminal Law' (2015) 33(4) Nordic Journal of Human Rights 380, 390.

45 William Ian Miller, *Humiliation And Other Essays on Honor, Social Discomfort and Violence* (Cornell University Press 1993) 165–167.

46 Gavin A Doig, 'Deception as to Gender Vitiates Consent' (2013) 77 J Crim L 464, 467.

47 *McNally* (n 1) [26].

48 Fischel (n 29) 115.

49 *McNally* (n 1) [26].

50 ibid.

51 Brooks and Thompson (n 43) 266.

52 Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998) 99.

V, although legitimate, is culturally conditioned, and ought to be weighed against the normatively and empirically rooted interests possessed by D: D's privacy and self-preservation.[53] For clarity, this is an argument in recognition of D's *interest* in non-disclosure, one that is bolstered by well-established *rights* to privacy and self-preservation. Charles Fried has argued that privacy allows individuals to control the information that they disclose to, or conceal from, others, which in turn has important implications for individual integrity and interpersonal relationships.[54] The absence of this right is harmful because 'to regard ourselves as objects of love, trust, and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions'.[55] Similarly, Thomas Nagel supports the view that privacy is a precondition to individual integrity and development, writing that '[t]he more we are … asked to expose our inner lives, the more the resources available to us in leading those lives will be constrained by the collective norms of the common milieu'.[56] The protection of privacy is thus undergirded by a significant moral concern: intrusion on one's privacy (particularly in the form of demanding the proclamation of one's gender history) damages the individual's ability to engage in relationships *internally* and *externally*, with themselves and with others. The normative importance of this protection is heightened by the empirical reality of transgender individuals. Reports of harassment, assault, and murder of transgender people are ubiquitous.[57] 'Bathroom bills' in several state legislators in countries like the United States,[58] effectively prohibiting transgender people from using the bathroom that aligns with their gender identity, coupled with narrative tropes of 'transgender people as duplicitous',[59] have created an oppressive cultural landscape in which the decision to be reticent about one's gender history begins to garner compassion, or at the very least begins to compete for attention in the consideration of V's sexual autonomy. Some may suggest that, in light of the above, *voluntary disclosure* of one's transgender status may be helpful as it avoids an individual being in a situation where they are harmed by transphobic individuals during sexual relations. In other words, perhaps transgender people are less likely to be the subject of harm if their identity is *communicated prior* to sexual relations rather than *discovered during or after* sexual relations. However, the empirical reality shows that the violence towards transgender people is not by virtue of the *means* through which their identity is discovered, but simply from their status as transgender individuals. The deaths of transgender or gender non-conforming people recorded by the Human Rights Campaign in 2021 were not situated within contexts of sexual encounters; many were fatally shot or violently killed by other means—the perpetrators ranged anywhere from acquaintances, partners or strangers.[60] The suggestion that a voluntary proclamation of transgender identity would alleviate concerns about violence is therefore misplaced. Violence may be, and has been, enacted towards transgender people irrespective of setting, be it public or private, and context, be it sexual or otherwise.

Without seeking to undermine the feelings of V, her harm 'should be understood as constructive disgust in so far as it is socially and culturally contingent'.[61] What was once desire-led sex is retrospectively coloured by V's conditionings of hetero- and cis-normativity. When engaging in the balancing exercise, therefore, it is not automatically obvious that the normatively constructed harm experienced by V ought to establish a finding of deception by D, who possesses compelling countervailing interests in privacy and self-preservation. Once these interests and their legitimacy are brought forward, the lack of scrutiny by the courts in its protection of V's sexual autonomy becomes alarmingly hubristic. As such, the section below seeks to revisit this right and to propose a workable framework that rectifies the deficiencies in the court's approach to deceptive sexual relations.

II. The Search for a New Conceptual Framework

II.I. Revisiting sexual autonomy

The *McNally* judgment's failure to account for the limits of the 'common sense' approach and to highlight when deceptions as to gender would *not* vitiate consent gives de facto trump card status to V's sexual autonomy. The need to protect this right is understandable, given that autonomy is underpinned by the individual's right to self-governance and self-sovereignty. As Joseph Raz has explained, '[t]he ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives'.[62] However, the view advanced by academics such as Jonathan Herring[63] and currently mirrored by the *McNally* model, one in which V's sexual autonomy is, and ought to be, allotted unquestioned primacy above D's potential interests in privacy and self-preservation, is problematic. It characterises V's sexual autonomy as an *absolute* right, at least when juxtaposed against the rights of a transgender D. As Laura-Anne Douglas argues, this hierarchy of rights creates an informational 'right to know' for the purposes of V's sexual autonomy, thus compelling transgender defendants to define and disclose their gender history.[64] Of course, sufficient and relevant knowledge is a reasonable precursor to autonomy as it allows the individual to make an informed choice, which in turn facilitates the individual's freedom of action. Beyond the purposes of seeking to invalidate the transgender person's gender identity, however, it is difficult to see why this 'right to know' is more important in cases with transgender defendants. Again, the preoccupation with biological sex is unjustified when we accept that the gender presentation of the transgender defendant *is* their gender identity. For precision, this is not a suggestion that biological sex can never be material to one's sexual experience. It is simply a clarification that a *default* preoccupation with biological sex intrudes

53 Sharpe, 'Ethicality' (n 22).

54 Charles Fried, 'Privacy' in Ferdinand Shoeman (ed) *Philosophical Dimensions of Privacy* (CUP 1984).

55 ibid 205.

56 Thomas Nagel, 'Concealment and Exposure' (1998) 27(1) Philosophy and Public Affairs 3, 20.

57 Cynthia Lee and Peter Kwan, 'The Trans Panic Defense: Masculinity, Heteronormativity and the Murder of Transgender Women' (2014) 66 Hastings Law Journal 77, 94.

58 Diana Ali, 'The Rise and Fall of the Bathroom Bill: State Legislation Affecting Trans & Gender Non-Binary People' (*NASPA*, 2 April 2019) <https://naspa.org/blog/the-rise-and-fall-of-the-bathroom-bill-state-legislation-affecting-trans-and-gender-non-binary-people> accessed 8 March 2021.

59 Fischel (n 29) 100.

60 HRC Foundation, 'Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021' (*Human Rights Campaign*, n.d.) <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> accessed 7 February 2022.

61 Moore (n 39) [9.7].

62 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon 1986) 369.

63 Jonathan Herring, 'Mistaken Sex' (2005) Crim LR 511.

64 Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: 'gender fraud' or compulsory cisnormativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 Jur Rev 139, 154.

upon the transgender person's right to maintaining the privacy of their gender history.

Further scrutiny is therefore required of the *substance* of the right to sexual autonomy; its content must be adequately explored such that the appropriate boundaries are drawn when determining the scope of criminality. More specifically, this right must be examined in tandem with its relationship to the defendant's conduct. Currently, the court's model relies upon a distinction between active deception and non-disclosure with only the former being sufficient to vitiate consent. As has been revealed throughout this article, this model is inadequate due to its inability to signpost, with sufficient clarity, instances of when the latter is elevated to be an active deception. Again, D in *McNally* never (conclusively) engaged in actively deceptive behaviour: on her account, she was never aware of V's desire to engage in sexual relations specifically with a cis-gender male, and as such, her level of knowledge can be distinguished from the defendants in *Assange* and *R(F)*. In those cases, D was made aware of the materiality of certain facts to V's consent yet proceeded with the act while inducing a belief in V that the conditions central to her consent were heeded. Enveloping the facts of *McNally* into the same label would fail to capture the varying shades of culpability and would likely lead to inconsistency in approach. There is a spectrum of behaviour, across which the appropriate label cannot always be active deception. The sections below will find that there is something that lays between active deception and non-disclosure, namely passive deception, and this is to be kept separate from a unilateral mistake made by V. It is argued that, along with active deception, passive deception can vitiate consent, arising *either* when D knowingly exploits a unilateral mistake by V to procure sexual relations, *or* when D is under an obligation to disclose certain information but fails to do so. As to the former, D's knowledge and opportunism elevates V's unilateral mistake to a passive deception. As to the latter, several approaches are considered below to help determine when an obligation is imposed upon D to disclose information for the purposes of V's sexual autonomy. The discussion below does not seek to offer a complete account of when deception-induced consent will be rendered invalid, and is instead an overview of various approaches that have been explored throughout the literature, with some comment on the best way to proceed in this controversial area.

II.I.I. Positive versus negative sexual autonomy

As mentioned above, this article adopts the distinction identified by Matthew Gibson between 'principal sexual offences' (such as rape, sexual or indecent assault etc) and 'deceptive sexual offences' (such as those in the cases of *Assange*, *R(F)*, and *McNally*). Per Gibson's argument, while deceptive relations are *equally* harmful to a victim's right to sexual autonomy as the relations proscribed by the principal sexual offences, they represent a *different* wrong.[65] The distinct nature of the wrongs in these offences can be elucidated by reference to the *type* of sexual autonomy that is engaged by D's conduct. In principal sexual offences, V is attempting to invoke, or defaulting to a state of, *negative* sexual autonomy.[66] V is unwilling, at the very least, to engage in such relations.[67] This is the case in instances that align with the paradigmatic understanding of rape, namely when there is coercion involved or incapacity on V's part to consent. Understood in this way, negative sexual autonomy is closely linked with the question of *whether* to have sex or engage in sexual relations. As regards the level of knowledge that is required to exercise such autonomy, V does not need all the information about the specific features of the act that is to occur, simply that a *sexual* act is to occur at all.

By contrast, in deceptive sexual relations, V is attempting to exercise both positive *and* negative sexual autonomy. V is willing to pursue those relations subject to a caveat (positive sexual autonomy) while wishing to avoid relations falling outside that caveat (negative sexual autonomy).[68] Positive autonomy involves the individual's right to choose *when*, *how*, and *with whom* to have sexual relations. D's deception harms V's right to positive sexual autonomy by frustrating its progress.[69] Sexual autonomy in the positive sense leads to a more textured understanding of the 'right to know'. Beyond knowing *whether* the act will be sexual, V will need to know more detail about some of the features of the act, D's characteristics, or other circumstances surrounding the relations, in order to make a judgment about whether they fall within the ambit of their caveat. Although deceptive sexual relations may seem more harmful due to their engagement of both positive *and* negative sexual autonomy, violating negative sexual autonomy is much *more* serious than violating than violating its positive counterpart.[70] Negative sexual autonomy allows everyone to resist unwanted sexual encounters altogether whereas positive sexual autonomy, which is only valuable to those wishing to engage in sexual relations, is less conducive to requiring the full force of the criminal law (that is, through labels such as 'rape' or 'sexual assault').[71] The "harm' to an individual from the non-fulfilment of any preferred sexual activity is…simply disappointment'.[72] Conceptualising and tracking sexual autonomy in this way assists in determining the moral and legal significance that ought to attach to D's acts. The next section proposes that deceptive sexual relations should be further variegated into a tripartite taxonomy.

II.II. A taxonomy for categorising deceptive relations

Deception in general may involve 'actions, omissions, as well as words and strategic silences',[73] the intention behind, and result of, which is to cause V to believe something false (X). D knows or believes that X is false, or at least not believe that X is true. Active deception involves a representation by D (either through words or actions) that *induces* a false belief in V, while passive deception requires that D *fail to disclose* a fact where D has an obligation to do so. A unilateral mistake still requires V to hold a false belief but, unlike deception, there can be no causative attribution of this belief to D; unilateral mistake per se does not attract culpability for D. For completeness, this article also takes the view that failing or refusing to correct a unilateral mistake made by V, one that D knows to exist, will also constitute a passive deception. This is not, however, the impetus of the current enquiry. The present task is to determine when D is under an obligation to disclose certain information such that a failure to do so will attract criminality. It is argued that when this obligation is triggered, coupled with D's failure to discharge, V's unilateral mistake is elevated to a passive deception. The question then becomes: in what circumstances is such an obligation generated? Space precludes an in-depth exploration of all

65 Gibson (n 5) 100.
66 ibid 86.
67 ibid.
68 ibid 97.
69 ibid 86.
70 ibid 103.
71 ibid.
72 ibid.
73 Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22(5) Law and Philosophy 393, 400.

perspectives on this matter, but a survey of the literature in this area has produced several possible approaches to this question:

a) There are certain features of sexual relations that are *always* material and therefore *always* need to be disclosed. This equates to an argument that gender history is *always* relevant, and the transgender defendant is *always* under a reciprocal obligation to V's 'right to know'.
b) The materiality of certain facts or features of sexual relations is *subjectively* determined by V, but D's obligation to disclose is contingent on whether this materiality meets an *objective* test of reasonableness.
c) The materiality of certain facts or features of sexual relations is *subjectively* determined by V, but D's knowledge, or the reasonable expectation that D possesses knowledge, of this materiality generates the obligation to make V aware of any dissonance between those facts and the true state of affairs.

These will be discussed in turn.

II.II.I. Implied conditional consent

Amanda Clough is a proponent of the view that gender history is *always* relevant to the question of what V is entitled to know for the purposes of her sexual autonomy.[74] She argues that the correct analytical lens to be placed on a case like *McNally* is one that views it as a case of implied conditional consent, rather than as a case of deception as to biology. V consents to 'what they think is a sexual encounter in line with their sexual orientation, and this is implicit'.[75] Their partner is then required to 'meet the condition of being a biological gender to fit with the victim's sexual orientation'.[76] If D does not disclose that this condition is not met, V cannot be deemed to have truly consented. Gender, therefore, and its compatibility with one's sexual orientation, is a paramount consideration in, and indeed *always material* to, one's consent to a sexual encounter. With respect, there are several deficiencies in this argument.

First, as explored in Section 2, gender and sexual orientation are not always fixed. They are made and remade reflexively, adjusting to the postures of the individual's negotiation with the world and with their identity. Again, as the World Health Organization notes, '[a]s a social construct, gender varies from society to society and can change over time'.[77] The inherent complexity involved in pinpointing one's gender and sexual identity, let alone in conveying it with sufficient cogence such that others may also comprehend it, risks injecting another slippery concept into what is already a contentious area of the criminal law. Using sexual orientation as the implicit basis upon which consent is premised places an enormous burden on individuals to correctly anticipate the sexual orientation of their potential partner lest their biological gender be incompatible with it. The prudent transgender defendant may of course enquire about this openly, but this comes at the price of exposing themselves to a potential transphobe, and more generally, is not conducive to the spontaneity that often accompanies sexual intimacy. Second, this reasoning serves to reinforce that cis-normativity that is latent in the *McNally* judgment. It effectively forces transgender individuals to disclose what is likely private and highly sensitive information, on the ill-informed assumption that a heterosexual and cis-gender individual would never knowingly engage in sexual relations with them. This assumption is evident throughout Clough's analysis, particularly in her assertion that 'McNally *knew* her victim has made a presumption about biological sex that was essential to her agreement in sexual intercourse' (emphasis added).[78] Again, there is insufficient evidence to ground such an assertion; on D's account, she had no such knowledge about this materiality to V's consent. To claim that she knew is to assume that transgender individuals should *always* know that theirs is a gender identity that cannot be accepted as it is presented, effectively relegating them as inferior versions of cis-gender individuals. Adopting such an approach would sharpen the law's discriminatory potential and would '[fly] in the face of the empirical reality of successful unions between cisgender and transgender people, [rendering] transgender people and their bodies undesirable'.[79]

II.II.II. Reasonable materiality

The difficulties involved in determining which deceptions should count for the purposes of vitiating consent have led some academics to propose a model in which the law, rather than the individual, prescribes the legitimacy of V's 'deal-breakers'. On this view, V's consent is vitiated only if what is material to their consent would also be material to the *reasonable* person. This standard of reasonableness is justified by the idea that sexual autonomy is not an absolute right; its magnitude 'may be graded, some violations [being] greater than other ones'.[80] Further, the harm to which the criminal law must respond should not be defined by the victim's idiosyncratic perceptions of harm, but rather the set of moral and legal principles that are formed by 'the values assigned by society to specific interests and the magnitude of a setback to those interests'.[81]

Vera Bergelson's approach to reasonable materiality attempts to temper the primacy of V's sexual autonomy by focusing on D's culpability. She explains that any intentional violation of V's rights, with intention being the highest level of culpability, will warrant criminal punishment.[82] Moving the down the spectrum, when D is at fault but does not act intentionally, the amount of the inflicted harm should determine whether D should be held liable.[83] This harm is determined by reference to the types of interests that V possesses. When applied to deceptive sexual relations, she finds that there is no general duty to tell the truth, which in turn means that any obligation to do so would be contingent on the types of interests that are engaged if V is lied to. The greater is the probability that the risk of harm would materialise, and the more important is the jeopardised interest, the stronger is the legal claim not to be lied to about it.[84] This would mean that negligently failing to inform a sexual partner about one's HIV status would attract criminal liability, while negligently failing to provide information about one's age would not.[85] The materiality of the former is objectively reasonable by reference to the harm done to V's *welfare* interests (that is, in physical health), whereas the latter is only likely to infringe upon one of V's specific sexual preferences. She argues that 'since there is

74 Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82(2) J Crim L 178.
75 ibid 189.
76 ibid.
77 Kari (n 27).
78 ibid 190.
79 Sharpe, 'Ethicality' (n 22) 175.
80 Vera Bergelson, 'Sex, Lies and Law: Rethinking Rape-By-Fraud' in Nicola Wake, Chris Ashford and Alan Reed (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016) 161.
81 ibid 162.
82 ibid.
83 ibid 161.
84 ibid 164.
85 ibid 162.

no general legal duty to tell the truth, then…one's grievance relating to the sexual partner's lie may only be derivative': V has a right to be free from physical harm, but there is no *positive* right that V may invoke against a lie about one's age.[86] Although this model offers more nuance than the implied conditional consent model described above, particularly in its ability to tie together the interplay of actor's culpability and the corresponding harm in cases of deceptive sexual relations, it nevertheless poses its own evidentiary and conceptual difficulties.

Beyond having to show that their belief in the existence of a 'deal-breaker' was causally attributable to D, V would also have to show that being induced into such a belief results in a harm that is objectively reasonable or serious. This not only imposes an added evidentiary hurdle upon V, but, in Bergelson's model, is underpinned by an incorrect understanding of how the right to (sexual) autonomy is conceptually understood. In her account, misrepresentations that do not hurt V physically, and instead cause emotional distress or financial and career disappointment, are beyond the proper reach of sex crimes law.[87] Again, this is because lie-induced harms that are not derived from V's existing rights (such as a right not to be harmed physically) cannot fall within the scope of the criminal law. This assumes that the reasonableness of harm must be determined by reference to *physical* consequences that flow from deception (for example, the consequence of pregnancy in cases of condom-related deception). Yet this overlooks precisely the reason that the rhetoric of deception is used in the first place. The moral significance of the term lies not in its ability to capture the physical harm of deception, but in its ability to mirror the *wrong* involved in distorting the choices open to an otherwise autonomous individual and subjecting them to the distress of having their choices taken away. Bergelson's model in turn conceives of V's sexual autonomy in deceptive sexual relations as *derivative* of a right to be protected against the physical consequences of sex, as opposed to a right, deserving of protection *on its own merit*, to be the author of one's choices. To adhere to such an account, one in which the calculus of harm done to V by a deception is externally pre-determined by legal principles, is to deflate *positive* sexual autonomy of its very essence—that is, the ability and freedom to seek out sexual encounters that fall within the ambit of one's desires, while avoiding those that fall beyond its bounds.

II.II.III. Subjective materiality

Although this article rejects Bergelson's reasonable materiality model, it nevertheless shares her desire to return to the fundamentals of the law on sexual offences and to recalibrate the interplay between the victim's *harm* and the defendant's *culpability*. As discussed above, one of the errors in the *McNally* judgment was its failure to disaggregate questions about V's consent and D's *mens rea*. The finding of deception, which (for the reasons stated above) was unsubstantiated, was premised on V's perception of harm, which in turn pre-determined D's lack of reasonable belief (that is, D's culpability). What is proposed here seeks to segregate these questions in order to better track the corresponding levels of harm and culpability in deceptive sexual relations, such that the infringement upon V's sexual autonomy can be properly weighed against the need for the intervention of the criminal law.

Sovereignty-based accounts of consent have explained autonomy as a person's authority to make demands on others and to claim a space of autonomous choice.[88] If D steps on V's foot without voluntary agreement from V, D causes harm to V by failing to recognise V's authority to demand that others do not do so.[89] Consent is therefore the mechanism through which one expresses their demands on others and elects their choices; it is D's destruction of that mechanism, whether through coercion, deception or otherwise, that leads to V's *harm*. To externally determine the validity of what is material to V's consent, often guided by the vagaries of moral intuition, therefore undermines V's inherent authority to make demands about the circumstances or conditions of their sexual encounters. Given this autonomy-based rationale, it is submitted that the validity of V's 'deal-breakers', or the materiality of certain aspects to V's consent, ought to remain subjectively determined by V. Gibson is correct in identifying that 'there is something capricious about dictating the presence (or otherwise) of V's consent according to fluctuating intuitions about the legitimacy of deal-breakers'.[90] Consent must be *harms*-oriented give due weight to V's personal *positive* sexual autonomy, enabling V to *subjectively* define the harm arising from the infringement thereof, and to determine the boundaries of their sexual desire. V is therefore the author of their sexual autonomy. Of course, this subjective approach is allied to allowing 'deal-breakers' that may be intuitively outlandish or downright prejudicial—V may choose to have sexual relations only with individuals who voted for Elizabeth Warren in the Democratic primary, or only with individuals of a particular race. Such an approach is reminiscent of Herring's somewhat all-or-nothing stance on sexual autonomy, when he writes that 'ultimately it is for V to decide with whom to have sex…She is under no duty to supply sexual service to others on a non-discriminatory basis'.[91] While this aligns with the *substance* of V's sovereignty-based sexual autonomy, the position adopted here departs from Herring's view in his assertion that any privacy rights of a transgender person must be subservient to their partner's right of sexual integrity.[92] Again, as mentioned above, this hubristic approach is difficult to defend: feelings of humiliation, shame, or disgust may serve to retrospectively and constructively aggravate the harm felt by V, but may not necessarily reflect the level of culpability that ought to be attributed to the transgender D, given their compelling reasons for non-disclosure.

Although the *content* of V's sexual autonomy must remain personally defined by V, the *exercise* of such autonomy should not be absolute in the eyes of the criminal law. As has been repeated throughout this article, the hamartia of the *McNally* judgment was its privilege of V's autonomy in the question of D's *mens rea*. In finding that D acted deceptively simply by virtue of her authentic gender identity, the court was complacent in its determination of reasonable belief. This inappropriately extends the *exercise* of V's autonomy and superimposes it onto questions about D's culpability. The calculus of harm and culpability was prematurely altered in V's favour. In order to restore balance, the criminal law must ensure that *subjective* questions about V's consent and sexual autonomy (harm) are adequately and robustly tempered against *objective* questions about D's reasonable belief in consent, or the reasonable expectation of knowledge about the materiality to V's consent (culpability). It is submitted that the determination of deception and reasonable belief

86 ibid 164.
87 ibid.

88 Stephen Darwall, 'The Value of Autonomy and Autonomy of the Will' (2006) 116(2) Ethics 263, 267.
89 Tom Walker, 'Consent and Autonomy' in Andreas Müller and Peter Shaber (eds) *The Routledge Handbook of the Ethics of Consent* (Abingdon: Routledge 2018) 137.
90 Gibson (n 5) 98.
91 Jonathan Herring, 'Rape and the Definition of Consent' (2014) 26 National Law School of India Review 62, 71.
92 Herring, 'Mistaken Sex' (n 63).

should include the concept of 'justifiability' in order to illustrate more holistically the picture of D's culpability. What is proposed here does not seek to be a complete or comprehensive account of how the law ought to be developed, but hopes to highlight where the deficiencies of the current approach may be corrected and to provide a starting point for further discussions.

First, any reasonable expectation of D's knowledge about the materiality of V's consent for the purposes of passive deception must be divorced from cis-normative assumptions about sexual intimacy. The law cannot condition the threshold of reasonableness by pointing to the prejudice latent in society and leveraging it to expect that transgender people anticipate their sexual partner's involvement within such prejudice. Any expectation to make reasonable enquiries must be made by reference to the *facts* of the case rather than arbitrary and inevitably ever-changing assumptions about the larger socio-cultural landscape within which they operate. The law would not impose, for the purposes of meeting a reasonableness threshold, an expectation upon a Jewish man to make enquiries about whether his sexual partner is anti-Semitic, let alone label him deceptive simply by virtue of his failure to readily volunteer this information.[93] On the facts, that D was authentically living as a transgender boy means that the only way in which an expectation to disclaim her gender history would arise is through a concession that there is something undesirable in her identity that ought to be prefaced. The court's current standard of reasonableness is therefore cis-normative, which places an enormous and, in this author's opinion, unjust burden upon transgender defendants. As Sharpe cogently argues, '[p]lacing the obligation on transgender people produces a situation where the one who has no problem with his/her identity/body…is required to disclose personal information to the one who has a problem'.[94] The law must therefore remove the 'supererogatory kind of ethical performance' that it seems to demand of transgender people in order to reinvigorate the importance and essence of the *mens rea* element in these offences.[95]

Second, the calculus of culpability when determining passive deception should involve an enquiry into the 'justifiability' of the defendant's actions. The broad view adopted here is that defended by Scanlon, namely that when we claim that an action is wrong, such an action would be one that we could not justify to others on grounds that we could expect them to accept.[96] Although seemingly abstract, what this concept seeks to introduce is not a rigid multi-factor assessment into the morality of a defendant, but instead simply invites the court to consider any reasons that may underlie a defendant's actions (or, in the case of non-disclosure, inaction). For example, when taking cases of undisclosed HIV status, the 'wrongness' or culpability that we may attribute to the defendant's inaction flows from the fact that there are likely many reasons to reject any justification of such conduct. The defendant may invoke stigma as a justification, but this is unlikely to outweigh the victim's harm, both to sexual autonomy and to physical health. In the case of the transgender defendant, as mentioned above, the justifications for non-disclosure ranging from privacy to self-preservation, with both interests being normatively and empirically rooted, are likely to garner acceptability such that the broader image of the defendant's culpability can be illustrated, in turn pointing away from a finding of deception. Such a calculation would not rely on mere moral intuition, but instead on the court's institutional capacity for fact-finding, as well as its well-established ability to weigh relative harms.

When these factors are taken together, it is clear that D in *McNally*, on her account of the facts, was not under an obligation to inform V of her gender history. The authenticity with which she lived as a transgender boy points away from a reasonable expectation of knowledge about V's cis-oriented consent. This, coupled with the justifiability of non-disclosure, means that any inaction would not lead to a finding of passive deception. Put simply, V made a unilateral mistake that should not have been redressed by the criminal law.

Conclusion

McNally was decided incorrectly. This article has argued that the current approach taken in the law of consent in sexual offences failed the defendant through its characterisation of her transgender identity as deceptive. Beyond the lack of sensitivity shown towards the ontological implications of such an identity, the distinction between active deception and non-disclosure has proven insufficient to categorise the types of behaviour to which criminality should attach. This article has proposed that a better form of categorisation would involve, first, separating principal sexual offences from deceptive sexual relations in order to reflect the *type* of sexual autonomy that is engaged, with the former warranting stronger sanction given its gravity, and second, variegating deceptive sexual relations into a tripartite taxonomy, namely, active deception, passive deception, and unilateral mistake. Only active and passive deceptions are sufficient to attract liability. The approach advocated for in this article holds that the *content* of sexual autonomy must remain subjectively defined by V, but its *exercise* must be appropriately circumscribed. This can be done by ensuring that the law refrains from expecting transgender defendants to anticipate transphobia for the purposes of the reasonableness threshold, and by making a meaningful enquiry into the justifiability of D's actions. An over-emphasis on V's harm, likely to be normatively constructed by cis-normativity, has led to oversight on the proper organisation of the legal enquiry that ought to be undertaken in criminal offences. This article has made clear that the question of V's consent (which ought to be *harm*-oriented, to reflect the *subjective* nature of sexual autonomy) must be kept distinct from the question about D's *mens rea* (which ought to be *wrong*-oriented, to adequately capture D's level of culpability). Doing so will bring much-needed clarity to the law on sexual offences, and will ensure that the disturbing reality in which McNally is labelled a sexual predator is never repeated.

93 Sharpe, 'Criminalising sexual intimacy' (n 19) 222.
94 Sharpe, 'Ethicality' (n 22) 170.
95 ibid 178.
96 Thomas M Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 4.

Making Consent Meaningful Again: A Review of the Online 'Consent' Model and Alternative Approaches

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Introduction

From atoms to bits, digital convergence has made science fictions come true.[1] Web, mobile applications, smart homes, and increasingly more digital products have changed the way people interact with the world time and again. However, no matter how much technologies evolve, the 'agree' or 'consent' button is following like a shadow. From the start of this century to date, the 'notice-and-consent' model, as one of the most fundamental methods to protect the users' privacy, still dominates the virtual world.[2]

There are conflicting attitudes towards this long-established 'consent' model. Criticisms towards the consent model are prevalent, while the legislators seem to ignore them.[3] Academics claim the people today can no longer provide a meaningful form of consent,[4] some even say that the current model offers no choice at all.[5] However, this consent model is still at the heart of many data-protection legislations today worldwide,[6] such as the California Consumer Privacy Act 2018 and China's Personal Information Protection Law 2021.

1 Andrew Murray, *Information Technology Law: The Law and Society* (4th edn, Oxford University Press 2019).
2 Alessandro Mantelero, 'The Future of Consumer Data Protection in the E.U. Re-thinking the "Notice and Consent" Paradigm in the New Era of Predictive Analytics' (2014) 30 Computer Law and Security Review 643.
3 Anne Josephine Flanagan, Jen King and Sheila Warren, 'Redesigning Data Privacy: Reimagining Notice and Consent for Human Technology Interaction' (*World Economic Forum*, 2020) <https://www.weforum.org/reports/redesigning-data-privacy-reimagining-notice-consent-for-humantechnology-interaction> accessed 29 November 2020.
4 ibid.
5 Lord Sales, 'Algorithms, Artificial Intelligence and the Law' (2020) 25 Judicial Review 46.
6 Flanagan, King and Warren (n 3).

This essay assesses the status quo of the consent model through the lens of this conflict. It aims to answer two questions: whether the consent model is still a reliable method for privacy protection today? If not, what can be done to bring it back on track? Section II of the essay analyses the two sides of the conflict. Section III then offers suggestions as to how to address problems of the current model summarised in Section II.

I. The Two Sides of the Coin

This section unfolds in two parts. The first part discusses the criticisms of the consent model which are primarily based on the definition of 'valid consent'. The definition, provided by Kim, includes three essential elements: *intentional manifestation of consent*, *knowledge* and *volition/voluntariness*.[7] The second part then considers the causes why, despite the criticisms, legislators still uphold the consent model enthusiastically.

Intentional manifestation of consent

'Intentional manifestation of consent' means the 'reason or purpose for the manifestation of consent is to communicate consent to the act'.[8] However, in the context of online consent, the constantly appearing cookie pop-up windows and agree buttons result in an end-user 'consent fatigue'.[9] This consent fatigue, with the long-winded privacy notices, undermines the original purpose of consent; it only makes people more likely to ignore it.[10] Thus, can clicking the agree button be understood as a well-informed privacy trade-off?

7 Nancy S. Kim, *Consentability: Consent and Its Limits* (Cambridge University Press 2019) 10.
8 ibid.
9 Daniel Susser, 'Notice after Notice-and-Consent: Why Privacy Disclosures Are Valuable Even If Consent Frameworks Aren't' (2019) 9 Journal of Information Policy 37.
10 Flanagan, King and Warren (n 3).

Knowledge

Knowledge to consent means the person must understand what they are consenting to.[11] To conform to this principle, it is necessary that the information is clear and the person has the ability to understand.[12] Nevertheless, the majority of privacy policies today are filled with legal jargon deliberated word by word. They are not something that the average end-user could figure out.[13] More ironically, thanks to the rising complexity of the algorithm, the drafter of the statement or developer of the product even sometimes does not understand the real impacts behind the data processing activities they engaged.[14] The developers in commercial companies may be clear about the input and expected output of those algorithms, but they probably do not know how things are worked inside of the algorithm and what kinds of implications the algorithm may bring. Without accessible information, it is impossible that the users can make meaningful consent.

Volition/Voluntariness

Digital services are tempting people to trade off their privacy for *de facto* benefits. Nowadays, it would sound like nonsense if an email service charged a fee or Facebook and Twitter sent an invoice. It becomes so natural to have a pizza delivered to the door or have a ride ready in minutes by just clicking on a smartphone. These benefits make the consent seem to have *voluntariness.*

Nevertheless, is that a real free choice? Voluntariness requires consideration of the cost of rejection. The wide adoption of the 'take-it-or-leave-it' model results in an either/or situation.[15] Rejecting the contemporary digital service means not merely refusing the convenience it brings but isolating oneself from the digital community and one's generation. Moreover, taking a smart city as an example, refusing to give consent means removing oneself from the entire society.[16] The pressure and coercion[17] of exclusivity only leaves people a 'free' Hobson's choice.[18]

The above criticisms suggest an interim conclusion that the online consent model today fails to achieve all essential elements that could make consent meaningful; in other words, in practice, there is no valid consent at all. However, the reasons why legislators around the world still advocate the consent model are worth considering.
The intuitive reason is that governments themselves also benefit from the consent model to realise projects such as smart cities and state surveillance. However, Susser's work effectively summarises the deeper reasons: 'it's cheap, encourages innovation, and *appeals to individual choice*'.[19] It means that such a 'free-market' approach[20] could help stimulate the economy at a minimal cost and simultaneously create an illusion of respect to individual choices.[21] This is the allure of the consent model, which sounds fair as an acceptable privacy trade-off appearing in the age of digital technology explosion.[22]

Is the consent model still a reliable way to protect individuals' privacy today? Yes and no. It is worth pointing out that the core rationale of the consent model still stands; both advocates and critics of the current model acknowledge the free-market approach that the consent model brings.[23] Even looking back at the criticisms, almost no one is attacking the rationale of the notice-and-consent model; the critics always go after the actual practice. The critics argue that it is impossible to make meaningful consent under information and power asymmetry.[24]

II. Recommendation for a Way Out

Given that the underlying rationale of the current consent model should be upheld, it is necessary to address the problems arising from the actual practice. I propose a solution which consists of three different levels of actions that would fulfil all three essential elements of consent in practice.

Informational Norms

Ben-Shahar and Schneider argue the simplest way to solve the *knowledge* issue is to give people more information.[25] This approach does not aim to train people as legal or computer experts, but to familiarise people with the context.[26] Sloan and Warner's solution, called the 'informational norms', is an efficient way to achieve this. This proposal advocates establishing norms to govern data processing behaviours, so that people would have a reasonable expectation about what parts of their privacy they would trade off for the services, and in what contexts this trade-off scenario is taking place.[27] They used the analogy that it is very natural to understand 'why your pharmacist may inquire about the drugs you are taking, but not about whether you are happy in your marriage' to illustrate the importance of specific contextual knowledge.[28] Through the informational norms, an individual is equipped with the essential *contextual* knowledge to make such decisions regarding the use of their personal data.

I suggest that the data protection authority coordinate with sector associations and non-profit organisations to establish such norms. They should then continue to run awareness campaigns to ensure that the users are well informed and companies to follow the new norms.

Raising the Bar for Consent

In practice, more and more companies are inclined to implement the consent model even if another lawful basis is available to choose. Susser's study points out an important observation that the notice-and-consent model may be adopted as just 'notice-and-waiver'.[29]

11 Kim (n 7).
12 ibid.
13 Helen Nissenbaum, 'A Contextual Approach to Privacy Online' (2011) 140 Daedalus 32.
14 Susser (n 9).
15 Robert H. Sloan and Richard Warner, 'Beyond Notice and Choice: Privacy, Norms, and Consent' (2013) SSRN Electronic Journal <DOI:10.2139/ssrn.2239099> accessed 28 November 2020.
16 Jennifer Cobbe and John Morison, 'Understanding the Smart City: Framing the Challenges for Law and Good Governance' in E Slautsky (ed), *The Conclusions of the Chaire Mutations de l'Action Publique et du Droit Public* (Sciences Po 2018).
17 Flanagan, King and Warren (n 3).
18 Sloan and Warner (n 15).
19 Susser (n 9), my emphasis.
20 Sloan and Warner (n 15).
21 Flanagan, King and Warren (n 3).
22 Sloan and Warner (n 15).
23 Susser (n 9).
24 ibid.
25 Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014).
26 ibid.
27 ibid.
28 ibid.
29 Susser (n 9).

This enables the companies to shield themselves from liability but reserve the inexhaustible potential of the data.[30]A report released by the President's Council of Advisors on Science and Technology of the Obama government states that 'notice and consent fundamentally places the burden of privacy protection on the individual – exactly the opposite of what is usually meant by a "right"'.[31] Furthermore, it leads to consent fatigue. Thus, the second action in the portfolio is to raise the bar for consent usage.

First of all, there should be a clear boycott against the current abuse of consent. For example, if the purpose is as simple as delivering a pizza order, the lawful basis shall simply be 'contract' rather than asking for 'consent'.[32] Second, with establishing of the informational norms, a clearer sector-based legitimate interest justification could be formed. For instance, why not have personalised advertisements to be legitimate interests for those free services (e.g. Gmail)? If one worries about the level of personal data used in the advertisement, this should be addressed by advertising regulations such as the Committee of Advertising Practice code. Such efforts can restore the *manifestation of consent*: this significantly reduces the times of consent scenario the people face, and makes the people aware that if consent is required, it must be something they should pay special attention to.

Meanwhile, these efforts also offer higher certainty for the companies to engage lawful basis of data processing activities other than the consent model, and the companies' legitimate interests can be protected by the sector norms. Therefore, there is no more excuse for the take-it-or-leave-it model to continue to be adopted in so many data processing scenarios.

Fundamental Safety Guard

The last action is a fundamental safety guard. Zuboff,[33] Yeung[34] and others[35] warn people against other risks of privacy infringement embedded in the current consent model, such as fake news, echo chambers and data breaches. Thus, two related actions may be implemented to help form a fundamental safety guard. First, it should be similar to food safety regulations; there should be 'hard boundaries' for data processing activities that protect people from obvious harms.[36] One possible way would be to ban data processing activities, such as targeted political campaigns, which could cause obvious harms to public safety. Setting up a specific standard may be another choice. For example, China's Cybersecurity Law requires all systems which process personal data above a certain amount to pass a mandatory third-party cybersecurity audit.[37] Second, for those potentially high-risk activities, such as processing special categories of personal data, even with explicit consent, the system should log all activities associated and provide justifications of the output. These records would make retrospective/future investigations possible and deter unnecessary activities. Even though the scope of logging function is limited in the Section 62 of the UK Data Protection Act 2018,[38] this function was an example in which such a requirement to log can be implemented. The ultimate goal for the fundamental safety guard is to further shift the privacy protection burden back to companies and governments.

However, there might be one last flaw in the foregoing three-levels solution, which is that it seems only applicable to private sectors. Indeed, it would be hard for any actions in the solution to restrict the power of the state. In that case, I suggest introducing a data trust[39] to deal with state-level data processing. An independent data trust which represents the collective citizens, authorised by the people, could be an efficient channel to fill the gap in the information and power asymmetry between an individual citizen and the state.[40] The pilot projects conducted by the Open Data Institute are excellent examples.[41]

Conclusion

It is worth emphasising that the core rationale of the consent model is still valid. The issue today is that the people's knowledge can no longer catch up with the explosive growth in technology. Meanwhile, the organisations and governments are circumventing their due responsibilities by abusing the consent model.

The solution proposed in Section III restores the validity of the three essential consent elements. For the private sector, the core strategy is to reduce the unnecessary use of consent by diversifying its legal instruments. The informational norms establish the *knowledge* of the public and facilitate the public's understanding of different sectors' legal interests. *Raising the bar of consent* mitigates fatigue to reinforce the *intentional manifestation of consent*. These two actions are more effective alternatives to the take-it-or-leave-it model, which makes real *voluntariness* possible. Moreover, this combination could also help address the new emerging challenges such as the Internet-of-Things, which does not offer the chance for privacy statements to be presented in advance. Finally, the fundamental safety guard offers an extra protection to reassure the public that they are protected from obvious harms, which plays a crucial role in re-establishing public trust and confidence in the data protection legislation. For the public sector, an independent data trust could draw the power asymmetries back into balance.

The solution to the dilemma is not a full abandonment of the consent model; this would not help. Instead, the real way out is to fully realise the advantages of the consent model through concrete and realistic implementation pathways and thereby make consent meaningful again.

30 ibid.

31 PCAST, *Report to The President – Big Data and Privacy: A Technological Perspective* (PCAST 2014) 38.

32 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (hereinafter referred as 'GDPR').

33 Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (PublicAffairs 2019).

34 Karen Yeung, 'Five Fears About Mass Predictive Personalisation in an Age of Surveillance Capitalism' (2018) SSRN Electronic Journal <https://ssrn.com/abstract=3266800> accessed 28 November 2020.

35 See e.g. Kathleen M. Kuehn and Leon A. Salter, 'Assessing Digital Threats to Democracy, and Workable Solutions' (2020) 14 International Journal of Communication 2589.

36 Susser (n 9).

37 China Cybersecurity Law 2017, art 21.

38 Data Protection Act 2018, s 62(1).

39 Bianca Wylie and Sean McDonald, 'What Is a Data Trust?' (*Centre for International Governance Innovation,* 2018) <https://www.cigionline.org/articles/what-data-trust> accessed 28 November 2020.

40 Anouk Ruhaak, 'Data Trusts: What Are They and How Do They Work?' (*RSA* 2020) <https://www.thersa.org/blog/2020/06/data-trusts-protection?gclid=Cj0KCQiAh4j-BRCsARIsAGeV12CL1qnJPUAxOHc7ROKhlid5xQHrgKbQSAtS6XdINfwadAkjAeScWf4aAuz0EALw_wcB> accessed 23 November 2020.

41 The ODI, *Data trusts: Lessons from Three Pilots,* (ODI 2019).

Making the Law 'Take its Own Course'

Jyoti Punwani

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Does the law take its own course or is it *made* to take a certain course? Property cases are notorious for taking forever, but when the crime is murder, i.e., when the state is the prosecutor, and the facts of the case have been ascertained by the most reliable authorities, can justice elude the victim's families for as long as two or three decades? Or is it made to do so?

These questions arise from the way two cases—which should have been front page news but have simply disappeared from the public consciousness—have developed.

I. When protectors become predators

On 9 January 1993, when Mumbai was in the grip of the second wave of communal riots sparked off by the demolition of the Babri Masjid[1], eight Muslims were shot dead by the police inside the Suleman Usman Bakery and the adjacent madrasa (an Islamic school) in the city's old Muslim quarter.

The trial of those policemen is still on—over 29 years later.

If there was ever a case that can be described as an 'orphan', this is it. Nobody is interested in it. Those most affected by the incident—the victims' families—are either unaware of or indifferent to the legal proceedings. The whereabouts of only one of the eight affected families is known: Abdullah Qasim, the son of one of the victims, is now a middle-aged school teacher with a family in Mumbai. The fire within, that propelled him as a 20-year-old to intervene in the initial stages of the case, is seemingly gone. Believing that the killers of his father will never be punished, his involvement is limited to appearing in court when summoned as a witness. He has already done so five times in the space of a year, taking leave from work each time—but every time, his turn to depose hasn't come.

For the Public Prosecutors (PPs) that have handled the case through the years, the tattered, yellowing files present an unpleasant, thankless duty; for the defence, the longer it is delayed, the lower the chances of their clients being brought to book. And for judges, the fact that the case is still pending, almost three decades after the incident at its centre, remains an enigma.

'*Kasla case ahey*? (What's this case about?)'. This question, asked with irritation by every new judge (the case record shows it's meandered through at least 11 courts and 13 judges so far), is like a stab through the heart. If only they knew the words used by a sitting High Court judge to describe the incident! 'The police behaved in a manner not becoming of a police force of a civilised, democratic state', concluded Justice B N Srikrishna, heading the one-man judicial commission of inquiry into Mumbai's post-Babri Masjid demolition riots of December 1992 and January 1993.[2]

I have, in my capacity as a journalist, followed this case from the time it was filed, i.e., since 2001. The detailed descriptions of the incident that I had read earlier, in the Srikrishna Commission's records, remain like vivid images in my brain. Had those descriptions been reported in the mainstream media, the victims' families may have got

1 On 6 December 1992, the Babri Masjid, a 463-year-old mosque in Ayodhya, Uttar Pradesh, was demolished by supporters of the Hindu supremacist organisation the Rashtriya Swayamsevak Sangh (RSS), as security forces looked on. The demolition resulted in communal violence in various cities, the worst affected being Mumbai. The demolition was the culmination of a 7-year-long campaign by the RSS and its various affiliates, including its political wing, the Bharatiya Janata Party (BJP – which currently rules at the Centre). The campaign propagated the belief that the mosque had been built by the first Mughal emperor of India, Babar, on the exact site where the Hindu deity Ram was born, and that it was built after demolishing a Ram temple. In its judgement on the dispute in 2019, the Supreme Court found no evidence of the mosque having been built after demolishing a temple. Then BJP president L K Advani described the Ayodhya movement, which abused Indian Muslims as 'children of Babar', as an assertion of 'cultural nationalism', thereby equating a Hindu deity and Hinduism with the nation, and challenging the concept of secularism guaranteed in the Indian Constitution. That phase was the forerunner to the majoritarian politics that dominates today. The communal campaign helped the BJP increase its tally from 2 Members of Parliament in 1984 to 85 MPs in 1989 and 120 in 1991.

2 Justice B N Srikrishna, 'Volume II: The Evidence' (The Srikrishna Commission 1998) <https://www.sabrang.com/srikrish/vol2.htm> accessed 12 June 2022.

the justice they deserve. Alas, the proceedings of the Commission did not get the media coverage they deserved.[3]

Hence, what's prevailed in the media and the public consciousness is the police's narrative: that when the city was in the grip of communal riots, the police had no option but to raid the Suleman Usman Bakery in response to an SOS about AK-47-wielding terrorists firing at them from the rooftop. The fact that no terrorist, no AK-47, indeed, no firearm was recovered, and no policeman was injured (either before or during the raid) has been ignored.

This narrative has prevailed even in the Supreme Court, which upheld the discharge of 9 of the 18 policemen accused of murder for this raid, including the senior officer who led it, then Joint Commissioner of Police Ram Dev Tyagi, who later became Mumbai's Commissioner of Police.

In 2003, a trial court accepted Tyagi's argument that he had merely done his duty by responding to the SOS. Moreover, he had told his squad to use minimum force, and himself had neither entered the bakery, nor fired a single shot. Eight of his colleagues were also discharged because it was proved that they had not fired at all.

This reasoning was upheld by the Bombay (Bombay High Court has NOT changed its name) High Court in 2009 and finally by the apex court in 2011, thus freeing these policemen from the burden of standing trial for an operation executed by them that left 8 unarmed people dead.

Their nine colleagues were, however, not discharged, and continue to stand trial. (Two have died.) The trial court found that these nine were the ones who had actually fired during the raid, and hence they should be tried for murder.

There was ample evidence that the firing had been accompanied by assaults on the civilians within the bakery and madrasa, but the charges against the policemen did not include assault.

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Was this discharge simply a matter of the law taking its own course? Not quite. This was in fact the best the Maharashtra government[4] could achieve in its efforts to protect these policemen. Left to themselves, no administration in India would have prosecuted them. When Justice B N Srikrishna submitted his report in February 1998, the Maharashtra government was run by the Shiv Sena in coalition with the BJP, both parties who believed in Hindutva.[5] Given that the report indicted leaders of both the Shiv Sena and the BJP, it was no surprise that the government rejected the Report.

The Congress-Nationalist Congress Party (NCP) coalition, which took over the state a year later, had had the implementation of the Srikrishna Commission Report in its manifesto. Yet, it was only after the Chief Justice of India (CJI) pointedly asked the government counsel what action had been taken against Tyagi that the government moved.[6] The CJI was hearing petitions urging implementation of the Srikrishna Commission Report, which had indicted 31 policemen for their conduct during the riots. Tyagi was the senior most of those indicted.

Forced to act, the Maharashtra government appointed a Special Task Force (STF) comprising hand-picked policemen to analyse the Report and act on it. The STF filed a First Information Report (FIR) charging Tyagi and 17 policemen who had participated in the Suleman Usman Bakery raid, with murder.

The media went hysterical. A former Police Commissioner actually being charged with murder for his actions during a time of communal violence! The BJP repeated its recurring charge of 'Muslim appeasement'[7] against the Congress; senior police officers waxed eloquent on 'demoralization'[8] and how the next time there was a riot, no policeman would bother to act.

In all this, the state government kept silent. Indeed, it need not have said anything; it could have just presented to the media the depositions of the survivors of the incident in front of the Srikrishna Commission. The following testimonies would have been in the papers.[9]

A bakery employee told the Commission that, hiding behind a small wall, he heard sounds of firing, saw blood splashing onto the pile of baking trays in the room, people running out onto the terrace.[10] When all was quiet, he peeped out and saw the bakery manager Shamshad, clad in vest and *lungi,* with two commandos pointing their guns at him.

'Shamshad was folding his hands and begging them to excuse him. Then he sat down near the feet of the commandos. One of them kept saying that Shamshad was a Pakistani, while the other said he was a Kashmiri. Shamshad kept saying he was a *bhaiya* from Jaunpur, Uttar Pradesh. One of the commandos said, '*Khaata hai Hindustan ka, gaata hai Pakistan ka.* (You eat India's food, but you sing praises of Pakistan)'.[11]

Two minutes later, the witness heard more firing. Peeping out again, he saw 'Shamshad lying on his side, writhing in pain, blood flowing out and drenching his clothes. He was reciting the *kalma* (the Islamic prayer). After about a minute or two, his voice trailed off and he became quiet'.[12]

3 Jyoti Punwani, 'Delhi police in 2020 and Mumbai police in 1992-93: Why consistent media focus matters' *The Times of India* (Mumbai, 14 October 2021) <https://www.newslaundry.com/2021/10/14/delhi-police-in-2020-and-mumbai-police-in-1992-93-why-consistent-media-focus-matters> accessed 12 June 2022.

4 Mumbai (earlier called Bombay) is a city within the Indian state of Maharashtra. The state has its own government, since India follows the federal structure of governance. This article predominantly focuses on the actions of the Maharashtra state government, therefore 'state government' and 'Maharashtra government' are used interchangeably. Government at the centre will be referred to as 'central government'.

5 The political ideology that equates Hinduism with Indian nationalism and believes that India belongs primarily to the Hindus.

6 As reported to me by the lawyers present at the event.

7 TNN, 'BJP workers protest against Tyagi's arrest' *The Times of India* (Mumbai, 18 August 2001) <https://timesofindia.indiatimes.com/city/mumbai/bjp-workers-protest-against-tyagis-arrest/articleshow/1105208227.cms> accessed 12 June 2022.

8 Nirmal Mishra, 'Tyagi's arrest is darkest chapter in police history' *The Times of India* (Mumbai, 16 August 2001) <https://timesofindia.indiatimes.com/city/mumbai/tyagis-arrest-is-darkest-chapter-in-police-history/articleshow/36270639.cms> accessed 12 June 2022.

9 Jyoti Punwani, *Witnesses Speak: A compilation of evidence produced before the Srikrishna Commission of Inquiry into the December 92 – January 93 Mumbai Riots* (1998) Available online at <http://www.unipune.ac.in/snc/cssh/humanrights/04%20COMMUNAL%20RIOTS/A%20-%20%20ANTI-MUSLIM%20RIOTS/06%20-%20MAHARASHTRA/k.pdf>.

10 ibid.

11 ibid.

12 ibid.

This one testimony would have been enough to silence all those talking about 'appeasement of Muslims'. But there were more: 'Shamshad was shot on the right side of his chest. He fell. Anwar was shot on the left temple. He also fell down and died. Feroz, Jamil and Shabir were all shot down near the water tank on the second terrace', recounted another witness.

All this while, said the witnesses, the police demanded that the people in the bakery show them their weapons.

Unable to find any 'armed terrorists' in the bakery, the police moved to the adjacent madrasa. There, they dragged a disabled elderly teacher, Abul Qasim, out of the room and, according to an eyewitness: 'made an action as if they were trying to throw him down from the second-floor balcony of the madrasa. However, they did not actually throw him down, but pulled him back from the passage and dragged him down the steps to the ground floor. I saw him lying in the courtyard of the masjid with four bullet wounds'.[13] 'The police's main target was our beards', deposed 60-year-old Sadrul Huda, an Arabic teacher. His head was broken and bleeding after the police beat him. He saw Noor ul Huda being kicked on the face when the latter revealed that he was an Arabic teacher.

Wouldn't these testimonies have convinced readers that if this was the police doing their 'duty', they could not go unpunished? Why didn't the Congress-NCP government publish them? Leaving aside Justice Srikrishna's assessment of the raid, why did they at least not publicise what their own Special PP had said about the incident: 'the accused (policemen) abused their authority and misused their power to cause intentional death, without there being any duty to perform or any authority to exercise'. Why did they allow the common Indian (especially the Hindus) to believe the BJP's propaganda that charging policemen with murder was only done to 'appease Muslims'?

Obviously because the government's heart was not in this prosecution. This became clear immediately, in the way they responded to the anticipatory bail application filed by Tyagi to avoid being arrested. Tyagi had by then retired.

Left to themselves, the Congress-NCP government would have left the handling of Tyagi's application to the regular PP, who would have treated it as just another case. But human rights groups pressured the Home Minister into appointing a Special Public Prosecutor (SPP).

The Home Minister then was Chhagan Bhujbal, a believer in the Shiv Sena's Hindutva ideology, even after having left the Sena to join the Congress and later the NCP. When the Commission's Report was tabled in the State Assembly in August 1998, and simultaneously rejected by the Sena-BJP government, Bhujbal was Leader of the (Congress) Opposition in the Assembly. I had asked him then, whether, as leader of the Opposition, he would make the implementation of the Srikrishna Commission Report an issue. 'What! And lose the Hindu vote?' he had retorted.

After the Congress-NCP took over in 1999, activists fighting to get the 31 policemen indicted by the Commission punished, found the Home Minister unresponsive: 'What do you expect?' Bhujbal asked in his characteristic belligerent fashion. 'That I punish every policeman and make the force my enemy?'.[14]

However, in 2001, under public pressure, Bhujbal appointed senior criminal lawyer Pheroze Vakil as SPP to oppose Tyagi's anticipatory bail application. Vakil's impassioned and brilliant arguments ensured that Tyagi's application was rejected. Prima facie this was a case of murder, observed the judge. The Supreme Court refused to intervene when Tyagi appealed.

The same words: 'prima facie, this is a case of murder' were used by the Sessions Court too, where Tyagi filed for regular bail. However, the court was forced to grant him bail, on grounds of parity with his co-accused policemen. To the judge's surprise, the government did not oppose the latter's anticipatory bail applications[15] because, as the SPP stated, they didn't want them to lose their jobs. Had they been arrested, they would have had to be suspended.

Such was the Congress-NCP's concern for cops accused of murder, first by a sitting High Court judge and then by their own specially constituted panel of policemen! Neither Tyagi, nor any of his co-accused, spent even a moment in police or judicial custody.

Given SPP Pheroze Vakil's spectacular oratory against Tyagi, how could the trial court grant the former Commissioner a discharge? Simply because Vakil was kept in the dark about Tyagi and his fellow accused's discharge applications. The regular PP handled them.

The regular PP had once presented an application in court on behalf of Tyagi, the man he was supposed to prosecute. 'Are you representing the accused or the State?' the magistrate had shouted at him.

Thus were the victims of 'cold-blooded murder' by the police (Justice Srikrishna's words) betrayed by those entrusted with protecting them. Any surprise then that the government did not appeal against the discharge? It was left to Maulana Noor ul Huda, whose first encounter with the police was a blow to his head when he opened the door of his madrasa to let them in, to appeal against the discharge all the way to the Supreme Court. Huda carried that scar on his temple till he died.

An ill-tempered man, Huda had refused to get involved in the struggle to book the cops who'd beaten and humiliated him. 'Leave me alone; I have a heart problem', he would tell activists who approached him. But when it dawned on him that Tyagi's discharge meant that the officer who'd changed his life forever would never be tried, he plunged into the legal battle, staying with it till the end, rejecting feelers sent by Tyagi, and advice by mediators to 'compromise'.

'I want to show that we are not powerless, we too have guts', he said. 'History will record that there were people who fought'.[16]

It would have been easy for Huda to give up, or compromise, for he was, all through those years, caught up in another unfair battle. After the raid, he, among 78 people found inside and around the bakery and madrasa, had been taken to the police station and charged with attempt to murder and rioting. For Justice Srikrishna, the police's

13 ibid.

14 TNN, 'A riot that got away' *The Times of India* (Mumbai, 5 August 2007) <https://timesofindia.indiatimes.com/a-riot-that-got-away/articleshow/2256040.cms> accessed 12 June 2022.

15 Anticipatory bail enables an accused to avoid arrest. Regular bail is given to an accused who has been arrested. Tyagi filed for anticipatory bail hoping to avoid arrest. After his application was rejected, arrest became inevitable. So, he got admitted to a hospital and was formally arrested while in hospital. He remained in hospital till he got regular bail.

16 Interview with me.

version of events inspired 'no credence'. For the STF, these charges were 'a got-up document', an attempt by the police 'to justify their firing'. These were the words they used in their FIR against Tyagi. Yet, the government didn't think fit to withdraw this case against the 78.

In 2011, 18 years after the incident, Noor ul Huda and the other 77 accused got their freedom from these bogus charges. Disposing of the discharge application filed by the Maulana and another accused, the High Court said: 'Nothing can be more frightening than when the protector becomes the predator'.

But hardly had Huda savoured his freedom then came the news of the Supreme Court dismissing his appeal and upholding Tyagi's discharge. That shattered him. A year later, Huda passed away.

The trial against those who'd tormented him began in 2019. By then, two of the 18 accused policemen had died. Since then, four different judges have heard the case. While the accused have had the same lawyer defending them from the start, the state has not bothered to appoint an SPP who would be dedicated to this case. Thus, every time the case lands up in a new court, a new PP, totally in the dark about what it's about, has to fight it.

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I remember asking Tyagi to comment on August 6, 1998—the day the Srikrishna Commission Report was tabled—on the Commission's indictment of him, its recommendation of 'strict action' against him. 'This is what the Commission has said', Tyagi had replied coolly. 'Let's see what the government has to say'.

As events have shown, the senior police officer's confidence was not misplaced. In this case, all along, the protector has acted like the predator.

II. When the state subverts a trial

When 27-year-old Khwaja Yunus came home to Parbhani for a Christmas break from his job as a computer engineer in Dubai, his family couldn't have imagined that this would be the last vacation he'd spend with them.

He was holidaying in the hill-station of Chikaldhara when he was arrested on 25 December 2002, for bomb blasts that had taken place 500 km away in a Mumbai bus on December 2. Two people had died in what came to be known as the Ghatkopar blasts, after the suburb in which they took place. Yunus and his 17 co-accused were charged under the Prevention of Terrorist Act (POTA).

On 7 January 2003, the young man was reported to have 'escaped' when the vehicle in which he was being escorted by police to Aurangabad met with an accident.[17] A police complaint was even lodged against him by Assistant Sub Inspector Sachin Vaze, head of his escort party.

Yunus was never seen alive again.

A petition filed by Yunus' father resulted in a court-ordered Criminal Investigation Department (CID) inquiry which concluded that Yunus had been killed in custody. The CID named 14 policemen as responsible. But the state government gave sanction to prosecute only four of them, those who supposedly took him to Aurangabad, with whom he was last seen.

Then began the long legal battle to get the policemen punished. Yunus' father died a year later; his mother Asiya Begum and his brother have been carrying on the fight till today.

In the process, they've found that there's no adversary more powerful than policemen, for they have the full might of the state behind them. This reality was stated in so many words earlier this year by the former SPP appointed for the case.

After the first witness in the trial, Dr Abdul Mateen, a co-accused in the Ghatkopar blast case, testified that he had seen four (other) policemen torturing Yunus till he collapsed, the SPP filed an application asking that these four be added to the list of accused (bringing the total accused to 8 policemen).

Soon after, he was sacked.

In an email to Yunus' lawyer, now part of the court's record, the former SPP wrote about his sacking: 'The disturbing aspect of this case is that some faceless bureaucrat(s) actively connived with the police personnel responsible for causing the death of a person in custody in order to thwart criminal proceedings, and they have successfully managed to cause further delay in an already inordinately delayed trial'.[18]

This one sacking was enough to reveal the government's desire to protect policemen indicted by its own investigative agency for a custodial death. So enraged was the government that it dismissed the SPP without even informing him! He came to know that he had been removed from the case in court, when the regular PP brought the government's resolution sacking him. She even bore a request from the government that the trial be stayed till the Supreme Court heard Asiya Begum's long-pending petition asking that all 14 policemen indicted by the CID be prosecuted. Interestingly, this request had already been made thrice by the 4 policemen who were being prosecuted, and turned down by the trial court.

In his email, the SPP revealed that a caller from the government had sought to find out who had instructed him to file the application asking that the four policemen named by Dr Mateen be made additional accused. He replied that no instructions were received, 'nor were any necessary in view of the clear provisions of the law'.

'Would he withdraw this application if he were to be reinstated?' the former SPP was asked. His answer was one expected of a man whose first loyalty was to his client: 'No'.

That the government's first loyalty was to the indicted policemen was clear even before this sacking. Having allowed only four of the 14 indicted by the CID to be prosecuted, it tried its best to protect them in court by denying their victim a good lawyer.

17 TNN, 'Ghatkopar blast accused escapes' *The Times of India* (Mumbai, 8 January 2003) <https://timesofindia.indiatimes.com/city/pune/ghatkopar-blast-accused-escapes/articleshow/33782672.cms> accessed 12 June 2022

18 Jyoti Punwani, 'Khwaja Yunus custodial death: Ex-special public prosecutor questions state govt's motive' (*Mid-day*, 28 March 2022) <https://www.mid-day.com/mumbai/mumbai-crime-news/article/khwaja-yunus-custodial-death-special-public-prosecutor-questions-state-govts-motive-23220248> accessed 12 June 2022.

Those familiar with criminal cases know that regular PPs, overworked and underpaid, are least interested in giving their best and getting a conviction. For them, every case is as unimportant as the next.

Keeping this in mind, in 2014, the Bombay High Court passed an order that matters of custodial deaths needed a Special PP to handle them. Yet, after the resignation 'on personal grounds' of the first SPP who had handled the Khwaja Yunus case from the start, the government put it on record that the regular PP would handle the case.[19]

When Asiya Begum's lawyers pointed out that this violated the Bombay High Court order, the government tried the next best ploy to help the accused—non-cooperation with the SPP. Neither of the two SPPs appointed after this were given the necessary case papers. It was left to Asiya Begum's lawyers to fill in the lacuna.

Indeed, the government's reluctance to prosecute any policemen at all for having killed an innocent man in their custody, was evident right from the beginning. That Khwaja Yunus was innocent became clear when all those accused *with* him of *together* conspiring to set off the Ghatkopar blast were either discharged or acquitted. Yet, the government dragged its feet even in quashing the false case against him of having 'escaped' from police custody.

The Khwaja Yunus case has seen two clear demarcations. Instead of the usual divide in murder cases between the accused and the state which prosecutes them on behalf of the victim, in this case the victim's lawyer and the SPP chosen by her have found themselves having to fight not only the accused's highly-paid lawyer but also the state government which appoints the SPP!

It's worth noting that state governments comprising all political parties have acted in the same way. When Yunus was arrested and killed in 2003, the Congress-NCP government was in power. It remained in power till 2014. The delaying tactics, the resistance to move in the matter, were all acts of this government.

The BJP-Shiv Sena government that succeeded it in 2014, kept up the tradition, as seen by its actions in the Supreme Court.

In 2012, the Bombay High Court had upheld the state government's decision to sanction the prosecution of only four policemen. Asiya Begum had appealed against this decision in the Supreme Court.

Her appeal was naturally opposed by the indicted officers. But the State government opposed it too. Curiously, the same lawyer defending the policemen was appointed by the BJP-Sena government then ruling Maharashtra to represent it.

What did this imply? In theory, the government was supposed to safeguard Asiya Begum's interests, for, according to the government's own investigative agency her son was killed by the state police. But the Maharashtra government came out openly identifying itself with the policemen accused by its own agency of killing an innocent man in their custody; it saw no difference between protecting the rights of the victim and those of his killers.

19 Jyoti Punwani, 'Special prosecutor in Khwaja Yunus case quits' *Mumbai Mirror* (Mumbai, 13 February 2013) <https://mumbaimirror.indiatimes.com/mumbai/other/special-prosecutor-in-khwaja-yunus-case-quits/articleshow/18480150.cms> accessed 12 June 2022.

But it is the current government, comprising a coalition led by the Shiv Sena, with the NCP and the Congress as its junior partners, that has committed the most brazen act of support to the policemen so far. It has reinstated the four cops standing trial for murder.

This was done in 2020, during the COVID-19 lockdown, when courts were at a standstill, hearing only urgent matters in virtual mode. The four accused policemen, who were under suspension, were reinstated under the pretext of staff shortage during the Covid 19 crisis.

In its defence, the police administration cited a government circular of 2011, which said that where a case is pending against suspended policemen two years after the charge sheet has been filed, they can be reinstated to non-executive posts.

In the Khwaja Yunus case, the government itself has made sure the case against these suspended policemen has remained pending for 19 years.

Interestingly, there were as many as 113 suspended policemen in the force who met this criterion for reinstatement. Of them, only 18 had their suspension revoked. In this highly selective exercise, the government made sure that four policemen charge-sheeted for a custodial death and for destruction of evidence, made the grade.

Here too, there was an irregularity. The main accused, Assistant Sub Inspector Sachin Vaze, was reported to have resigned from the police force after his arrest.[20] In 2008, he even joined the Shiv Sena at their annual rally, and in 2010 formed his own company and launched his own website.[21]

How then could he be reinstated? Simple—his resignation had never been accepted by the police. He was suspended after his arrest, and continued to be regarded as part of the force.

So Vaze, known as an 'encounter specialist' (part of a group of policemen encouraged by all governments to indulge in extra-judicial killings of criminals, in orchestrated shoot-outs called 'encounters'), had the best of both worlds: he could fall back on the force when needed, and could also enjoy the freedom of being outside it.

Contrast this indulgent treatment with the way the government has treated Asiya Begum, as well as Dr Mateen, on whose eyewitness testimony the case against the policemen rests. Khwaja Yunus' mother, now 72, has spent the last 19 years rushing to court every time the government has refused to prosecute the uniformed men who killed her son. Indeed, if at all the truth about her son's 'disappearance' has emerged (and four out of 10 of his alleged killers have faced arrest and trial) it's been only because of the orders passed by various courts. In fact, the courts had to force a reluctant Maharashtra government to 'trace' the three (out of four) policemen who absconded right after prosecution against them was sanctioned.

20 S Ahmed Ali and Mateen Hafeez, 'Cop accused of killing Yunus quits' *The Times of India* (Mumbai, 1 December 2007) <https://timesofindia.indiatimes.com/city/mumbai/cop-accused-of-killing-yunus-quits/articleshow/2586635.cms> accessed 12 June 2022.

21 Swapnil Rawal, 'Sachin Vaze's Shiv Sena connection' *Hindustan Times* (New Delhi, March 16 2021) <https://www.hindustantimes.com/cities/mumbai-news/sachin-vaze-s-shiv-sena-connection-101615836711194.html> accessed 12 June 2022.

The latest such order in favour of Asiya Begum has come from the Supreme Court, and it is poetic justice that it vindicates the last act of the dismissed SPP. In response to a petition filed by her, the apex court has ruled that the trial court could go ahead and decide on the application filed by the dismissed SPP which sought to make the four policemen named by Dr Mateen as additional accused. It didn't need to wait for the Supreme Court's decision on whether the remaining 10 policemen should also be made accused.

No doubt the government will now pull out all stops to protect these policemen in the trial court, but for now, Asiya Begum has won this round.

Dr Mateen was a doctor in a government hospital when he was arrested in December 2002. After his acquittal in 2005, the hospital refused to take him back, because the government had appealed against his acquittal. He currently works in a private hospital.

A job in a government hospital is a respected post; Dr Mateen earned it through his merit but lost it due to the malafide action of the government.

In this manner, innocent Muslims are pushed out of the mainstream by governments supposed to represent them.

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Soon after his reinstatement, Vaze got involved in a bizarre case involving a bomb placed in a vehicle outside the Mumbai residence of top industrialist, currently Asia's richest man, Mukesh Ambani. The owner of the vehicle was killed and Vaze is now in jail accused of murder.

For Asiya Begum, who once told me that the 'policemen are roaming free, we are slowly dying', that's the only justice she's got in these 19 years.

In Conversation with Stephen Marche

Charlotte Friesen

Stephen Marche is a novelist, essayist and cultural commentator. He is the author of half a dozen books and has written opinion pieces and essays for The New Yorker*,* The New York Times*,* The Atlantic*,* Esquire*,* The Walrus *and many others.*

***CJLPA*: Let's begin by outlining the main premise of your latest book, *The Next Civil War*. Who did you have in mind when you were writing it and what was your initial interest in the topic?**

Stephen Marche: The subject of the book is the political leanings that are tending towards a disunion, a civil war in the United States, or the breakup of the United States in some form. I wrote it as a warning to Americans. It is not written out of contempt for America at all, in fact it's written out of deep affection for and love of America. I feel that they are in quite a bit of danger and that they've accepted certain political realities as normal when they're quite abnormal.

I originally started writing it when a Canadian magazine sent me to Washington to cover the Trump inauguration in 2016. That had a real kind of 'fall of Rome' vibe. I was walking around with anarchists and then I came back from buying cigarettes and they had all been arrested. Then I was standing on top of a limousine and somebody lit the limousine on fire. The police were right down the knife edge between left and right groups, and they could barely keep the peace. After that experience, I decided to dedicate the next four or five years to trying to figure out how much danger America is actually in. And the book is my answer to that.

***CJLPA*: You go through five dispatches in the book. Were there any outside of that which you considered writing about, or started writing about and decided not to continue with?**

SM: Electoral outcomes really didn't make their way into the book; like what a challenged election would look like, what would happen if there was a contingent election, or no agreement on January 6th when they certified the election. I didn't include that because I wanted to base the dispatches on solid information, for which I had excellent, well-established models – like environmental models or models of civil war. It's very hard to find non-biased or non-political and non-agenda driven approaches to questions like those around contested or contingent elections.

Some models are stronger than others; economic models are not really worth anything. Nobody knows what's going to happen in the economy. We do know that by 2040, 50% of the American population will control 85% of the senate, and we do know that trust in institutions is in freefall. And the environmental models offer an incredible predictive capacity. I wanted to keep it on that level.

People get really confused in America about the importance of elections, whereas I think the trends that are really shredding the United States are well below and well above who gets elected. People are worried if Trump gets elected. I'm not really worried about that because I think the problems are a lot deeper than that.

***CJLPA*: There's a prevailing idea that issues as deep-set as those that you discuss in your book can only be diagnosed from a safe objective distance. I'm wondering how your being a Canadian brought a unique perspective to these issues and allowed you to consider them in a different way.**

SM: We are very close to America. I've lived in America and I've worked in America. Most of my income has always come from American sources. I have family in America. But I'm not an American. I can go to America, and no one would know that I'm not an American, so that's also extremely helpful as a researcher.

Being a Canadian is the perfect amount of distance because you're right there geographically and culturally. But you also know that healthcare systems do not have to be as they are in America; gun control does not have to be as it is. There are other options. The realities that you see in America are not normal. A huge problem in America is that the educated elites have really managed to convince themselves, and have been taught from a very young age, that their political institutions are the solution to history, whereas to me they are just one option among many. I think that's the difference between myself and an American commentator, who on one hand really has to believe in their country, and on the other has been indoctrinated into believing that it is the greatest country in the world and an exception to history and so on. When of course there are no exceptions to history.

***CJLPA*: I agree with your conclusion in the book that the hope for America lies with Americans, and that it is the fusion of opposites and the coming together of differing opinions that makes America so unique and allowed it to become what it is today. Great political thinkers like Hannah Arendt and Walter Benjamin view contrasting opinions as the highest good in politics. How do you think the University helps––or maybe doesn't help––in creating a space for dissent?**

SM: From the outside it looks horrible. I don't think anyone imagines that the university would be a place where you could openly explore ideas anymore. I would never have the inclination that if I really want to explore or open up ideas, I should make an appointment at a university and talk about it with some students.

The university really isn't the world. The humanities are falling apart, they cannot argue for a reason for their own existence. They get less powerful every year out of a willed powerlessness. And if you can't make arguments for why you should exist you won't exist.

***CJLPA*: Where do you think that space of dissent could be or is?**

SM: My opinion generally is that these things go in cycles: political leanings, engagement, disengagement. There's a great temptation whenever we're in these situations to feel like we are in the ideology that's going to survive forever. One of the things that worries me is that the right-wing backlash to that will be so horrible that it will be worse than what we have now. The heroes that I had were renaissance humanists; people like Arendt and Benjamin, who maintained their humanism in very dark periods. I really believe in cosmopolitan humanism as an intellectual approach to the world, and that's the world that I want to be in. I don't feel like that's impossible at all. I feel like I can write and say what I want, and some people will hate me, and some people will like me, but I'm a journalist! You're supposed to be hated, that's part of the gig. I don't really feel all that threatened by any of that.

I feel like it's important to keep your eye on the prize of what you want to do and who you want to be intellectually, and to not respond to trends that are based in fear. Fear is quite overblown on these matters. I've been attacked a lot, but I think we should expect to be attacked. Sharing an opinion of the world comes with a price. I feel like there is still room for humanism, probably as much as there ever has been because it's never been very popular. Humanism is always under threat; it's never been the successor ideology but it's the one I have. It's all that I care about and want to do. And I can do it.

***CJLPA*: Since you're a Shakespeare scholar and this is a British journal, is there any particular play, or even a scene, which you see as particularly illuminating to contemporary Canadian or American politics?**

SM: *Coriolanus* is a big one because it's about patriotic elites who turn into a globalized fascist force, which you don't have to look too far to find. Someone like Putin is very Shakespearean; people who manage to convince themselves of their own propaganda and become obsessed with their own rhythms of revenge, This is absolutely the Shakespearean mode.

The parallels are not exact, but there are a whole host of plays which can be related to the ongoing conflict between the Ukraine and Russia, like *Antony and Cleopatra* or *Coriolanus*. Unfortunately, they are all tragedies. The tyrants of *Richard III* and *Macbeth* undoubtedly still apply. It's amazing how these works remain so in tune with the psychological process behind tyrannical behaviour. Richard III is pretty damn close to Putin. I don't think you're going to find a better representation, except maybe Boris Godunov.

***CJLPA*: Thank you so much for taking the time to speak with me. I really appreciate it.**

Charlotte Friesen is an honours graduate from King's College, Halifax, Nova Scotia. She wrote her thesis on early modern cookery manuscripts and cookbooks, and works as a bread baker when she's not writing or reading.

A Flawed Democracy

John Rennie Short

John Rennie Short is a Professor in the School of Public Policy, University of Maryland Baltimore County. He has published widely in a range of journals and is the author of 50 books. His work has been translated into Arabic, Chinese, Czech, Italian, Japanese, Korean, Persian, Romanian, Spanish, Turkish and Vietnamese. His essays have appeared in Associated Press, Business Insider, Citiscope, City Metric, Market Watch, Newsweek, PBS Newshour, Quartz, Salon, Slate, Time, US News and World Report, Washington Post *and* World Economic Forum.

Each year, *The Economist* publishes a Democracy Index. The 2022 edition listed 167 countries ranked on metrics of five dimensions: electoral process and pluralism, the functioning of government, political participation, democratic political culture, and civil liberties. The US ranked 26th in the world. At the top of the list were Norway, New Zealand, Finland, and Sweden. At the bottom were North Korea, Myanmar, and Afghanistan. No real surprises there, but Taiwan (8), Uruguay (13), South Korea (16), UK (18) and Costa Rica (21) all outranked the US. The US had slipped over the past six years from a full democracy to a flawed democracy.[1]

All democracies have flaws. They are human creations after all. But the US has more flaws than many of its democratic peers. The insurrection of 6 January 2021 revealed a disturbing refusal by some to accept the results of democratic elections. On that day, protestors gathered at the Capital to overturn the result of the 2020 Presidential election. The insurrectionists sought to stop the ceremonial congressional confirmation of Joe Biden as the 46th President of the US. In this essay, I want to explore some of the reasons behind this democratic slippage. I focus on electoral issues, rather than the deep-seated socio-economic context of the insurrection. I will draw on some of my previous work.[2]

It is important to begin with the realization that the US was founded as a republic, not as a democracy. The founders were distrustful of the raw political energy of the people. In 1787, James Madison, the 4th US President, described democracies as spectacles of turbulence and contention; incompatible with personal security or the rights of property.[3] Thus, the government in the US was structured to insulate political elites from popular opinion. The Congress, the executive, and the judicial–a nine-member oligarchy of lifetime political appointees whose guiding ideology always seems half a century behind the general public–limit and blunt the expression of the popular will. The hallmarks of a healthy democracy are that each vote should be counted and each one should count equally. This is not the case in the USA, where the difference between popular will and political representation is growing. Let's look at four sources for the growing deficits of US democracy.

Follow The Money

Money plays a huge role in US politics. Members of Congress need to solicit vast amounts of money to wage their electoral campaigns. Money comes from a variety of sources. There is the modest contribution of the ordinary citizen, that can sometimes make a difference in insurgent campaigns. There are also the legal contributions from well-founded groups. Lastly, there is the '*dark money'* of nonprofit organizations including unions and trade

1 'A New Low For Global Democracy' (*The Economist*, 2022) <https://www.economist.com/graphic-detail/2022/02/09/a-new-low-for-global-democracy> accessed 17 April 2022

2 John Rennie Short, *Stress Testing The USA* (2nd edn, Springer 2022).
John Rennie Short, 'An Election In A Time Of Distrust', *U.S. Election Analysis 2020: Media, Voters and the Campaign* (1st edn, Election Analysis - United States 2022) <https://www.electionanalysis.ws/us/> accessed 17 April 2022.
John Rennie Short, 'After Supreme Court Decision, Gerrymandering Fix Is Up To Voters' (*The Conversation*, 2019) <http://theconversation.com/supreme-court-says-gerrymandering-fix-up-to-voters-not-judges-117307> accessed 17 April 2022.
John Rennie Short, 'Four reasons gerrymandering is getting worse' (*The Conversation*, 2018) <https://theconversation.com/4-reasons-gerrymandering-is-getting-worse-105182> accessed 17 April 2022.
John Rennie Short, 'Campaign season is moving into high gear – your vote may not count as much as you think' (*The Conversation*, 2018) <http://theconversation.com/campaign-season-is-moving-into-high-gear-your-vote-may-not-count-as-much-as-you-think-101764> accessed 17 April 2022.
John Rennie Short, 'Globalization and its discontents' (*The Conversation*, 2016) <https://theconversation.com/globalization-and-its-discontents-why-theres-a-backlash-and-how-it-needs-to-change-68800> accessed 17 April 2022.
John Rennie Short, 'The legitimation crisis in the USA: Why have Americans lost trust in government?' (*The Conversation*, 2016) <https://theconversation.com/the-legitimation-crisis-in-the-us-why-have-americans-lost-trust-in-government-67205> accessed 17 April 2022.
John Rennie Short, 'The Supreme Court, The Voting Rights Act And Competing National Imaginaries Of The USA' (2014) 2 *Territory, Politics, Governance* <https://doi.org/10.1080/21622671.2013.875938>.

3 James Madison, 'Federalist Papers No. 10 (1787) - Bill Of Rights Institute' (*Bill of Rights Institute*) <https://billofrightsinstitute.org/primary-sources/federalist-no-10> accessed 17 April 2022.

organizations, and political action campaigns (PACs) who do not have to disclose their donors.[4] Individuals can contribute to these organizations' political campaigns while remaining anonymous. The Supreme Court, in a series of rulings including *Buckley v, Valeo* in 1976 and *Citizens United v. FEC* in 2010, made it easier for all types of money, including dark money to flood into the political system.[5]

Politicians look to garner support through campaign contributions. To take just one example from recent news reports: in May 2021, the FBI was investigating a case involving Susan Collins, a US senator and Republican from Maine, for receiving contributions to her 2020 re-election campaign – organized by an executive at the defense contractor firm, Navatek. It is worth noting that Senator Collins sits on a key Senate subcommittee that controls military spending. In 2019, Senator Collins lobbied for Navatek to receive an $8 million contract at a Maine shipyard. In the 2020 election, the Navatek executive routed $45,000 personally and $150,000 through a PAC to support her re-election bid.[6]

Collins is not accused of any wrongdoing. It is the executive that is under FBI scrutiny, for allegedly breaking one of the few legal restrictions on campaign contributions: being a defense contractor and giving a political campaign contribution. Collins, in contrast, did nothing wrong, legally speaking. She could be said to be working for the constituencies in her state by directing work to a shipyard in Maine. There is no obvious personal venality by Collins. While individual politicians such as Collins may not be corrupt in the formal sense of gaining individually for a service or favor, the system is rotten to the core. Most political campaign contributions deemed illegal in most of the other liberal democracies around the world do not constitute corruption in the US. It is everyday politics; business as usual.

Today, policies in Washington DC are shaped more by interest groups who hone regulations to meet their needs, rather than the needs of the ordinary electorate. The political system listens to the power of money. Politicians desperately need money to stay competitive, win races, and remain in power. Those with the most money have the best access: they have the power to influence and advise. Ordinary people exercise political choice at elections but those with money exercise real political power all the time.[7]

4 Peter Geoghegan, *Democracy For Sale: Dark Money And Dirty Politics* (Head of Zeus 2020).
Heather K. Gerken, 'Boden Lecture: The Real Problem With Citizens United: Campaign Finance, Dark Money, And Shadow Parties' (2013) 97 Marquette University Law Review <https://scholarship.law.marquette.edu/mulr/vol97/iss4/3/> accessed 17 April 2022.
Jane Mayer, *Dark Money: The Hidden History Of The Billionaires Behind The Rise Of The Radical Right.* (1st edn, Anchor 2017).

5 *Buckley v Valeo* [1976] United States Court of Appeals, District of Columbia Circuit, 519 F2d 821 (United States Court of Appeals, District of Columbia Circuit).
Citizens United v Fed Election Commission [2008] Supreme Court of the United States, 170 L Ed 2d 511 (Supreme Court of the United States).

6 Byron Tau and Julie Bykowicz, 'FBI Probes Defense Contractor's Contributions To Sen. Susan Collins' *Wall Street Journal* (2021) <https://www.wsj.com/articles/fbi-probes-defense-contractors-contributions-to-sen-susan-collins-11621382437> accessed 17 April 2022.

7 Benjamin I. Page, 'How Money Corrupts American Politics' (*Scholars Strategy Network*, 2013) <https://scholars.org/how-money-corrupts-american-politics> accessed 17 April 2022.

Divided Government

Under the mounting pressure of growing partisanship, the constitutional division of political responsibilities across the different levels of government is now revealed as a major flaw.

The Senate is Rigged

The rigging of the voting system for the US Senate so that some electoral votes count more than others is not new; it's a foundational reality, an integral part of the political architecture of the country. Under the US constitution, each state receives the same number of senators, despite differing population size, while the number of representatives afforded to a state is based on its population. It started at the beginning of the Republic, when each state was allocated two senators, despite differing population size. At the time of the First Congress in 1789, the population of the largest and smallest states, respectively Virginia and Delaware–and here we will only include free White males over 16 as befits the prioritization of the time–was 110, 936 and 11,783. Roughly, a 9-fold differential.[8] By the time of the 2016 presidential election, the population of the most and least populous states, respectively California and Wyoming, was 39.25 million and 585, 501. The differential has increased to 67-fold, whilst the senator allocation has remained the same. Senators from small states with reliably consistent voting preferences can amass seniority that bestows enormous power beyond their demographic significance. A longtime leader of the Senate, Mitch McConnell, co-represents a state with a 2020 total population of only 4.4 million that is 89.4 percent White with only 3.5 percent foreign-born while the US average is 71.7 percent white and 12.9 percent foreign-born.[9]

Senate representation reflects the political realities of the largely rural 18th Century rather than the demographic realities of the metropolitan 21st Century. More than a quarter of the entire US population resides in just 10 metro areas across only 16 states. And 85 percent of all Americans now live in metro areas. The opinions of the metropolitan majority on such issues as gun control, abortion rights or immigration policy, are countermanded in the Senate by the preferences of voters in small, rural states.[10]

Political power no longer parallels demographic realities. To be sure, the US was never designed as a democracy but as a republic engineered to limit the power of the people and prevent political convulsions. The multiple sources of governmental power were to be a check on unbridled power. A majority of the Supreme Court can be appointed by Senators representing a minority of the US population.[11]

8 U.S. Census Bureau, Public Information Office (PIO) '1790 Census' (*National Geographic Society*) <https://www.nationalgeographic.org/media/us-census-1790/> accessed 17 April 2022.

9 Nicholas Jones and others, '2020 Census Illuminates Racial And Ethnic Composition Of The Country' (*Census.gov*, 2021) <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html> accessed 17 April 2022.

10 Kristen Bialik, 'State Of The Union 2018: Americans' Views On Key Issues Facing The Nation' (*Pew Research Center*, 2018) <https://www.pewresearch.org/fact-tank/2018/01/29/state-of-the-union-2018-americans-views-on-key-issues-facing-the-nation/> accessed 17 April 2022.

11 Kevin J. McMahon, 'Is The Supreme Court's Legitimacy Undermined In A Polarized Age?' (*The Conversation*, 2018) <https://theconversation.com/is-the-supreme-courts-legitimacy-undermined-in-a-polarized-age-99473> accessed 17 April 2022.

What About the House?

Seats in the House of Representatives are based on the population of the states.[12] Thus California with a population of almost 40 million sends 52 representatives to the House, while New Hampshire with a population of around 1.36 million sends two. Thus, the House is supposed to even out the effects of states with different populations. However, the pooling of Democratic voters into dense areas lessens their effectiveness as they tend to win big in a few districts while Republicans have a wider national spread. The current system gives the Republicans an advantage over Democrats. A mathematical model produced by *The Economist* concluded that the Democrats need to win 53.5 percent of all votes cast to have an even chance of winning a House majority.[13]

The Local Level is Stymied

Although voting also takes place at the more local level of towns and cities, there is a problem as state politicians are allowed to overturn local initiatives. Twenty-four states now have pending legislation to reverse ballot measures that were introduced at the local level.[14] In Virginia, with the Republican control of state legislature, the state prohibited localities from removing memorials or replacing street names that honor southern 'heroes' of the Civil War. In this case, the democratic will of progressive districts was blocked because they were encased by the power of conservative states. On the other hand, conservative localities can be blocked by progressive states. This was evident in local resistance to more liberal states' mandates for mask wearing during the worst of the COVID pandemic.[15]

The Electoral College Does Not Represent the Popular Will

The Electoral College, not the voting electorate, elects the President. This system was established in the Constitution to blunt the power of raw popular opinion. It is not the total votes cast for a presidential candidate that leads to a winner, but the votes of the 538 electors of the College allocated to each state in the same numbers as their Congressional delegation.[16] It tends to favor the large states since they have more population, and hence more congressional representation. Since 1888, the system worked well in that the popular vote and the Electoral College were in sync.[17] However, in both 2000 and 2016 a President won without obtaining a majority of popular votes. If presidents were elected by a simple popular vote, we would have had President Hilary Clinton and President Gore. The Electoral College does not transmit the will of the people, and is starting to undermine it.

The Electoral College system also overvalues voters in large swing states such as Florida. Because of its importance and the demographic profile of this state the interests of elderly voters, self-identified Jewish voters[18] and anti-Fidel Castro voters have influenced national policies as a succession of presidential candidates sought to appease these groups to win the Presidency.[19] US foreign policy toward Israel and Cuba, and domestic safeguards to Medicare are in no small part a function of the importance of Florida's Electoral College votes.

Gerrymandering

Then there is the manipulation of voting boundaries to engineer specific political outcomes.[20] The political party that controls state legislatures is directed by the Constitution to redraw Congressional boundaries every 10 years, after the results of the most recent Census, in order to take account of population shifts. This redistricting is often done to win seats and is known as gerrymandering. Basically, it allows politicians to select their voters, rather than citizens to choose their representatives. In 2012, Republicans won a majority of 33 seats in the House despite getting 1.4 million fewer votes than their Democratic opponents.

The term 'gerrymandering' originates with the activities of Elbridge Gerry who, in 1810 as governor of Massachusetts, signed a bill that created legislative boundaries that favored his political party. A cartoonist of the day depicted the outline of the boundaries as a salamander, attempting to convey the arbitrariness of the resulting boundaries (Figure 1).[21]] The system was so 'gerrymandered' that the Democratic-Republicans won only 49 percent of the votes but picked up 72 percent of the seats.

Gerrymandering involves what's called the 'cracking and packing' of voters by moving the boundaries of voting districts. Cracking spreads opposition voters thinly across many districts to dilute their power, whilst packing concentrates opposition voters in fewer districts to reduce the number of seats they can win. Gerrymandering has gotten worse in the last 20 years for three main reasons.

First, gerrymandering is effective in helping political parties hold power in the House. Since 1995, after 40 years of uninterrupted Democratic dominance, the House has become more competitive. It is now up for grabs and gerrymandering has helped tip the scales.

One political consultant, Thomas Hofeller, described by many as a gerrymander genius[22], was particularly effective in designing

12 The total number of representatives in the House is limited to 435.

13 'America's Electoral System Gives The Republicans Advantages Over Democrats' [2018] *The Economist* <https://www.economist.com/briefing/2018/07/12/americas-electoral-system-gives-the-republicans-advantages-over-democrats> accessed 17 April 2022.

14 Lori Riverstone-Newell, 'The Rise Of State Preemption Laws In Response To Local Policy Innovation' (2017) 47 Publius: The Journal of Federalism <https://doi.org/10.1093/publius/pjx037> accessed 17 April 2022. pp. 403-425

15 Jeffrey Lyons and Luke Fowler, 'Is It Still A Mandate If We Don't Enforce It? The Politics Of COVID-Related Mask Mandates In Conservative States' (2021) 53 State and Local Government Review <https://journals.sagepub.com/doi/full/10.1177/0160323X211035677> accessed 17 April 2022. pp. 106-121
Dannagal G. Young and others, 'The Politics Of Mask-Wearing: Political Preferences, Reactance, And Conflict Aversion During COVID' (2022) 298 Social Science & Medicine <https://pubmed.ncbi.nlm.nih.gov/35245756/> accessed 17 April 2022.

16 John C. Fortier, *After The People Vote: A Guide To The Electoral College* (4th edn, AEI Press 2020).

17 Benjamin Forest, 'Electoral Geography: From Mapping Votes To Representing Power' (2018) 12 Geography Compass <https://pubmed.ncbi.nlm.nih.gov/35245756/> accessed 17 April 2022.

18 These are voters who identify themselves as Jewish voters, as opposed to Jewish people who vote but do not consider themselves Jewish.

19 David A Schultz and Rafael Jacob, *Presidential Swing States* (2nd edn, Rowman & Littlefield 2018).

20 John Rennie Short, '4 Reasons Gerrymandering Is Getting Worse' (*The Conversation*, 2018) <https://theconversation.com/4-reasons-gerrymandering-is-getting-worse-105182> accessed 17 April 2022.

21 *The Gerry-Mander* (1813), Newspaper. Available at: <https://americanhistory.si.edu/collections/search/object/nmah_509530> accessed 17 April 2022.

22 David Daley, 'The Secret Files Of The Master Of Modern Republican Gerrymandering' (2019) *The New Yorker* <https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-

***Fig 1**. The Gerry-Mander. (Elkanah Tisdale 1812). Originally published in the Boston* Centinel. *Wikimedia Commons. < https://commons.wikimedia.org/wiki/File:The_Gerry-Mander_Edit.png>.*

redistricting strategies for Republicans between 1992 and 2017. He realized early on that redrawing boundary was one way to elect as many Republicans as possible. He worked for the Republican National Committee in drawing congressional maps after the 1992 elections in Arizona, Michigan, Minnesota and Ohio. The gerrymandered seats helped the Republican win the House in 1994. He subsequently advised Republican politicians across the country on how to redraw electoral maps to their advantage.

Second, gerrymandering has become a much more effective tool in the last 20 years due to greater insights in voters' preferences. With sophisticated computer programs and ever more detailed information on voters' location and preferences, politicians now crack and pack with surgical precision.[23] Maryland's 3rd congressional district, for example, slithers and slides across the state to pick up as many Democratic voters as possible. With pinpoint accuracy afforded by the new technologies, the Democratic-controlled state legislature was able to create a Democratic majority vote. Over a third of all votes cast in the state in the 2016 congressional races were for Republican Party candidates but Republicans won only one out of 8 districts. But across the country gerrymandering favors Republicans. The Brennan Center estimates that the tactic provides at least 16 seats in the current Congress with extreme partisan bias most obvious in Michigan, North Carolina and Pennsylvania and significant bias in Florida, Ohio, Texas and Virginia.[24]

The third reason is that the Supreme Court has effectively sanctioned gerrymandering. In 1986, the Court in *Thornburg v. Gingles* ruled against a Democratic legislature's attempt to thinly spread, or crack, minority voters among seven new districts in North Carolina. The ruling helped create districts where minority voters were concentrated and aided the packing of voters in future cases. Later, a more conservative court in *Vieth v. Jubelirer* ruled 5-4 not to intervene in cases of gerrymandering. Predictably, partisan gerrymandering then increased without legal challenge, especially after the 2010 redistricting round initiated by the 2010 Census results. In *Shelby v. Holder* in 2013, the Court in a 5-4 ruling overturned key elements of the 1965 Voting Rights Act that protected voters' rights in the South. The ruling gave the green light for a return to partisan gerrymandering in areas of the country previously under federal scrutiny. In 2017, and again in 2018, the Supreme Court passed up numerous opportunities to declare gerrymandering unconstitutional. The Supreme Court's 2018 decision has emboldened ever more gerrymandering.[25]

Gerrymandering has a pernicious impact on the electoral system and on the wider democratic process. It encourages long-term incumbency and a consequent polarization of political discourses. In gerrymandered districts, politicians only need to appeal to their base rather than to a wider electorate. Gerrymandering remains an ugly fact of the U.S. electoral system that belies the claim to democracy. Gerrymandered districts produce safe seats and lock politicians into political postures than promote ideological purity and party loyalty over bipartisan negotiation. Primary voters in gerrymandered districts thus count more than the general voting public.

Suppressing The Vote

Of all the disturbing trends causing the decline of democracy in the US, voter suppression– another foundational feature of US politics– is the most insidious. Women and Black people were long denied the right to vote, and strict citizenship rules were often employed to marginalize recent immigrants. Voter suppression is a way for a White oligarchy to remain in power.

Naturally, there was resistance. Voter suppression was often met by renewed efforts at securing voting rights, which in turn stimulated new rounds of suppressions by traditional holders of power. We can briefly recount the political history of the USA as a series of attempts to suppress an extended franchise that in turn prompts resistance and in turn new forms of suppression. Let me flesh out this assertion with a more detailed exposition.

In the wake of the Civil War in the Reconstruction era, traditionally dated from around 1863 to 1877, three major constitutional amendments abolished slavery (the 13th Amendment, adopted in 1865), created citizens from former enslaved people (the14th Amendment, adopted in 1868) and extended the right to vote to Black people and other minorities (the 15th Amendment, adopted in 1870). Together, they constitute a 'Second American Revolution'. It was a difficult struggle to ensure political equality in the old South, where racist attitudes were most strongly held. Despite the hurdles and difficulties, Black people were elected to state legislatures in a period of political emancipation. From 1869 to 1876, two Black men became US senators and 20 Black men were elected to the Congress.[26] However, this political flowering proved short-lived, as

gerrymandering> accessed 17 April 2022.

23 Samuel S.-H. Wang, 'Three Practical Tests For Gerrymandering: Application To Maryland And Wisconsin' (2016) 15 Election Law Journal: Rules, Politics, and Policy.

24 Michael Li and Laura Royden, 'Extreme Maps' (Brennan Center for Justice 2017) <https://www.brennancenter.org/our-work/research-reports/extreme-maps> accessed 17 April 2022.

25 Supreme Court Cases on Gerrymandering: *Thornburg v Gingles* [1986] US Supreme Court, 478 US 30 (US Supreme Court); *Vieth v Jubelirer* [2003] No. 02–1580 (US Supreme Court); *Shelby v Holder* [2012] 12–96 (US Supreme Court).

26 Black-American Members By Congress, 1870–Present | US House Of Representatives: History, Art & Archives' (*History, Art and Archives*, 2022) <https://history.house.gov/Exhibitions-and-Publications/BAIC/

southern states reentering the Union were freed from outside and military control and local White political elites began working to marginalize the active political participation of Black people.

Reconstruction was dead by the end of the 19th Century. In the South, White supremacy was reincarnated and maintained by the suppression of the Black vote through poll taxes, literacy tests, and outright intimidation. In 1896, 130,334 Black people were registered to vote in Louisiana, but by 1904 there were only 1,342.[27] By the early 1900s, only 2 percent of Black people eligible to vote in Alabama had cast their ballot. This effective political disenfranchisement was maintained by White Democratic voting registers that excluded Black voters from voting lists and was enforced by the threat and constant practice of violence by local and state police, and paramilitary organizations such as the White League and the Klu Klux Klan. This period of 'Deconstruction' lasted for decades, until the middle of the 20th Century. It was reinforced by absolute Democratic control of the South and the entrenched power of incumbent White southern Democrats in Congress, chairing influential committees to suppress, deflect, or minimize civil rights legislation that threatened a monopoly of White political power in the South. There was no federal civil rights legislation from 1877 to the 1950s. The Supreme Court was an active participant in, what one legal historian refers to as, the process of Black people being "erased from national politics."[28]

A new civil rights movement emerged in the 1950s. The 1957 Civil Rights Act, the first such legislation since Reconstruction, established a civil rights section in the Department of Justice (DOJ) that employed federal prosecutors to pursue voting discrimination and created a federal Civil Rights Commission. Put forward by the then Republican President, Dwight Eisenhower, the act was weakened by the southern Democrats in the Congress.[29] It was the last time that Republicans favored federal oversight of state voting practices and Democrats actively resisted them, as alliances were shifting. White voters in the South drifted to the Republican Party and Black people overwhelmingly moved their allegiance to the Democratic Party. Agitation and protest resulted in the Civil Rights Act of 1964 that sought to end segregation in public places and discrimination in the job market. It also inaugurated a restructuring of US spatial politics as the white South began its eventual transformation into a Republican rather than a Democratic stronghold, and as a consequence, the national Republican Party became a more overtly religious and socially conservative party.[30]

The 1964 legislation also provided the platform for the Voting Rights Acts (VRA) of 1965 that proposed stiffer legal safeguards to ensure registration and voting for Black people. The VRA has evolved over the years in a series of amendments –most noticeably in 1970, 1975, 1982 and 2006– but at its core, it prohibited discriminatory voting laws across the land and identified areas of the country subject to special conditions; they were termed covered areas (essentially the South).[31] Section 5 spelled out these conditions: any changes in voting laws or voting procedures in these covered areas had to be precleared by the DOJ or by the US District Court of DC. The political space of the country was reimagined; across the country there was a greater federal oversight of elections that traditionally had been the sole responsibility of the states. It was a shift of the ultimate control of elections from the state to the federal level because there was a sense that at the more local levels' discriminatory practices were both possible and actual.

While much civil rights legislation had broad and general goals such as eliminating job and housing discrimination, the VRA specifically targeted the reality as well as the promise of the 15th Amendment by removing the persistent and pervasive political discrimination. The VRA is one of the most successful pieces of federal public policy. In 1964, in Alabama, Georgia, Louisiana, Mississippi and South Carolina only 6.7 percent of eligible Black voters were registered to vote compared to 60 percent of Whites. By 2010, the figure for Back people was comparable to White people. In 1960, only 4 percent of registered voters in Mississippi were Black, but by 1984 this had increased to 26 percent. With the implementation of the VRA, Black people's political participation has increased dramatically, reversing decades of exclusion from the political process. In 1964, there was only 1 Black legislature in the original covered areas, by 2010 there were over 230. Black political representation increased across the country.[32]

Shelby County is an affluent county in central Alabama with a population of just over 200,000. According to the census of 2010, it had about 11.5% Black people, whereas the percentage for the state is 26.5. Only 7% live below the poverty line compared to 17% for the state. It is an affluent majority-predominantly White county in a poor state. It also reflects the recent political history of the South shifting from solidly Democratic in the 1980s to overwhelmingly Republican. By 2010, every elected partisan office in the county was held by a Republican. In 2010, Shelby County took a case to federal court arguing that sections of the VRA were unconstitutional. The county lost its case in a federal district court, a decision upheld in a court of appeals. The case went to the Supreme Court in February 2013. The majority decision released in that busy end-of-session week in June of 2013, and written by Chief Justice Roberts, ruled that Section 4 of the VRA (which identified areas subject to preclearance) was unconstitutional. Essentially, it freed local areas with a long history of pernicious racial suppression from federal oversight.[33]

Historical-Data/Black-American-Representatives-and-Senators-by-Congress/> accessed 17 April 2022.

27 Allie Bayne Windham Webb, 'A History of Negro Voting in Louisiana, 1877-1906' (Louisiana State University Dissertation 1962) <https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=1747&context=gradschool_disstheses> accessed 19 April 2022.

28 James MacGregor Burns, *Packing The Court* (Penguin Books 2009), 93.

29 The Civil Rights Movement And The Second Reconstruction, 1945—1968 | US House Of Representatives: History, Art & Archives' (*History, Art and Archives*, 2022) <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/> accessed 17 April 2022.

30 Jonathan Peter Bartho, 'Whistling Dixie: Ronald Reagan, The White South, And The Transformation Of The Republican Party' (PhD, University College London 2021).

M. V Hood, Quentin Kidd and Irwin L Morris, *The Rational Southerner* (2nd edn, Oxford University Press 2014).

31 Marsha Darling, *The Voting Rights Act Of 1965: Race, Voting, And Redistricting* (1st edn, Routledge 2013).
Chandler Davidson and Bernard Grofman, *Controversies In Minority Voting* (2nd edn, Brookings Institution 2011).
John Rennie Short, 'The Supreme Court, The Voting Rights Act And Competing National Imaginaries Of The USA' (2014) 2 Territory, Politics, Governance.

32 Robert Brown, 'Race And Representation In Twenty-First Century America' (2020) 8 Journal of Global Postcolonial Studies. David T Canon, *Race, Redistricting, And Representation: The Unintended Consequences Of Black Majority Districts* (University Chicago Press 2020).

33 John Rennie Short, 'The Supreme Court, The Voting Rights Act And Competing National Imaginaries Of The USA' (2014) 2 Territory,

In the seemingly ever-repeating cycle of voter suppression leading to resistance that in turn ushers in new forms of voter suppression, we are at the 'third stage' of renewed voter suppression. Stung by former President Trump's defeat in the 2020 Presidential elections, Republican state legislatures tried to suppress the popular vote with more new forms of voter identification and registration designed to penalize the less wealthy. Now, freed from federal oversight, states and municipalities across the nation have introduced discriminatory practices fueled by exaggerated and false accounts of voter fraud especially in partisan media accounts. In actuality, voter fraud is negligible.[34]

Voter suppression is masquerading as ensuring voting integrity. It is nothing more than a brazen attempt to suppress Democratic leaning voters, with restrictive practices such as restrictive ID requirements that favor the affluent, not allowing freed prisoners to vote, and the restriction of early voting and absentee voting. There is also the more indirect voter suppression such as the inequities on voting facilities.[35] Poorer districts with majority people of color tend to have to wait in line for much longer than those in affluent, majority-White districts as there are fewer places to cast a ballot. These are all attempts at voter suppression. In 2020, the Texas legislature worked to pass a bill that would not allow voting on a Sunday before 1 pm. Its one and only aim was to suppress Black churchgoers from going to the polls directly from Sunday morning services. Many of the faithful in this state lack private transport, so Black churches often provide group transportation to the polls. The same bill also sought to restrict people driving non-relatives to the polls. It is aimed directly at elderly poor black voters who do not have their own cars.[36]

Voter suppression in various forms is not about combating voter fraud; it is a way for Republicans to remain in power, even as the electorate drifts away from supporting them.[37]

Fully-functioning democracies allow voters a sense of participation in a shared experience. Flawed democracies, in contrast, feed resentments about fairness and create fertile conditions for conspiracy narratives. There is no simple explanatory step from noting these mounting democratic deficits to explaining the insurrection of 6 January 2021. However, the flaws in US democracy are significant background factors in creating narratives of resentment and anger. Insurrections happen in the context of declining political legitimacy and growing discontent. While all voters get to exercise political choice, only some get to exercise real political power. As the undemocratic trends strengthen, we are likely to see more crises of political legitimacy and more expressions of raw political anger.[38]

Politics, Governance.

34 Brennan Center for Justice, 'The Myth Of Voter Fraud' (Brennan Center for Justice 2021) <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud> accessed 17 April 2022.

35 Lisa Marshall Manheim and Elizabeth G. Porter, 'The Elephant In The Room: Intentional Voter Suppression' (2019) 2018 (1) The Supreme Court Review.

36 Patrick Svitek, 'Republicans Say They'Ll Tweak Part Of Texas Elections Bill Criticized For Impact On Black Churchgoers' *The Texas Tribune* (2021) <https://www.texastribune.org/2021/06/01/texas-voting-bill-sunday-republicans/> accessed 17 April 2022. Brad Brooks, 'Vote On Texas Bill To Make Voting Tougher Blocked By No Quorum' (*Reuters*, 2021) <https://www.reuters.com/world/us/texas-legislature-close-approving-measure-make-voting-more-difficult-2021-05-30/> accessed 17 April 2022. Nick Corasiniti, 'Texas Senate Passes One Of The Nation's Strictest Voting Bills' *New York Times* (2021) <https://www.nytimes.com/2021/05/29/us/politics/texas-voting-bill.html> accessed 17 April 2022.

37 Lisa Marshall Manheim and Elizabeth G. Porter (n 35). Bertrall L. Ross II, 'Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor.' (2019). *114 Nw. UL Rev.*

38 John Rennie Short, 'The 'Legitimation' Crisis In The US: Why Have Americans Lost Trust In Government?' (*The Conversation*, 2016) <https://theconversation.com/the-legitimation-crisis-in-the-us-why-have-americans-lost-trust-in-government-67205> accessed 17 April 2022.

In Conversation with Iqan Shahidi

Casper Alexander Sanderson

Iqan Shahidi is a PhD candidate in Intellectual History at the University of Cambridge. He completed his undergraduate studies in Sociology at the Bahai Institute of Higher education and was arrested in 2010 because of his activities in support of the universal right to access education. After he was released from a five-year prison sentence, he continued his studies in the UK with a Master's in Social and Political Thought at the University of Sussex, and an MPhil in Intellectual History and Political Thought at the University of Cambridge.

***CJLPA*: Iqan, where did you grow up, and what did you study before arriving in Cambridge?**

Iqan Shahidi: I grew up in a city in the west of Iran called Kermanshah. When I turned 18, I took the national university entrance exam. I was informed that I couldn't attend university because my file was incomplete. That's a common error encountered by members of the Baha'i faith.

After being turned down, I wanted to explore the issue and to access my right to higher education. So, I started corresponding with a number of authorities: from various commissions of the parliament, the Islamic Commission on Human Rights, various NGOs defending civic rights, religious and political authorities in our region and at the national level, to courts of justice. But the result was the same. I was not allowed to go to university because I was a Baha'i.

***CJLPA*: So, wherever you went they just said: 'Sorry, that's not possible'?**

IS: It wasn't fully clear in all the cases. Some of them said they would investigate, but I never heard anything back. It was interesting because the agency that was responsible for the national exam said: 'You can't go to university because of a memorandum that was signed in 1991 by Ali Khamenei, the Supreme Leader of the Islamic Republic of Iran'.[1] In that memorandum, it is mentioned that Baha'is must not be permitted to attend university, and that any paths towards their economic or cultural progress should be blocked. That's the reason why Baha'is can't access higher education, hold governmental jobs, or be teachers, for example.

I started studying at an institution founded in 1987 by the Baha'i community itself: the Baha'i Institute for Higher Education (BIHE). It was an active and constructive response to the systematic deprivation of their right to education. They hired all the Baha'i professors who had been expelled after the Islamic revolution, taking advantage of this wide pool of human resources and putting it to good use.

I studied sociology at the BIHE and was arrested during the last semester of my studies because of my human rights activities. Whilst I was studying, I collaborated with an increasing number of lawyers, human rights defenders and social activists that were trying to follow legal paths for acquiring the right to education for those who had been deprived of it.

***CJLPA*: So, you were very much making connections and exploring the options there. Did you then hold protests?**

IS: No, we didn't hold protests. The Baha'i faith recommends that Baha'is obey the government, and if they face discrimination or persecution, they are encouraged to focus on attaining their legal rights through legal means at the local and national level. If that doesn't resolve the issue, like in Iran, they are urged to simultaneously explore every international legal avenue in order to acquire these rights.

***CJLPA*: Would you say the Baha'i approach to obtain social rights – through legal pathways – is a humanistic approach? Is it in line with Baha'i beliefs?**

IS: Yes, Baha'is actively try to promote these kinds of values, because they believe that humans hold the utmost responsibility to bring injustice to a standstill. They have tried to promote these ideas in peaceful ways, to share these principles, to promote them at all times, in all possible spaces. The original Baha'i population of Iran was a mixture of different communities from various backgrounds: Zoroastrians, Jews, Christians, Muslims (both Sunni and Shia) and atheists. They tried to embody these principles within that community so that people could hold the same rights and respect for each other.

1 The memorandum is available online at <https://www.humanrights.bic.org/iran>.

***CJLPA*: How would you describe the Baha'i faith? It's quite modern, but has it been persecuted for a long time in Iran, or is that something that arose with the Islamic Revolution?**

IS: The Baha'i faith, as you mentioned, is a relatively new religion. It was born in Iran, but it's now a global community. There are Baha'is in every country and in most cities in the world. Baha'is believe in the oneness of humankind, freedom of opinion, in the equality of men and women, and in the harmony of science and religion. Baha'is also believe that divine educators or manifestations of God—Abraham, Krishna, Zoroaster, Moses, Buddha, Jesus, Muhammad, and Baha'u'llah (whom Baha'is believe is the latest of these messengers so far)—come from the same source. In essence, these religions are different manifestations of one truth and are all from God.

The Baha'i community in Iran has been persecuted since its birth—mainly because of their convictions. Originally, persecution against the Baha'i community arose from their belief in oneness and gender equality, for example. Their ideas weren't acceptable to the religious understanding of the era, or of that specific geography. Over time, the persecution of Baha'is took various forms. After the Islamic Revolution it intensified: over 200 Baha'is were executed over false accusations such as spying for Israel or promoting corruption on Earth.

***CJLPA*: What has been the main reason for persecution of the Baha'is in Iran?**

IS: This persecution is still religious in its nature, but, for example, Baha'is have long been accused of being Israeli spies, because their holiest shrine is in Israel. If someone knows the history, however, they would know that the Baha'i faith was born in Iran, about a century before the existence of Israel and that Baha'u'llah was exiled to Palestine by two Muslim rulers – the Qajar rulers of Iran and the Sultan of the Ottoman Empire. This was decades before the establishment of Israel. A finite number who had followed Baha'u'llah into exile remained there and later the Baha'i World Centre was established there to assist in the management of Baha'i community affairs. The accusation of spying for Israel arises from ignorance and the fact that Baha'is have never had freedom of the press in Iran. They aren't able to defend themselves or to raise awareness of their own ideas or principles. In the public sphere, many Iranians think that Baha'is do not believe in chastity, but this is a slanderous lie promoted by the clerics to incite hatred and justify persecuting the Baha'is. Anti-Baha'i organisations in Iran hold the freedom to promote these false accusations through national TV, radio or newspapers, but Baha'is were never granted the opportunity to respond. Instead, they were imprisoned or exiled.

But I think the situation has changed in the last few decades. Baha'is now have access to global media, where they can share the true principles and values of Baha'i Faith. Now, more of the Iranian people know that the Baha'i Faith has millions of followers all over the world. However, in Iran, Baha'is still don't have access to the national media or the press and unfortunately, lots of hate speech still takes place every day in Iran against them.

***CJLPA*: When you started campaigning for equal education rights, had you heard about these issues facing Baha'is before experiencing them first-hand? Was it something you knew about, or was it your experience that led you to take action?**

IS: I had heard about it—my mother was expelled from university in the early years of the revolution, so I knew that Baha'is weren't allowed to access higher education. Although the Baha'is are the largest community deprived from education in Iran, there are others who have also been denied a right to education. In 2006, however, when my application to university was unsuccessful, there were 600 Baha'is turned down, just in that year.

***CJLPA*: How does that take place? Does the government have records of who is Baha'i? Do you have to state it when you take the national exam?**

IS: I don't know how the government finds out. It's not difficult, really, because if you ask a Baha'i if they are Baha'i or not, of course they would say: 'Yes, I'm Baha'i'. One of the principles of the Baha'i Faith is truthfulness, because it fosters social capital and is the foundation of all human virtues.

***CJLPA*: When you took the exam, did you suspect that you would be barred?**

IS: Yes, but I wanted to try my absolute best. I dedicated a full year and a half to studying intensely all day and night before the exam, on the off chance that things would go differently this year and I would be allowed to go to university. I had very good grades. But it didn't happen.

***CJLPA*: Clearly it paid off somehow, since you're now doing your PhD! Was it difficult to transfer to Sussex University for your Masters?**

IS: It was difficult because the BIHE is not recognised by the Iranian Education Department or Ministry. When you apply for higher education in other countries, in most cases, you are asked to provide the name of your previous university. As a Baha'i from Iran, you have to explain in depth to the institution that you are applying to that although the BIHE isn't recognised as an official university, it functions just like one. I don't know of any other such university or higher educational institution in the world.

***CJLPA*: It is a very unique concept. There are universities that don't even exist in some countries, where you can pay to receive a degree, but they don't even have lecturers. It's funny that this can exist, but you can't have recognition of the BIHE as a legitimate educational institution.**

IS: Exactly. Luckily, nowadays, there are a growing number of prestigious universities that have accepted Baha'i students from BIHE. On the website of the BIHE there is a list compiling these, with universities such as Harvard, Yale, the University of California, Columbia, the University of Chicago and so on—and that's just in the United States.

***CJLPA*: How many Baha'i citizens do you think have been deprived of higher education overall?**

IS: That's very difficult to estimate. Not everyone speaks about it. Every year though, hundreds of Baha'i students are turned down from university and now this is a multi-generational problem, so it is fair to say thousands and thousands of the Baha'is have been deprived of higher education.

***CJLPA*: When you started campaigning for the universal right to education in Iran, you went to all of these institutions, all of these public services—was there any one event that led to your arrest in 2010, or was it something that built up gradually?**

IS: We were a group of Baha'i students actively asking for our rights. In 2010, as you mentioned, a number of us were arrested along with some other non-Baha'i human rights activists. This happened very suddenly, and I never anticipated anything like it because every single thing we were doing was completely legal.

***CJLPA*: Your measured attempt to obtain equal education rights was met with aggression and violence**.

IS: It was, and not just towards us. In the next couple of years, many other Baha'i students were threatened with intimidating messages, or arrested. I was arrested in 2010 and interrogated for 72 days. They kept me in solitary confinement, all day, for that entire period. It was very difficult. I was even tortured physically and psychologically. I was just 21 years old. The conditions in which we were kept were horrifying. It was neither a formal nor a peaceful detention. When we were arrested, it felt like a kidnapping. It took place in the middle of the night in a dark street, and I wasn't told why I was being arrested. My parents had no idea where I was, and for the next 10 days they were searching everywhere for me.

***CJLPA*: That's terrifying.**

IS: I didn't even know where I was, because I was taken to Tehran, a considerable distance from the city where I lived. One night, after the interrogations started, I was beaten extensively and forced to wear a blindfold. I never actually saw my interrogator's face, or the people who were beating me. I didn't even know what objects they were beating me with. I remember the first day they started the beatings—it was eleven in the morning and it continued until sunset. When I was returned to solitary confinement, I felt immense pain in my entire body. My main question was: 'What have I done?'. The pain subsided after a few days, but the question never left my mind. At the time, they were attempting to get a video confession out of us: that, for example, we had participated in various demonstrations. They wanted us to confess that we were ordered by Baha'i institutions to be present at protests against the government. This was when the Green Movement[2] was taking place. But it was all false. We resisted the confession, despite the pain. To have agreed to the interview would have meant an admission of guilt, for something we had never done.

Following the 72 days of interrogation, I was released and taken to court. When I informed the general prosecutor that I had been tortured in detention, he just laughed in my face. It was shocking, and extremely embarrassing because he represented the final authority that I could have turned to for justice. I think this kind of attitude has become systematic in various kinds of persecution against a wide variety of citizens in Iran.

In court, it was like another interrogation. The judge was questioning me and insulting me—he was completely biassed. He sentenced me to five years of imprisonment. I was accused of being a member of a 'misled Baha'i sect', and an illegal group. It was just a made-up charge.

2 The Green Movement, or Green Wave, was a political movement that arose after the 2009 Iranian presidential elections, demanding the removal of Ahmadinejad from office.

I was 22 when I was brought to court. I couldn't believe that I was going to be sentenced for five years of prison for absolutely nothing.

***CJLPA*: When you should have been at university.**

IS: Exactly. I was asking to go to university and they sentenced me to jail. When I was granted an appeal but the verdict was reiterated, it was an even greater shock. The second court hadn't even read my file. They just confirmed it.

I was in prison from 2012-2017. It was a very difficult time. It was tough, but I learned a lot in those years because I was in prison with many other political prisoners and prisoners of conscience from different backgrounds. Funnily enough, the relative majority of the prisoners were Baha'i. Baha'is were no longer a minority in prison!

***CJLPA*: Did you find a sense of community? Did you make any good friends?**

IS: In that particular sense, it was a good time. Of course, it was tough, the sanitary conditions were awful and the food was terrible. We didn't have access to a phone. We couldn't call our families or friends. Added to the pressure of living in a very, very small place with many people – all male – it was hard.

I tell my friends that when you love someone and have chosen to live together, you may have disagreements from time to time, but you always have the possibility of getting a coffee or having a walk in the park. But in prison we hadn't chosen each other, we weren't in love with each other, and we didn't have any opportunities to leave. We had to stay in each other's company for 24 hours a day, seven days a week, 52 weeks a year, for five years. Many prisoners had much longer sentences than mine: some were there for 10 or 15 years. I was living in a room with two friends who had been given execution sentences. You can probably understand how difficult it would be to have that death sentence hanging over you and to be summoned one day…

Everyone was going through a very hard time. But even in that space, you had to be kind, to serve them, and to listen to them. Although we were all very distressed, I tried to be as friendly and helpful as possible to my friends who were in there. Unfortunately, both of my roommates were executed in 2018.

***CJLPA*: I'm so sorry to hear that.**

IS: You can begin to understand the pressure that everyone was under: this was the negative and difficult aspect of prison. And though it's ironic to talk about the positive side of prison, we could talk to people from different backgrounds, with people who had never associated with Baha'is. Some of them were political activists, but had never had met any Baha'is. Some didn't even know that Baha'is had been deprived of a right to education. Can you believe it? They were political commentators and they hadn't heard of that fact. Earlier I discussed how the Iranian government had been trying to maintain people's ignorance about Baha'i ideas and the Baha'i situation in Iran. They were somehow successful, because these political activists knew absolutely nothing about it.

Anyway, we had a unique opportunity to talk amongst ourselves. Some of them felt estranged in the early days. But after that, the feeling evaporated, because we were living together and they could see my life, my attitude towards various things, and my love for

them. We tried to help them correct their misunderstandings, to bring us closer together. It wasn't as if they were just learning from us, either. We tried to go beyond an idea of 'us and them', and there was a lot that we, as Baha'is, learned from these different political activists in prison. Baha'is learned that they ought to be even more active in various civil spheres which Baha'is had previously thought inaccessible. We are now all close friends, and have the amazing privilege of being able to call each other whenever it's necessary.

I think it was a big step for the Baha'i community in Iran, actually, to have been able to meet these people and to have had the opportunity to exchange so many ideas about Iran's future. How could we engender a more diverse and inclusive society? How could we be more united, since Iran is made up of so many different ethnicities, ideas and religions? The fact that we were stuck together also represented an amazing opportunity to reflect on these cardinal subjects.

***CJLPA*: It may be difficult to talk about this, but what was your daily routine like?**

IS: It's not difficult. It's still part of my life, unfortunately, because many of my friends remain in prison. Everyone had his own schedule. You could sleep during the day and work at midnight. The important thing was to respect the privacy of others, because it was so hard to find. Not having a room to yourself, everyone had to respect each other.

I tried to get up early in the morning and to study. We sometimes struggled to get books brought into the prison, since each one had to be reviewed by the director, who often vetoed them. You can understand why the head of the prison didn't exactly want us to be happy there. It was difficult, because we wanted to read, to study, to walk even. We only had two or three hours a day in the yard where we were allowed to get some fresh air. You could run, if you had shoes, but no-one was actually allowed to have them inside the prison. That was an added challenge. It was a very small yard, with only one tree at its centre and no grass. They even cut down the tree after two or three years.

As a service to prisoners, I distributed the prison meals twice a day. I was so ashamed during lunch and dinner because the food was absolutely terrible. I had to convince people to come each time, to encourage them to eat, and they were always disappointed. But someone had to do it.

***CJLPA*: In terms of facilities, did you have a library, or a reading room?**

IS: Actually, the books were all kept in various rooms. For example, when I managed to import some books for myself, I kept them in mine. You had to keep up to date with which books were in whose room. It was also, of course, dependent on your relationship with people. If you knew them, you could borrow a book from them. We didn't have many books and our options were really limited. But they were from different contexts, so if you wanted to you could read across a wide array of subjects.

***CJLPA*: You're now doing your PhD at Cambridge, with almost limitless access to any book that you like. What did you choose to write about?**

IS: I'm writing on the concept of decline in the writings of Iranian intellectuals of the 20th century. If someone in prison had told me that I would be doing my PhD at Cambridge in three years' time, I wouldn't have believed it. One day you're in prison because of your struggles for the universal right to higher education, and then three years later you find yourself at one of the most famous universities in the world.

***CJLPA*: How do you remain in contact with the Baha'i community in the UK?**

IS: The UK has a strong Baha'i community. They organise different community-building activities that aim to build capacity in people to become protagonists of the wellbeing of their community and society. These activities are open to everyone. Baha'is welcome members of the public, so that they can consult and reflect together on how best to promote justice in society, to build unified communities, to apply the principles of gender equality in different settings of family, work and so on.

There is a focus at the grassroots level on community-building and social activities, in order to empower people, but the Baha'i community in the UK is also trying to contribute to different discourses such as social cohesion, the role of the media, freedom of religion and belief and so on, and to collaborate with various actors of civil society.

***CJLPA*: If there were one thing that people reading this interview should walk away with, what would you like them to share with other people, to raise awareness of?**

IS: I think the most important thing is the concept of universal participation, to understand that every human being has a potential that should be released through education, and that it is our duty to help everyone access that right. In a healthy body, all the cells are involved in the body's well-being. The body itself supports all cells by feeding them, so it's also a mutual relationship. In our society, if you want to have a healthy society, all the cells, the different citizens of the world should be educated and empowered, so that their potential can materialise and they can work in promotion of the public good. That's how I perceive the main role of education and it is probably the ultimate goal of my activities.

***CJLPA*: I wanted to ask you one last personal question. Being away from home is an important theme in Iranian popular music, for example in LA and other exile communities. Is there a song that that you particularly associate with Iran, that makes you think of home?**

IS: There is a very famous song by Shajarian, called Morgh-e Sahar. The main idea expressed in the song is one of optimism for the future and taking steps towards overcoming the barriers in our way. I think that's something we should always keep in mind. There are many difficulties or challenges in our lives, and I think we need to nurture this optimism. We should also be systematic, of course, with evolving conceptual frameworks that are fostered both by spiritual principles and scientific knowledge.

***CJLPA*: You remain hopeful about the future of Baha'is in Iran, and their education. You have to, in a way, don't you?**

IS: Yes, that's an indispensable part of any kind of desire for change. We need to keep going on, and I think this song fosters both hope and action, so that we can all take part in the betterment of the world, and build a brighter future.

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Heraldic Politics: **Why Flags Still Matter**

Edward Lucas

Edward Lucas is a British writer and journalist who has written for newspapers including The Economist*,* The Times*, and the* Daily Mail*. His focus has been on European and transatlantic politics, economics, and security. He is now the Liberal Democrat candidate for Cities of London and Westminster.*

The Estonian flag is a blue-black-white tricolour. Or at least it should be. As a foreign correspondent in 1990, I was puzzled to see that the flags sprouting across the country as Soviet rule crumbled sometimes featured a dingy yellow bar at the bottom, instead of the correct crisp white. The reason was illuminating. These flags had been stored in secret during the past forty-five years of Soviet occupation — an era when possessing any symbols of the pre-war republic was a serious criminal offence. The fact that the flags could be flown again not only exemplified the dawn of freedom. It paid tribute to the dogged bravery of those who had cherished these fading pieces of cloth at a time when the restoration of independence seemed as unlikely as the re-emergence of Atlantis.

Flags are the most potent form of political art. People will kill for them, suffer and die. Even their existence can arouse fury. Taiwan's flag, for example, is taboo in the eyes of the mainland Chinese authorities. They regard the offshore democracy as a rebel province and its claims to statehood as an affront to national unity. So how should an international airport signal the right visa queue to Taiwanese passengers? One option is to show the Taiwanese flag. Another is to replace it with a bland TWN on a white background.

Flags, wrote the late Whitney Smith, an American pioneer of vexillology (the study of flags) 'are employed to honour and dishonour, warn and encourage, threaten and promise, exalt and condemn, commemorate and deny'. They 'remind and incite and defy...the child in school, the soldier, the voter, the enemy, the ally and the stranger'.[1]

Flags' origins are lost in the mists of time. An Iranian standard made of beaten copper dates back 5,000 years. Their function was originally military: an identifiable rallying point on a confusing battlefield, possibly with religious connotations – a holy relic, for example. The switch from military heraldry to politics can be traced back to the 16th-century Dutch revolt against Spanish rule, when the ancient red, white, and blue colours of the Charlemagne era came to symbolise not a monarch, but a people, a language, a culture, and a cause.

Flags are the simplest way of encoding national myths, with all their errors and ambiguities. Britain's Union Jack comprises the cross of St George, the white diagonal Scottish saltire (St Andrew's Cross), and the red diagonal St Patrick's cross of Ireland. This is odd. Only Northern Ireland is part of the United Kingdom, and Wales, very much a constituent country, is not represented. The US flag is a complicated and slightly inaccurate representation of the country's composition (the District of Columbia and Puerto Rico are short-changed when it comes to the 50 stars). The Estonian flag combines blue for the sky, black for forests, and white for snow.

Religion plays a big role. Crosses reflect Christian origins (the oldest national flag in continuous use is Denmark's white cross on a red background, dating from the 15th century). Muslim countries use Koranic texts or crescents.

Flags send more detailed signals too. Before the advent of radio, flags were the most effective way of communication across water. Their use, with special knots tied at high speed to flag halyards, to send complex (and coded) naval signals is one of many all-but-lost nautical arts.

The rules about flags can seem arcane. Protocols about lowering, raising, and folding – when to fly them at half mast, for example – are fussy and detailed. British pedants insist, wrongly, that the flag of the United Kingdom should be called the Union Flag when flown on land, and the Union Jack only at sea.

But flags are not going out of date. They went into space on the rockets that launched the Soviet Sputnik satellite and were planted on the moon by American astronauts. Afghan embassies around the world still defiantly fly the red-green-black of the fallen pro-Western regime, not the Taliban's stark black and white version emblazoned

1 'Obituary: Whitney Smith, vexillologist, died on November 17th' *The Economist* (London, 10 December 2016) <https://www.economist.com/obituary/2016/12/10/obituary-whitney-smith-vexillologist-died-on-november-17th>, accessed 15 February 2022.

with a Koranic verse. That continuing defiance recalls the Baltic states' embassies in Rome, Washington DC, and elsewhere, which throughout the Soviet era signalled their countries' surviving de jure statehood by flying the national flags.

As political technology, flags are still highly effective. A daily salute, a pledge of allegiance, marchpasts, and other ritual displays help entrench patriotism and cohesion. Foreigners visiting the United States do well to remember the particular veneration that Americans have for the Stars and Stripes (though oddly, this does not preclude its ruthless commercial exploitation).

Aesthetic concerns, however, usually come second. Crests and symbols create clutter. The ideal flag is attractive, memorable, and significant. Whitney Smith designed the flag of Guyana, with its red diamond (for steadfastness), gold arrowhead (Amerindians and mineral wealth), and green background (verdure).

Distinctiveness matters. Austria's horizontal scarlet-white-scarlet is easily confused with Latvia's, which uses maroon. Chad and Romania have identical flags; Andorra and Moldova use the same blue-yellow-red tricolour, but with different crests. Monaco and Indonesia use the same red and white format, though the Mediterranean micro-state's version is a tad shorter. Ireland and Chad have the same tricolour, but with the colours in reverse order. Australia and New Zealand are almost identical (both using the British Union Jack), with differences in the depiction of the Southern Cross constellation.

For those with fervent vexillic attachments, outsiders' ignorance can be vexing. I lived in Washington DC during the Soviet crackdown in Lithuania in January 1991. As my friends in Vilnius stared death in the face, I hung the beleaguered Baltic state's tricolour from my window as a sign of solidarity. It features a yellow stripe (for sunrise), a red one (for dawn), and a green one for the country's fields and forests. A few days later my neighbour stopped to ask me — slightly puzzledly — about my support for Rastafarianism, a religion whose flag uses the same colours but in a different order.

But overlaps can be useful too. The souvenir shop at Tallinn airport does a brisk trade in patriotic-themed souvenirs. Its staff were understandably bemused when vast quantities of their stock were bought up by burly visiting Britons. The blue-black-white colours just happen to be the same as Bath Rugby Club, and its diehard fans, in Estonia by chance for a stag weekend, were delighted to find a new source of team memorabilia.

Just don't call it cultural appropriation.

In Conversation with **Dr. Alison Gilliland**

Kylie Quinn

Dr. Alison Gilliland was Dublin's 353rd Lord Mayor in 2021/2022. She is currently a Dublin City Councillor for the Labour Party, representing her local area of Artane/Whitehall and works as a facilitator, advisor and researcher. Her community-oriented council work is underpinned by her previous experience as a training and equality officer for her trade union, the Irish National Teachers' Organisation.

***CJLPA*: Dublin has had a mayor for nearly 800 years. How do you view your role as mayor this year?**

Dr. Alison Gilliland: The role of mayor this year is a particularly pertinent one in the sense that we're transitioning out of a global pandemic. And then suddenly, we have the dark cloud of a war in Ukraine. So it's a year with lots of ups and downs.

When I was elected in June, I had three priorities: the sustainable recovery of our city, giving visibility to women and girls, and housing. I chose those three because they were issues in our city, like other cities around the world that are trying to recover from COVID, but they also speak to the global perspective – of the climate crisis, for example.

Firstly, COVID gave us great opportunities here in Dublin to accelerate some of the plans we had, particularly with regard to active travel and mobility. You might see a huge increase in cycling infrastructure around the city. That change took place over a couple of months, to allow people greater space to walk around and to cycle, conscious that people didn't want to get on public transport, but also conscious at the back of our head that we need to keep people less dependent on private cars. So there's an element of human and community recovery as well one of climate resilience.

Women, secondly, because globally women are not equal partners at the decision-making table. I'm only the 10th female Lord Mayor of Dublin City. The 10th in the last 80 years, because our first female was in 1939. So I'm very conscious of that gender imbalance. Also, from the perspective of urban planning and development, we need to have both views. How women move around the city and their experiences of work, culture, and recreation are very different to those of men.

And finally housing. We have a massive housing crisis in the country, but more so in Dublin as our capital city and biggest urban centre. We have people struggling to make rent, and people who would like to buy their own home but can't, due to lack of supply. We're seeing an excess of 'build-to-rent' development, generally funded by investment funds demanding very high rents. That has a financial impact on people's ability to live and work in the city, and a knock-on impact on our domestic economy. The question is: how can we square that circle? We do as a city have responsibility for the provision of what we call social housing, housing for people under a certain income threshold. While we don't technically have a responsibility for the provision of housing for those above that threshold, we're very conscious of those at a middle income that are struggling, so we've taken it upon ourselves to build cost-rentals: lower rent, not-for-profit rentals on public land.

They're the three big issues for me. And, of course, other issues pop up during the course of the year. One of the issues that has come up for me is the high level of street issues: on-street homelessness, on-street addiction and substance misuse, and on-street safety.

***CJLPA*: You said earlier that 'we only have a responsibility for social housing, but have taken on developing cost-rentals on public lands' to ameliorate the housing crisis. Who is 'we'? Is that the Dublin City Council?**

AG: Yes, it's the Council. At the national level, the Minister for Housing, Local Governments, and Planning produced legislation that allows for what we call cost-rentals. As a local authority, we own some of the public land in Dublin City, with other public land owned by state bodies or the Office of Public Works. What we are doing on some of our larger developments is mixing social with cost-rental.

I think one of the reasons we have got into a situation where we have so little housing stock in public ownership is because we've had a scheme whereby local authority tenants could buy out their local authority rental house. We've 'lost' 25,000 units because of that and I'm very concerned about the long term. We have people now paying very high rents. My question is: what will happen to those people when they retire and they take a significant drop in their income? They won't be able to afford those rents. We need to build

and increase our housing stock so that we have a cushion there for that eventuality down the line.

We also need to increase our stock to accommodate those on social housing waiting lists. As a state, I believe we have a responsibility to help those who can't afford housing because we need sustainable communities. If we don't have sustainable mixed income communities, we're going to get different ghettos and communities isolated from each other.

***CJLPA*: How has Russia's invasion of Ukraine impacted Dublin?**

AG: We now have refugees arriving in the city every single night. We have established several 'resting centres' with the civil defence and housing section, where we look after them for 24 or 48 hours until they're allocated somewhere for accommodation. That's our role at the moment. I can see that developing into the provision of housing and also integration.

I'm conscious that most of the families are women and children, who will need schools, and involvement in local community activities. They are safe here, but probably suffering trauma and we need to figure out how we can best support the manifestation of that trauma.

***CJLPA*: You have been a Dublin City Councillor from 2014 to 2021. Over those seven years, which of Dublin's issues have grown in salience and which have shrunk?**

AG: What has particularly grown in importance is the climate crisis. Every report that we get is worse. The national government does have a Climate Action Plan, which is very good in the sense that it sets out very clear objectives. But I don't feel that we are doing enough. I don't feel a sense of urgency from some of the actors at a national level. So for ourselves at council, it's our responsibility, and my responsibility as Lord Mayor, to push that agenda. The climate lens permeates everything I do.

For example, in the sustainable COVID recovery, we're concerned with accessibility in the city, permeability in the city, walking, and cycling. This ensures sustainability, but also enhances the quality of our air. I'm old enough to remember smog in Dublin clinging to your clothes. We've come a long way, but we still have a long way to go.

We also need to be more conscious of greening our city, not only from the carbon and climate change perspective, but also in terms of quality of life and the aesthetics in the city. We started a pilot to pedestrianise some of our streets. We have two main areas that are pedestrianised, and a third one which we trialled on weekend evenings last summer. That is now going to be made permanent.

This should really enhance the city. What we hope to do is have people arrive into the city by Connolly Station, which is our north-south access, and be able to walk at least five kilometres in a pedestrianised or traffic-free area. That will give great accessibility to the city, a lovely sense of flow, and a sort of added ambience.

***CJLPA*: The Dublin City Development Plan 2022-2028, and the development strategy of other cities such as Paris, emphasise the '15 minute city'. Can you speak to the significance of this?**

AG: Yes. What the idea of the '15 minute city' will do for Dublin is make us focus on creating communities that have all the services they require within a 15 minute walk, cycle, or journey by public transport.

There are two challenges in that. Obviously, it's about reducing your carbon footprint by limiting the need for private transport, but it's also about growing communities and bringing people back together. I think we all saw that during COVID lockdowns, with small enterprises developing within local communities. The challenges we have in this respect are getting more people to live in the city centre, because that's where a lot of the employment is, and getting employment into local communities. We now need to be more conscious of the balance between employment opportunities and housing. We can't build residential units and housing on every single piece of land we have and take every piece of land, because it's more than houses. You need community infrastructure, recreation, and employment.

One of the issues I'm working on is over-the-shop vacancy, or what we call upper floor vacancy. I hosted an online summit just before Christmas, where we brought in a lot of the stakeholders, owners of some of those buildings, architects, developers, and businesses, to identify what the key challenges were. There are challenges around planning requirements. But one of the biggest challenges is that those who own them are not motivated to go through the pain of planning, financing, and regenerating the floors of the shop. In a lot of cases, they don't need the income. Many of the owners don't even live in Dublin.

So that is a challenge. We have a few ideas of how we might partner with private developers and owners to help regenerate those upper floors because they're such a valuable resource. We can't demolish and rebuild everything. We need to be sustainably 'recycling' these buildings, reusing them and not releasing any more carbon into the atmosphere.

***CJLPA*: Do you compare Dublin to other cities? And if so, are they other Irish cities, other EU capital cities, or global cities?**

AG: I consider Dublin a European capital city. The size of our country and the size of our capital is similar to Denmark, one of the smaller European countries. Every city, particularly Dublin, has its own unique characteristics, but we do aspire to be one of the leading European capital cities and I think we're well respected. Tourists love Dublin because of its unique character and the people. Dublin people make Dublin. And we have similar challenges to other European countries with regard to climate, housing, resilience, and post-COVID recovery. So there are a lot of similarities, but Dublin has its own unique context.

One of the things that really struck me this year was the reaction from Dubliners to outdoor dining. We don't have a tradition of outdoor dining in Dublin because of the climate, but with COVID we introduced outdoor dining as a way of enabling the hospitality industry to get back on its feet while there were still restrictions on eating indoors. We doubled the number of seats and tables in an outdoor space in the city in a couple of weeks. And I think that that atmosphere, along with the pedestrianisation of a lot of the streets, has really increased the European vibe in the city. I know a lot of people have fed it back to me and said the city now feels like those modern European capital cities. You have it in Paris, and it rains in Paris as well. I think we don't mind sitting outside, under the heater, with coats on. It's an element of the city that we can then enjoy.

***CJLPA*: How has COVID impacted Dublin?**

AG: No more than any other European city. We've lost businesses, particularly in the hospitality sector because they suffered most from the lockdown and the restrictions. I wouldn't say we 'lost' our arts and culture and industry, but they really, really suffered.

I think that had a two-fold impact on us. We realised how central arts and culture are to our well-being, and the balance that we need in every community within our city. Previously, there was focus on the city centre and on people coming into what we call 'town' to go for a bite to eat, go to the theatre or cinema. COVID exposed the dependence the city centre had on workers coming in every day for retail, for hospitality, and for culture. When they weren't there, communities in the periphery of the city were flourishing because everybody was located at home in their own area. And the city centre was vacant and empty. That has given us a real impetus to work harder on upper floor vacancies, for example, to get more people living in the city.

***CJLPA*: Why are arts and culture important to communities?**

AG: I suppose it's the coming together of the community. Even though you may not know most of the people in the cinema, everybody laughs at the same thing. It's that sharing. As there can be such a focus on academia, and business, and the economy, people tend to forget the importance of people who work and thrive in the arts, how we as humans thrive through the arts.

One of our challenges is to find more arts and culture spaces. Because it's not a business as such, it's hard to make a profit that will allow you to pay the high rents. When we came out of lockdown just after my election last year, myself and the head of city recovery approached some of the big landlords on our main retail shopping street, Grafton Street, where they had vacant commercial space, and asked them if they would give us the space for six months at a very cheap rent, where we could experiment with pop ups. Whether that be arts workshops or the circular economy and upcycling, to see what people would react to, what they wanted in a space, and at the same time create footfall.

***CJLPA*: Where, and in what way, is Dublin's local art and culture under threat?**

AG: We're particularly conscious of 'The Liberties', Dublin 8. We've had a significant amount of applications for build-to-rent. We're looking at thousands of new apartments. But it's also one of the areas that has the fewest green spaces. We're in favour of preserving green spaces for recreational use. If we're going to be true to the concept of a 15-minute city, you should also be able to walk to your local football pitch to play, or your local club. So there's always a tension around use of land.

The other challenge we have is where private owners develop older buildings that might have a cultural space in them. One earlier this year was called the Cobblestone which, for all intents and purposes, is a pub. But it's bigger than that! It has rooms for people to learn to play Irish traditional music or take Irish language classes. It brings people together for that Irish cultural space, and you just can't recreate that. That was going to be demolished, and a hotel built on it, but planning wasn't given. We've written a compromise into our Development Plan: where a cultural space is going to be redeveloped, the size of the cultural space has to be retained and recreated as far as possible. One of our problems, in the interaction between national and local, is that we have no definition of 'cultural spaces' in national legislation. So for some, as in this case, a pub was a cultural space, even though that would generally come under hospitality. The other is the architecture of the place. These new shiny buildings are beautiful, but it's almost like we're sanitising the city.

We have to be conscious to retain what makes Dublin City's character and hold onto some of those old buildings. We have a beautiful theatre, Smock Alley Theatre, and we're in the process of reclaiming that as a municipal theatre space. We have the old school of music off Grafton Street, which is vacant at the moment. In our Development Plan, we're looking at how we can best use that space. We're giving it over to artists for temporary use, but questions remain in the long term. Should we use it as a museum? My preference would be using it for something that's more interactive. That could be science, tech, or arts, but the aim would be something that people can actually go in and interact with, instead of just passively looking. My underlying principle when it comes to developing our city is: if it works for Dubliners, it'll work for tourists alike. I think there was an over-emphasis during the early 2000's on the tourist economy. We're creating an experience in the city for tourists without thinking about our own Dubliners who need experience.

Another challenge is that our public cultural experiences like museums all close at six, which isn't always accessible to families with children or workers. We hosted an exhibition at the Round Room of the Mansion House this past summer open until eight o'clock, and the public reception towards this showed these opening hours are more accessible.

***CJLPA*: In an architectural sense, how do you balance progress with culture and heritage?**

AG: We have a scheme called 'Protected Structures', according to which we are conscious of buildings with a particular architectural, social, or historical value. Once they're included in that record of protected structures, the physical and cultural integrity of those buildings has to be preserved. In some cases, planning would just require the façade to be retained, whilst the inside can be regenerated in a more modern way. Other times it's the integrity of the entire building, including the contents. That's probably the best way that we can retain our cultural and social architectural heritage.

***CJLPA*: Who puts structures on that protective list?**

AG: We retain the list. Anyone can apply and say 'let's save this building, we think this building is of significant architectural heritage'. You make an application, then it is assessed by heritage officers in the Council. Every building has some sort of architecture, culture, or social value to it. It is a balancing act, since you have to ensure you're not blocking a huge amount of modern development, but we're very conscious of the need to preserve our cultural and architectural heritage.

***CJLPA*: How does a city facing a housing crisis balance the rapid delivery of houses with social infrastructure?**

AG: We use our Development Plan. In this Plan, we have certain criteria with regard to social and community infrastructure. For example, our Development Plan requires a childcare or creche facility for every X number of residential units. There are requirements in some of our zonings for 20% of the land to be used for public open space.

It's not always easy. Take schools, for example: the Department of Education decides where schools are. If we own the land we can work with them, but where private owners own the land this isn't possible. One of the difficulties we have run into is that the Department of Education doesn't take account of the 15-minute city or sustainability. They look at a five kilometre radius, but you cannot walk five kilometres, and you probably couldn't cycle it if you're a young kid. Again, it's trying to align national and local parameters.

***CJLPA*: Dublin is a short city, slow to incorporate skyscrapers. But are they a viable solution to the housing crisis?**

AG: We've been gradually moving to higher buildings in the city. Our docklands are a wonderful example of height when it's well planned. I think that there's an aesthetic 'skyline' consideration. There are questions with regard to them being the solution to residential needs. I'm not sure about that. There is a cost: the higher you build, the more expensive it is. And with regard to our own fire safety requirement, once you pass a specific height, you then have to increase your fire safety installation requirements.

There's also the energy concern as regards the installation of lifts up and down. There's a lot to consider there. We have some very high-density areas that are low; height doesn't necessarily give you density. The other consideration is the amount that a residential skyscraper would cost either to buy or rent. We have a lot of very high end, high buildings that are financially inaccessible to those who need housing. While developers will say 'I want to build a 42 storey residential building that will provide X amount of residential units', my question is: well, how much will they cost through rent? Because if it's more than 30-40% of somebody's disposable income, it's not going to serve the city.

***CJLPA*: What would be some popular misconceptions about solutions to the housing crisis?**

AG: That there *is* a solution. It's very, very nuanced. We do have to build, but planning regulations can inhibit this. The new, special planning policy requirements that were brought in nationally, which superseded our development plan, particularly with regard to height, have held up so many planning applications.

With regard to social housing, we have to jump through hoops with the Department of Housing when we're building. It takes about a year and a half to go through that application process with them. The big challenge now is how to build sustainably.

The war in Ukraine has created difficulties with international trade and prices of construction products have increased. There is a difficulty finding people now to work on construction. So there are lots of factors and no one simple solution, except just build! And build sustainably.

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'The Eyes of the World Are Upon You': The Role of International Organisations in the Suez Crisis

Asa Breuss-Burgess

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Introduction

Gamal Abdel Nasser savoured the moment: it is 26 July 1956 and he has just announced the nationalisation of the Suez Canal. The thousands packed into Alexandria's Mohammed Ali Square are ecstatic.[1] This bold and highly contingent decision marked the beginning of the Suez Crisis, a complex mixture of war and diplomacy that tested the 1950s international system. Despite intense disagreement and violence, the crisis eventually reached a peaceful (if not uncontested) resolution. In this study, I will pursue a comparative analysis of international organisations (IOs) in order to understand their role in bringing the conflict to a close. Beginning with a narrative and historiographical background, the purpose of this section is to demonstrate how the introduction of new primary and secondary material can help us to understand this role and, consequently, enrich scholarship on the Suez Crisis.

The crisis itself can be divided into three phases. First, after Egypt nationalised the Canal, a period of diplomatic deliberation ensued between Britain, France, the United States, and Egypt, which failed to bring about the international control of the Canal. Second, as planned in the clandestine Sèvres Protocol of 24 October 1956, an Israeli invasion of Egypt commenced on 29 October. Two days later an Anglo-French force intervened on the pretext of 'police action' to protect international shipping. Hostilities ended with a ceasefire on 6 November. Third, a withdrawal period began, which entailed intense diplomatic pressure on Britain, France, and Israel as well as the stationing of UN Peacekeepers (UNEF) in Egypt. UNEF supervised the withdrawal of troops, the clearing of the Canal, and the keeping of the peace on the Israeli-Egyptian border. British and French personnel evacuated by 22 December and the last Israeli troops left Egypt on 12 March 1957.

1 Jean Lacouture and Simone Lacouture, 'The Night Nasser nationalised the Suez Canal', *Le Monde diplomatique* (Paris, July 2002), <https://mondediplo.com/2002/07/12canal> accessed 6 March 2022.

Each of the crisis' protagonists regarded their vital interests to be at stake as they entered the crisis. President Nasser felt compelled to nationalise the Canal in order to fund the Aswan High Dam project, the cornerstone of his plan for Egypt's socioeconomic development. The West had withdrawn funding for the dam over fears of Soviet influence in Cairo; thus, by nationalising the canal, Nasser could both enrich Egypt and capture an important symbol of both the old imperialism and contemporary Western influence. Indeed, Britain had maintained a Protectorate over Egypt between 1882 and 1922 as well as a massive military base in the canal zone primarily to protect what a young Anthony Eden once called the 'swing-door of the British empire'.[2] Regarding the 120-mile waterway as essential to communications, trade, and (increasingly) oil-supply, Britain and France had together owned most of the shares in the Canal Company.[3]

The imperial powers could not accept that Nasser, who lambasted the French presence in Algeria and the British-led Baghdad Pact, would have control over a strategic interest that British leaders still regarded as their 'jugular vein'.[4] Israel, constantly under threat from its numerous hostile neighbours and cross-border *Fedayeen* raids, was also unsettled by the fervently anti-Zionist Nasser. For these reasons, the botched British-French-Israeli operation had attempted to precipitate Nasser's downfall and restore international control to the Canal.[5]

2 Quoted in Keith Kyle, *Suez: Britain's End of Empire in the Middle East* (2nd edn, I.B. Tauris 2003) 7.

3 Jacob Coleman Hurewitz, 'The Historical Context' in William Roger Louis and Roger Owen (eds), *Suez 1956: The Crisis and Its Consequences* (Clarendon Press 1991) 19-30.

4 ibid 22.

5 Mordechai Bar-On, 'David Ben-Gurion and the Sèvres Collusion' in ibid 145-60.

Broadly speaking, three waves of writing on the Suez Crisis can be identified. The first of these was the publication of personal memoirs by contemporaries of the crisis, which, from the late 1980s, a second wave of scholars used alongside newly accessible archival material to structure a lively academic debate.[6] These diplomatic histories have understood the resolution of the Suez Crisis as a product of Britain and France's inability to withstand American pressure to withdraw.[7] Since the turn of the century, however, historians have emphasised the importance of non-state actors in the course and resolution of the crisis.[8]

International relations theory provides us with analytical tools that help us understand the role of IOs in history. I will draw inspiration from Abbott and Snidal's argument that IOs affect agency through their ability, first, to centralise diplomatic engagement in a single, stable forum, and second, to remain independent.[9] I will also draw on Barnett and Finnemore's idea that their 'control over technical expertise and information' gives them a special role in making international norms.[10]

To understand IO agency, I will focus on the United Nations (UN), the International Monetary Fund (IMF), and the International Committee of the Red Cross (ICRC). Though other IOs—notably the World Bank—played a role, these three organisations embodied the three central loci of multilateralism during the crisis: diplomatic cooperation (UN), international monetary stability (IMF), and humanitarian aid (ICRC). While my comparative methodology certainly adds complexities, this type of analysis will, I hope, allow me to make new and insightful conclusions about both the collective role of IOs and their place in the wider international society approach.

I will proceed as such: in the first chapter, I will investigate the aims of IOs. In the next chapter, I will outline their operations and assess the degree to which each organisation achieved its stated aims. Across both chapters, I will compare their aims, operations, and outcomes. In my final chapter, I will discuss how my research changes our understanding of the course and resolution of the Suez Crisis.

I will explore an under-utilised body of archival material from the ICRC, IMF, and UN to address the questions I have outlined. The ICRC reported its aims and operations in the *Revue Internationale de la Croix-Rouge* (hereafter *RICR*) whereas the IMF and UN employed press releases. Meeting minutes and resolutions from the UN Security Council and General Assembly also elucidate the organisations' activities. IMF press releases were infrequent and relatively uninformative, so I draw on the Executive Board Series, composed of internally circulated documents that appeared before Executive Board Meetings. Whereas the *RICR* and the UN documents I am using were immediately available to the public, much of the IMF material was strictly confidential. The *RICR* was mainly of interest to ICRC delegates, other humanitarian organisations, Red Cross societies, and the organisation's sponsors; whereas UN Secretariat documents, meeting minutes, and resolutions were generally addressed to 'the world', which, perhaps vaguely, we can take to mean the international community.[11] Though I rely on self-reporting by officials from each organisation, which lends itself to the presentation of activities in a positive light, I approach the sources critically and with reference to other primary and secondary sources. In this way, it becomes possible to appreciate the agency of IOs in the history of the Suez Crisis.

'Nothing Ventured, Nothing Gained': The Aims of International Organisations

Three central consequences of the Allied victory in 1945 characterised the 1950s international order. First, a superpower confrontation between the American-led West and the Soviet-led East permeated all areas of geopolitics. The rapid proliferation of nuclear weapons made the prospect of this incipient Cold War turning hot particularly frightening. Second, the power and legitimacy of European imperialism was quickly falling away. Especially after the Bandung Conference (1955), anti-colonial movements and post-colonial states increasingly challenged European political, economic, and ideological domination. Third, several international organisations, including the UN and IMF, were set up after 1945 to preserve the postwar peace. Despite the intensifying East-West Cold War confrontation and North-South contestation over decolonisation, states continued to engage with multilateral institutions through the 1950s. Sequentially, I will locate the mandate of the ICRC, the IMF, and the UN in this international order before outlining their articulated aims at the Suez Crisis and concluding with a comparison of these aims.[12]

The ICRC

The ICRC was founded in 1863 'to protect and assist people affected by war'.[13] Though technically a private Swiss association, the ICRC was mandated by the 1949 Geneva Conventions—international treaties governing armed conflict—to inspect the treatment of civilians, prisoners of war, and the wounded.[14] Its role as the centrepiece between various national Red Cross and Crescent Societies and in the 1949 Geneva Conventions was justified with specific reference

6 For memoirs, see Anthony Eden, *Full Circle: The Memoirs of Sir Anthony Eden* (Cassell 1960); Dwight Eisenhower, *The White House Years vol. ii: Waging Peace, 1956–1961* (Doubleday 1965); Howard Macmillan, *Riding the Storm, 1956–1959* (Macmillan 1971); Muḥammad Ḥasanayn Haykal, *Nasser: The Cairo Documents* (New English Library 1972).

7 For diplomatic histories, see Diane Kunz, 'The Economic Diplomacy of the Suez Crisis' (Yale University Ph.D thesis 1989); Kyle (n 2); Louis and Owen (n 3); W Scott Lucas, *Divided We Stand: Britain, the US and the Suez Crisis* (Hodder & Stoughton 1996).

8 See for example James M Boughton, 'Northwest of Suez: The 1956 Crisis and the IMF' (2000) 00/192 IMF Working Papers; Norrie MacQueen, *Peacekeeping and the International System* (Routledge 2005) 61-79; Amy Sayward, *The Birth of Development: How the World Bank, Food and Agriculture Organisation and World Health Organisation changed the world, 1945-65* (Kent State University Press 2006) 56-63; Esther Moeller, 'The Suez Crisis of 1956 as a Moment of Transnational Humanitarian Engagement' (2016) 23(1-2) European Review of History: Revue Européenne D'histoire 136-53.

9 Kenneth W Abbott and Duncan Snidal, 'Why States Act through Formal International Organizations' (1998) 42(1) The Journal of Conflict Resolution 4.

10 Michael N Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53(4) International Organization 707-15.

11 For example, United Nations General Assembly (hereafter UNGA), '565th Plenary Meeting', 4 November 1956, UN, A/PV.565 80.

12 Odd Westad, 'The Cold War and the International History of the Twentieth Century' in Melvyn Leffler and Odd Westad (eds), *The Cambridge History of the Cold War: Vol. 1 Origins, 1945-1962* (3 vols, Cambridge University Press 2010) 1-19.

13 François Bugnion and Françoise Perret, *From Budapest to Saigon: History of the International Committee of the Red Cross, 1956–1965* (ICRC 2009) 2.

14 ibid 5.

to the organisation's neutrality.[15] Thus, its humanitarian role at Suez would be to implement the Geneva Conventions as a 'specifically neutral and independent institution'.[16]

By the time the Suez Crisis arrived, moreover, the ICRC badly needed to prove its worth: since 1945, it had not only lost major portions of its funding, but also the confidence of governments on both sides of the Iron Curtain.[17] Its failure to expose the Holocaust and the wholesale abuse of Soviet prisoners during the Second World War as well as its supposed anti-communist biases during wars in Korea and Indochina had especially harmed its standing in the East, though relations had improved somewhat since 1945.[18]

Moving from the general to the particular, ICRC delegates had identified specific risks for the humanitarian management of conflict in the Middle East; an ICRC delegate who toured the region between January and May 1956 noted 'l'absence de préparation pour le temps de guerre'.[19] Furthermore, in Autumn 1956, the ICRC would at the same time be stretched to address humanitarian issues arising from the Hungarian Revolution. As the first interstate war where the ICRC was tasked with implementing the untested 1949 Geneva Conventions, the Suez Conflict was expected to test the ICRC.

The ICRC articulated specific aims prior to its involvement in the Suez Crisis that corresponded closely to its general mandate. On 2 November, it released the following radio broadcast: the ICRC 'a prié les Gouvernements des pays impliqués dans le conflit…à assurer l'application des quatre Conventions de Genève'.[20] In addition, the ICRC announced that it was 'prêt à assumer les tâches prévues pour lui par les Conventions de Genève', which have been outlined.[21] In addition, the ICRC committed to organising the direct provision of aid.[22] Overall, an analysis of the ICRC's mandate in international law and its press releases ahead of the Suez Crisis suggests that it aimed to mitigate the effects of war on civilians, prisoners of war, and the wounded by means of the neutral allocation of aid and by coordinating the efforts of various national societies.

The IMF

The IMF was set up in 1946 technically as part of the UN Economic and Social Council, but in effect operated as a fully independent organisation. During the 1940s, a consensus formed among economists that one key failure of the post-1919 world order had been the resort to manipulative currency practices in the 1930s, which had led to autarky, economic stagnation, and (indirectly) war.[23] The IMF was set up to prevent a regression to capital controls by resolving balance of payments issues through technical advice and temporary credit support.[24] Thus, it is possible to conceive of the IMF's formally economic role as consciously related to the maintenance of the post-1945 peace; the June 1956 Annual Report's reference to the organisation's 'obligations to the international society' supports this view.[25] In practice, member states, who pooled resources in the Fund, could request withdrawals of 'tranches' of their 'quota' when problems arose. This process protected the stability of the Bretton Woods international currency system, which governed monetary exchange outside of the Soviet bloc. Before 1956, however, the Fund had not made any major interventions in the international monetary system.

The most revealing feature of the IMF's aims at the Suez Crisis is that they were never publicly announced. The absence of press releases related to the crisis was not surprising given the organisation's functions as articulated in the Articles of Agreement. The Articles mandated the IMF 'to promote international monetary cooperation'[26] and 'to facilitate the expansion and balanced growth of international trade'.[27] Given the technical, jargon-laden focus on economics in the Articles, it is unsurprising that political neutrality was a tenet of the IMF.[28] Article 12 states that 'the Managing Director and the staff of the Fund, in the discharge of their functions, shall owe their duty entirely to the Fund and to no other authority'.[29] Thus, the IMF presented itself as a technocratic institution with technocratic goals.

There was, however, one private reference to the Fund's aims with regard to the Suez Crisis at an Executive Board meeting in September 1956. When Egypt's request to withdraw its gold tranche was accepted, the IMF acknowledged that the crisis might crop up in the press; thus, it was noted that 'if the press raised any questions on [the dispute over the Canal], the management would reply that the transaction was of a routine nature and consistent with Fund rules and practice'.[30] It appears, then, that the IMF was committed to discharging its functions apolitically and intended to treat any incidental involvement in the crisis as routine. In sum, IMF documents suggest that the organisation sought to perform its normal function as guarantor of international monetary stability and, by consequence, to remain as neutral as possible.

The UN

The United Nations was established in 1945 as the world's premier multilateral organ 'to save succeeding generations from the scourge of war'.[31] Though by 1956 its membership contained a large majority

15 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted 12/08/1949), 75 UNTS 31, Art 9 <https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-970-English.pdf> accessed 1 March 2022.

16 ICRC, *Handbook of the International Red Cross*, (10th ed, ICRC 1953) 305-11.

17 David Forsythe, 'On Contested Concepts: Humanitarianism, Human Rights, and the Notion of Neutrality' (2013) 12(1) Journal of Human Rights 65-6.

18 Gerald Steinacher, *Humanitarians at War: The Red Cross in the Shadow of the Holocaust* (Oxford University Press 2017) 237-44.

19 'The absence of preparation for wartime'. Comité International de la Croix-Rouge (hereafter CICR), 'De Retour du Moyen-Orient…' (1956) 38(449) Revue Internationale de la Croix-Rouge (hereafter RICR) 278.

20 'Has requested the Governments of the countries involved in the conflict…to guarantee the application of the four 1949 Geneva Conventions'. CICR, 'La Croix-Rouge et le Conflit de Suez' (1956) 38(455) RICR 659.

21 'Ready to assume the tasks laid out for it by the Geneva Conventions'. Ibid.

22 ibid 661.

23 John Keith Horsefield and Margaret Garritsen De Vries, *The International Monetary Fund, 1945-1965: Twenty Years of International Monetary Cooperation* (3 vols, International Monetary Fund 1969) ii 40.

24 ibid 3-18.

25 'Annual Report, 1956', 23 May 1956, IMF, SM/56/43, 134.

26 *Articles of Agreement of the International Monetary Fund* (adopted 27/12/1945), 2 UNTS 39, Art. 1(i) <https://treaties.un.org/doc/Publication/UNTS/Volume%202/v2.pdf> accessed 1 March 2022.

27 ibid Art. 1(ii).

28 Ian Hurd, *International Organizations: Politics, Law, Practice*, (4th edn, Cambridge University Press 2021) 146.

29 *Articles* (n 26) Art. 12, section 4, (c).

30 'Executive Board Meeting', 22 September 1956, IMF, EBM/56/48.

31 *Charter of the United Nations* (adopted 24 October 1945), 1 UNTS 16, Preamble <https://www.refworld.org/docid/3ae6b3930.html> accessed 1 March 2022.

of the planet's population, Cold War divisions within the Security Council and disputes about decolonisation in the General Assembly had circumscribed its grandiose collective security ambitions.[32] Especially after disputes between the West and East over the use of the UN mandate in Korea, many feared that the organisation would repeat the sorry demise of the League of Nations. Appointed in 1953, however, Secretary-General Dag Hammarskjöld had worked to win the trust of the Warsaw Pact countries and the Global South in order to develop collective security in the absence of Security Council consensus.[33]

The UN Charter laid out shared principles that national representatives and UN officials were obliged by international law to serve. Article 1 defined the fundamental purpose of the UN: 'to maintain international peace and security'.[34] Enshrining the 'principle of the sovereign equality of all its Members', the Charter commits signatories to only engage in self-defensive wars.[35] Though UN organs all worked under these shared principles, our assessment of the organisation's aims must distinguish between the UN as diplomatic forum—the Security Council and the General Assembly—and the UN as international diplomat and civil servant—the Secretariat.[36]

The two UN diplomatic forums never expressed unanimous 'aims' because of intense disagreement between member states, but did pass resolutions that indicated where consensus could be found. The one substantive resolution passed by the Security Council during the crisis, SCR/118, preceded the invasion of Egypt and formed part of Britain and France's deceitful 'agenda within an agenda', which merely set the stage for invasion.[37] On 31 October, moreover, the Security Council deferred the crisis to the General Assembly, noting a 'lack of unanimity of its permanent members'.[38] Thus, the Security Council professed collective aims either disingenuously or not at all.

Invoking the 'Uniting for Peace' Resolution for the first time, an Emergency Special Session of the General Assembly set three goals: a unilateral ceasefire, the withdrawal of invading troops, and the restoration of free navigation to the Canal.[39] On 2 November, GAR 997 '[urged] as a matter of priority that all parties now involved in hostilities in the area agree to an immediate ceasefire'; it passed with an overwhelming majority, but not unanimously.[40]

Even if the General Assembly was only a diplomatic organ, it could authorise the Secretariat to take action in the pursuit of its goals—the setting up of UNEF, for example.[41] Mandated by the General Assembly, Secretary-General Hammarksjöld's aims would then be aligned with those of the Assembly as well as the Charter. Although Article 97 of the Charter describes the Secretary-General as 'the chief administrative officer of the Organisation', Dag Hammarskjöld expressed an intention to use his position to broker peace.[42] For example, on 13 October 1956, a Secretariat press release indicated a desire to facilitate 'a just and peaceful solution to the Suez problem'.[43] In addition, Hammarskjöld personally emphasised his aspiration to 'discretion and impartiality' in his role.[44] In sum, the Secretariat aimed to restore peace with a special focus on remaining neutral.

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To conclude, the ICRC, the IMF, and the UN Secretariat expressed different specific aims, but shared a commitment to neutrality and the service of their core values. Interestingly, the ICRC, IMF, and UN presented humanitarianism, monetary stability, and peace as neutral, universal goals. This presentation of neutrality and universality fits nicely into the wider discourse of twentieth century internationalism, which is defined as 'values which were supposed to be valid to all people at all times…everywhere'.[45] These commonalities, moreover, strengthen the case for considering IOs collectively in the wider question of the international society approach to the Suez Crisis. As the dispute over the Suez Canal entered its militarised phase, then, the ICRC, the IMF, and the UN Secretariat aimed to go about protecting those affected by war, ensuring monetary stability, and promoting peace as neutral parties.

'Acting Neutral': The Operations of International Organisations

Now for the action: in this chapter, I will examine primary and secondary accounts of what IOs did after the beginning of hostilities on 29 October and outline the outcomes that had emerged by the end of the crisis the following spring. By referring these outcomes back to the aims I described in the last chapter, it becomes apparent that IOs for the most part achieved their articulated goals: atrocities were, by and large, avoided, monetary stability maintained, and the *status quo ante bellum* restored. By looking at the actions of each organisation sequentially and then comparatively, I will analyse the processes employed by IOs in the realisation of their aims. With this in hand, it will become possible to assess the collective contribution of IOs to the resolution of the Suez Crisis, which will be the focus of the next chapter.

The ICRC

Today, our popular memory of the Suez Crisis (if such a thing exists) tends to forget the extreme threat to human security that it precipitated. That threat was all too apparent to the ICRC, however. Accounts of the organisation's intervention in this 'short but intensive war' show that: it effectively supervised the implementation of the 1949 Geneva Conventions, recording very few violations; it coordinated the allocation of its own aid supplies reserves alongside those of other national Red Cross and Crescent societies; and it maintained neutrality in the eyes of states during its activities.[46] These outcomes can be attributed to three core activities: diplomacy, information gathering, and coordination.

32 MacQueen (n 8) 61.
33 ibid 68.
34 *Charter* (n 31) Art. 1.
35 ibid Art. 2.
36 Thomas G Weiss, 'The United Nations: Before, During and After 1945' (2015) 91(6) International Affairs 1230.
37 United Nations Security Council (hereafter UNSC), 'Resolution 118', 13 October 1956, UN, S/3675; Kyle (n 2) 148.
38 UNSC, 'Resolution 119', 31 October 1956, UN, S/3721.
39 UNGA, 'Uniting for Peace', 3 November 1950, UN, A/RES/377(V).
40 UNGA, 'Resolution 997 (ES-I)', 2 November 1956, UN, A/RES/997(ES-I).
41 For example, see UNGA, 'Resolution 998 (ES-I)', 4 November 1956, UN, A/RES/998(ES-I).
42 *Charter* (n 31) Art. 97.
43 'Statement by Secretary-General after Security Council Action over Suez', 13 October 1956, UNA, Press Release SG/510.
44 UNSC, '751th Meeting', 31 October 1956, UN, S/PV.751 1-2.
45 Sandrine Kott, 'Cold War Internationalism' in Patricia Clavin and Glenda Sluga (eds), *Internationalisms: A Twentieth-Century History* (Cambridge University Press 2017) 340.
46 Moeller (n 8) 137.

Upon the outbreak of hostiles on 29 October, the ICRC's first response was to push for the application of the Geneva Conventions. After the ceasefire came into effect on 6 November, however, the ICRC went about ensuring that civilians, the wounded, and prisoners of war received proper treatment and humanitarian aid; negotiating the repatriation of prisoners; and organising the departure of Jews fleeing persecution in Egypt.[47]

The ICRC's supervision and diplomacy ensured the near universal adherence to the new Geneva Conventions. On 2 November, it issued a radio broadcast reminding all parties in the conflict the contents of the Conventions.[48] One day prior, it had used its diplomatic positions to receive guarantees from Anthony Eden that Britain would adhere to the Conventions, even though they had not yet been ratified.[49] Similarly, given the ambiguous position of UNEF in international law, the ICRC worked to receive a guarantee from Dag Hammarskjöld on 4 December 1956 that the UNEF would 'observe the principles and spirit' of international humanitarian law if it had to use force.[50] Thus, the ICRC used its diplomatic position to ensure that all parties in the Suez conflict would in principle adhere to the Geneva Conventions.

This diplomatic position allowed the ICRC to negotiate and supervise the reciprocal transfer of prisoners. By the time the ceasefire had come into effect, Israel held some 5600 Egyptian prisoners with France and Britain in possession of a further 400.[51] Conversely, Egypt captured one Frenchman, who died unavoidably soon after detainment, and four Israelis.[52] The ICRC was essential for organising the repatriation of 48 seriously injured Egyptians held in Israel on 18 November; flights between Egypt and Israel had been banned since 1949 and no diplomatic relations existed between the two countries.[53] Using its position as Israel's protecting power to negotiate with Egypt, it had organised the final repatriation of all prisoners by 5 February.[54] Especially in view of the difficulties faced repatriating prisoners after the 1947-9 Palestine War, the ICRC's formally neutral diplomatic position appears to have facilitated dialogue between Egypt and Israel that would otherwise have been impossible.[55]

Except with regard to the maltreatment of Israeli prisoners in Egypt, ICRC accounts suggest that the organisation's formal neutrality and the special ability of its personnel to gather information allowed it to minimise violations of the Conventions. Newly established delegations in Alexandria, Port Said, and Tel Aviv secured permission to inspect prison facilities and the administration of occupied zones.[56] In the occupied Sinai, Dr Louis-Alexis Gailland spoke to prisoners in Israeli, British, and French captivity, securing the release of those imprisoned unjustly.[57] On the other side of the ceasefire line, however, Egypt initially prevented the inspection of Israeli prisoners. Indeed, it was reported on 27 January that Israelis had been beaten and even tortured in captivity.[58] After further investigation, the ICRC received the almost certainly disingenuous reply from Egypt that the Israelis had fought amongst themselves.[59]

Thus, the ICRC ultimately depended on the cooperation of states. The maltreatment of Israeli prisoners suggests that we cannot entirely accept the assertion in the March 1957 *Revue Internationale* that 'pendant leur captivité tous les prisonniers ont été assistés, en Israël et en Égypte'.[60] Still, there is nothing to suggest that this was not mostly the case. In sum, even if it could not prevent any violations of the Geneva Conventions from occurring, it is possible for the most part to accept the ICRC's assertion that the Suez Crisis 'demeure très caractéristique de l'accomplissement des tâches du [CICR] dans le cadre des Conventions de Genève'.[61]

The attitude of the belligerents to the ICRC suggests that its formal neutrality made it more trustworthy than various national Red Cross and Red Crescent societies, which helped it to both gather information on humanitarian conditions and allocate humanitarian aid. From the start of the conflict, 'un fonds spécial de secours aux victimes des événements est immédiatement ouvert;' the ICRC was better placed than national Red Cross societies to allocate this aid.[62] For example, on 10 November, the Egyptian Red Crescent tried to gain access to the heavily damaged Port Said; only one ambulance of supplies was permitted entry, and only for one day.[63] Access was again denied on 26 November.[64] In contrast, ICRC delegate Maurice Thudichum was able to enter Port Said on 12 November and negotiate the passage of a large freight train of cargo across the ceasefire lines on 16 November.[65]

It is clear that Britain's understanding that the ICRC was neutral was a condition for this; on 10 November, the British army had told Egyptian Red Crescent personnel that groups entering Port Said 'should consist of neutral and not (repeat not) Egyptian personnel'.[66] Consequently, by the time the Egyptian Red Crescent was given full access to Port Said on 12 December, the ICRC had long been running regular convoys of aid.[67] Egypt also perceived the ICRC to be neutral; despite great suspicion of European encroachment in Egypt, the organisation's European delegates were given free reign to inspect Port Said after the British-French withdrawal.[68] Thus, because "neutrality' was…achieved more easily by the ICRC than by the various national societies', the ICRC provided aid where other actors could not.[69]

47 Bugnion and Perret (n 13) 63-82.
48 CICR (n 20) 659-60.
49 Bugnion and Perret (n 13) 68.
50 'Letter from the UN secretary-general to the ICRC president', 4 December 1956, ICRC Archives, B AG 201 139-001 quoted in Bugnion and Perret (n 13) 79.
51 CICR, 'Le rapatriement des prisonniers de guerre dans le Proche-Orient' (1957) 39(459) RICR 162.
52 Moeller (n 8) 143.
53 CICR, 'L'action du Comité International dans le Proche-Orient' (1957) 39(458) RICR 92.
54 CICR (n 51) 163.
55 Moeller (n 8) 144.
56 CICR, 'L'action du Comité International dans le Proche-Orient' (1956) 38(456) RICR 732.
57 CICR (n 20) 661.
58 Moeller (n 8) 145.
59 Bugnion and Perret (n 13) 73.
60 'During their captivity all prisoners in Israel and Egypt were supported'. CICR (n 51) 158.
61 'Remains characteristic of the fulfilment of the tasks of the [ICRC] within the framework of the Geneva Conventions'. CICR (n 53) 90.
62 'Special aid funds [were] immediately opened up to the victims of the events'. CICR (n 56) 732.
63 CICR, 'Égypte' (1957) 39(461) RICR 283.
64 Moeller (n 8) 141.
65 CICR (n 53) 91.
66 'That a request was made by two Red Crescent vehicles, containing Egyptians, to proceed to Port Said and inquires if General Burns could be approached on the Subject', 10 November 1956, TNA, JE 1094/90, fo. 371/1118906 quoted in Moeller (n 8) 141.
67 CICR (n 56) 734.
68 CICR, 'La Croix-Rouge au secours des sinistrés de Port-Saïd (1957) 39(459) RICR 165.
69 Moeller (n 8) 142.

The ICRC's position as an international aid agency allowed it to coordinate national Red Cross societies and to convert the international community's solidarity with Egypt into concrete aid commitments. By February 1957, forty-seven national Red Cross societies had answered the ICRC's call three months earlier for aid to be sent to Egypt.[70] For example, Denmark and Italy donated planes for the ICRC to transport the wounded out of Israel. ICRC inspectors in occupied areas were able to distribute vaccines and other supplies, including juice, games, and cigarettes.[71] According to reports from ICRC delegates, the organisation worked 'en liaison étroite' with other aid agencies such as the UN Relief and Works Agency.[72]

Thus, the ICRC for the most part achieved the goals it set for itself during the Suez Crisis. With the notable exception of the treatment of Egyptian prisoners, its sources indicate that it was able to inspect the treatment of prisoners and civilians, ensuring the adherence of the combatants to the Geneva Conventions in the process. Through information gathering and diplomacy, it was also able to delegate aid in ways that were not available to other organisations. Through this examination of the ICRC's functions, moreover, an interesting observation emerges: its neutrality in the eyes of states gave it special access. The construction of neutrality, it appears, was essential to the ICRC's achievement of its goals.

The IMF

To understand the IMF's role in the resolution of the Suez Crisis, I will assess how far the IMF maintained international monetary stability as well as its neutrality. I will pursue my investigation by evaluating the extent to which the Fund approved loans according to its own rules during the crisis. With this in mind, I will assert that the Fund prevented a calamitous rupture in the international monetary system and maintained a significant though not unqualified degree of neutrality by allocating aid according to the rules of the international monetary regime and producing technical economic information. Viewing the conflict as just another economic factor on its balance sheet, the organisation avoided involving itself in politics. Even if the United States did use its disproportionate voting power in the IMF as leverage over Britain, I will seek to understand the operations of the IMF on its own terms. Overall, I find that when confronted with questions relating to the crisis, the Fund worked almost entirely according to 'business as usual'.

During the diplomatic phase of the Suez Crisis, the archives do not suggest that IMF officials were much preoccupied with the dispute, even when dealing with requests from its main protagonists. On 21 September, the Egyptian government made a request to draw its gold tranche. Noting that 'in recent months the payments position has been complicated by international developments', the loan was rapidly approved on 22 September as a normal response to a short-term trade imbalance.[73] In any case, it was rare for a gold tranche withdrawal to be denied. Business as usual with Egypt.

It took longer for IMF staff to approve a French stand-by arrangement for its gold and first credit tranche, which it requested on 11 October. Delays arose because of concerns over the franc's par value and the size of the withdrawal, but not over France's involvement in the Suez Crisis.[74] Staff were of the opinion that France's massive current account losses were a result of 'temporary factors', including the import demands of the booming postwar economy, a bad harvest in 1956, and the intensifying war in French Algeria.[75] Indeed, Suez was not mentioned in any of the multiple staff reports which were considered at the 17 October Executive General Meeting where the stand-by agreement was approved.[76] The 18 October press release announcing the arrangement did not mention any political concerns.[77] Staff analysis recommended its approval on the basis that the balance of payments issue would be temporary. France was able to withdraw funds allocated by the stand-by arrangement as normal between February and June 1957. Business as usual with France.

When war broke out in the Middle East the IMF moved more cautiously, albeit still according to its normal rules. Tranche withdrawals were designed to ease short-term pressures on balance of payments, rather than to support 'large and sustained' outflows of capital—such as a protracted war.[78] The continued presence of Israeli troops in Egypt complicated its request for a first credit tranche withdrawal on 25 January 1957; staff analysis noted that 'the full impact of [the Suez] crisis on the Egyptian economy cannot yet be assessed'.[79] Still, on 4 February the withdrawal was approved on the basis that difficulties had arisen from the loss of dues from the closed Canal and sanctions imposed by Britain and the US the previous summer.[80] Business is more complicated, but again business as usual with Egypt.

As a result of the Suez Crisis, discussions between Israel and the Fund on increasing its quota and setting a par value for the Israeli pound were stalled; the matter was removed from the 31 October Executive Board Meeting agenda because of the invasion of Egypt.[81] However, despite the continued presence of Israeli troops in Egypt, consultations continued from December to February, culminating in a long report in February 1957 on the economic situation in Israel; the report steered clear from sensitive policy matters, referencing the 'international situation' only once.[82] Israel's quota was increased on 27 February to $7.5 million and on 6 March the Fund recommended that Israel's par value be set at 1.80 Israeli pounds to the dollar all while boots were still on the ground in Egypt.[83] Despite Israel's recent transgressions in Egypt, its request on 15 May 1957 for a gold and credit tranche was also dealt with largely apolitically. The staff consultation document presented to the Executive Board, explained Israel's large trade deficit with reference to increased immigration from Poland and Hungary; the words immigration and immigrant are together mentioned 11 times, whereas Suez is only (indirectly) referenced once.[84] Thus, the loan was approved, again for economic

70 CICR (n 20) 661; CICR (n 53) 89.
71 CICR (n 56) 733; CICR (n 53) 94.
72 'In close contact'. CICR (n 53) 94; CICR, 'L'activité du Comité' (1957) 39(457) RICR 27.
73 'Use of the Fund's Resources - Egypt', 21 September 1956, IMF, EBS/56/28 3.
74 Boughton (n 8) 10.
75 '1956 Consultations - France', 17 October 1956, IMF, SM/56/61 (Supplement 2) 2.
76 'Executive Board Meeting', 17 October 1956, IMF, EBM/56/51.
77 18 October 1956, IMF, PR/243.
78 Boughton (n 8) 5.
79 'Use of the Fund's Resources - Egypt', 30 January 1957, IMF, EBS/57/7 (Supplement 1) 4.
80 'Minutes of Executive Board Meeting', 4 February 1957, IMF, EBM/57/5 2-3.
81 'Israel - Revision of Quota', 19 October 1956, IMF, EBS/56/31, 1; 'Par Value for Israel', 26 October 1956, IMF, EBD/56/124.
82 '1956 Consultations - Israel', 5 February 1957, IMF, SM/57/12 16.
83 'Minutes of Executive Board Meeting', 27 February 1957, IMF, EBM/57/10 15.
84 'Use of the Fund's Resources - Israel', 13 May 1957, IMF, EBS/57/26 (Supplement 1).

reasons. Business was more complicated and temporarily delayed, but almost as usual with Israel.

No precedent existed in the Fund's history for resolving the problem brought by Britain in December 1956. The crisis of confidence in Britain precipitated by the Suez dispute created a massive speculative pressure on the sterling that almost forced the British government to devalue and/or impose capital controls. Bank of England director CF Cobbold had already been warned in October by Commonwealth central bankers that 'a further devaluation of sterling would mean the end of the sterling area'.[85] Not only was the sterling area considered to be a binding force in the Empire and the Commonwealth, it also ensured to a large degree the stability of the Bretton Woods exchange system, financing over 50% of global transactions.[86] Thus, the importance of 'the continued existence of the sterling area to the British government in 1956 cannot be over-emphasized'.[87]

Naturally, Britain began seriously considering an IMF withdrawal request in November alongside relief funds from EXIM and the delay of lend-lease repayments due to the US and Canada. When Chancellor of the Exchequer Macmillan informed Cabinet on 6 November that the US would not allocate this aid so long as Britain maintained operations in Egypt, a sense of crisis grew.[88] Indeed, the IMF's weighted voting system gave the United States disproportionate influence over the allocation of funds. As a consequence, Diane Kunz argues that in this position Britain had 'complete and utter dependence' on US support for its continued presence in Suez because to continue Britain needed money that only America could release from the IMF.[89]

Diplomatic histories have conclusively demonstrated that the US used its leverage in the IMF, alongside other bargaining chips, to force a British withdrawal from Port Said by threatening to block a tranche release.[90] It does not follow, however, that the IMF failed to approach the British loan request neutrally when it arrived or, indeed, that the Fund ever contravened its rules. In fact, if we look at the way that the IMF handled Britain's request—rather than the way that the US threatened to handle the IMF—it becomes clear that its decision making conformed to the normal technical approach. On 7 December, British Director Lord Harcourt made a request for the release of Britain's gold and first credit tranches ($561.47 million) with its remaining quota available on standby ($738.53 million) for reasons, in his own words, entirely 'consistent with the provisions of the Fund Agreement'.[91]

It would be the technical recommendations of IMF staff and not American geopolitical interests, it appears, that decided the approval of this massive tranche release. The Executive Board was presented with a background material document that noted the 'improvement in the situation, both internally and externally' of Britain's 1955 trade deficit into a surplus in 1956.[92] Staff analysis concluded that 'reserves were influenced not only by the United Kingdom's trading position but also by its role as banker and by the international use of sterling'.[93] During the Executive Board Meeting itself, executive director FA Southard remarked that 'if the Fund did not act to bolster such a key currency as sterling…all members would regret it and…the consequences would be serious'[94] because of its status as reserve currency. The Fund granted Britain support because it recognised that the sterling's problems resulted from a speculative attack rather than from fundamental problems with the British economy. It applauded Britain, furthermore, for avoiding the introduction of trade controls.[95]

Case by case, IMF internal documents suggest that the organisation operated according to its own rules during the Suez Crisis. Even if Executive Board documents were available to top officials in member countries' central banks, which incentivises the presentation of impartiality, I find that the willingness of the IMF to deal with Israel while it sustained troops in Egypt suggests that it was not so extensively influenced by the US, who at the same time vehemently sought an Israeli withdrawal in the UN. Still, Kunz presents the IMF as just another instrument of American economic leverage.[96] Indeed, she goes as far as to describe Britain as an American 'client state' because of its reliance on IMF aid.[97] However, Kunz's view likely stems from her reliance on British-American diplomatic correspondence; in 'The Economic Diplomacy of the Suez Crisis', which is nearly 400 pages long, she references IMF sources just once.[98] Relating IMF documents to secondary material, in contrast, demonstrates that it is inappropriate to see the Fund merely as another weapon in America's economic arsenal. Thus, we must circumscribe Kunz's argument. Instead, 'the IMF was able to act upon [loan requests] without becoming embroiled in the crisis'.[99]

Turning to outcomes, it appears that the technical information and neutral decision making affected by the Fund mitigated the short to mid-term monetary problems associated with the Suez Crisis. The 1957 annual report 'found it encouraging that difficult internal adjustments had been made with considerable success, and that it had proved possible, with the assistance of the Fund, to avoid a reintroduction of the restrictive practices [in Europe]'.[100] Indeed, after the announcement of the IMF package, staff analysis found that 'speculative pressures [on the sterling] virtually ceased'.[101] Despite the role of direct US aid in reviving the sterling, Boughton argues that 'a much larger multilateral package would have to be assembled to end the crisis, and the IMF was the institution that was best placed to do so'.[102] The pound retained its exchange rate with the dollar until 1967. In February, an Executive Director noted that 'the current balance of payments was better than one would have thought possible some months ago'.[103]

Thus, the IMF maintained the stability of the international monetary system during the Suez Crisis. Even if its decisions affected the diplomacy of the crisis, it has been shown that they were

85 'Cobbold to Macmillan', October 17 1956, TNA, T 236/4188 quoted in Kunz (n 7) 197.
86 Kunz (n 7) 353.
87 ibid 152.
88 ibid 230.
89 ibid 246.
90 Kyle (n 2) 464; Boughton (n 8) 19.
91 'Use of the Fund's Resources - United Kingdom', 7 December 1956, IMF, EBS/56/44 1.
92 'United Kingdom - Background Material', 7 December 1956, IMF, SM/56/83 7.
93 '1956 Consultations - United Kingdom', 11 February 1957, IMF, SM/57/14 19.
94 'Executive Board Meeting', 10 December 1956, IMF, EBM/56/59 3.
95 ibid.
96 Kunz (n 7) 1.
97 ibid 5.
98 See footnote in ibid 279.
99 Boughton (n 8) 5.
100 Horsefield and De Vries (n 23) i, 441.
101 '1957 Consultations - United Kingdom', 10 December 1957, IMF, SM/57/101 4.
102 Boughton (n 8) 26.
103 IMF, EBM/57/10, 11.

by and large formulated according to a neutral application of the Articles of Agreement. Like the ICRC, then, the IMF could perform its functions in no small part because its neutrality was credible. Its unprecedented achievement in keeping countries financially buoyant and open for trade in this time of crisis is captured in the Business Week headline of 30 March 1957: 'IMF wins over the sceptics'.[104] It had put its technical powers to effective use in a testing time for the international monetary system.

The UN

Though the UN had been involved in the first, diplomatic phase of the Suez Crisis, its operations began in earnest after Israeli tanks rolled into the Sinai Peninsula.[105] With the military conflict in motion, the organisation's aim became the restoration of peace with a full withdrawal by all the belligerents. In fact, a ceasefire was declared within a fortnight of the Israeli invasion and the full withdrawal of foreign troops from Egypt completed inside six months; however, it is necessary to draw direct causal links between the UN's intervention in the conflict and the outbreak of peace. The UN affected four key processes: it set international norms and directly encouraged states to follow them; it solved technical problems; it shaped interstate diplomacy by creating a neutral forum for debate; and it created the world's first peacekeeping force, which acted as a physical extension of its diplomacy.

The UN acted as the primary shaper of norms during the Suez Crisis, a position that proceeded from the 'strength of its [near] universal membership' and its status as the premier diplomatic organ in world politics.[106] Crucially, the UN Charter commanded what Weiss calls 'international legitimacy'.[107] Security Council and General Assembly Resolutions were the main vehicle by which the UN made normative pronouncements over the crisis. From the outset of the crisis, belligerents attempted to frame their actions in terms of the normative mandate of these resolutions. Indeed, even though Britain and France ended up completely transgressing the principles of SCR/118 both countries presented their invasion as a 'police action' to protect international shipping—ie in terms broadly consistent with the Charter.[108]

Unfortunately for Anthony Eden and Guy Mollet, however, deliberation at the UN affirmed the opposition of most states to the invasion. The First Emergency Special Session of the General Assembly passed Resolution 997 on 2 November, which called for a ceasefire, withdrawal, and clearance of the Canal. These demands were repeated in motions passed on 4, 7, and 24 November.[109] After the British-French withdrawal, Israel was pressed further through motions on 19 January and 2 February.[110]

Though some countries (notably Australia), voiced their support for the British-French 'police action', the General Assembly, overall, conclusively condemned the tripartite aggression with large majorities in the General Assembly.[111] On 3 November, the Egyptian representative rebuked Britain and France's 'false pretext of separating the Egyptian and Israel armies until a solution has been found to the Suez Canal question'.[112] In an address on 7 November, the delegate for Ceylon noted that, 'the Assembly, by its resolution [GAR 997], rejected in unmistakable terms the explanation that their [Britain and France's] action was a 'police action'; it was an invasion, a military operation conducted against Egypt. In those circumstances, they have no legal or moral right to remain there'.[113] Thus, the role of the African-Asian bloc in admonishing the imperial powers is especially important.[114] Britain and France had attempted to prevent this by framing their invasion as a 'police action', which demonstrates a key diplomatic dimension of the Suez Crisis: UN norms mattered.

The diplomatic operations of the Secretariat were also crucial in the UN's pursuit of peace, facilitating consensus-building deliberation on the General Assembly Floor as well as behind the scenes. On 29 October, Secretary-General Hammarskjöld convened private meetings with American, British, French, and Soviet diplomats to discuss the situation.[115] Working with Canadian Foreign Minister and committed UN advocate Lester Pearson, he led backroom discussions from 2 November that helped to distil the principles of UNEF, which would replace British-French 'police action'.[116] While it was important that the superpowers supported UNEF, the independent diplomatic action of the Secretariat was essential. Between 16 and 18 November, Hammarskjöld opened talks in Cairo to secure Nasser's approval, spending seven hours alone on 17 November to sway his doubts about the inclusion of Canadian forces—whose head of state was the Queen of England—in the operation.[117] Nasser's acceptance of foreign UNEF troops on Egyptian land depended on his trust in Hammarskjöld.

To understand the agency of the Secretariat, we also have to appreciate its use of what I call 'hard diplomacy'—diplomatic process that bolsters verbal negotiations with action on the ground. The Secretariat's status as a neutral, international body allowed it to provide the technical aid needed to clear the several ships scuttled in the Suez Canal at the start of the invasion. Whereas Britain and France argued that their own engineers would be needed, Hammarksjöld organised an alternative pool of technical expertise, which was accepted because it was not deemed to undermine Egypt's sovereignty.[118] As a result, France and Britain lost an important justification for their continued presence in Egypt. The United Nations began work in mid-December and the Canal was in full

104 'IMF Wins Over the Skeptics', 30 March 1957, IMF, PREP/57/3.

105 Edward Johnson, 'The Suez Crisis at the United Nations' in Simon C Smith (ed), *Reassessing Suez 1956: New Perspectives on the Crisis and Its Aftermath* (Ashgate 2008) 170.

106 Weiss (n 36) 1226.

107 ibid 1227.

108 UN, S/3675; UNGA, '567th Plenary Meeting', 7 November 1956, UN, A/PV.567.

109 UN, A/RES/997(ES-I); UN, A/RES/998(ES-I); UNGA, 'Resolution 1002 (ES-I)', 5 November 1956, UN, A/RES/1002(ES-I); UNGA, 'Resolution 1120(XI)', 24 November 1956, UN, A/RES/1120(XI).

110 UNGA, 'Resolution 1123 (XI)', 19 January 1957, UN, A/RES/1123(XI); UNGA, 'Resolution 1124 (XI)', 2 February 1957, UN, A/RES/1124(XI).

111 Peter Lyon, 'The Commonwealth and the Suez Crisis' in Louis and Owen (n 3) 257-274; UN, A/PV.567 126-7.

112 UNGA, '563rd Plenary Meeting', 3 November 1956, UN, A/PV.563 46.

113 UN, A/PV.567 124.

114 Ibid., 106; UN, A/PV.563 59.

115 Kyle (n 2) 277-88.

116 M. Tudor, 'Blue Helmet Bureaucrats: UN Peacekeeping Missions and the Formation of the Post-Colonial International Order, 1956-1971' (Manchester University PhD thesis 2020) 47.

117 Manuel Fröhlich, 'The 'Suez Story': Dag Hammarskjöld, the United Nations and the creation of UN peacekeeping' in Henning Melber and Carsten Stahn (eds), *Peace Diplomacy, Global Justice and International Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammarskjöld* (Cambridge University Press 2014) 334.

118 ibid 330.

working order by 10 April 1957. The UN's provision of neutral, technical aid, then, both resolved a material problem created by the Suez Canal—the blocking of a major seaway—and increased diplomatic pressure on Britain and France to withdraw.

A more impressive example of the UN's 'hard diplomacy', however, is the formation of UNEF. By establishing a peacekeeping force that was neutral and 'fully independent of the policies of any one nation', the security of the Suez Canal could be assured without undermining Egyptian sovereignty.[119] With the first UNEF troops entering Egypt on 15 November to supervise the Egyptian-Israeli truce, the basis for British-French occupation began to evaporate. Indeed, the forceful appeals of GAR 1121 for the three invading countries to withdraw emphasised the presence of UNEF.[120] Though only mandated to act in self-defence, these forces were a physical embodiment of the UN's mandate for peace as Dag Hammarskjöld emphasised in a radio address to his soldiers: 'You are the frontline of a moral force which extends around the world…Your success can have profound effect for good'.[121]

In sum, the UN was an active participant in the restoration of peace in the Middle East. First, the UN set norms that carried real weight due to the organisation's near universal membership and commitment to high ideals. Second, the UN's body of international civil servants in the Secretariat facilitated diplomatic engagement between states, especially through the personal work of Dag Hammarskjöld.[122] Third, this diplomatic engagement was bolstered by 'hard diplomacy', including technical aid and UNEF.

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Overall, international organisations were active participants in making their articulated goals happen. Interestingly, despite their varying aims and institutional designs, there were remarkable similarities between the operations that each international organisation used in the pursuit of its goals. The IMF, ICRC, and to some extent the UN were very active gatherers of technical information. Furthermore, the ICRC and UN facilitated diplomacy between different entities, acting both as diplomatic agents and forums of dialogue.

This overlap in function can explain apparent clashes between organisations; in an address on World Red Cross Day, Dag Hammarskjöld noted that 'when…the United Nations arranged and carried out the transfer of prisoners of war, the International Committee of the Red Cross lent valued assistance'.[123] The ICRC claimed credit for supervising the same operation—such contradictory reporting was rare, but it demonstrates the extent to which overlapping interests could lead to conflict.[124] While the IMF 1956 Annual Report noted that the UN and IMF 'have worked together in close association, whenever their interests required it', there is no evidence they *actively* cooperated during the Suez Crisis.[125]

Still, IOs employed common processes in a way that allows us to consider their role in the resolution of the Suez Crisis collectively, strengthening the argument for an international society approach. Most importantly each of these international organisations sought to embody neutrality in the eyes of states both as an end in itself and as a means to achieving their goals, presenting their actions through a discourse of internationalism.[126] Thus, the humanitarian, monetary, and diplomatic rules and norms promulgated by the ICRC, the IMF, and the UN respectively held weight because they were deemed to be neutral.

A Crisis for the World?

It is clear that international organisations were deeply involved in making the history of the Suez Crisis. Yet in some ways this conclusion begs more questions than it answers. In this chapter, I will argue that the similarity of the processes affected by IOs and the analogous way that they constructed neutrality in the eyes of states necessitate certain adjustments to the historiography. Most importantly, international organisations must be central to how we understand the course and resolution of the militarised phase of the crisis. Though IOs were not always the principal shapers of events, their status as neutral actors with internationalist aims allowed them to exert an important agency that has hitherto been overlooked. Furthermore, the similarity of the processes that they employed supports the application of the international society approach to the Suez Crisis. I will close with some tentative research recommendations for future scholarship into the crisis

International organisations were at the centre of the Suez Crisis from the first shots fired in the Sinai Desert on 29 October 1956 to the reopening of the Canal on 10 April 1957. Though they achieved their articulated goals, the role of states in this process remains to be fully examined. Indeed, most histories of the Suez Crisis have understood international organisations merely as instruments of states; however, this ignores the way that IOs shaped norms, which directed state power.[127] The UN is of primary importance here. For example, the United States exerted diplomatic and economic pressure on Britain, France, and Israel to withdraw in a large part because the UN had laid bare the way that the invaders' actions violated international norms, which jeopardised the West's position in the Cold War.[128] As Sir Charles Keightley, Commander-in-Chief of the British forces, put it, 'the one overriding lesson of the Suez operation is that world opinion is now an absolute principle of war and must be treated as such'.[129]

119 UNGA, 'Second and final report of the Secretary-General on the plan for an emergency international United Nations force', 6 November 1956, UN, A/3302 2.

120 UNGA, 'Resolution 1121 (XI)', 24 November 1956, UN, A/RES/1121(XI).

121 'UN Pamphlet on UNEF', 1 March 1957, UNA, S-0313-0002-12, 17 quoted in Tudor (n 116) 64.

122 Fröhlich (n 117) 308.

123 'Message from United Nations Secretary-General Dag Hammarskjöld on World Red Cross Day', Security Council Action over Suez', 3 May 1957, UNA, Press Release SG/591.

124 CICR (n 53) 93.

125 IMF, SM/56/43 141.

126 Eva-Maria Muschik, 'Managing the World: The United Nations, Decolonization, and the Strange Triumph of State Sovereignty in the 1950s and 1960s' (2018) 13(1) Journal of Global History 122.

127 See for example Kyle (n 2); Lucas (n 7); Nigel John Ashton, *Eisenhower, Macmillan and the Problem of Nasser: Anglo-American Relations and Arab Nationalism, 1955-59* (Macmillan 1996); Simon C Smith, *Ending Empire in the Middle East: Britain, the United States and Post-war Decolonization, 1945-1973* (Routledge 2012).

128 Peter G Boyle, 'The Hungarian Revolution and the Suez Crisis' (2005) 90(4/300) History 564.

129 Sir Charles Keightley, 11 December 1957 quoted in Kyle (n 2) 392.

In sum, 'the UN…established norms of government but did not rule'.[130] For just this reason, British Foreign Secretary Selwyn Lloyd had attempted to cast Britain's invasion in terms of 'an international policing role', reflecting on 8 November that Britain 'have heartily welcomed the idea of sending a United Nations force to the area to take over the responsibilities which we have felt bound to shoulder'.[131] A similar narrative of the crisis is repeated in Eden's memoirs.[132] By consequence, the establishment of UNEF necessitated a French-British withdrawal. Thus, norms coming from the UN exerted agency on state action.

It has been noted that international organisations pursued courses of action unavailable to states. Paradoxically, the unique ability of the ICRC to supervise the implementation of humanitarian law and the IMF to maintain monetary stability has led their influence in the crisis to be overlooked. Given the preoccupation of diplomatic historians with state action, it is unsurprising that the historiography has ignored *the several problems that states did not face because of IO activity*. For example, although the US aid helped to ease pressures on the sterling, it could not have resolved Britain's balance of payments problem alone.[133] Furthermore, the ICRC's unique position in the supply of aid to civilians, prisoners of war, and the wounded prevented human disasters and public relations difficulties for the invading powers, which were explicit concerns of British commanders in Port Said.[134] The impact of these two organisations does not appear in the state archives precisely because they were successful.

Reflecting on this point, one might model the agency of IOs, then, along a continuum between 'stage-setting'—the ICRC's preemption and mitigation of humanitarian problems—and 'actioning'—the deployment of UNEF. Each IO shaped the crisis in both of these ways, with the UN engaging in the most actioning, the ICRC in stage-setting, and the IMF somewhere in between.

Across both of these processes, though, the construction of neutrality by IOs was a means to achieving their goals and an end in itself. Indeed, as research of their aims has shown, the neutral promotion of universal values was central to the internationalist mandates of the UN, the IMF, and the ICRC. Still, the realisation of these goals during the Suez Crisis depended to some extent on the support of the two superpowers, the USA and the USSR. For example, they both supported the intervention of a UN peacekeeping force because each wanted to bring about a British-French withdrawal without facilitating the intervention of the other superpower.[135] Still, though it was important that American and Soviet diplomats accepted the idea, the UN occupied a unique position as an *international* organisation designed to serve *internationalist* goals in the formation of an *international* peacekeeping force. Though the IMF acted according to its own rules in approving the massive rescue package for Britain, its approval was by then in the USA's interests as Britain had already committed to withdraw from Port Said. In addition, circumstances at Suez did not present the ICRC with difficult questions on how to remain neutral that were faced in other conflicts.[136] Thus, if by their own accounts IOs operated as neutral actors, this depended to some extent on favourable background conditions.

Overall, I contend that this study has bolstered the importance of international society as an object of analysis in international history. I have not pursued such an analysis outright, but rather have drawn inspiration from it and examined one facet of building a more holistic, international understanding of the Suez Crisis. By examining the aims and operations of IOs, I have shown that they pursued similar aims and generated influence in comparable ways. Indeed, they often interrelated in their functions. For example, the UN and ICRC jointly managed the transfer of prisoners in the Sinai peninsula. In addition, they sometimes exerted a joint influence of states, even unintentionally. For example, the flight on the sterling was to a large degree motivated by Britain's weak position at the UN, which pushed Britain into the hands of the IMF.[137] The main point, however, is that the internationalist, neutral aims of IOs were realised through some combination of diplomacy, information gathering, technical aid, and normative influence, which are processes I have identified through primary research. This suggests that in an international society approach to the Suez Crisis individual IOs ought to be examined together.

In sum, this study impels the historian to approach the Suez Crisis—and indeed international history—more holistically. In 2008, Scott Lucas noted that 'various collections from 1991 have tried to represent Suez as a multinational affair, only to run the risk of merely re-scripting the historical play with more actors'.[138] What this study has sought to show is that future research should seek to understand the crisis in terms of international society, a singular category that brings all of these actors—and the historiographies they bring with them—together.

My research throws up other future areas of exploration into the Suez Crisis. Most importantly, the Suez Crisis must be recognised as an important moment in the history of the organisations themselves. Indeed, the way that IO officials discussed the crisis reveals a palpable sense of their 'making history' for their respective organisations.[139] In addition, historians should build on this study to revisit state archives with international society in mind and perhaps new material will become useful. It will be important to study how different actors shaped norms and other features of international society. Furthermore, the interaction between normative rhetoric in foreign relations and domestic policy ought to be addressed. In view of postcolonial approaches, further study should go into the Eurocentrism lurking behind the ability of IOs to construct neutrality. Perhaps this study of the Suez Crisis begs more questions than answers, but it is certainly a start in the right direction.

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On 4 November 1956, Omar Loufti, the Permanent Representative of Egypt to the United Nations appealed to the sovereign nations of the world, 'The solution of the problem is in your hands. The eyes of the world are upon you. Yours is a great responsibility'.[140] Several states responded to his call for support, but the resolution of the problem to which he referred—the Suez Crisis—could not

130 Muschik (n 126) 125.
131 Tudor (n 116) 61; UN, A/PV.567 112
132 Eden (n 6) 522-27.
133 Boughton (n 8) 26.
134 Moeller (n 8) 144.
135 John C Campbell, 'The Soviet Union, the United States, and the Twin Crises of Hungary and Suez' in Louis and Owen (n 3) 247.
136 Michael N Barnett, *The Empire of Humanity: A History of Humanitarianism* (Cornell University Press 2011) 133.
137 Kyle (n 2) 464.
138 Scott Lucas, 'Conclusion' in Smith (n 105) 239.
139 Bugnion and Perret (n 13) 80; Horsefield and De Vries (n 23) i, 426; UNGA, '594th Plenary Meeting', 24 November 1956, UN, A/PV.594 295.
140 UN, A/PV.565 80.

have happened in the way that it did without the intervention of international organisations. Acting in ways that states could not, the ICRC, the IMF, and the UN together shaped the course of the crisis and contributed significantly to its conclusion. This study has shown that states did not underestimate their influence; neither should history.

Appendix: Archival Sources

Washington D.C., International Monetary Fund Archives (IMF)

Executive Board Minutes (EBM/169483)

Executive Board Documents (EBD/169391)

Executive Board Specials (EBS/169337)

Press Reports (PREP/183443)

Press Releases (PR/169465)

Staff memoranda (SM/169374)

New York City, United Nations Archives (UNA)

Fonds: Secretary General Dag Hammarkjold (1953-1961)
Series: Press Releases

Items: S-0928-0001-04; S-0928-0001-05

UN Digital Library

Security Council Documents
Resolutions

S/3675, S/3721

Procès Verbal

S/PV.743, S/PV.751

Letters

S/3649, S/3654, S/3656, S/3674, S/3679, S/3683, S/3712, S/3721, S/3728

General Assembly Documents
Resolutions

A/RES/377(V), A/RES/997(ES-I), A/RES/998(ES-I), A/RES/999(ES-I), A/RES/1000(ES-I), A/RES/1001(ES-I), A/RES/1002(ES-I), A/RES/1003(ES-I), A/RES/1120(XI), A/RES/1121(XI), A/RES/1123(XI), A/RES/1124(XI)

Procès Verbal

A/PV.562; A/PV.563; A/PV.565; A/PV.567; A/PV.572; A/PV.594; A/PV.596; A/PV.642; A/PV.652

Committee Reports

A/3256; A/3275; A/3276; A/3290; A/3308; A/3309; A/3329; A/3383(Annex)/Rev.1; A/3385/Rev.1; A/3386; A/3501/Rev.1; A/3517

In Conversation with **Amitav Acharya**

Richa Kapoor

Amitav Acharya is the UNESCO Chair in Transnational Challenges and Governance and Distinguished Professor at the School of International Service, American University. He's written multiple books on international relations theory, global governance and world order. He has received awards for his 'contribution to non-Western IR theory and inclusion' in international studies. In 2020, he received American University's highest honour: Scholar-Teacher of the Year Award.

***CJLPA*: Could you tell me about your journey to becoming a renowned scholar of international relations?**

Professor Amitav Acharya: I never see myself that way—rather, I would say I'm a reluctant academic.

I embarked on a PhD because it would take me to Australia, which sounded like a fun place to be, rather than going with the aim of being an academic.

Once there, I began to like the idea of being an academic, because it seemed freer, you get to meet very interesting people and can travel a lot, attending conferences and doing field work. So, I grew into academia, rather than having a lifelong ambition for it.

The moral of the story is that sometimes you don't know what you want to be. I decided to stay as an academic maybe after 10 years of doing different things—being a research fellow or being a lecturer—only then did I settle into this.

If there's one thing that drove me to write and do my best, it was the need to challenge the Western-dominated knowledge and literature that we have in the field. That was almost personal. Growing up in India, in the Global South, it hits you when you start reading all these textbooks, articles, and journals that a lot of it is just *not right*. They are trying to impose theories and ideas that were originally developed in a European or US foreign policy context onto the rest of the world.

I almost instinctively rebelled against it—and I'm not the only one. I thought that there must surely be better explanations that capture the voices, experiences, and histories of the people who are being written about.

For instance, theories like realism or liberalism claim to be universal but they mostly come out of what happened in Europe centuries earlier. Or consider the theory of Hegemonic Stability, which really captures and legitimises the role of United States as 'the manager' of the world order, with a pronounced bias to accentuate its benign effects while downplaying its dark sides, such as intervention in and exploitation of weaker and poorer nations.

Hearing that made me a sceptic—and gave me the energy and drive to publish. Even now, my writing is always driven by the idea that I need to challenge what people are talking about in the mainstream media and literature.

Challenging that has been my main motivating force. Almost every major thing I've written and all the concepts I've created around my work—like norm localization, global international relations (IR), post-hegemonic multilateralism, the multiplex world order—are driven by the same push from within myself to challenge Western-centric IR theories and concepts.

***CJLPA*: That leads very well into my next question. You've explored the Global South, and you've sought to counter the dominating influence of European history and international relations theory development. Do you think that IR teaching today has managed to move past Eurocentrism?**

AA: Oh, far from it. In fact, I see a backlash coming up now.

Certainly, a lot depends on where you are. If you are in Asia or Africa, you challenge it but are constrained by the fact that most of the textbooks, literature, and journals are produced in the West—that knowledge production is intimately focused and concentrated in the West.

In the West, especially the United States and more specifically the elite US universities which produce the bulk of the PhDs, those who will be the next generation of teachers, the majority remain very much beholden to the same Western narrative.

Although there's now a growing demand for globalising IR, which I have been pushing for, there's still considerable backlash against it. There was a 2014 survey by the College of William and Mary, of scholars in the US, Europe, and some other parts of the world.[1] The first question was: 'Do you think international relations is American-centric/Western-centric?'. The majority of the people said yes, it is. The second question, crucially, was: 'What can we do about it? Should it be reversed?'. The answers are slightly patterned: non-white IR scholars were far more likely to support the challenging of Western or American hegemony in IR teaching.[2] So, it's one thing to recognise what's happening and quite another thing to do something about it. There is a kind of a Gramscian hegemony, and a collective vested interest in keeping the discipline as it is.

People find all sorts of ways to suppress alternative voices, especially those that emphasise decolonization of the discipline. I can see it in the way universities or journal publishers hire, fire, and promote their faculties. The big universities and the places of academic privilege see the alternative work of scholars in a negative light, not worthy of recognition.

This affects students. My students ask me: but can we get a job 'doing' global IR? At the American University, where I teach, we had several seminars and roundtables inviting IR stars from around the world to get answers to these questions. Some of them say that it's possible, but most of them think that there is a lot of gatekeeping, a lot of resistance to accepting globalising IR in elite Western universities.

I'm afraid it may be getting worse in some ways. How many universities, especially the big places of knowledge production, have scholars from the Global South or racial minorities holding prestigious chairs in IR? IR remains very much white.

I became more conscious of it as I got into the question of race in international relations. The paper in *International Affairs*' 100th anniversary issue gave me a greater opportunity to think about how racism is reproduced in academia.[3] I realised not only that the curriculum is racist in many ways, directly or indirectly, but also that there's an attempt to deny when problems arise and to suppress voices that speak to issues like colonialism and race.

Universities and IR departments pay lip service to diversity, equity, and inclusion, buzzwords now in academic circles, especially managers and administrators, out of political correctness. But when it comes to hiring non-white people into their departments, or when it comes to encouraging research and publications by these scholars, and when scholars from the Global South want to use alternative narratives derived from their own cultures, traditions, and contributions, there is much gatekeeping, overt or implicit. The establishment bites back; it is in a privileged position that it does not want to give up.

I'm not saying that because I'm cynical. I've done quite well for myself, but I'm concerned about the scholars who live in the Global South—who are increasingly becoming the global majority in the study of international relations—who are struggling to get recognised, or to get their voices heard.

1 Wiebke Wemheuer-Vogelaar et al, 'The IR of the Beholder: Examining Global IR Using the 2014 TRIP Survey' (2014) 18(1) International Studies Review 16-32.

2 Amitav Acharya, 'Advancing Global IR: Challenges, Contentions and Contributions' (2016) 18(1) International Studies Review 8.

3 Amitav Acharya, 'Race and racism in the founding of the modern world order' (2022) 98(1) International Affairs 23-43.

***CJLPA*: I'm going to move away from your experience of teaching and look towards your published work. Your book *Constructing World Order* is about how a world order was established in the post-Second World War era, and its development into the 1990s. It's known for advancing a new perspective on the role that non-Western, postcolonial states have played in the process of creating that world order by showing that they weren't as passive in the process as we have been told. Could you talk me through the crux of your argument and how you reached your conclusion?**

AA: The contributions and agency of the Global South—some of them would be in creating norms of human rights, for instance—have been hidden from view.

We are told continuously that the West invented all human rights, that the Universal Declaration on Human Rights was led by Eleanor Roosevelt. But if you study the records, the documents, you'll find that if Mrs. Roosevelt had had her way the Universal Declaration of Human Rights would say rights of all *men*, not all *human beings*.[4]

The reason it was changed to refer to the equality of all human beings is due to an Indian delegate to the UN Convention—Hansa Mehta—who argued with Mrs. Roosevelt. I think billions of people around the world owe it to her, for standing up and saying that we can't have this male-dominant expression.

Similarly, a challenge to the traditional way of looking at development and security, which is very GDP-centric, was originally proposed by a Pakistani economist, Mahbub ul Haq, who worked with a like minded Indian scholar (the two first met at Cambridge University as students) and Nobel Laureate in economics Amartya Sen. They looked at their own countries, India and Pakistan, and found that these countries were spending too much money on defence and too little on human development.

They came up with the idea that we have to ignore the idea of economic growth measured exclusively using GDP. Instead, we should look at human potential, by taking care of education and public health. It's a very inspiring story, which gave birth to the UNDP's widely used Human Development Index and Human Development Report, yet hardly anyone knows about it. Unless you are an expert, it's not in the mainstream books or in the introductions to international relations.

I wrote about it in the chapter on human security for the *Globalisation of World Politics* textbook, among Britain's most popular textbooks, and I put in a case study of my home state in India: Orissa.

I found that there are many more examples of Global South agency—in sustainable development, in human rights, in security, in disarmament. In fact, the first person in the world to talk about a ban on nuclear testing was Jawaharlal Nehru, the first prime minister of India.

A lot of this is hidden from view, partly because of the structural bias against the Global South in our academia, especially in textbooks and in the institutions that teach and train in international relations.[5]

4 Acharya (n 2) 2.

5 Cf. Amitav Acharya, *Constructing Global Order* (Cambridge University Press 2018).

CJLPA**: In the same book, there are two pillars—security and sovereignty—on which the global order is developed. Are there more pillars that you would consider today, such as sustainability, newer concerns on which the global order is being shaped?**

AA: I mainly talk about security and sovereignty because those are the two areas that I am most familiar with, but sustainability is touched upon in the book's last chapter, and in the context of the discussion of human security.

The whole idea of *Constructing Global Order,* and my earlier work on which the book drew, was to develop a theory of agency beyond the traditional narrow view which equates agency with the material power of Western nations. The book holds that agency is also ideational and normative, and comes as much from the Global North as from the Global South. I now see that scholars have been increasingly applying this broader view of agency to all kinds of issue areas. For example, I was involved in a project at SOAS University which looked at the role played by women in the making of the UN. My theory of agency fit well in this research, and that is where the story of Hansa Mehta and her contribution came up.[6]

You can find much evidence of non-Western or Global South agency in a whole variety of elements of the global order, whether it's security, sovereignty, development, ecology, human rights.

And not just today, or in contemporary times, but throughout history. My latest project is focused on a history of world order, where I find key institutions and ideas of world ordering, such as humanitarianism in war or freedom of seas, while credited to the West, had other points of origin, in non-Western civilizations.

For example, the Roman empire is often credited with promoting freedom of the seas and free trade. But it was underwritten by Roman imperialism, which incorporated all the major states of the Mediterranean. By contrast, in the Indian Ocean, where there was no hegemony like Rome's over the Mediterranean, there were no restrictions on who could trade where. The jurisdiction of empires like those of the Moghuls never extended to the sea. Instead, a group of trading states maintained a vibrant and open trading network, the largest oceanic trading system in the world until the Atlantic trade created by European imperialism in the Americas. That was freedom of the seas in practice without anyone's hegemony. In fact, when the Portuguese first went to the Indian Ocean, they found out that there was no division of the sea into the spheres of influence—anybody could trade as long as you paid customs.

The idea of freedom of seas has also been credited to Hugo Grotius, but Grotius had been exposed to the practice of maritime openness that had prevailed in the Indian Ocean through papers supplied to him by the Dutch East India Company, on whose payroll he was. The Dutch East Indian Company initially fought against Portuguese monopoly in the Indian Ocean, but then itself went on to impose an imperialistic monopoly over what is today Indonesia, with its actions defended by Grotius himself. How many IR scholars know about this?

6 Cf. Amitav Acharya, Rebecca Adami, and Dan Plesch, 'Commentary: The Restorative Archeology of Knowledge about the role of Women in the History of the UN - Theoretical implications for International Relations' in Rebecca Adami and Dan Plesch (eds), *Women and the UN: A New History of Women's International Human Rights* (Routledge 2021).

Regarding humanitarian principles of warfare, or what is today called just war, the injunctions against, say, torture, killing of civilians, or harming combatants who have surrendered that one finds in the so-called Geneva Conventions can be found almost principle by principle in ancient India's Code of Manu.

There are many such examples of agency out there which are not captured in the mainstream literature, so it has been my passion to uncover this and bring it to the IR field. I'm sure there are other scholars, especially historians, who are doing similar work. But putting it in a global IR context has not been done, and I hope more people will get into this field.

CJLPA**: In your conception of international relations, you've coined the term 'multiplex world' and used the analogy of modern cinema. Could you elaborate on this term, and the curious analogy for it?**

AA: I was thinking about how we can sit in different movie theatres under the same roof and choose to see from a wide-ranging bunch of themes, plots, actors, styles. This is unlike the times of the monoplex, where there was only one movie in one theatre—we had to wait until it had run before we could go to see another one.

Even if you take the view that Hollywood dominates the multiplex cinema today, in countries like India, people watch more Bollywood and regional movies than Hollywood ones. In China, which is becoming one of the world's most lucrative markets for foreign movies, there are more and more Chinese-produced and directed films. Hollywood increasingly relies on markets like China's for its earnings. Hence it must cater to the local tastes of an increasingly global audience.

When applying this to the world order, it means that the world also has more choices to build it with. They're not just going to look at the Western-dominated or American-led 'liberal international order'. It's partly because it was never very peaceful for the developing world. It was also not very economically beneficial to many postcolonial nations. It led to uneven development, inequality, and resource exploitation. It benefited mostly the Western countries. There were a lot of military interventions, and a lot of double standards in promoting democracy, human rights, and development in the Global South.

Hence, non-Western countries have started to look for alternative ideas—sometimes from their own historical contexts or by looking at other, more successful developing nations like China. In this multiplex postcolonial order, the rising powers like China, India, or others are trying to develop their own ideas and approaches to development, stability, and ecology, sometimes with pathways that fit their own history and culture.

The world is being decentralised, becoming post-hegemonic as the relative power of the West is declining.

The second thing we see is that in global governance, the UN and related institutions are no longer the only leaders. We see the rise of a lot of other types of institutions, including regional groups, whether in Africa, in Southeast Asia, or for that matter in the West itself, as in Europe, where the EU now governs many aspects of life in its member nations. There are also newer development bodies like the China-led Asian Infrastructure Investment Bank (AIIB). In that sense, there is an ongoing decentring from what was at one

point (in the 1950s) supposed to be a universal system of global governance. Now we have non-state actors, transnational civil society, corporations, foundations getting into the business of global cooperation.

Culturally, it's not just one set of ideas—liberal ideas, or democracy, or capitalism—that are the only sources of progress for many nations. We also have communitarian ideas, more nationalistic ideas, which are not necessarily conforming to liberalism and democracy, for better or for worse. To put it simply, the idea of an 'end of history' that Francis Fukuyama once talked about, that capitalism and democracy will prevail over everything else, is far from happening. The world order today is best understood through the hybridity of ideas: the Western liberal ideas and non-Western ideas interacting with one another. Ideationally, we are not in a hegemonic world. We are in a post-hegemonic or multiplex world. We have different types of ideologies and ideas—communitarianism, liberal individualism, socialism, extremist, radical ideas—and they all need to be acknowledged. We have a mix of regional and inter-regional orders, connected yet distinct from each other, instead of a single, overarching so-called universal global order.

Bringing all this together—the relative erosion of American hegemony; the rise of new powers like China, India and their ideologies; as well as the decentralising of global governance—you get a much more pluralistic world order, rather than a singular Western-dominated, American-imposed world order. This is the essence of what I have called a multiplex world.

A world of multiple agents, multiple ideas, manifold dimensions: that's what the application of the multiplex concept to world order looks like.[7]

***CJLPA*: In this moment of time, with a war in Ukraine and a highly economically interconnected world dealing with the aftermath of the COVID-19 pandemic, how do you think the global order is changing, if at all?**

AA: Both the pandemic and Ukraine have challenged the existing liberal international world order.

They certainly haven't finished world order—one shouldn't conflate the liberal international order under Western dominance with world order generally—but both cases have given more ammunition, more strength, more force to this idea of a multiplex world.

The events in Ukraine, and the swift and comprehensive Western sanctions against Russia, led many Western pundits to gloat over how 'the West is coming back'. These people see this as the victory or triumph of the idea of the West. Yet, one should not forget that Ukraine also represents a failure of the West to lead and manage peace and stability with the help of the ideas and institutions, including the EU and NATO, that the West itself built. It specifically means that major war is back in Europe—something that we haven't seen since World War II.

I, on the other hand, argue that this is another nail in the coffin of the liberal international order because the majority of the Global South don't back either side. Whilst many of them condemned Russia, some key players like South Africa, India, and China, did not. Also, whilst Brazil and Mexico voted for the UN General Assembly resolution against Russia, they rejected the West's sanctions that came with it. And condemning Russian invasion is not the same as accepting Western dominance, especially as many non-Western countries keep in mind the provocation of NATO's post-Cold War expansion as a factor in the conflict.

The NATO-Ukraine-Russia war will accelerate the trend towards a multiplex world as non-Western countries lose trust in both the West and Russia to deal with future conflicts.

Regarding the COVID-19 pandemic, there was a similar dynamic where many Global South countries did not like what they saw in China. China's denial of COVID when it broke out, its refusal to take early action that might have limited the spread of the virus, and the fact that it still refuses to allow a thorough investigation of the outbreak, all this mean that China is not the model for the rest of the world, and it has undercut China's soft power quite a bit.

The United States also behaved in a most selfish way, under Trump, who was basically blaming China, blaming everybody except himself, while letting Americans get infected in the millions and die in the hundreds of thousands.

What do people outside say when they see this? They say, 'neither USA nor China'. We have to find another model, maybe a New Zealand model or maybe South Korea, Japan, or Taiwan. I see multiplexity in all this. In this sense, a 'third way', neither the West nor the Russia/China bloc, is the path to the future stability and well-being of the world.

***CJLPA*: In this increasingly multiplex world, how can states ensure better outcomes for humanity, whether that's people that they're directly responsible for within their state and/or other parties they take an interest in caring for? Can we guarantee less conflict and less uncertainty?**

AA: We cannot guarantee either less conflict or less uncertainty going forward, but keep in mind that there was a lot of conflict in the previous world order.

Although one cannot predict the future, that doesn't mean everything is gloom and doom. There's a lot of scaremongering going on, claiming that the whole world is now on fire. I've heard this repeatedly for the last 30 years, before COVID-19 and Ukraine. But ironically, whereas most Western analysts predicted a major war in Asia for a long time, such a war has already happened in Europe first. Outside of Europe, we would continue to see more internal wars than inter-state wars.

At the same time, even though the idea of the liberal world order may be weakening, it doesn't mean people are just breaking away from institutions and interdependence.

I also think that what is happening now need not be permanent. We will ultimately see some sort of resolution to the Ukraine conflict. We will also see some sort of revival of multilateralism. Because it's not just a normative moral aspiration, it is in the self-interest of the actors.

***CJLPA*: You say you don't want to jump to conclusions, but I'd still like your thoughts on the multiplex world and the challenge of climate change. Are there going to be more kinds of solutions or is it going to become more chaotic?**

7 Cf. Amitav Acharya, *The End of American World Order* (2nd edn, Polity Press 2018).

AA: In my edited book, *Why Govern? Rethinking Demand and Progress in Global Governance*, contributed to by specialists on global governance, we found that pluralization and multiplexity—sometimes called complexity and fragmentation—is already happening in climate change.[8]

Look at the Paris Accords: it doesn't work the way normal multilateral organisations do. It is based on voluntary compliance—which is the ASEAN way of doing things, not the European way. By adopting a consensus-based ASEAN-style decision-making and compliance model, the international community was able to achieve consensus and co-operation that had eluded it for a long time, because it had been looking for strict legalistic standards and measures.

Also, it was done not by governments only. There are a lot of expert groups, NGOs, corporations, parts of civil society involved. The whole idea of the Intergovernmental Panel on Climate Change is that they are not bureaucrats, they're scientists, who operate within a governmental-plus framework. I call it 'G-plus global governance'. In a G-Plus model, leadership in global governance is not the monopoly of big powers and their national governments. In fact, the most striking example is that it was the European Union that really got it together, not the US, nor China, the largest economies in the world. Leadership also depends on the issue areas. So maybe the European Union leads in climate change. China certainly leads in international development. The United States, when it wants to, can play a role in collective security, like Iraq in 1990-91. However, today in the case of Ukraine, the US is playing the power bloc, or alliance game. India can play a role because its largest vaccine manufacturer in the world and also one of the largest manufacturers of generic drugs—so in terms of scientific and technological contribution, India is a big leader.

We see the G-plus model in action, which is an integral feature of multiplexity, rather than singularity, or hegemony in global governance and world order. That world is going to be ruled and operate very differently from 40 years ago, but that doesn't mean all hell is going to break loose. Countries and leaders are not going to get into conflict with each other just because they are non-Western and do not buy typical Western liberal ideas.

The idea that only the West can manage stability because the West has the best ideas and approaches to peace and development, and that all the other countries are incapable of producing peace and development, is a legacy of the colonial and racist origins of the present world order. It is time to reject them, and move past them. Only then can one establish new and much needed ways of managing world order.

***CJLPA*: Thank you Professor, that's a good note to end on. Thank you for your time and your expertise.**

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8 Cf. Amitav Acharya (ed), *Why Govern? Rethinking Demand and Progress in Global Governance* (Cambridge University Press 2016).

Is Peace Merely About the Attainment of Justice? Transitional Justice in South Africa and the Former Yugoslavia

Alejandro Posada Téllez

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As a field of scholarship and practice, Transitional Justice (TJ) has become the dominant framework through which to consider 'justice' in periods of political transition ever since the end of the Cold War.[1] Understood here as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation',[2] TJ systems are founded on the premise that attaining justice for past atrocities is a fundamental pillar to building lasting peace in societies emerging from conflict.[3] This logic, largely disseminated by liberal peace proponents, is relatively persuasive. However, the literature on TJ and peacebuilding too often takes the meaning of 'justice' for granted, focusing instead on other areas of contestation, such as the 'amnesty versus punishment' or the 'peace versus justice' debates, which presume a standardised and narrow conceptualisation of justice as individual accountability for Human Rights (HR) violations.[4]

For this, it is useful to situate the global surge of TJ systems within the broader process of judicialization in international relations, a trend Subotic terms 'global legalism'.[5] This unquestioning adherence to law not only fails to respond adequately to the complex realities of conflict and peace, but also confines the potential of 'justice' to alter oppressive power structures to the boundaries of a technocratic, legalistic tradition. A Galtungian distinction between positive and negative peace is thus an appropriate theoretical frame to explore the limitations of the law in delivering far-reaching and holistic transformation to conflict-affected societies. Accordingly, it is argued that in practice, justice often constrains the production of positive peace frameworks by reinforcing the application of seemingly apolitical legal principles to guide and inform political transitions, which may reproduce patterns of direct and indirect violence. An assessment of the role of law in shaping notions of justice in South Africa's Truth and Reconciliation Commission (TRC) and the International Criminal Tribunal for the former Yugoslavia (ICTY) serves to illustrate this argument.

The paper proceeds as follows. First, it locates 'justice' within the liberal peace paradigm, elucidates the distinction between positive and negative peace, and offers a brief background of the ICTY and the TRC, justifying the selection of these cases. It then focuses on three basic legal principles underpinning TJ processes and mechanisms in South Africa and the former Yugoslavia: i) the notion of individual accountability; ii) the emphasis on HR abuses; and iii) a statist ontology, highlighting the ways in which each of these norms limit the potential contribution of 'justice' towards fostering a meaningful peace in both contexts. The conclusion reiterates the critique against depoliticised notions of law and justice.

1 Ruti G. Teitel, *Globalizing Transitional Justice: Contemporary Essays* (OUP 2014) 37.
2 United Nations, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General* (S/2004/616, 2004).
3 Chandra Lekha Sriram, 'Beyond Transitional Justice: Peace, Governance, and Rule of Law' (2017) 19 International Studies Review 53.
4 Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 The Modern Law Review 1, 12.
5 Jelena Subotic, 'The Transformation of International Transitional Justice Advocacy' (2012) 6 International Journal of Transitional Justice 106, 109.

Justice, Law, and the Liberal Peace

The end of the Cold War saw the consolidation of the liberal vision as the dominant set of principles informing the theory and practice of transnational peacebuilding.[6] Chief among these principles lies the conviction that lasting peace is not possible without justice, a premise that has been the cornerstone for the creation of TJ systems globally.[7] Indeed, proponents of the liberal peace often suggest that the liberal conception of 'justice' as accountability is the surest route to peace because such a notion is rooted on the apolitical, ahistorical and universal framework of the law, which makes it uncontroversial.[8] This legal positivism responds to the Western ideal that law is an 'objective, blind and consequently fair arbitrator',[9] and to the expectation 'that subjecting political behaviour to the apolitical judgement of law will exert a civilising effect'.[10]

Yet, liberal peace proponents tend to ignore the core tensions at play between law and politics, and the ways in which these tensions develop in transitional contexts. For instance, Wilson's definition of law 'as an ideological system through which power has historically been mediated and exercised'[11], challenges the thin and depoliticised liberal notion of justice. This rationale suggests that the application of law unavoidably implies normative moral and value judgements that cannot be separated from political considerations, thus revealing the inherently politicised nature of 'justice' and of TJ discourses. In fact, Nagy contends that the TJ industry is deeply embedded within the principles of international law, which are themselves based predominantly on Western legal standards, norms and practices.[12] This is perhaps unsurprising, considering the leading role of Western professional and donor networks in envisaging international TJ frameworks, and their advocacy in favour of legalistic responses to wrongdoing.[13] The way we think about TJ is thus overtly governed by the legal culture of international HR,[14] which displays some intrinsic moral dilemmas that emerge from uncritically reducing justice to law in periods of political transition.

That said, evaluating the substantive contribution of justice towards peace requires a consideration of the *quality* of peace being (re) produced by TJ. Here, Galtung offers a useful analytical lens to survey the transformative potential of a liberal 'justice' that operates primarily through law[15]. Galtung develops a distinction between direct and indirect violence that helps him to separate positive from negative forms of peace. Direct violence is conceptualised as the harm inflicted on a person by means of physical force,[16] whilst indirect violence is understood as a form of violence built into a society's structures of power, and which deprives individuals of their rights or needs.[17] Galtung argues that the absence of direct violence yields a negative peace, whereas the absence of indirect violence produces a positive peace, a concept he equates to social justice, or 'the egalitarian distribution of power and resources' in a society.[18] These maximalist conceptions of violence and peace accurately capture the intricacies underlying processes of conflict and peacebuilding, and are therefore considered to be the ideal framework to explore the role of justice in the pursuit of a holistic and long-term peace.

The TRC and ICTY

Broadly speaking, the focus of this paper is on the two main forms of justice through which a society might cope with a history of past abuses: retributive justice, which generally follows the principles of criminal justice and emphasises the need to punish unlawful activity;[19] and restorative justice, which places a higher value on reconciliation, community relations and truth, and may therefore compromise strictly punitive procedures for amnesties, truth-seeking, reparations and other measures.[20] The former kind of justice is explored through the work of the ICTY in the former Yugoslavia, while the latter is assessed using South Africa's TRC. Although these are not the sole types of justice sought by societies emerging from conflict - and acknowledging that law and justice operate differently across contexts where TJ systems are in place - the ICTY and TRC share a normative conception of justice that is profoundly ingrained within the structures of international liberal legalism,[21] which makes these cases suitable to consider the transformative potential of law whilst integrating two diverse approaches to justice. Indigenous and hybrid TJ frameworks are outside the remit of this essay.

The first case in question, the ICTY, was an *ad hoc* international tribunal established in The Hague in 1993 to prosecute war crimes and crimes against humanity committed during the Yugoslav Wars since 1991.[22] Only between 1991-1994, it was estimated that the predominantly ethnic conflict in the Balkans led to over 200,000 deaths, 50,000 cases of torture, 20,000 cases of rape, and more than three million refugees.[23] The ICTY was hence set up to deliver justice to these victims through formal and retributive judicial processes, 'under the conviction that the Tribunal would help restore and maintain peace in a region still at war'.[24] Yet, the ICTY also held an important restorative component, given that it attempted to promote inter-ethnic trust and reconciliation in the region. In Teitel's words, at the core of the ICTY was the 'expectation that

6 Roland Paris, *At War's End: Building Peace after Civil Conflict* (CUP 2004).

7 Payam Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 Human Rights Quarterly 737, 742.

8 Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'' (2009) 3 International Journal of Transitional Justice 5, 5.

9 Jenny H. Peterson, ''Rule of Law' initiatives and the liberal peace: the impact of politicised reform in post-conflict states' (2010) 34 Disasters 15, 19.

10 Leslie Vinjamuri and Jack Snyder, 'Law and Politics in Transitional Justice' (2015) 18 Annual Review of Political Science 303, 304.

11 Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (CUP 2001) 5.

12 Rosemary Nagy, 'Transitional Justice as Global Project: critical reflections' (2008) 2 Third World Quarterly 275, 276.

13 Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' (2007) 21 Global Society 579.

14 Teitel (n 1) 32.

15 Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167.

16 ibid 170.

17 ibid 171.

18 ibid 183.

19 Janine Natalya Clark, 'The three Rs: retributive justice, restorative justice, and reconciliation' (2008) 11 Contemporary Justice Review 331, 333.

20 Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2010) 14.

21 Nigel C. Gibson, *Challenging Hegemony: Social Movements and the Quest for a New Humanism in Post-Apartheid South Africa* (Africa World Press 2006) 6; Teitel (n 1) 86.

22 Clark (n 19) 337.

23 United Nations Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (S/1993/674, 1994) 84.

24 Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Institute 2010) 26.

international criminal justice would establish a form of individual accountability that would break old cycles of ethnic retribution and thus advance ethnic reconciliation'.[25]

Similarly, South Africa's TRC was established in 1995 to investigate human rights violations committed under apartheid between 1960-1994, a period during which 'over 18,000 people were killed and 80,000 opponents of apartheid were detained, 6,000 of whom were tortured'.[26] However, the TRC utilised the discourse of a 'bigger goal' to relinquish conventional legal remedies and instead, pursue a restorative form of justice that could promote social harmony and community-building through truth-telling.[27] Consequently, amnesties were offered to individuals 'in exchange for their full disclosure about their past acts'.[28] Such an approach to justice points to a salient social element consistent with positive peace ambitions, which, much like the ICTY case, transcend the simplistic notion of peace as the absence of war. South Africa's conception of justice therefore appears to distance itself from the international legal culture that sees justice as inextricably connected to retribution. Nevertheless, a closer inspection of the values informing the TRC reveals that the global legalist paradigm is strongly implicated in producing its understanding of justice; the central difference to retributive justice merely being the absence of formal retribution. The following sections uphold this claim by examining the role and impact of three fundamental principles of transnational legalism on the ICTY and TRC: individual accountability, HR abuses, and a statist ontology.

Individual Accountability

At the heart of the dominant conception of justice espoused by TJ systems globally rests the idea that individuals responsible for mass atrocities should be held legally accountable for their actions. Whilst this might appear commonsensical, the norm of isolating individual wrongdoing is not built into nature; rather, it is a political construct rooted in the principles of international criminal law and predicated on liberal ideals of agency and responsibility.[29]

Vitally, the application of such a value in contexts of political transition is problematic, given that it fails to tackle structures of economic, social and cultural violence, and obscures oppressive forms that are crucial to fostering positive peace, such as the vulneration of socio-economic rights, discrimination or marginalisation. As argued by Gready and Robins, TJ mechanisms only tend to address conflict symptoms, as TJ emerges from a tradition where individual acts of violence 'are of greater interest than chronic structural violence and unequal social relations'.[30] Moreover, individualising accountability implies a politics of exceptionalism, which glosses over systematicity in violent practices. According to Akhavan, the criminalistic assumption that a determinate conduct deviates from 'normal' behaviour is 'especially problematic in the context of large-scale crimes (…), which often implicate a significant proportion of the population as perpetrators'.[31] The reliance of dominant conceptions of 'justice' on the legalistic norm of individual accountability can thus be said to constrain the impact of justice in creating positive peace frameworks.

The ICTY case displays some of the challenges intrinsic to advancing positive peace through individual accountability, not least because this principle served to reproduce inter-ethnic tensions and violence in the Balkans. Bass contends that by targeting crimes at the elite level through the simplistic mechanism of criminal trials, the ICTY failed to adequately address grassroot ethnic animosity, asserting that 'all the old grievances are still there'.[32] Subotic goes as far as to suggest that ICTY rulings fuelled ethnic tensions by reinforcing Serbian and Bosniak ethno-nationalism,[33] an idea developed by Clark's claim that there was 'an intense resistance by many in the region to the reality that their own ethnic kin committed atrocities'.[34] This narrative of collective denial and ethnic reaffirmation helped to further entrench divisive narratives among ethnic groups, feeding discursive structures of 'us versus them' that enabled mass atrocities in the Balkans to occur in the first place. Indeed, the thin conception of individual accountability limited the ICTY's capacity to fulfil its objective of promoting inter-ethnic reconciliation, since the Tribunal itself institutionalised ethnic divisions and became an agent in the revitalisation of the conflict it was created to resolve.

Likewise, the TRC's emphasis on individual accountability hampered its ability to confront the structures of apartheid, which fostered the persistence of widespread social injustice and inequalities in South Africa. To elucidate, Nagy critiques the TRC's exclusive prosecution of extra-legal violence committed during this period, since this form of violence 'was facilitated by apartheid's dehumanising message of black inferiority'.[35] In Nagy's view, gross HR abuses were committed systematically, as they 'were inscribed within basic apartheid structures'.[36] Yet, the TRC's individualised notion of accountability was unable to tackle or redress this collective dynamic of conflict. Furthermore, authors like Evans or Gready have condemned the absence of socio-economic rights violations from the scope of the TCR, highlighting the apartheid legacy of structural poverty and inequality that endures in contemporary South Africa.[37] The persistence of economic apartheid is illustrated by the fact that in 2000, 'black average disposable income per person was only 14.9 percent of that of whites', and that 'only 27% of blacks had access to clean water compared with 95% of whites'.[38] Although the TRC prosecuted 'exceptional', individualised crimes, the everyday structures and agents of apartheid evaded responsibility, and it is these systems of oppression that continue to reproduce social and criminal violence in South Africa today.[39] As with the ICTY in the Balkans, the TRC's individualised accountability could do little

25 Teitel (n 1) 86.
26 Lyn S Graybill, 'Pardon, punishment, and amnesia: three African post-conflict methods' (2004) 25 Third World Quarterly 1117.
27 Donna Pankhurst, 'Issues of justice and reconciliation in complex political emergencies: Conceptualising reconciliation, justice and peace' (1999) 20 Third World Quarterly 239, 245.
28 Graybill (n 26) 1117.
29 Teitel (n 1) 20.
30 Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339, 342.
31 Akhavan (n 7) 741.
32 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 17.
33 Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell University Press 2009) 164.
34 Clark (n 19) 335.
35 Rosemary Nagy, 'The Ambiguities of Reconciliation and Responsibility in South Africa' (2004) 52 Political Studies 709, 714.
36 ibid.
37 Matthew Evans, 'Structural Violence, Socioeconomic Rights, and Transformative Justice' (2016) 15 Journal of Human Rights 1; Gready (n 20).
38 Geoffrey Schneider, 'Neoliberalism and economic justice in South Africa: revisiting the debate on economic apartheid' (2003) 61 Review of Social Economy 23, 45.
39 Gready (n 20) 1.

for positive peace in South Africa, and its limited transformative capacity served to replicate dynamics of direct and indirect violence instead.

Human Rights Abuses

An additional legal principle that underscores TJ is the idea that justice can be attained by targeting HR abuses. Such violations, which include killing, torture, rape, genocide and other 'inhumane' acts that breach international HR law, should be legally prosecuted by TJ mechanisms insofar as they have been committed against civilians and during wartime.[40] The dominance of this liberal legalistic norm in TJ responds to the institutionalisation of HR discourses in international politics as the 'lingua franca of global moral thought'.[41] Nonetheless, to frame justice exclusively within the boundaries of HR yields an overly narrow understanding of violence that runs counter to positive peace. Not only does a focus on HR violations overlook a myriad of violent practices present in conflict and post-conflict spaces, but it also reproduces and legitimises a binary narrative of harm founded on reductive dichotomies like war-peace, good-evil, or victim-perpetrator.[42] Crucially, the attainment of a substantive and positive peace requires a form of justice that can account for violence in the 'in-betweenness' of such binary oppositions, rather than a limited scope targeting a set of specific crimes loosely associated to HR, civilians and wartime.

For example, the ICTY's mandate to prosecute HR abuses against civilian populations during wartime did not adequately match the complexities underpinning the Yugoslav wars. In particular, because the ICTY was established in 1993, in the midst of an 'unfolding bloodbath',[43] in which the siege of Sarajevo alone cost 10,000 lives between 1993-1996, when the ICTY was already fully operational.[44] This seriously questions the coherence of the ICTY's objective to serve justice for past HR violations at a time when populations were still being brutalised. Though it is true that the foundational purpose of the ICTY was to act as a peacemaking force by delivering justice to victims,[45] the belief that justice can contribute to peace when tensions and direct violence persist to such a degree is highly problematic and contradictory in itself. First, because it challenges the presupposed exceptionalism of the violence being addressed by the ICTY, and second, because the emphasis on HR violations effaces direct and indirect forms of violence taking place at the margins of the disembodied war-peace distinction informing the ICTY. These problems further interrogate the transformative potential of international legal frameworks and their grounding on HR language for building a positive peace through TJ.

Equally, the ubiquity of indirect violence in South Africa questions both the TRC's thin focus on HR abuses and the Commission's prospective contribution towards a positive peace with social justice. The mandate of the TRC specifically covered HR violations committed between the period 1960-1994, under the premise that the violence of this time frame deviated from 'normal', 'peacetime' conduct. In doing so, the TRC prioritised coming to terms with past violence over eradicating the roots of conflict in the present.[46] This weak conceptualisation of violence and crime was therefore unable to alter oppressive power structures that perpetuated everyday experiences of exclusion, marginalisation and subjugation suffered by black South Africans, leading to a massive disillusionment with the work of the TRC among black communities.[47] In this sense, Comaroff and Comaroff rightly posit that the obsession of TJ systems with HR fails to empower those who have conventionally been marginalised.[48] Thus, the war-peace binary informing the TRC's fixation on wartime HR violations caused it to disregard forms of indirect violence permeating South African society, again highlighting the Commission's role in facilitating the recurring patterns of both direct and indirect violence.

Statist Ontology

Lastly, the primacy of law underlying the liberal notion of 'justice' inherently reifies a statist ontology, which in periods of political transition might serve more to construct and legitimise a liberal ideal of the state than contribute to a positive and transformative peace. According to Teitel, law in transitional periods becomes an instrument for 'the normative construction of the new political regime', given that 'the language of law imbues the new order with legitimacy and authority'.[49] For Gready and Robins too, this 'state-centred paradigm in which building the institutions of the state and building peace are considered largely equivalent', is a fundamental pillar of the liberal peace statebuilding project.[50] Crucially, however, the statism that pervades the application of TJ systems globally fails to disturb oppressive power relations that marginalise groups and individuals, and may in fact reinforce them.[51] This is because the consolidation of a Westphalian state is a fundamentally top-down process that empowers liberal elites, whilst neglecting affected populations at the grassroot level by alienating them from the legalistic discourses of TJ.[52] As such, TJ systems may become sites for renewed conflict dynamics and for the protraction of both direct and indirect forms of violence, hindering the pursuit of a holistic peace in war-hit environments.

To illustrate, the ICTY's reliance on state cooperation displays some of the limitations posed by the trappings of statehood towards the production of meaningful justice and peace frameworks. As argued by Peskin, 'the Tribunals' lack of police powers gave states wide latitude to withhold the vital assistance the Tribunals need to investigate atrocities and bring suspects to trial'.[53] This instrumental use of justice by Balkan states also served the domestic political objectives of victor governments, who utilised the ICTY to 'get rid of domestic political opponents, obtain international material benefits, or gain membership in prestigious international clubs'.[54] For example, the Serbian government under Milosevic regularly rejected the legitimacy of the ICTY and frequently refused to

40 Teitel (n 1) 30.
41 Subotic (n 5) 110.
42 Catherine Turner, 'Deconstructing Transitional Justice' (2013) 24 Law and Critique 193, 194.
43 Bass (n 32) 17, 223.
44 Subotic (n 33) 124.
45 Teitel (n 1) 83.
46 Gready (n 20) 8.
47 A Boesak, 'And Zaccheus remained in the tree: Reconciliation and justice and the Truth and Reconciliation Commission' (2008) 29 Verbum et Ecclesia 636.
48 John L. Comaroff and Jean Comaroff, 'Criminal justice, cultural justice: The limits of liberalism and the pragmatics of difference in the new south africa' (2004) 31 American Ethnologist 188, 192.
49 Teitel (n 1) 104.
50 Gready and Robins (n 30) 341.
51 Bell (n 8) 27; Sriram (n 3) 61.
52 Gready and Robins (n 30) 343.
53 Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 Journal of Human Rights 213, 214.
54 Subotic (n 33) 6.

cooperate with its legal proceedings, especially after 1999, when Milosevic himself was charged by the Tribunal for war crimes.[55] Only after Milosevic's resignation from the Serbian presidency in 2000 was he captured and brought forward to the ICTY, an occurrence that, far from reflecting a profound social transformation in Serbia, was part of the successor government's strategy for the removal of economic sanctions and for Serbia's accession to the European Union.[56] Such elite-level co-optation of the ICTY stands at odds with a pluralist and self-reflective engagement with the past at the local level, preventing the reworking of power relations and violent nationalisms, and thus limiting the impact of 'justice' for positive peace in the Balkans.

In South Africa, the state-centred justice pursued by the TRC failed to meet the needs of local, conflict-affected communities, given that this top-down statebuilding project clashed with the country's grassroot legal pluralism. Critically, the rigid statist ontology buttressing the TRC impeded the inclusion and participation of marginalised populations, revitalising apartheid-era conflict dynamics over the appropriate judicial frameworks to guide South Africa's transition. As per Wilson, the language of law was mobilised to unify and centralise the postapartheid state, and to grant it political legitimacy.[57] However, this scholar explains, the transitional project of legal homogenisation brought the state 'into conflict with local justice institutions and popular legal consciousness in a legally plural setting'.[58] This is relevant because at the core of popular resistance against apartheid was the control of state power.[59] So, the fact that the TRC worked to strengthen state institutions fuelled discontent among communities who saw their customary forms of justice overridden by technocracy and legalism, further sidelining them from state-level structures of power and justice. Accordingly, the TRC not only helped to preserve patterns of indirect violence and exclusion, but also became a vehicle for the reproduction of conflictual state-local relations in South Africa.

Conclusion

To conclude, this essay presented a critique of the normative foundations underpinning TJ as a global liberal endeavour and its technocratic, legalistic approach to justice as individual accountability for HR abuses. It was argued that in practice, this form of justice often constrains the production of positive peace frameworks by reinforcing the application of seemingly apolitical legal principles to guide and inform political transitions. This paradox, it was suggested, may well reproduce and revitalise patterns of both direct and indirect violence. Such an argument does not seek to refute the claim that serving justice for past heinous crimes is central to attaining peace, but rather looks to challenge the taken-for-granted terms framing this debate. A critical interpretation of law as intrinsically value-laden, alongside a more nuanced articulation of 'peace' concurrent with a Galtungian approach, revealed that a liberally framed 'justice' may be inadequate to address atrocities ensuing from political conflict, and might consequently hinder the production of a meaningful peace.

The case studies of the ICTY and TRC exhibit some of the inherent tensions at play between law and politics across two transitional settings where a distinct type of justice was pursued, the ICTY advancing a purely retributive notion of accountability and the TRC favouring a restorative kind. These cases were employed to demonstrate how the influence of three legalistic principles rooted in international law (individual accountability, HR abuses, and a statist ontology), can limit the impact of justice in producing a holistic, transformative peace. Indeed, as showcased by the ICTY and TRC, the end result is often that TJ mechanisms end up reproducing their own nemesis, since legal remedies so deeply embedded in global power relations tend to replicate structures of hegemony and marginalisation. This paper thus questioned the potential of justice-as-law to elicit the kind of social, political and economic transformation required to build a positive peace in conflict and post-conflict spaces.

Finally, insofar as the normative international law apparatus continues to guide our thinking about the praxis of TJ, the kind of justice pursued by societies transitioning from conflict is unlikely to respond adequately to the everyday needs and interests of individuals in war-hit environments. Law and justice do not exist in a vacuum; they are neither neutral nor ahistorical, and they should not strive to transcend domestic or international political dynamics. Future research should aim to broaden the conception and application of justice outside the parameters of global legalism, helping scholars and practitioners to conceive alternative models of justice in a culturally sensitive and responsive manner. Only by detaching TJ from the destabilising boundaries set by international law can a deeper and truly transformative justice be achieved, because, as Audre Lorde once wrote, 'the master's tools will never dismantle the master's house'.[60]

55 John Hagan, *Justice in the Balkans: prosecuting war crimes in the Hague Tribunal* (University of Chicago Press 2003) 94.
56 Subotic (n 33) 41.
57 Wilson (n 11) 214.
58 ibid xvii.
59 Pankhurst (n 27) 245.

60 Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' in Cherríe Moraga and Gloria E. Anzaldúa (eds), *This Bridge Called my Back: Writings by Radical Women of Color* (Kitchen Table Press 1983) 94.

Bonnie and Clyde, Schopenhauer, and the Paradox and Problem of Innocence

Paul Pickering

Paul Pickering is the author of seven novels, Wild About Harry, Perfect English, The Blue Gate of Babylon, Charlie Peace, The Leopard's Wife, Over the Rainbow *and* Elephant. The Blue Gate of Babylon *was a* New York Times *notable book of the year, who dubbed it 'superior literature'. Often compared to Graham Greene and Evelyn Waugh, Pickering was chosen as one of the top ten young British novelists by bookseller WH Smith and has been long-listed for the Booker Prize three times. Educated at the Royal Masonic Schools and the University of Leicester, he has a PhD in Creative Writing from Bath Spa University where he is a Visiting Fellow, presented his doctoral thesis to the Bulgakov Society in Moscow, recently completed a Hawthornden Fellowship Residency on Lake Como and is a member of the Folio Prize Academy. The novelist J.G. Ballard said Pickering's work is 'truly subversive'. As well as short stories and poetry, he has written plays, film scripts and columns for* The Times *and* Sunday Times. *He lives in London and the Pyrenees. A major theme of his novel* Elephant, *published by Salt in 2021, is innocence.*

***Fig 1**. Faye Dunaway and Warren Beatty in* Bonnie and Clyde *(1967). Used with permission from Warner Bros.*

In the 1967 gangster road movie *Bonnie and Clyde*, the often-horrific events of the real-life story are cut with ingenuous humour and sheer innocence. In the bleak landscape of dust bowl America, we are rooting for Faye Dunaway and Warren Beatty from the start, even though we know their love is doomed and they will die in a summary execution in a car riddled with bullets. The historic couple themselves knew this, as Bonnie Parker wrote in a poem: 'It's death to Bonnie and Clyde'. Yet we come out of the cinema, or off Netflix, convinced the couple are innocent, if not heroic. As Albert Camus says in *The Rebel*: 'Every act of rebellion reveals a nostalgia for innocence and an appeal to the essence of being'.[1]

One of the things the film, inspired by French existentialist new wave cinema, illustrates is that present-day legal systems have not caught up with philosophical thinking, in the same way the hapless police cars pursue the bank-robbing duo to state lines. Innocence has never been just a passive result of justice when guilt is not found, but a subjective phoenix-like state of childlike being.

Camus' thinking owes much to Arthur Schopenhauer's book, *Die Welt als Wille und Vorstellung*: the world as will and representation.[2] For Schopenhauer, as with Bonnie and Clyde, existence is meaningless except for our river of wantings (*Wille*) and what we individually and subjectively make of them. In Bonnie and Clyde's case, this is their tender love affair and increasingly catastrophic robberies.

1 Albert Camus, *The Rebel* (first published 1951, Vintage 1991) 54.
2 Arthur Schopenhauer, *The World as Will and Representation* (first published 1819, Dover Publications 1958).

Schopenhauer in turn was inspired by the poet Johann Wolfgang von Goethe, especially his *Faust*, where Goethe inverts morality, the true innocent, Gretchen, goes to the gallows, and even the devil Mephistopheles cannot be sure of his outcomes: 'That power I serve, which wills forever evil, yet does forever good'.[3] In its humanism the Enlightenment turned everything upside down, but not the law.

The Faust legend partially derives from the story of Eve and the garden of Eden, where Eve eats of the Tree of Knowledge, and discovers not just sin and the fig-leaf bikini, but free will. This wickedness, paradoxically, led to science, individual reasoning, democracy, the public meeting, and its natural corollary, the jury trial.

But the law itself has not embraced either existentialist thinking or, say, the Marxist-inspired structuralism of Michel Foucault, who said we should applaud criminals for keeping the justice system in work. The courts prefer instead to stress guilt, traceable to Eve's original sin, and dress up in spooky 17th-century costumes to reinforce the point. The call is for ever tougher sentences, yet there is little evidence these would have any effect on crime.[4] In Clyde Barrow's case they certainly did not, and he even cut off one of his toes to get released early. In the UK, the legal system has a Ruritanian monarchy at its head and is proud of ancient feudal rituals and traditions; in Kafkaesque court documents, it is always R or Rex against the supposedly innocent accused.

No former prisoner I have met will admit fully to his crime, even if he has pleaded guilty. The very act of thinking makes us feel like Gods, even if we know nothing of Descartes and *cogito ergo sum.* Possibly the beauty of the world and looking out at the helter-skelter wantings of Schopenhauer's *Wille* make us feel innocent again, whatever we have done, but the law does not take this into consideration.

There is this innocent joy of life and appreciation of art, in particular music and language, in the character of Alex in Anthony Burgess's *A Clockwork Orange*, so much so that the reader is sickened by his reprogramming at the hands of the state. 'Oh it was gorgeousness and gorgeosity made flesh. The trombones crunched redgold under my bed, and behind my gulliver the trumpets three-wise silverflamed, and there by the door the timps rolling through my guts and out again crunched like candy thunder… I was in such bliss, my brothers'.[5] Burgess saw the book as a sermon on free will.

Jean Genet, in *The Thief's Journal*,[6] likens convicts to flowers, and his demi-monde is inverted in a way that underscores Schopenhauer's ideas and those of Jean-Paul Sartre, to whom the book is dedicated. In Genet's jails and mean streets, as Mick Jagger sings in 'Sympathy for the Devil', written after reading Mikhail Bulgakov's *Faust*-inspired *Master and Margarita*,[7] 'All the cops are criminals, and all the sinners saints'.

To view the legal system as a zero-sum game, where innocence is defined or denied 'objectively' in a brief timeframe by a court, or by the police, can have consequences. When the law comes into contact with the 'street', occasionally the reaction can show just how philosophically out of step on innocence we have become. The 'outlaw' Mark Duggan, of Irish Afro-Caribbean descent, was shot by police on 4 August 2011 after the police had decided he was guilty, but the more humanist 'street' thought otherwise and, helped by mobile phone connections, there were days of nationwide rioting and a bill of 100 million pounds.[8] Messing with subjective perceptions of innocence can be costly as well as fatal.

Wearing a hijab in Iran is a mark of chastity and obedience. But the killing of Mahsa Amini by the morality police for not wearing one correctly also sparked riots, led by fifteen-year-old girls who are Eve-like in their rebellion and innocence.

Paradoxically, rehabilitation of serious offenders could be improved by using, not denying, this mantle of presumed innocence and accepting violent rebellion as part of being human. The Law Society has tried to modernise with publications like 'Law in the Emerging Bio Age' and the linked 'postcards from the next normal, but seems to shy away from a modern philosophical rethink of jurisprudence.[9]

In the picture from the film, Bonnie Parker is wearing a chaste head covering, but she also, wisely, has her finger on a trigger of her Colt Detective Special .38 revolver.

3 Johann Wolfgang von Goethe, *Faust* (first published 1808/1832, Macmillan 1965) passages 1335-6.

4 See Daniel S Nagin, Francis T Cullen, and Cheryl Lero Jonson, 'Imprisonment and Reoffending' (2009) 38(1) Crime and Justice 115-200.

5 Anthony Burgess, *A Clockwork Orange* (Heinemann 1962) 28.

6 Jean Genet, *The Thief's Journal* (Penguin 1967) 1.

7 Mikhail Bulgakov, *The Master and Margarita* (Vintage 1967).

8 Paul Lewis, "All hell broke loose': Oxford graduate held at gunpoint by police' *Guardian* (London, 7 August 2011) <https://www.theguardian.com/uk/2008/jul/09/ukcrime.ukguns> accessed 10 September 2022.

9 Wendy Schultz and Trish O'Flynn, 'Law in the Emerging Bio Age' (*The Law Society*, August 2022) <https://www.lawsociety.org.uk/topics/research/law-in-the-emerging-bio-age> accessed 11 October 2022.

Putin's Propaganda: A Path to Genocide

Marta Baziuk

Marta Baziuk is Executive Director of the Holodomor Research and Education Consortium (Canadian Institute of Ukrainian Studies, University of Alberta). She has more than 25 years' experience in the not-for-profit sector, in Ukraine and North America.

Fig 1. *Several victims of starvation lay dead or dying on a busy sidewalk in residential Kharkiv.*
Photo from the collection of Samara Pearce, great granddaughter of the photographer Alexander Wienerberger. <https://www.samarapearce.com/>.

Russia's assault on Ukraine continues, destroying homes, schools, theatres, and hospitals, and even whole towns and cities.

The actions of the Russian Federation in Ukraine by now can be termed genocidal. Perhaps the shocking readiness of the Kremlin to employ brutality is why so many area experts found the chance of a Russian invasion unlikely or inconceivable. Until recently, few people took Russian President Putin at his word, but he has long made his convictions known regarding Ukraine. Driven by nostalgia for both the Russian Empire and the USSR (which conducted its own genocidal assault on Ukraine), Putin has made it clear that he seeks at all costs to destroy independent Ukraine.

Not so long ago, Putin seemed satisfied with the Ukrainian-Russian relationship, when the Kremlin-controllable common criminal Victor Yanukovych was Ukraine's president. Putin never forgave the Ukrainians for driving Yanukovych from office during their Maidan revolution eight years ago. He retaliated by annexing Crimea and launching Russia's war in Ukraine's Donbas region.

Russian media has kept up a drumbeat of hatred for Ukraine and Ukrainianness ever since.

Dehumanizing and demonizing Ukrainians is state policy, intended to prime the Russian public to root for, or at a minimum to accept, Russia's genocidal acts against citizens of a peaceful neighbouring state. The soldiers who are firing missiles at Ukrainian apartment buildings, occupying cities, and torturing POWs are part of the Russian audience that has been fed a steady diet of hate.

Russian media has for eight years told its public that Ukrainians—particularly those who assert Ukraine's right to independence—are evil fascists and enemies of Russia. President Putin has declared that Ukraine is led by drug-addled Nazis: a particularly ugly, cynical smear given that Volodymyr Zelenskyy, Ukraine's democratically elected president, is Jewish and lost relatives in the Holocaust.

There is a precedent for the demonization of Ukrainians as a prelude to genocide. Propaganda paved the way to the Soviet- induced famine of 1932-33 known as the Holodomor, in which millions

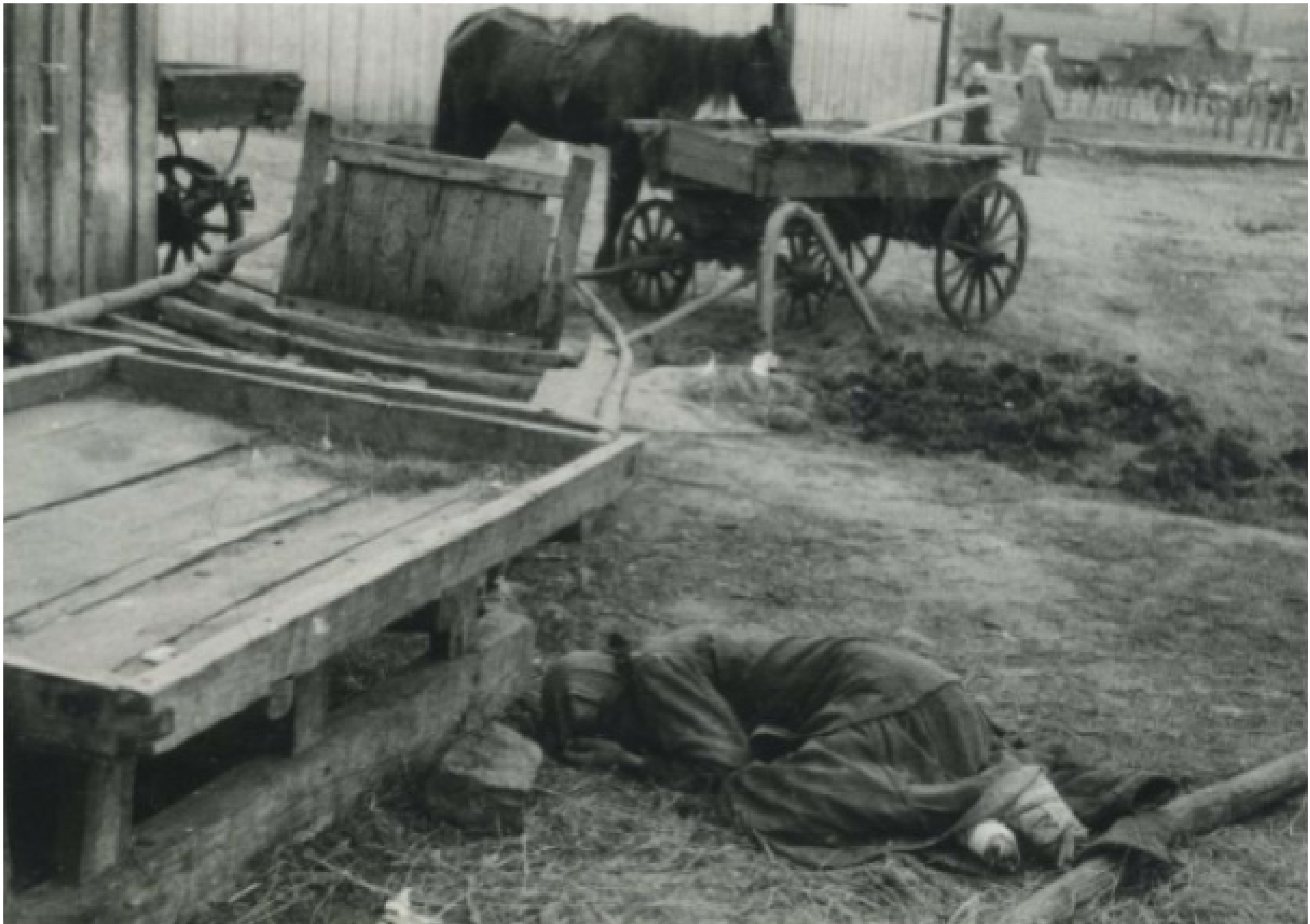

Fig 2. *A farm woman, victim of starvation, lies behind a cart near a marketplace in Kharkiv.*
Photo from the collection of Samara Pearce, great granddaughter of the photographer Alexander Wienerberger. <https://www.samarapearce.com/>.

of Ukrainians were starved to death. Ukrainian peasant farmers were branded kulaks—parasites that needed to be exterminated. A Soviet propaganda campaign primed Bolshevik activists to go house to house in the Ukrainian countryside seizing foodstuffs from a perceived enemy.

Propaganda today prepares Russians to applaud invasion, occupation, war crimes, and genocidal acts. In the places that Russia has occupied, Ukrainian educational institutions are quickly supplanted with Russian replacements. Speaking Ukrainian is hazardous. It isn't the first time. The man who developed the concept of genocide, lawyer Rafael Lemkin, saw the murder of Ukrainians by starvation during the Holodomor to be part of a genocide that included attacks on their language, culture, and leadership.

Kremlin mis- and disinformation was employed to obscure crimes during the Holodomor, and again today. In 1932-33, the Kremlin refused offers of international food aid, maintaining that there was no famine or starvation. Until its collapse, the USSR denied that the Holodomor had taken place. More recently, Russian disinformation asserted that Russian troops were in Ukraine's Donbas region only, with no mention of the vicious assaults on Kyiv, Kharkiv, and other cities. Until it became ridiculous to do so, Russian media claimed that the Russian army was fighting not the Ukrainian army but irregular formations of nationalists. Such lies are impossible to maintain in an age of cell phones and social media, but they manage to sow confusion, which leads to public inaction. In the case of the Holodomor, it took the fall of the USSR, when researchers finally gained access to Soviet archives, to once and for all disprove Soviet disinformation that denied the Kremlin's starvation of the Ukrainian countryside.

The intelligence sources that correctly predicted Russia's onslaught also warned of arrest and kill lists of the Ukrainians most likely to lead resistance to imposition of Kremlin rule. Mayors, journalists, and activists have gone missing. In the 1990s, I worked with civic organisations in Ukraine, and I fear for the people I know who are likely to be targeted for their commitment to the development of a democratic Ukraine. Today, as Executive Director of the Holodomor Research and Education Consortium, I fear for the Ukrainian academics I know. In Ukraine, historians are free to pursue their research interests. In Russia, historians who disagree with the Kremlin face persecution and imprisonment. Scholars engaged in the study of Ukrainian history and culture, including the Holodomor, will be certain targets under Russian occupation.

We are witnessing the Kremlin's atrocities in real time, unlike during the Holodomor, when journalists were forbidden from traveling to Ukraine. The question today is whether the world is willing to do what it takes to stop the Russian President who has headed down the path of genocide.

Three Stories of Art and War

Peter Bejger & Constance Uzwyshyn

Peter Bejger is an editor, filmmaker, and writer based in San Francisco. He was a Fulbright Research Scholar in Ukraine, where he wrote and produced a documentary film on Secession-era architecture of the city of Lviv. Previously, he lived in Kyiv for several years, where he worked as a journalist, media consultant, and cultural critic.

Constance Uzwyshyn is an expert on Ukrainian contemporary art. She founded Ukraine's first foreign-owned professional art gallery, the ARTEast Gallery, in Kyiv. Having written a masters dissertation entitled The Emergence of the Ukrainian Contemporary Art Market*, she is currently a PhD candidate at the University of Cambridge researching Ukrainian contemporary art. She is also CJLPA's Executive Editor and the Ukrainian Institute of London's Creative Industries Advisor.*

The following interviews have been condensed and edited for clarity.

коли гуркочуть гармати- музи замовкають

The Russian invasion catapulted the Ukrainian art world into crisis, and desperate measures were undertaken to secure staff, collections, and artists. Dreams are deferred but stubborn resilience manifests as a desire to not only protect cultural heritage, but also somehow provide opportunities for continued creativity. Three institutions from all regions of Ukraine—Central, East, and West—reflect on their current challenges, on how they are coping, and what might be in store for the future. When cannons roar, the muses will *not* fall silent.

In Conversation with **Olesya Ostrovska-Liuta**

21 April 2022

Olesya Ostrovska-Liuta is the Director General of the National Art and Cultural Museum Complex 'Mystetskyi Arsenal'.

Located in a magnificent eighteenth-century structure once devoted to the production and storage of artillery and ammunition in Kyiv's historic Pechersk district, the Mystetskyi Arsenal (Art Arsenal) is Ukraine's leading cultural institution, notable for its multidisciplinary programme in the visual and performing arts, as well as for its annual book fair.

Before her tenure at Mystetskyi Arsenal, Ms. Ostrovska-Liuta served in several leading roles in the development of Ukraine's national strategy for culture and creative industries. She has been the First Deputy Minister of Culture of Ukraine, the First Deputy of the National Committee for UNESCO, and was on the board of the International Renaissance Foundation, the Ukrainian Institute, and numerous other professional bodies. She is also a freelance curator and writes on culture and cultural policy.

Fig 1. *The National Art and Cultural Museum Complex 'Mystetski Arsenal' 2012 © Barnbrook.*

***Fig 2**. Futuromarenia Exhibition (15.10.2021—30.01.2022 Mystetskyi Arsenal) © Oleksandr Popenko.*

Olesya Ostrovska-Liuta: I am at Arsenal right now, the air sirens are blaring, and I am in a corridor sitting between two walls.

***Constance Uzwyshyn*: How are you able to work at the moment?**

OOL: We have a very different set of challenges. Our team is scattered all across Ukraine and Europe and this is the challenge for all organisations. People are everywhere. We have to rebuild the processes and understand what the organisations are about now, what the cultural centre should do, and what is the most important task.

Yesterday, I had a meeting with a German writer from a Western European publication. It is very difficult to think about the idea of war, that this is possible, and it is very, very strange for Ukrainians to imagine as well. In 2014, we could not imagine the war. Even this summer, Constance, when you were here, you could not imagine it.

Consider Putin's text of 12 July 2021, *On the Historical Unity of Russians and Ukrainians.*[1] It is very explicit in what he thinks and what he is going to do. It seemed like a theory, like mythology, not an action as it turned out to be.

***CU*: What kind of programming can you have now that there is war?**

OOL: We have multidisciplinary lines of approach.

Apologies, I have another call from security and must answer it. When you get a call from security you want to answer it.

We are a museum which holds a collection and the most important job for all museums in Ukraine is to protect the collection. This is very difficult because we were not prepared. There are no safe and prepared places in Ukraine to receive the collection. Museums are doing a lot and it cannot be discussed publicly where these collections are being safeguarded.

***Peter Bejger*: There is lots of information about this in the press; some people think that collections are safer abroad in other countries.[2] It is a delicate question. What are your thoughts about this?**

OOL: It is safer for certain objects, and it needs to be decided at the governmental level and not by separate organisations. You cannot move objects easily out of Ukraine, you need governmental decisions and permissions. Most museums cannot move their collections because there simply has been no time to prepare.

We have a very tragic and bad situation in Mariupol,[3] and also in Kharkiv and Chernihiv. Many cultural institutions have been

1 Vladimir Putin, 'On the Historical Unity of Russians and Ukrainians' (*President of Russian Federation*, 12 July 2021) <http://en.kremlin.ru/events/president/news/66181> accessed 12 March 2022.

2 Hannah McGivern, 'French Museums Rally to Protect Art Collections in Ukraine with Truckload of Emergency Supplies' (*The Art Newspaper*, 25 March 2022) <https://www.theartnewspaper.com/2022/03/25/french-museums-ukraine-emergency-supplies> accessed 26 March 2022.

3 Pjotr Sauer, 'Ukraine Accuses Russian Forces of Seizing 2,000 Artworks in Mariupol' *The Guardian* (London, 29 April 2022) <https://www.theguardian.com/world/2022/apr/29/ukraine-accuses-russian-forces-of-seizing-2000-artworks-in-mariupol> accessed 29 April 2022.

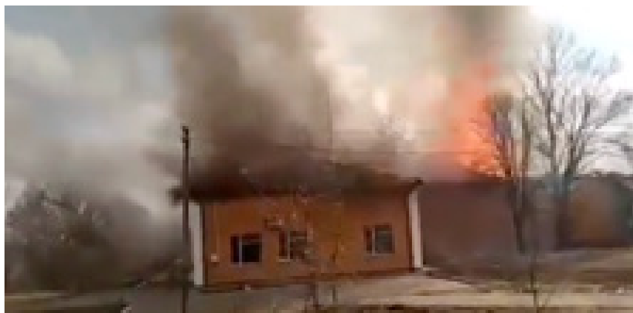

Fig 3. Shah Basit. Maria Prymachenko Museum in Ivankiv, Kyiv Oblast. Twitter post. *28 Feb 2022.*

Fig 4. Sunset on the Steppes
(Arkhip Kuindzhi 1900, oil on canvas, 39.5 x 57.5cm).

purposefully destroyed (fig. 3) and collections have been looted (for example, Arkhip Kuindzhi artworks were stolen) (fig. 4).[4] However, in Chernihiv, Russian troops have retreated. Furthermore, both Lviv and Chernivtsi are under threat but there are no Russian troops on the ground (they are targeted by long-range missiles), so it makes things different. Therefore, these institutions and their requirements need to be addressed differently. In some situations, it is wise to move a limited number of objects abroad.

Then you have the teams and the issues with people moving abroad. We need our people; we are being de-staffed. At the moment, we have connections with our staff, but the longer they stay abroad, the more they get immersed. It is very important to support programmes in Ukraine and it is difficult when the staff are not in Ukraine. However, there are exceptions. For example, our digital team is located outside of Ukraine and works well. An example of this is with the international book fairs. Our design team produces the designs for all the stands.

***CU*: Do you think the COVID experience in some way prepared for this remote work?**

OOL: Yes, it has helped us cope with the situation right now because we learned how to work remotely and how to use technology to keep on working. We also learned that communication is key, and that we cannot rely on spontaneous communication as one does in an office.

Also, Ukraine is a country with very good internet connections, and the Internet has not been down since the invasion, except for the occupied areas like Bucha, Irpin, and Mariupol. That is also why the press knows so much about what is going on in Ukraine. This also supports us!

Fig 5. May that Nuclear War be Cursed!
(Maria Prymachenko 1978, gouache on paper).

***CU*: When war began, as the director of the Arsenal, what was the first thing you did?**

OOL: On 24 February, our first action was to inform our partners abroad. I woke up at 5:30 a.m. My husband first told my daughter the war had started. When you hear these words, you don't believe it. You think this must be a mistake. It is macabre.

At 8:00 a.m. I met with my team, and we drafted an appeal to explain the situation to our partners, especially addressing book and literature circles which are a main component of our programme, in particular the *International Book Arsenal Festival*,[5] a large literature and book festival. This was our first step. This festival was scheduled for May. Of course, we had to redirect our work to let people know, to explain what is happening in Ukraine, and to explain our point of view, especially why Ukraine does not want to be part of Russia, and why Ukrainians are not Russian (as Putin put it). Therefore, we focused on our presence at international book festivals…we started with Bologna, Tbilisi, London, and Paris.[6]

4 Sophia Kishkovsky, 'Mariupol Museum Dedicated to 19th Century Artist Arkhip Kuindzhi Destroyed by Airstrike, According to Local Media' (*The Art Newspaper*, 23 March 2022) <https://www.theartnewspaper.com/2022/03/23/mariupol-museum-dedicated-to-19th-century-artist-arkhip-kuindzhi-destroyed-by-airstrike-according-to-local-media> accessed 24 March 2022; Alex Greenberger, 'Paintings by Maria Prymachenko Burn as Ukrainian History Museum Weathers Destruction' (*ARTnews*, 28 February 2022) <https://www.artnews.com/art-news/news/maria-prymachenko-paintings-ivankiv-museum-destroyed-1234620348/> accessed 12 March 2022; Jeffrey Gettleman and Oleksandr Chubko, 'Ukraine says Russia Looted Ancient Gold Artifacts from a Museum' *The New York Times* (New York, 30 April 2022) <https://www.nytimes.com/2022/04/30/world/europe/ukraine-scythia-gold-museum-russia.html accessed> 1 May 2022.

5 For more information on the International Book Arsenal Festival see <https://artarsenal.in.ua/en/book-arsenal/> accessed 16 May 2022.

6 'Book Arsenal Will not Take Place in May 2022' <https://artarsenal.in.ua/en/povidomlennya/book-arsenal-will-not-take-place-in-may-2022/> accessed 4 May 2022.

***Fig 6**. International Book Arsenal Festival 2021.*
© Oleksandr Popenko.

***Fig 7**. President of Ukraine Volodymyr Zelensky with First Lady of Ukraine Olena Zelenska and Olesya Ostrovska-Liuta at the International Book Arsenal Festival 2021. © Oleksandr Popenko.*

In addition to the book fairs, the team is working with contemporary art and putting together art exhibitions outside of Ukraine. At the moment, the head of exhibitions fled to Paris with her teenage son. We have put together an exhibition which is at the Ukrainian Cultural Centre in Paris and another exhibition will be in Treviso.[7]

In addition to the book fairs and art exhibitions, we are also creating an archive of artworks being produced in Ukraine during war. It is called 'Ukraine Ablaze'.[8] This has a special meaning because it refers to [Oleksandr] Dovzhenko's film *Ukraine in Flames* (1943).[9] We have also co-founded an art fund which deals with the consequences of the Russian invasion. It is the Ukrainian Emergency Art Fund and raises funds to purchase Ukrainian art and support curators, art writers, art research, and much more through fundraising activities.[10] As I said, Mystetskyi Arsenal has several programmes, but our programme has had to drastically change because of the war. We even have a legal department to assist us.

***CU*: Who funds Mystetskyi Arsenal now?**

OOL: We still receive basic funding but have just had severe financial cuts and we do not know how we will succeed.

***CU*: Due to the war, what are your thoughts on decolonisation and art and how has this been addressed by you as Director of the Mystetskyi Arsenal?**

OOL: First of all, Russian imperialism is something that is not unknown to Ukrainians. But there is a blind spot by other countries. Russian politics and policies here are seen as neo-colonial. Ukrainians are very sensitive to these narratives via Russian media and culture.

***PB*: Do you feel perhaps it is difficult to explain to Westerners, that is, to those who live in a post-modern society, decolonisation in Ukraine or Russian imperialism? They come from a different historical and cultural experience. How can you address these blind spots to western audiences?**

OOL: It depends. When you look from Ukraine, especially from Kyiv, and see for example statements and declarations made from the German political arena, it is shocking. It is like there is no amount of reality that can convince a German politician.

There is a discussion in Ukraine, which I think is a good argument, but you might find this controversial. What is the reason why Western, especially European countries (it is different in America), refuse to notice the imperial nature of the Russian discourse? Also, why do they often not notice other cultures apart from Russia in these regions? Why is that?

A hypothesis arose that this has something to do with all the imperialisms in the world as well. Empires speaking to empires, important capitals speaking to other important capitals. Even at these meetings those other important capitals, for example the Russian capital, have legitimate spheres of interest.

What are legitimate spheres of interest? It means that another capital has the right to define other nations' invasion choices. Why is it possible that a Western capital or nation is even capable of accepting this idea of legitimate spheres of interests? How could people accept that Russia has the right to define Ukraine's future? One of the explanations is connected to the parallel imperialism still present in other countries.

***PB*: Do you think this is a hangover nostalgia (among the Left) for the USSR? Perhaps it is a modernisation project and has been affected by this view, which is present in Soviet art and transposed in current discourses?**

OOL: The Soviet Union was definitely a modernisation project, which means modernisation is not always a good thing and can be a means of tolerating oppression. How do you measure good and evil? Was the Soviet Union good only because it opposed an evil side in the capitalist world? Is it enough to challenge the capitalist world to be good, no matter how many atrocities you bring with yourself? In our part of the world the answer is no. It is not enough. It can bring a greater evil. When your life is threatened, you might become melodramatic.

7 'Ukraine: Short Stories. Contemporary Artists from Ukraine. Works from the Imago Mundi Collection' (*Fondazione Imago Mundi*) <https://fondazioneimagomundi.org/en/progetti/exhibitions/ukraine-short-stories-2/> accessed 9 May 2022.

8 'Ukraine Ablaze; Project by the Laboratory of Contemporary Art' <https://artarsenal.in.ua/en/povidomlennya/the-ukraine-ablaze-project-by-the-laboratory-of-contemporary-art/> accessed 7 May 2022.

9 Alexander Dovzhenko and Yuliya Solntseva. '*Ukraine in Flames* (1943)' (*YouTube*, 24 June 2015) <https://www.youtube.com/watch?v=vmkpOqoNZSY> accessed 4 May 2022.

10 'Ukrainian Emergency Art Fund' <https://artarsenal.in.ua/en/povidomlennya/ukrainian-emergency-art-fund-report-on-the-month-of-work/> accessed 27 March 2022.

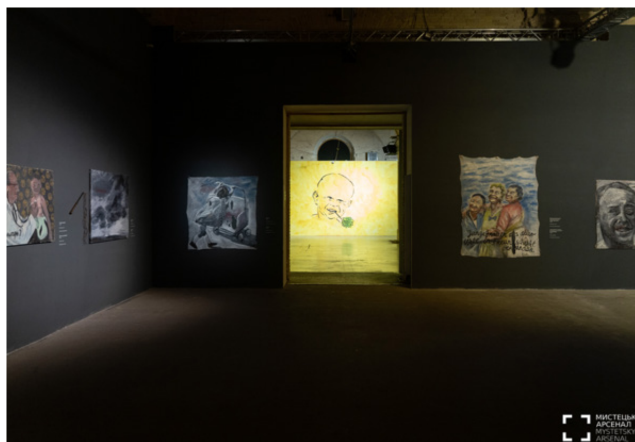

***Fig 8**. Andriy Sahaidovsky.* Scenery. *Welcome! Exhibition (18.09.2020—24.01.2021 Mystetskyi Arsenal) © Oleksandr Popenko.*

***PB*: Germany has a huge role in contemporary art, with their museums, fairs, and curators, but what do you think about the French, Italians, and other Europeans?**

OOL: Regarding Germany, there is a gap, luckily, between politicians and professionals. Professionals are much more supportive and there is a feeling that the understanding is deeper, and the public is much more sympathetic to Ukraine. I am not saying Germany is bad. We also have to state we are very grateful for the reception to Ukrainian refugees. We could not have imagined Ukrainians crossing borders in huge numbers without passports or COVID restrictions, and with free transportation. This is great and should not be underestimated. This is very important to point out. We should not underestimate these efforts.

Regarding the political discourse, what is most striking to Ukrainians are the Germans and the French. Consider when [French president] Macron stated that events in Bucha might not qualify as genocide and in the end Ukrainians and Russians are brotherly nations.[11] This sounds very alarming in Ukraine. First of all, this 'brotherly nation' is of course an imperial trope. This trope tells you that no one should interfere with those relations because they are a kind of family relations so let them decide by themselves because they are a 'brotherly' family. There is this family lexis, and this form of speaking camouflages international aggression and deprives Ukrainians of agency. If they are 'brothers', then they have no political agency to make their own political choices. Therefore, when a Ukrainian hears a French president state this, it sounds quite colonial as well.

Then the question arises, why would a French president take such a colonial position? That is really alarming in Ukraine. We heard nothing like this from the British.

I have the feeling the British and American are the most realistic. They understand what is going on. When it comes to southern Europe, there is a different history of relationships. The latest story

11 Reuters, 'French President Macron says Killings in Bucha were 'very probably' War Crimes' (*Euronews*, 7 April 2022). <https://www.euronews.com/2022/04/07/uk-ukraine-crisis-france-macron> accessed 2 May 2022; Shweta Sharma, 'Poland hits out at Macron after Massacre in Bucha: 'Nobody Negotiated with Hitler'' *Independent* (5 April 2022). <https://www.independent.co.uk/news/world/europe/poland-macron-hitler-bucha-killings-b2051006.html> 2 May 2022.

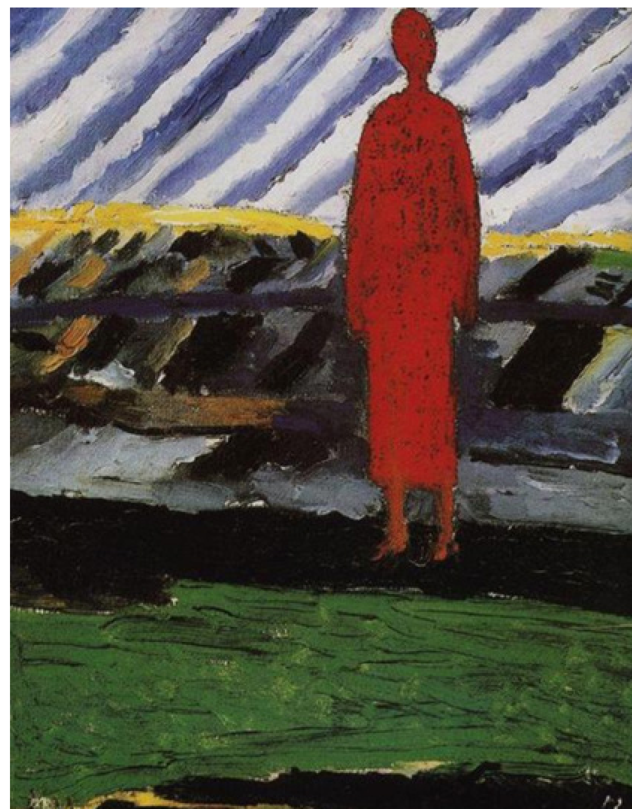

***Fig 9**.* Red Figure *(Kazimir Malevich 1928, oil on canvas, 30 x 23.5cm). Kazimir Malevich taught at the Kyiv Art Institute (1928 – 1930) when this painting was created.*

with the Vatican and Rome [Pope Francis arranged a Ukrainian and Russian woman to carry the cross together during a Good Friday procession] was received very poorly.[12]

All the international steps towards reconciliation are perceived as harming the victim and inflicting more suffering on Ukrainians. The time for reconciliation between Ukrainians and Russians has not yet come. Russians have to first analyse their own political reality and their actions towards Ukrainians.

***CU*: Do you have any professional relations with Russian artists or Russian Institutes?**

OOL: No one has reached out to us as an institution.

***CU*: With the war going on, the spotlight is now on Ukrainian art. Please comment on how Ukrainian art has changed during these last two months. First of all, what is Ukrainian Art?**

OOL: Anything produced in Ukraine now or anything where an artist defines himself/herself as a Ukrainian artist. That would probably be my explanation of Ukrainian art.

12 Cindy Wooden, 'A Ukrainian and a Russian were Invited to Lead the Vatican's Via Crucis. Ukraine wants Pope Francis to Reconsider' *America* (New York, 12 April 2022) <https://www.americamagazine.org/politics-society/2022/04/12/ukraine-russia-crucis-242811> accessed 12 April 2022.

***CU*: Do we need to re-examine and critically discuss the way art history defines and establishes Ukrainian-born or artists of Ukrainian descent as Russian? Let us consider, for example, Kazimir Malevich, Ivan Aivazovsky, Ilya Repin, Volodymyr Borovykovsky, David Burliuk, Aleksandra Ekster, or even Andy Warhol (a Carpatho-Rusyn). What does this say about art history and its practice?**

OOL: This is a huge question, and a complex discussion is ahead of us. How do you define a Polish or even Russian artist today? At the moment, here is my own definition today, and it might change over time: a Ukrainian artist is any artist that made an impact on the Ukrainian art scene or was either produced in Ukraine or by individuals who identify themselves as Ukrainian artists. In this way, Malevich would also be Ukrainian because he was teaching in the Kyiv Academy. He was one of the founders of the Academy and he was an important cultural figure in Kyiv life. Therefore, he is a Ukrainian artist but also belongs to other communities and societies.

We are discussing this because Putin and the Russians put forward this question, not only whether Ukraine is a political entity, but do Ukrainians exist? Since Putin put this question forward—by the way, Ukrainians thought this question was long resolved—he made it into a huge issue, and therefore we speak about it. Thus, his text is genocidal in nature because what he is saying is Ukrainians do not exist. There is no such thing as Ukraine. Although I exist as a physical reality, his answers are Bucha, Irpin, and Borodianka.[13] Those people, for him, should not exist physically. This is unexpected to anyone who knows about Ukrainian culture and history.

As for the question, are Ukrainians different from Russians? There are two different issues, in my opinion. Are Ukrainians different from Russians? The answer is yes, yes, and yes. Secondly, this question in itself is disgraceful. However, if you speak about Kyivan Rus', it is a medieval period that is neither Russian nor Ukrainian. It is like equating the Holy Roman Empire to being German.

***PB*: What is going to happen with the Arsenal Book Fair going forward?**

OOL: It will not happen in May. It all depends on the war, and it is too early to say anything. We will have to do other things. We are developing a programme to connect Ukrainians and international publishers because the international scene is very interested in connecting with Ukrainian writers. We are working with the Frankfurt Book Fair, which is the most important global book fair.

We are not able to do any cultural activities in Ukraine because this is not possible for security reasons. We cannot have a mass public event, even in Lviv. It's too dangerous. It is difficult to have a steady workflow because of sirens and you have to change your work schedule because of that. Kyiv is waking up at the moment, even hairdressers are starting to work…which is very exotic these days. The shops and markets are starting to function as well as the cafes… but there are no cultural or conference-related types of activities. We would love it, but it is just not possible.

***CU*: You are speaking at the Venice Biennale, can you tell us a bit about it?**

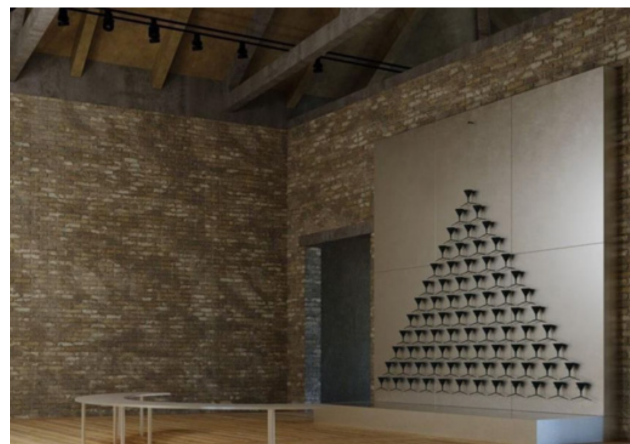

Fig 10*. Fountain of Exhaustion *(Pavlo Makov 2022). Image and description courtesy of @ukrainianpavillioninvenice on Instagram.

OOL: There are two separate Ukrainian projects at the Biennale, the Ukrainian Pavilion[14] and the Pinchuk project.[15] It is a parallel programme, and Pinchuk's projects are always well known. The Ukrainian Pavilion is organised by three curators and the artist Pavlo Makov. Makov stayed in Kharkiv, even under the shelling. Regarding the curators, one of them is a young man (he was originally not allowed to travel due to the war but was given special permission) and one of the females just gave birth in a bomb shelter in Western Ukraine. Their work routine was extremely complicated. It will be a miracle that it is even there.

***CU*: Why is Ukrainian art significant to other cultures?**

OOL: One thing, but it is so reactive, is because Ukrainian culture understands the nuances of Russian culture and Russian imperialism and can translate it to others. But isn't this a minor role, to be a translator? It is still part of colonialism…I feel uneasy about this.

***CU*: Perhaps Ukrainian artists represent values, integrity, and a morality which many in the West have lost. What do you stand for? Ukrainians are posing tough questions such as the purpose of NATO, the meaning of the United Nations, and so forth.**

OOL: I agree, Ukraine is forcing people and societies to change their views. Artists such as Alevtina Kakhidze[16] especially at the moment makes things uncomfortable for Westerners, with their previous views. They make people re-examine fundamentals, what people were there in Kyivan Rus' for example. In a sense Ukrainian art is a game changer, it challenges us.

Here is some small, good news. The sirens have stopped.

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13 'Bucha Massacre, Nightmares of Irpin and Hostomel' (6 April 2022) <https://war.ukraine.ua/crimes/the-timeline-of-tragedy-bucha-massacre-nightmares-of-irpin-and-hostomel/> accessed 7 April 2022.

14 'Ukrainian Pavilion at the 59th International Art Exhibition – La Biennale di Venezia' <https://ukrainianpavilion.org/> accessed 24 April 2022.

15 'This is Ukraine: Defending Freedom @Venice 2022' <https://new.pinchukartcentre.org/thisisukraine-en> accessed 24 April 2022.

16 See: <http://www.alevtinakakhidze.com/> accessed 9 May 2022.

***CU*: Do you contemplate leaving Ukraine?**

OOL: No. First of all, I am the director of Arsenal which means I am in charge, and I cannot leave. Legally I can, but morally no.

***PB*: How many staff are you?**

OOL: We had eighty people in our pre-war regular staff. We are a large institution by square metres but are compact by the number of people. In Ukraine, there are around sixty. All the museum directors are still in Kyiv, but some people have moved to other cities, and a few are outside Ukraine, but not many.

***PB*: Do you have any concluding thoughts on what is to be done during this period? What is the moral imperative of artists right now in Ukraine?**

OOL: It is important to pose questions, to try to be uncomfortable, to try to reflect on what is going on, to try to describe your experience… it is an extreme experience. How can you describe this other than through art? We will only see what the strategies are sometime later when we view it retrospectively. Some artists are trying to cope with reality through their art. Art is also about providing a voice, so many of them are voicing things…for example Alevtina. She says I am an artist, and I can ask unpleasant and uneasy questions to anyone. She challenges assumptions even for her western interlocutor, who does not want to change his/her lens…

Alevtina has a house in Kyiv, was very close to the front line, and spends most of the time in her basement with her dogs. The dogs were anxious and afraid; she spent most of her time in the basement because this was a space where her dogs were their calmest.

In her art, she draws all her impressions, thoughts, feelings…she writes questions and thoughts on her drawings in English. She said there are so many mistakes (in the grammar)…but they are authentic, but I don't think about correct expression. I just want to say something despite the ability to operate the language. It is not the translation made by a good translator, it is what I do, what I think, and she thinks about certain interlocutors, and she speaks to outsiders…Alevtina is powerful, her art is honest, and it is blunt.

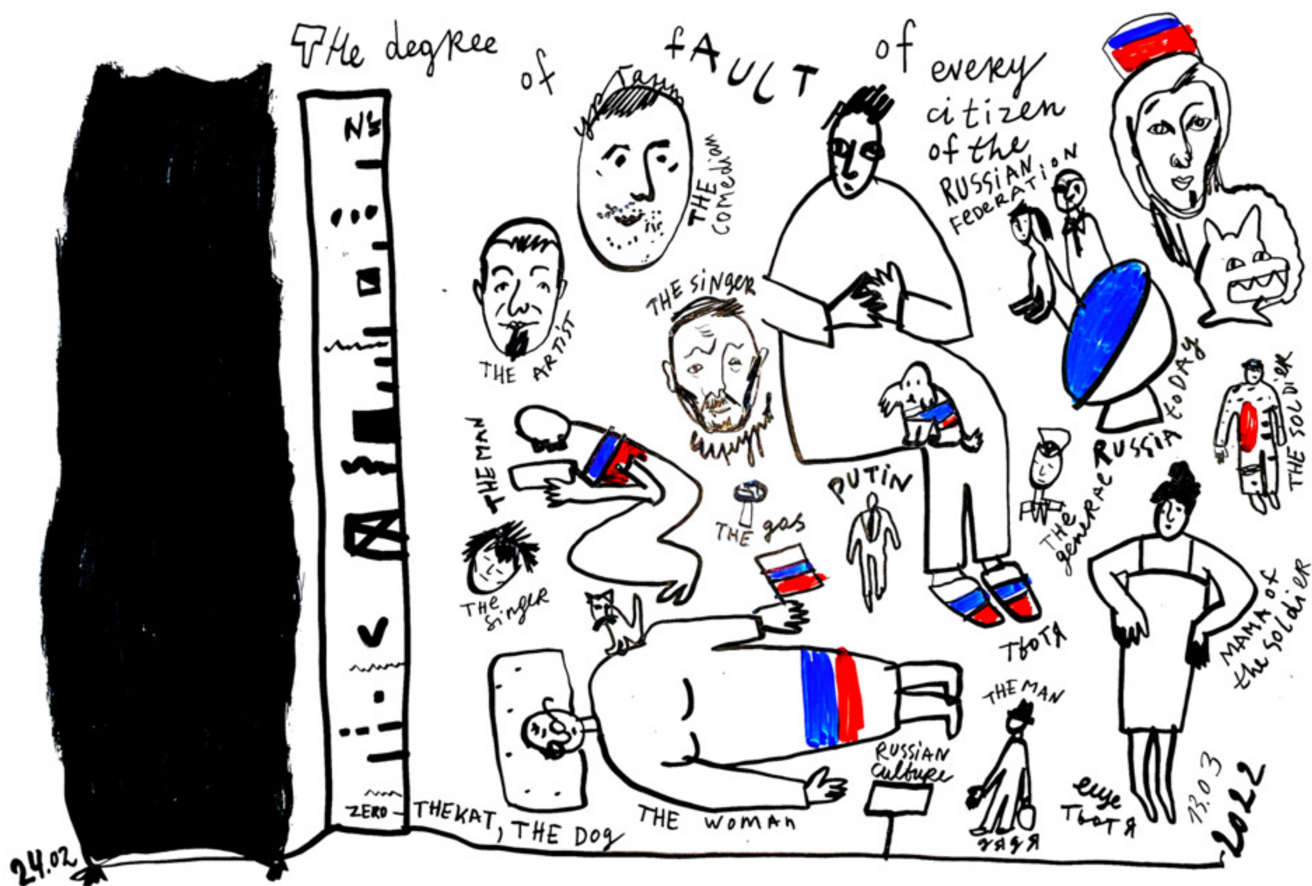

Fig 11. The Degree of Fault of Every Citizen of the Russian Federation *(Alevtina Kakhidze 24.02.2022, ink and coloured marker on paper) © Alevtina Kakhidze.*

In Conversation with **Mykhailo Glubokyi**

14 April 2022

Mykhailo Glubokyi, an IT specialist from Kharkiv, Ukraine, is the Communications Director for Izolyatsia/iZone and a board member of Trans Europe Halles, a Europe-based network of cultural centres at the forefront of repurposing industrial buildings for arts, culture, and activism. Izolyatsia is a non-governmental and non-profit platform for contemporary art. It was founded in 2010 in a former insulation materials factory in Donetsk and on 9 June 2014 the territory was seized by Russian Federation militants and is now used as a prison camp and torture chamber. Izolyatsia subsequently relocated to Kyiv to a shipyard warehouse where it continued its programme as both a centre for international creative industries and Ukrainian cultural activities. On 24 March 2022, Izolyatsia in Kyiv was forced to close due to the Russian invasion of Ukraine.

Figs 1 & 2. *Pre-2014, Izolyatsia Donetsk, Make-Up…Peace and Homo Bulla © Mykhailo Glubokyi.*

***Fig 3**. Post-2014, Inside a Prisoner Cell at Izolyatsia Donetsk. © Telegram/tractorist_dn.*

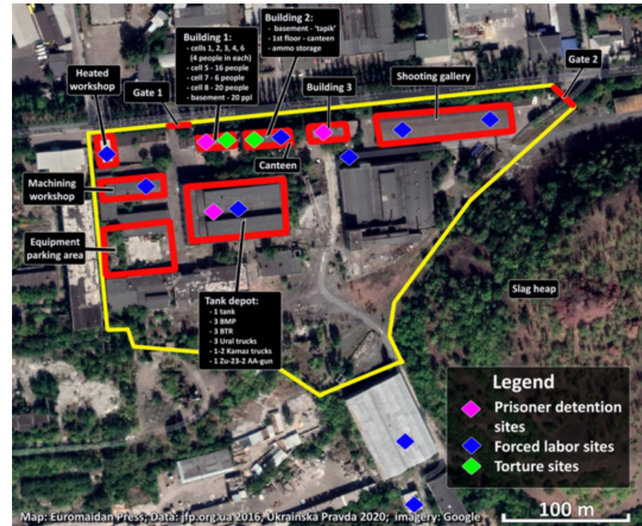

***Fig 4**. Plan of the Prison in 'Izolyatsia' in Donetsk. Euromaidan Press; Data: jfp.org.ua 2016, Ukrainska Pravda 2021; Imagery: Google.*

***Constance Uzwyshyn*: Izolyatsia in Donetsk, what is going on with the Donetsk Izolyatsia building now?**

Mykhailo Glubokyi: It is a prison.[1] Unfortunately, it remains held by Russians. Stanislav Aseyev,[2] who was released, has started looking furiously for people who imprisoned him. He managed to identify a couple of Russians who worked at the prison. As soon as they became public, they disappeared. It is not possible to understand who is behind this now and what happened to these people. Unfortunately, nothing has changed with this place. Now we have received reports that in newly occupied places, like Kherson, they are doing something similar there—building illegal prisons, holding people, torturing people, persecuting people. Unfortunately, this model is considered successful and is duplicated.

Stanislav is in Kyiv now and has joined the Territorial Defence and he is fighting and protecting Ukraine. He has written a book on the prison. It is now available in English, translated by the Canadian Embassy. It has also been translated into German, French, Latvian, and more languages.

The title of the book is amusing because the title in Ukrainian is *Svitliy Shlakh* (The Bright Path) and this is the street where Izolyatsia is located. So, it is a Soviet name…the 'Bright Path to Communism' and of course it became ironic because it is not so bright, and not so positive. The book title is *The Torture Camp on Paradise Street.* The funny thing is, when Western publishing houses were translating the text into French and German, we were told we could not use the description 'concentration camp' because it is a term that only refers to the Second World War and has another context.

'This is a prison operating in present-day Ukraine, where horrific torture techniques are being utilised. This prison is, in reality, a concentration camp, beyond whose fencing no laws reach. Life there is lived in humiliation, fear and uncertainty. Wounds and burns marks cover bodies that are filled with pain from broken bones and often too, broken wills…. a secret prison in the Russian-controlled part of Donbas…hundreds of people have passed through…most of them have survived torture by electric shock, rape, humiliation, and heavy forced labour. Several inmates are known to have been murdered. No human rights or humanitarian organisations have access to the prisoners. It continues to operate. It is overseen by the Federal Security Bureau of the Russian Federation (FSB).'[3]

One important thing to remember is there are a lot of testimonies by witnesses in the UN Human Rights High Commissioners Report. This can be referenced and can be considered impartial and is proof of torture.[4]

***CU*: What is happening with the Izolyatsia that had to be relocated in Kyiv?**

MG: I am not able to disclose anything about the Kyiv building.

***Peter Bejger*: What about the current programming and future programming?**

MG: There are several things we are doing now.

The first concerns humanitarian efforts—at the beginning of the war we called our donors to request that funds allocated for cultural purposes be used for humanitarian programmes and we received support from the European Commission, the Danish Institute, and several other organisations. We purchase equipment and organise shelters in Western Ukraine for internally displaced Ukrainians. Our focus now is humanitarian aid.

1 'Izolyatsia Must Speak' (*Izolyatsia*) <https://izolyatsia.ui.org.ua/en/> accessed 5 March 2022.

2 'Dispatches from Ukraine; Speakers: Stanislav Aseyev, Nataliya Gumenyuk, Isobel Koshiw' (*YouTube, Ukrainian Institute London*, 3 April 2022) <https://www.youtube.com/watch?v=f-Pgy1SpR_8> accessed 4 April 2022; Yuri Zoria, 'Multimedia Project Izolyatsia: Must Speak Sheds Light on Infamous Donetsk Concentration Camp' (18 Dec 2021) *Euromaidan Press* <https://euromaidanpress.com/2021/12/18/multimedia-project-izolyatsia-must-speak-sheds-light-on-infamous-donetsk-concentration-camp/> accessed 4 April 2022.

3 Stanislav Aseyev, *The Torture Camp on Paradise Street*, (The Old Lion Publishing House 2021) 2-3.

4 'Report on the Human Rights Situation in Ukraine 16 November 2019 to 15 February 2020' (*Office of the United Nations High Commissioner for Human Rights)* <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/29thReportUkraine_EN.pdf?fbclid=IwAR3P4AAb58AFNAPF0zzt4NfTZ_XbHPcpOJIz1Z9XDCxdjPix3eihYU_UkWM> accessed 9 May 2022.

***Fig 5**. Entrance to Izolyatsia (Factory in the Background) in Kyiv. 2021 © Constance Uzwyshyn.*

***Fig 6**. Inside Izolyatsia—IT Zone in Kyiv. 2021 © Constance Uzwyshyn.*

Secondly, we are a cultural organisation, and we have no funding now so we focus on events we can manage. For example, we organise small events in cultural communities in Europe to talk about what is going on in Ukraine. Most of them are centred around Ukrainian films and include a fundraising component, e.g., ticket sales, and funds are then transferred to volunteer organisations in Ukraine.

One of the most prominent events was our participation in the *London Stands with Ukraine March* (26 March).[5] We produced a video, with different people expressing their solidarity with Ukraine. There are 15 clips—most of them are artists who are fighting in the war now. We worked with Circa[6] and they are going to publish the full videos on our social media.

We also work with Trans Europe Halles and organised a couple of solidarity events within the network and have created a number of residencies and support networks for Ukrainian artists. Our relationship with both the Institut Français and the Goethe Institute is strong, and we have been in partnership for the last four years. We have been implementing 'iOpportunis Programme'—a mobility programme for artists and cultural professionals and funded by *Creative Europe*. It is called *Re-Imagine Europe*[7] and is very successful.

Regarding Mariupol, our team would like to continue from what we created in 2015. This was a residency programme with ten international artists which we presented at Venice Biennale. We hoped to continue this experience. However, it is now complicated because of the war. It is really crazy now. What is going on in Mariupol is really important to discuss and we would like to repeat this residency, but this time have more Ukrainian artists involved.

***Fig 7**. On Vacation—Venice Biennale 2015 © C. Rudeshko.*[8]

Since the first residency, almost half of the foreign artists have remained in Ukraine. This says a lot about their commitment to Ukraine.

5 Andrew Anthony, 'March in Support of Ukraine in London: Everything was Turning Blue and Yellow' *Guardian* (London, 27 March 2022) <https://www.theguardian.com/uk-news/2022/mar/27/march-in-support-of-ukraine-in-london-everything-was-turning-blue-and-yellow> accessed 1 May 2022.

6 See *CIRCA* <https://circa.art/> accessed 1 May 2022.

7 See *Re-Imagine Europe* <https://www.paradiso.nl/nl/landing/re-imagine-europe/24828/re-imagine-europe/24831/?gclid=CjwKCAjw9qiTBhBbEiwAp-GE0ZA8h5CHLjRNL--BVsxbM0JfgkqPPhecww0dC85d-a8YsPX34bVaKBoCJwgQAvD_BwE> accessed 9 May 2022.

8 'In 2014, the New York artist and curator Clemens Poole was invited to Izolyatsia and just as he arrived, it was occupied. In 2015 he returned and created a project called *Zahoplennya* which dealt with the subject of the occupation of public spaces. The timing was unique. Izolyatsia had been taken over by the Russians. We wanted to participate in the Venice Biennale, but Pinchuk dominated the scene. So Poole created uniforms, like an army, and on the back, they had a big sign reading, 'on vacation'. We all toured the Biennale and invited visitors to take selfies in the pavilions of countries they consider to be occupying powers. A huge number of people went to different pavilions. Some went to the former 'Yugoslav' pavilion which now belongs to Serbia. Some went to the Israeli pavilion, and some to the Russian pavilion. A lot of Americans went to the US pavilion to protest American foreign policy. We created a website of photos taken by visitors (https://on-vacation.info). There was a contest on the website to win a trip to Crimea. It was all very political, and a huge number of people were supportive'. Taken from an interview by Constance Uzwyshyn with Mykhailo Glubokyi in 2021.

Fig 8. *Soledar.*
2021 © Mykhailo Glubokyi.

Fig 9. *Soledar, Salt Mine.*
2021 © Mykhailo Glubokyi.

***PB*: Izolyatsia today has been displaced once already, and now twice. Going forward, what are your views on the role of Ukrainian contemporary art and what purpose does Izolyatsia have during this time of war?**

MG: The role of art and culture is very significant now; we can see that there is a spotlight on Ukraine. The country is in Western media, and it is important to say something meaningful. One of the main roles is cultural diplomacy…to explain what is going on here, what people feel in Ukraine, and how they see the situation. There is a very big need to take down this imperial Russian narrative. The Western world needs to understand Russian imperialism, and what it means…they don't see it as something bad, something disturbing, something that brings more trouble.

***CU*: When I met you in the Summer (2021) you spoke about a new art and cultural project called *Soledar* in a salt mine.[9] What is happening with this project now?**

MG: Up to the last moment, the role has been providing humanitarian and medical aid, but now the entire region is not accessible. It is now estimated that over 60 percent of the people have fled, because it is on the contact line and there is a huge chance it will be destroyed. It is a really bad situation now. Some of our team members have fled and are staying in different places, yet there are many who have refused to leave.

I am very proud of how we have inspired *Soledar* to become active from previous projects. They are self-organised volunteer groups and are preparing bomb shelters, supporting internally displaced people. They are much more active than the city authority and government and they do this from their own initiative. This is great because before 2014 they were sitting and waiting for someone to come to do everything for them and now, they take initiative and are proactive. We see this change in our society in Ukraine.

***CU*: This war has shown the strength and self-determination of Ukrainians.**

MG: Yes, we are determined to fight for the preservation of our identity, our nation, and our sovereignty. The word nationality is very different in Ukrainian than in Russian and how it is used in Russian and Russian propaganda.

***CU*: Where are you now?**

MG: I have one son who is five, he is the reason we moved outside of Kyiv (to an undisclosed location) because it is better he doesn't see what is happening or hear explosions and sirens. However, my mother is in Donetsk. At the beginning we thought it might be safer for her in Donetsk rather than in Kyiv. However, no one is safe anywhere in Ukraine and it is really frightening.

***CU*: After the war is over, what are your plans? Would you return to Donetsk?**

MG: This is a difficult question. There is obviously a need to do something in Donetsk. The city is subjected to propaganda, without any access to international or independent media, independent culture, or discussion. We have to organise some programmes, to speak to people. It is even more important because we come from Donetsk. This means people are more receptive to us, more open to building and developing, there is a code of comradery amongst us—the people of Donetsk.

However, at this moment and time in war, it is hard to imagine how this is possible. It is all crazy, I was talking to a journalist from England and at the same time he was also communicating with people from Donetsk on Instagram. I was trying to tell the journalist it is impossible for these people to say anything except how they love Donetsk and the 'so called government'. Either they like their government because of this propaganda or otherwise they are afraid and will get into trouble. They are not free to discuss. Even the journalist cannot understand the fact he is not [getting uncensored material].

9 Soledar is a city in Donetsk Oblast (Province) of Ukraine. The name means 'gift of salt' and the art project was to take place in one of Soledar's spectacular salt mines.

It is very important for us to do something in Donetsk, but we do not know what this will look like. We have this plan we started to develop a couple of years ago. We want to demolish the entire complex of Izolyatsia and turn it into a memorial garden. It is impossible to work in a place which has been used to torture so many people and has such bad energy. This memorial garden will talk about Izolyatsia, and it will be the best thing to do.

The British architect Rick Rowbotham, who designed the Donetsk Izolyatsia, has already created plans for this Memorial Garden. We need to liberate Donetsk so we can do this.

Fig 10. *Izolyatsia Memorial Forest Donetsk*
© Rick Rowbotham

In Conversation with Bozhena Pelenska

16 April 2022

The Jam Factory was on the verge of its debut as an interdisciplinary contemporary art centre in a repurposed industrial space in the Western Ukrainian city of Lviv when the Russian invasion started.

Jam Factory General Director Bozhena Pelenska has a background in art and culture management, with a bachelor's degree in philosophy from the Ukrainian Catholic University in Lviv, an overseas scholarship year of study at the University of Ottawa, as well as a master's degree in cultural studies from Lviv National University through a programme affiliated with the Central European University. She fled temporarily to Poland at the onset of hostilities to place her young daughter in a safer environment and has been returning to Lviv to continue preparations for the opening in now radically changed circumstances.

Fig 1. *An architectural rendering of the future Jam Factory Art Centre, Lviv.*
© The Jam Factory.

***Fig 2**. A current view of the Jam Factory.*
© The Jam Factory.

***Peter Bejger*: Please describe the Jam Factory.**

Bozhena Pelenska: The Jam Factory is a complex of several buildings in the Pidzamche industrial district of Lviv. The main part, when you arrive at the site, is a beautiful old building which looks like a castle. It was built in a neo-Gothic style, with a tower, and the building was originally used to produce alcoholic beverages in the Austrian period, and jam during the Soviet era. This was a heritage building and had to be adapted and restored correctly. Our approach was to preserve as much as possible and to be true to ourselves. By May everything should have been finished. We had our timeline and date. The international press conference was planned for 4 April. We had our final timeline where the curators had to present the programme. The opening date actually was set for 26 August. That was in our calendar. This is where the war caught us.

***PB*: Has everything been frozen now? Or is work continuing?**

BP: The first week (of the war) was a shock for everyone. My colleagues and I couldn't do anything the first week. We wanted to volunteer, to do something crucial, and for me this was important. When the air raids began, we were afraid and all of us in the neighbourhood used the basement of the building as a shelter. Lviv was being hit by rockets.

Our first question was: what can we do? We gave our offices to internally displaced people as a refuge. Also, regarding the renovations, many of the workers were from Central or Eastern Ukraine. In the early morning of the day the war started, they immediately returned to their families, to Kharkiv, or they became soldiers and joined the military to defend their cities. After a week and a half of the war, we had a meeting with the construction company to see if they could complete the renovation. Would they be able to get workers, material, and finish the Jam Factory? We are awaiting their response.

***PB*: Who is the owner of Jam Factory?**

BP: He is a private investor, Dr Harald Binder, who is a Swiss academic with a special interest in East Central Europe and a cultural entrepreneur who lives in Vienna and London. He is the owner of the buildings, and he is the investor, or philanthropist, who invests all the costs in renovation.

***Constance Uzwyshyn*: So, he bought the building?**

BP: Yes. It was purchased by Dr Binder and it is part of his Foundation. He also established in Lviv in 2004 the Centre for Urban History[1] which is different from the Jam Factory and concentrates on academic research with an extensive public programme of lectures, exhibits, and events.

***CU*: I would like to talk about how your programme works, as well as the concept and the vision.**

BP: The vision for the Jam Factory was to create an international art centre. I wanted to have a curatorial approach that would be rigorous, and we would create exhibitions of Ukrainian artists from Ukraine, Ukrainian artists that are abroad, and also international

1 See <https://www.lvivcenter.org/en/> accessed 9 May 2022.

Fig 3. *An appeal for the 'Artists in War' programme. © The Jam Factory.*

Fig 4. *A damaged building in Kharkiv, 23 May 2022. © Dimitar Dilfoff/AFP via Getty images.*

artists. This centre for contemporary art is important, in order to show Ukrainian art as an integral part of Europe and involved in world discourses.

One of the biggest problems is that many people are not familiar with Ukrainian contemporary artists, or the Ukrainian avant-garde. We are connected to Europe, despite the borders separating us for many years. We have wonderful, brilliant artists who use different contemporary approaches in either the visual arts, painting, installation, or media arts. One of the artists we wanted to exhibit was Olena Turyanska.

We want to be inclusive. For example, we had one artist who is transgender. The curator selected the artist because of the interesting work. We want to be inclusive as much as possible, but we also want to have this frank approach where we choose what we believe is good and important and that can really talk about the subject.

Our first exhibition was to be 'Organic Community' and it was to involve theatre, music, and the visual arts. It was to include issues of colonialism and appropriation, ecology and human relationships, and modernisation. Colonialism is a very important topic today in Ukraine, with the war. We wanted to show that Ukrainian artists are engaged in global issues and showcase them to the world. And all this is created in Lviv!

***CU*: Now we are in a war, and you are living in Poland with your child, right? What's next? Can you even make plans for the future?**

BP: Well, I will be frank with you. Actually, it was a very hard decision for me to leave. I actually felt very guilty leaving Lviv because I felt I had to stay in Ukraine and do everything I need to do and do whatever is necessary. But on the first day there were all these sirens, and it was such a shock. I was so frightened, especially for my daughter. This was so stressful for her, and I simply didn't know what was going to happen. I had a friend in Warsaw and she said, 'Come, I have a room. My son will move out of his room and I will put a mattress on the floor and you can sleep there'. I didn't know, I didn't know…And there was someone with a car and they had two places and they said they were leaving in ten minutes. I took my backpack and my daughter's backpack and our laptops and fled. This was one of the hardest decisions in my life.

***PB*: How old is your daughter now?**

BP: She's twelve now. It was very hard travelling, and it took 30 hours to get to the border.[2] But this was the moment when my responsibility for my daughter and the unknown future prevailed and I decided I must leave. Yes, there were a lot of difficulties, but I returned to Lviv last week. It is still very stressful for children, and adults for that matter. If you can imagine all these sirens. I have recorded some of them. There is martial law and a curfew and you have to return home very quickly. There is a shortage of different products. Of course, this is also a very exciting time for creating now and more people are in Lviv. And now after 50 days of war a lot of people are starting to write that they are ready to do something. It is so strange, there are few children in Lviv.

I recently spoke with Harald about how we will renew activities. However, it is hard to plan. There are many battles and then it is so psychologically difficult. I want to finish the renovations and we may open the Jam Factory, but now in totally different conditions. We don't know many things.

***PB*: I understand now you are actively engaging with artists to help them through this crisis?**

BP: Quite a lot of artists have said that they are blocked, and unable to create. Many are participating in humanitarian aid or doing military service. There are so many different stories. We created a program in response to the war. It's called 'Artists at War' and a lot

2 Lviv is located about 70 kilometres (43 miles) from the Polish border.

Fig 5. A rendering of the future Jam Factory with performance space.
© The Jam Factory.

of artists can apply to this programme. We do not demand them to create, but we ask them in the next six months to create something in their work relating to the war. And we want these works to help us to collect funds, to help other artists. And I think we might also produce an exhibition later.

***CU*: So, you give them money to do this, is that the idea?**

BP: We have collected some money for them already, and we are asking people to donate for that programme. We are selecting, we are looking at who the artist is…we are looking at their portfolios, and if they fit our criteria, we give them money for their needs and we ask them to create. The conditions are quite easy as we understand it's already very hard to create, but I think this would encourage them and it's important to give them a voice in these conditions.

***PB*: What is the mood like in Lviv now when you returned? What is it like psychologically?**

BP: Oh well, I met quite a lot of people. They are exhausted and cannot sleep. They are very motivated to do as much as possible. A lot of volunteer work is being done. However, with some people there is a new feeling. They feel so vulnerable. There are so many people from the East or the northern part of the Kyiv region who have lost so much. They are in shelters and this situation tires them so much. I feel I can't rest because they are not resting and I am conflicted about why I care so much about me when they have nothing? This is psychologically difficult. But many people are still very motivated to help.

***PB*: You might want to think about this question. How might the influx of people into Lviv have changed the art scene there?**

BP: You know, it has changed a lot. And it is changing now.

***PB*: What's going to happen with the Ukrainian art scene now, as it's dispersed?**

BP: It is changing now. For example, in theatre. We are also working in theatre. As you know Kharkiv is totally destroyed.[3]

Kharkiv was quite strong in theatre, in experimental theatre groups. They had a very good and very strong theatrical school, and people there. And most of them are now in Lviv. They very quickly created a new group and they started to perform. I think they will stay. One of the leaders, his last name is Utsyk, Anton Utsyk, said that most probably they will stay in Lviv and in Kharkiv after the war is over. So they created this group, and I'm sure it is already an influence, and I was thinking how I as a Jam Factory director can engage with them. We can give them space, maybe to one of the groups. And this will already change Lviv. And one of the designers, he is also in Lviv. He is from Kyiv. I'm sure he is going to change things quite a lot. It's hard to envision exactly how, but I really hope for much better in the future for all of us who have been brought together quite unexpectedly.

CU: I know, it's tough. Eight years you worked on this, right? So close. But you know what? It will happen. I just know the world will come into Lviv and it will be very exciting. Just hold on.

3 Taylor Dafoe, 'Kharkiv's Palace of Culture was Destroyed by a Russian Missile Attack, Leaving Eight Injured' (*Artnews*, 24 May 2022) <https://news.artnet.com/art-world/a-ukrainian-palace-of-culture-in-kharkiv-destroyed-2120574> accessed 25 May 2022.

The Art Industry in Ukraine **During the War**

Igor Globa, Maria Sivachenko, Anastasiia Yatsyna

The authors of the article are the team of the gallery Portal 11.

Portal 11 is an art gallery in the centre of Kyiv, Ukraine and a space for true connoisseurs of fine arts. The mission of the gallery is to exhibit contemporary Ukrainian artworks that will eventually become classics. Gallery projects attract a broad audience and are highlighted in the press.

The article examines the current state of the Ukrainian contemporary art market in the aftermath of Russia's invasion of Ukraine and the occupation of a portion of the country's territory. We look at how the war affects various agents of the art world in the short term and how they respond to the crisis. As the crisis is still ongoing, this is an interim study; the information was collected up until mid-April 2022. We believe that putting the data together now will be critical for a better understanding and analysis of what will transpire afterwards. As we can see, the war has turned into the most heinous embodiment of violence against Ukrainian culture. Employees of the Kyiv-based art gallery *Portal 11* gathered the materials for this article. The majority of the materials were gathered during a written survey of artists with whom the gallery has worked since its foundation. We also included materials obtained privately from collectors. Many facts are covered for the first time in our article because they only just occurred during this specific period.

The Ukrainian art market has actively sought to integrate itself into the global art market. Every year an increasing number of artists and galleries from Ukraine participate in various art events, exhibitions, and auctions. Digital technologies, social networks, and globalisation have opened up many opportunities for Ukrainian art. Many Ukrainian artists and art dealers have found success in foreign markets.

The war is an unprecedented event, having a profound impact on the Ukrainian art community. It has no parallels in Ukrainian history and possibly in European history since World War II. The fates of most Ukrainian artists, collectors, galleries, and artworks were irrevocably altered on February 24, 2022, when the first Russian bombs exploded. We have unwittingly become participants and witnesses to a massive cultural disaster, as well as a shift in all processes related to the art market in Ukraine. Artists and the art industry as a whole are now actively working on various ways to help the country. One of the most essential messages in this article is that the Ukrainian art sector requires assistance as well.

Artists

A survey of artists, with whom we have collaborated since the gallery's establishment, allowed us to record important facts, including their emotional states. First of all, we were interested in the places where our respondents were when the war started and where they are after 3–4 weeks. Other questions included the following: Where are your works now? What is happening with your workshop now? Can you continue to work and create art under these conditions? Do you already have ideas and plans for a creative future and what are they? Have you cancelled any projects because of the war and which ones? Do you know the fate of your works that are in private collections around the world, especially in Ukraine? Any forms of answers were accepted. Subsequently, they were organised according to their content.

Under ideal conditions, we would wait for a response from the 67 artists with whom we have interacted since the opening of the gallery. But we are glad that more than half of them responded to us in these extreme conditions. We believe the findings from the sample of 34 artists can represent the situations of all Ukrainian artists and the entire country. The gender ratio of participants reflects the population of Ukraine. The respondents turned out to be artists from all parts of our country (from the west, east, and centre of Ukraine), including an artist from Crimea (who once experienced a similar situation of being attacked by the Russian Federation and forced to move), an artist from Mariupol (who miraculously escaped with her family from this city), and more from Poltava, Kyiv, Lviv, and other cities respectively. They got in touch, took the time, and shared their experience, for which we are very grateful. We also received a response from an artist-veteran of the ATO (Anti-Terrorist Operation on the territory of Donetsk and Lugansk regions since 2014), who is now at the forefront.

Statistics show that on February 24, 2022, all but one of the artists encountered the sounds of the first rocket strikes at home. Subsequently, 30% remained in the same place at the time of the

Fig 1. *Artist Oleksii Koval in Ljubljana where he was on 24 February 2022. (Credit: Oleksii Koval).*

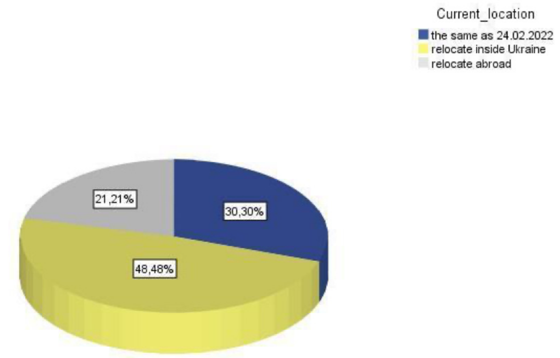

Fig 2. *Where the artists were at the time of the survey, about 1 month after 24 February 2022. (IBM SPSS Statistics 23 Output).*

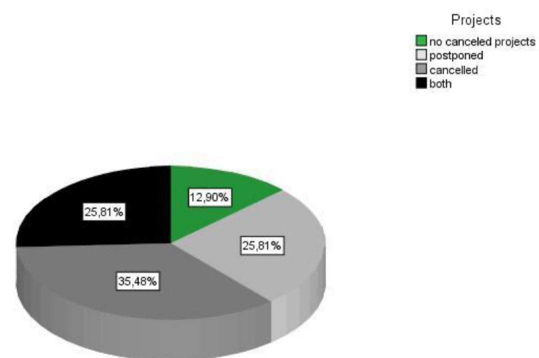

Fig 3. *Infographics of losses of exhibitions and other projects by artists. (IBM SPSS Statistics 23 Output).*

survey, 48% became internally displaced, and 21% went abroad. Artists from western Ukraine, further from the borders with the Russian Federation, stayed at home, and most of the inhabitants of the eastern, northern, and southern parts became refugees. Egor and Nikita Zigura, two well-known sculptors working in tandem, are experiencing difficulties. They worked together before the war but were separated as a result of it. Egor is currently in Europe while Nikita is in Ukraine. We wonder what kind of dynamics their work will take on in the future.

Artists of each gender were impacted differently by the war. Since the start of the war and the introduction of martial law, many female artists have left Ukraine. They lost access to their works and studios, but found themselves safe and supported in the West. Male artists do not have the opportunity to leave Ukraine before the end of martial law. Although some of them have retained access to their workshops and artworks, they do not have the opportunity to be safe and work at full capacity.

Regarding the location of the artists' works, results show that 84% of works remained on the territory of Ukraine, 54% of them at home and in studios. Only 15% had some work outside their homeland. They are preserved from being destroyed by war by international projects as well as by being in private foreign collections. Astian Rey, for example, was one of the artists whose work was stuck at exhibition sites: 'It just so happened that a week before the conflict began, I presented a personal exhibition, *Form. Symbol. Time*, at Kyiv's city gallery *Lavra*. In addition, I participated in an Italian project at the Institute of Contemporary Art on the subject of Dante Alighieri. The majority of my work remains in these institutions. However, a portion of them remained in the workshop'.[1] Artists cannot always track their paintings in private collections. It is possible that they were resold. While people run from war, leaving all of their belongings behind, it becomes even more difficult. Therefore, only 27% of artists knew that their works were safe, while 4.5% were only aware of the destiny of a portion of their work. Others surveyed did not have any information.

Maxim Mazur offered perhaps the most emotional and humane answer to the question about his work's location: 'there is nothing more important than human lives. I didn't think about the fate of my works in the collections'. His exhibition was to be mounted in our gallery on February 24, 2022, and an opening was planned for the next day.[2] Vsevolod Kovtun also told us: 'the last purchased work was for a private collection, I do not know the fate of it and other works sold. And I will not try to find out about them, so as not to provoke an excessive sense of guilt in people who may not have been able to save art during hostilities. The main thing is that these

1 Mariana Chikalo, 'Opening of a new project by artist and sculptor Astian Rey' (Lucky Ukraine, 17 February 2022) <https://www.luckyukraine.in.ua/vidkruttya-vustavku-astian-rey> accessed 15 March 2022.

2 'Exhibition by Maksym Mazur "Transliteracija"' (*Portal 11 Gallery*, 21 February 2022) <https://portal11.com.ua/en/exhibition-by-maksym-mazur-transliteracija/> accessed 16 March 2022.

***Fig 4**. 'From the Italian Diary' exhibition opening at Villa Longoni near Milan. (Credit: Valerio Lombardo).*

people are saving their lives now—because human life is much more valuable than my work'. We have also learnt from other sources that the exhibition of the famous street artist Gamlet, *3652019 + 2/3*, is stuck in the Kyiv art platform *M17*.[3] He presented the exhibition on February 18, 2022. During the war, he took a proactive stance and is raising funds on social networks to help the Armed Forces of Ukraine and civilians.[4] After the recent exhibition in the gallery *Portal 11* of the artist Victoria Adkozalova,[5] one of the bought paintings, *Pink Flamingo*, remained in our framing workshop; the new owner will collect it after the war.

For an artist, a gallery is a stage, and an exhibition is a performance. This is a crucial aspect of life for a successful artist, so we couldn't ignore it. More than 87% suffered from the disruption of plans due to the war. Of these, a quarter needed to deal with both postponed and cancelled plans. As most of the galleries and museums in the country have paused their exhibitions, and the delivery of works abroad is problematic, only 12% of artists have not cancelled any projects. As far we are aware, some projects are still going as planned, and most of them are located abroad. Ivan Turetskyy's paintings were stored in Europe after a museum project in Italy and an exhibition in Switzerland in 2021. In April, two exhibitions became possible: one in *Fabrica del Vapore* in Milan[6] and the other in *Villa Longoni* near Milan. One exhibition was planned ahead of time, while the other occurred as a result of a rising interest in Ukrainian art.

The studios of 75% of respondents were intact at the time of our study. Most of the answers contained the hope that everything was fine with the workshop because it was difficult to find out

***Fig 5**. 'HOW ARE YOU' project in Kharkiv's Yermilov art centre. (Credit: Natalia Ivanova) <https://yermilovcentre.org/announcements/256/>.*

about its condition. We hope that, even if it is impossible to find out about the state of the workshop at the moment, after the war they will be reunited with their owners unscathed. In fact, 20% of respondents remain unaware of the state of their workspaces. And 3% reformatted these premises out of necessity into, for example, a shelter for friends, acquaintances, relatives, and those who needed it. Olga Zaremba wrote: 'the room where my workshop is located is used as a shelter and for other wartime needs'. Oleksandr Prytula shared his unique experience: 'the workshop is in working condition, but since sculpting requires a lot of money (materials, moulding, 3D printing, casting, etc.), I spend little time there...My workshop is now entirely my computer'.

As many artists do not have access to their workshops, their regular tools and materials have to change. Those who worked with large scale oil paintings are now switching to smaller sizes and watercolours or pencil and chalk. Sculptors cannot continue their work with stone, wood, and metal. Olga Zaremba, an artist from Kyiv, replied to our survey: 'my notebooks, pencils and watercolours go with me. These materials take up as little space as possible'. Artists who are familiar with new technologies embraced digital art completely. Many artists have told us that they are now working with NFT art to support Ukraine with the funds raised from the token sales. Anna Moskaletz said: 'I make digital works for sale at NFT auctions to transfer 100% of the profit to the needs of the Armed Forces'.

3 A Gavrilyuk, 'From February 18 to March 17 in the Center for Contemporary Art M17 is an exhibition of Gamlet Zinkivskyi "3652019 +' (*M17 Contemporary Art Center*, 2022) <https://m17.kiev.ua/exhibition/3652019-gamlet-zinkivskyj/> accessed 1 April 2022.

4 Gamlet Zinkivskyi, 'Gamlet remains in Kharkiv. In the spring he will paint new street works in the European city of Kharkiv. The good will win' (*Instagram*, 1 March 2022) <https://www.instagram.com/gamletzinkivskyi/> accessed 1 April 2022.

5 'Exhibition by Viktoriia Adkozalova "Shadows of unforgotten ancestors"' (*Portal 11 Gallery*, 24 January 2022) <https://portal11.com.ua/en/exhibition-by-viktoriia-adkozalova-shadows-of-unforgotten-ancestors/> accessed 16 March 2022.

6 'The museum exhibition "From the Italian diary" of Ivan Turetskyy's paintings is open till the 15 of April in Milan' (*Portal 11 Gallery*, 6 April 2022) <https://portal11.com.ua/en/the-museum-exhibition-from-the-italian-diary-of-ivan-turetskyy-s-paintings-is-open-till-the-15-of-april-in-milan/> accessed 15 April 2022.

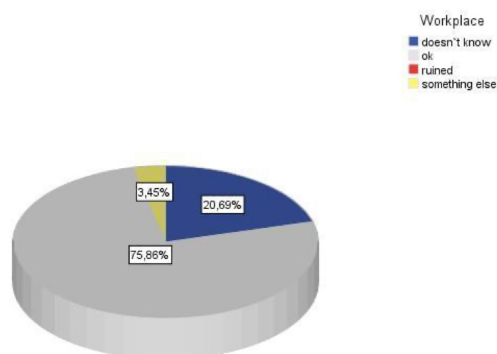

Fig 6. *What happened to the artists' workshops, 1 month after 24 February 2022. (IBM SPSS Statistics 23 Output).*

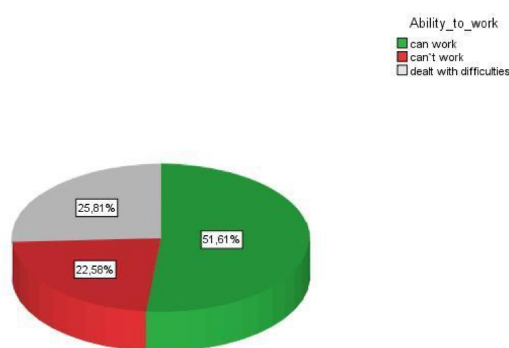

Fig 7. *Infographics about the readiness/ability of artists to create art, 1 month after 24 February 2022. (IBM SPSS Statistics 23 Output).*

Creativity

Art is a social phenomenon; it is always affected by and reflects the state of the society. The experience of war transforms art; it gives rise to new styles, new techniques, and movements. Resentment, rage, despair, depression, and, on the other hand, unity and solidarity are all powerful emotions that artists experience and express in their work. Although a quarter of the respondents experienced difficulties in their creative processes, more than half of the survey participants were able to continue creative activities in one form or another. 22% cannot even hold a pencil in their hands and are waiting for victory, peacetime, and a sufficient sense of security. Mariko Gelman admitted that it is extremely difficult for her to work: 'I am creating a graphic series #*summer2050* about the sanctions and the turn of Russia to the Paleolithic. I can't paint. Maybe, because right now everything is ruined in my homeland—people, connections, adequacy. That is why it is very hard for me to live and create vividly'. She still tries to do something useful, 'donating my artworks for the needs of the Ukrainian army, volunteering, and not falling into despair, now I take part in exhibitions and events in support of Ukraine. For example, we worked together with *Urban Sketchers Prague* on a painting session on the island of Kampa in Prague, and then sold our work, transferring all the money to the Člověk v tísni Foundation, which cares for displaced Ukrainians in the Czech Republic. A similar event is currently being held by the Czech gallery *Holešovická* Šachta, where I have donated three of my works'.[7] A lot of artists have retained the ability to create. They record events and create supportive patriotic art. Those who have adjusted take part in humanitarian missions and assist in battle on their front lines. They are also in a difficult situation, but they help to collect money and even deliver food under siege.

In terms of plans and ideas for the future, only 77% of the artists are thinking about creative projects and their implementation. Because of a substantial emotional shock as well as an inability to meet fundamental human needs, such as security, 23% confessed they are unable to think about their artistic career. What are these plans about? Everyone in the survey, without exception, mentions the war and the reflection on personal experiences during this challenging time. Nataliia Antypina, a ceramic artist, responded: 'Ideas for art are very difficult to produce because constant stress keeps you from concentrating. There are ideas to help rebuild Ukraine, I think I can take part, and fill it with art and important meanings. So that future generations will never forget this tragedy and the heroic struggle of the Ukrainians'. Artists are now focused on helping the country in whatever manner they can, with the great majority of concepts centred on promoting Ukraine's brand.

In the post-war period, a boom in patriotic motives is foreseen. Artists always show the most acute problems, raise the most daring questions, experiment with the most contradictory forms, and discover the most unexpected facts. Collective shock trauma is afflicting our people. Independent artists and other creative organisations have already begun to respond. Current events undoubtedly drive artists to create patriotic art, with the most visible trend being a widespread fascination with national Ukrainian symbolism. The yellow and blue colours of the Ukrainian flag, the national flower, the sunflower, the Ukrainian Coat of Arms in the shape of a trident, the characteristics of national clothing, and so on, are frequently used to encourage the national spirit. Anna Moskaletz wrote in an answer to our survey: 'since my art was imbued with Ukrainian motives before the war, I will continue to work in the same direction. Now my series with national scarves is more relevant than ever. Although, I think that after my experience the narratives will still change a bit and become even deeper because through the prism of acquired emotions and atrophy of fears it is quite natural'. We must, however, emphasise that before the war we noticed that demand for contemporary art pieces with traditional national symbols was lower than the desire for modern art pieces with a more global style in the art market. We expect this to change in Ukraine as a result of the current surge of patriotism, although the pieces in the current trend may be less popular in the international art market. It is appropriate at this point to quote Oleksandr Prytula, one of the artists who replied to our questionnaire: 'every day, new ideas emerge. Politics and topics concerning global issues only appeared on rare occasions in my work. That's why it's important for me to keep it balanced now, so that everything said through creativity is first and foremost honest, not because Ukrainian symbols are hyping now. Obviously, soon, I plan to create sculptures and graphics inspired by events that take place literally outside the window. I will try to keep everything in the style that was inherent in my work before. It's critical, in my opinion!'

Because art images have the undeniable force and potential to convey a powerful message in a concise form, art has become increasingly effective for ideological purposes. People are brought

7 'Benefit exhibition in support of Ukraine'. (*Holešovická* Šachta *Digital Gallery*, 15 March 2022) <https://www.holesovickasachta.cz/beneficni-vystava-na-pomoc-ukrajine-%f0%9f%87%ba%f0%9f%87%a6/> accessed 16 March 2022.

***Fig 8**. Oleksandr Prytula 'Blinded madman', 3D graphics, sculpting. <https://www.instagram.com/p/CamH4jft38i/>.*

***Fig 9**. Igor Matroskin's street art in Odesa. The inscription means: 'I believe in the Armed Forces of Ukraine'. <https://www.instagram.com/p/CbiUK3_AX4o/>.*

together by artistic imagery. A lot of art images serving this purpose can be found on the streets, on billboards, and on social media. Contemporary Ukrainian patriotic art images are actively used now as illustrations for news reports. There are partnerships between the top magazines in the world and Ukrainian artists. Visual artists working in the field of documentary photography are highly significant, because they chronicle the horrific moments of this conflict for the rest of the world to see. Documentary photography exhibitions from Ukraine are being held all over the world. On March 28th, renowned American magazine *Time* published two covers, one titled 'The Resilience of Ukraine' and the other 'The Agony of Ukraine'. A photograph by Ukrainian artist Maxim Dondyuk depicts the country's suffering in the face of the Russian invasion on one of the covers. In the photograph, a Ukrainian soldier is seen assisting a mother and her child in evacuating the Kyiv suburb of Irpin, which Russian forces were attempting to occupy as part of their besiegement of the capital.[8]

War-inspired street art is already emerging. In Odesa, the artist Igor Matroskin draws cats. These cats represent the Ukrainian Army and ordinary people with patriotic symbols.[9]

Text art is also actively used as words become a symbol of support; they empower people. Graffiti and posters where the text appropriates symbolic value and is turned into popular art can be seen all over Ukraine. This type of art can also be attributed to propaganda art. The phrase 'Russian warship go fuck yourself' was communicated by a Ukrainian soldier, defender of the Zmiinyi (Snake) Island of Ukraine, Marine Roman Grybov, and became one of the most important slogans of this war.[10] Artists are actively using the phrase, as do companies for marketing purposes. It is used now as a symbol, written on the streets, in tabloids, on t-shirts, on cars, and even in the official design of bank cards. The popularity of these words inevitably led to the rise of the problem of copyright protection and royalty. When the soldier returned to Ukraine from captivity, he filed for an EU trademark application as the phrase had become viral and its value had grown to be of national importance.[11] The Ukrainian national postal operator *Ukrposhta* has announced a competition for artists to design a collectable postage stamp for the slogan discussed above.[12] The winning image became the sketch by the artist from Crimea, Boris Grokh. As soon as the sale began, there was a queue kilometres long in front of the central branch of *Ukrposhta* in Kyiv. People stood in it for five hours for the brand, which has already become a legend. On April 22, Ukrainian postage stamps, on which a Russian warship sets off in a direction known to all, signed by the author of the legendary phrase and General Director of Ukrposhta, were sold at the Prozorro charity online auction for 5 million UAH (≈165 thousand USD). This is 200 times more than the starting price.[13]

8 Simon Schuster, 'A Ukrainian Photographer Documents the Invasion of His Country' *Time* (New York, 17 March 2022) <https://time.com/6158001/ukraine-invasion-in-photos-kyiv-russia/> accessed 14 April 2022.

9 'Patriotic graffiti with cats appeared in Odesa (photo)' (*Ukrainian Information Service*, 17 March 2022) <https://usionline.com/v-odesse-pojavilis-patrioticheskie-graffiti-s-kotami-foto/> accessed 20 April 2022.

10 Katie Campione, "Go Fuck Yourself': Ukrainian Soldiers Celebrated as Viral Heroes for Last Words to Russian Warship' (*TheWrap*, 25 February 2022) <https://www.thewrap.com/go-fuck-yourself-ukrainian-soldiers-memes-tributes/> accessed 18 April 2022.

11 Tim Lince, 'Ukrainian Snake Island soldier seeks trademark for the iconic phrase, as major brand challenges grow in Russia' (*WTR*, 17 March 2022) <https://www.worldtrademarkreview.com/ukrainian-snake-island-soldier-seeks-trademark-iconic-phrase-major-brand-dilemma-grows-in-russia> accessed 13 April 2022.

12 Dmitri Ponomarenko, 'Ukrposhta has started the national selection of illustrations for a postage stamp on the theme "Russian warship, go to x@y", (*Ukrainian News*, 1 March 2022) <https://ukranews.com/news/837981-ukrpochta-nachala-natsionalnyj-otbor-illyustratsij-dlya-pochtovoj-marki-na-temu-russkij-voennye> accessed 20 April 2022.

13 Tatiana Nechet, 'Postage stamps «Russian warship, go ...!» and envelopes with special cancellation signed by the author of the legendary phrase were sold at auction for UAH 5 million. – 200 times more expensive than the starting price' (*ITC UA*, 22 April 2022) <https://itc.

***Fig 10**. 'HOW ARE YOU' project in Kharkiv's Yermilov art centre. (Credit: Roman Pyatkovka) <https://yermilovcentre.org/announcements/256/>.*

***Fig 11**. The temporary storage of artworks by Portal 11 gallery. (Credit: Igor Globa).*

This is an example of how artists are being used for ideological and marketing purposes.

We can see how art performances around the world bring attention to the conflict in Ukraine. On the 25 March in Warsaw, approximately four thousand people laid down on the ground and covered themselves with bags and coats in solidarity with Ukraine, to show how Ukrainian cities look now with the dead bodies of Ukrainian civilians who cannot be buried under fire.[14] This action, under the title 'Stop promising, start acting!', was organised to force the US president to provide everything to close the sky above Ukraine.[15] Later these actions were reproduced in many cities all over the world.

An art installation was created by the French artist JR in Lviv. A 45-metre-long photograph of a 5-year-old Ukrainian refugee Valeriia was held up by more than 100 people on March 14. This performance draws attention to the terrifying number of Ukrainian children who have been slain since Russia's invasion began, and the thousands who have fled in search of safety. The 'Resilience' cover of *Time* magazine features an aerial view of this performance.[16]

As a contemporary art gallery in Kyiv, we are fascinated by artists' ideas. We are prepared to organise exhibitions of front-line photographs, heroic sculptures, paintings, and other installations that depict the experience. Although art with a political agenda is frequently seen as inferior, we are aware of numerous instances in art history where artwork was used first as propaganda and afterwards acclaimed as a masterpiece. In wartime, the significance of symbols cannot be overstated.

ua/news/pochtovye-marki-russkij-voennyj-korabl-idi-i-konverty-so-speczpogasheniem-s-podpisyami-avtora-legendarnoj-frazy-prodali-na-aukczione-za-5-mln-grn-v-200-raz-dorozhe-startovoj-cze/> accessed 25 April 2022.

14 'A four-thousand-strong demonstration in Warsaw – thousands of bodies on the ground' (*Fundacja im. Kazimierza Pułaskiego*, 2022) <https://pulaski.pl/en/a-four-thousand-strong-demonstration-in-warsaw-thousands-of-bodies-on-the-ground/> accessed 15 April 2022.

15 Emmanuel Wanjala, 'Stop promising, start acting! Ukrainians to protest for NATO to act on Russia' (*The STAR*, 2022) <https://www.the-star.co.ke/news/2022-03-25-stop-promising-start-acting-ukrainians-to-protest-for-nato-to-act-on-russia/> accessed 15 April 2022.

16 Tara Law, 'The Story Behind *Time*'s 'Resilience of Ukraine' Cover' *Time* (New York, 17 March 2022) <https://time.com/6158007/ukraine-resilience-time-cover/> accessed 10 April 2022.

Art galleries

Kyiv

Kyiv, Ukraine's undeniable cultural capital, is home to a plethora of museums and art galleries of remarkable cultural and historical significance. Treasuries of national art saved here represent Ukraine's rich culture from antiquity to the present day. In the early days of the war in Kyiv, citizens were actively evacuated. Many employees of galleries and museums were forced to flee the city or were trapped in the outskirts. According to our conversations with colleagues from other galleries, practically all Kyiv galleries are now focusing their efforts on assisting in the evacuation of contemporary art pieces, as well as various humanitarian missions in Ukraine and abroad. Art galleries in Ukraine are often located in semi-basement converted premises with a separate entrance. Since the galleries are equipped with heating and other amenities, some gallery owners in Kyiv and other cities have turned their premises into shelters. Gallerists are planning several exhibition projects abroad but cannot hold exhibitions in their galleries in Kyiv until the ongoing hostilities have ended.

On the day war broke out, an exhibition by the artist Maxim Mazur was scheduled to be mounted in the Kyiv-based gallery *Portal 11*. The catalogue was ready, there were big plans for the opening the next day. With the first rocket blasts in Kyiv, it was obvious that our gallery's exhibiting activity would be interrupted. Shock was the initial reaction. Then came the time to reflect on the situation and make decisions. All gallery employees were notified that all projects were being stopped until the situation was clear. Our gallery had plenty of plans for the coming months, several projects in our space, participation in the Luxembourg Art Fair, and an exhibition of our artists in Italy in April 2022. We always plan projects for at least a year ahead in the schedule of our gallery. Since the gallery is located in the historical centre of Kyiv and is close to the government quarter, we found ourselves in a place of a potential attack by Russian troops. Access to the Gallery has been blocked for security reasons. There was the question of the safety of the works that were brought to the gallery the day before for the installation of the exhibition. Also, there was the question of the safety of the gallery's collection and works commissioned by the gallery, but not completed by the artists. On the day the war began, we had to organise the conservation and preservation of an unfinished large-scale tapestry that we were preparing for the autumn exhibition. After two months of the war, we were able to organise the continuation of the tapestry work.

***Fig 12**. Kharkiv Municipal Gallery during the war. (Credit: Maryna Koneva) <https://www.instagram.com/p/Cb7s_fpNw_J/>.*

***Fig 13**. 'HOW ARE YOU' project in Kharkiv's Yermilov art centre. (Credit: Margarita Rubanenko) <https://yermilovcentre.org/announcements/256/>.*

We, as a gallery, have also organised temporary storage of the works of the artist Alexei Koval. In addition, a private collection of contemporary art from Kharkiv was brought to us for safe storage.

During the war, we managed to complete the creation of an audio guide in the Ukrainian language for the Pantheon in Rome. The audio guide is already published on the museum's website, and now the Pantheon is speaking Ukrainian.

War crimes in Bucha, near Kyiv, were broadcast all over the world. A huge gallery space was opened there half a year before the conflict. Fortunately, it was out of the way of the battle, and the gallery building was unharmed. The gallery's future is unknown, as the city was severely devastated and will take a long time to recover.

Some gallery owners fled to other countries during the war. Some gallerists were already abroad, where they held exhibition projects. For example, the *Voloshin Gallery* owners were in the USA with an exhibition project of the gallery and the run of their pop-up exhibition there was extended.[17]

East

Kharkiv is a region located in the East of the country on the border with the Russian Federation. Kharkiv itself is known as a clean, beautiful, cultural city, full of students and youth, with many educational opportunities. The creative artistic life of the city is as highly developed as in the capital. According to our calculations, before the war, about 22 exhibition spaces were operating in this area, including state museums with unique collections, as well as about 20 art schools, 3 specialised colleges, and an art academy.

The Kharkiv Art Museum announced on its social networks that the team managed to evacuate the permanent exhibition at the beginning of the war. They also shared photos of empty walls.[18]

Tatyana Rud, an employee of the Kharkiv Literary Museum, spoke on *Hromadske* radio about the movement and evacuation of art objects: 'The topic of evacuating the museum collection has been discussed since 2014. At the same time, we compiled lists of the most valuable museum items in the collection... In the summer of 2021, the museums of Ukraine received a questionnaire from the Ministry of Culture about readiness for the evacuation of cultural property in the event of an armed conflict...The Ministry of Culture has an idea of how ready museums are for the evacuation of what they need'.[19]

The Kharkiv Municipal Gallery, which actively promoted artists, including participation in foreign art fairs, showed their premises during the war on their social media. The gallery was hit by a shell; there is damage but the building survived. Friends of the gallery helped to close the broken windows and protect the premises from possible further destruction. The gallery team now works remotely.

Kharkiv's Yermilov art centre has become a safe place for local artists, as it is located in the basement of the university. Hiding from shelling in this makeshift shelter, the activists created the 'HOW ARE YOU' project. Konstantin Zorkin writes: 'the project 'HOW ARE YOU' is a total installation consisting of various constructions for sleeping, cooking, washing and entertainment. This is a performance where artists constantly work in the environment which they created and in the company of other artists. This is an adaptation of the exhibition space with the remnants of the last exhibition for life and creative needs. This project shows a new form of relationship between the space and the artist, the art institution and the art community, which may be the final for the great historical cycle of Kharkiv art. We were there together, we built a house out of what we could find, we worked and rested, we were synchronously scared of explosions and calmed each other down. And everything we did was real art'.[20]

The city also contains the art studio *Aza Nizi Maza*. They have a very recognizable style of art, but it is nonetheless clear that the students are given maximum freedom of expression. Now the studio

17 Brett Sokol, 'In Miami, a Ukrainian Art Show Becomes Unintentionally Timely' *The New York Times* (New York, 28 February 2022) <https://www.nytimes.com/2022/02/28/arts/design/miami-ukrainian-art-show.html> accessed 18 March 2022.

18 Anna Chernenko, 'We save paintings by Russian artists from their own people - a representative of the Kharkiv Art Museum' (*Hromadske radio*, 12 March 2022) <https://hromadske.radio/publications/my-riatuiemo-kartyny-rosiys-kykh-khudozhnykiv-vid-ikhn-oho-zh-narodu-predstavnytsia-kharkivs-koho-khudozhn-oho-muzeiu> accessed 20 April 2022.

19 'The Ministry of Culture has not given any orders to Ukrainian museums to act in emergencies or evacuate the collection' (*Hromadske radio*, 22 February 2022) <https://hromadske.radio/news/2022/02/22/minkul-t-ne-dav-ukrains-kym-muzeiam-niiakykh-rozporiadzhen-shchodo-diy-u-ekstrenykh-sytuatsiiakh-chy-evakuatsii-kolektsii> accessed 20 March 2022.

20 Kostyantyn Zorkin, 'HOW ARE YOU' (*Yermilov Centre*, 2022) <https://yermilovcentre.org/announcements/256/> accessed 10 April 2022.

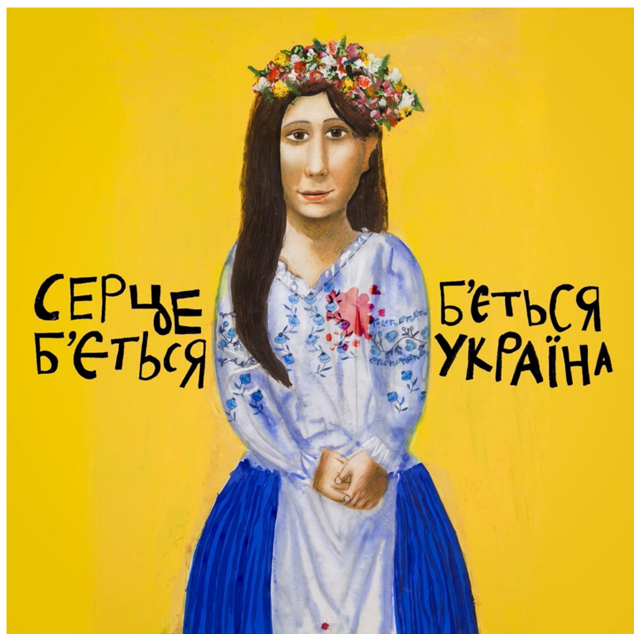

Fig 14. The artwork from Aza Nizi Maza's poster diary — 'WHAT I SEE'. The inscription means: 'Heart beats — Ukraine beats'. <https://www.facebook.com/AzaNiziMazaStudio/>.

conducts classes in the Kharkiv metro where people are hiding from airstrikes. For everyone, this is akin to art therapy. Their work reflects the reality and experiences of every Ukrainian.[21]

Mariupol is the city that probably has suffered most from the war. According to reports, there was not a single intact building remaining in the area.[22] One of the destroyed buildings was the Academic Drama Theatre, which was hit by an air bomb. According to inaccurate data, 300 people died in the basement of the theatre.[23] At the time of writing, the Azovstal plant, where about a thousand residents have been hiding for 2 months, is being attacked by the Russian army. The plant is held as the last fortress. Local residents who escaped along the green corridors are an exception. Most were forcibly deported to Russia. We were very lucky to contact an artist who managed to escape from Mariupol and is in a relatively safe city now. About the past cultural life of the city, Violetta Terlyha recalls: 'the galleries that I know are the popular *Kuindzhi Gallery* and the *Tu!* platform, but I don't know the fate of either of them, since it was completely impossible to move from area to area in the city and track the situation'. In total, according to our calculations, there were about 10 spaces dedicated to contemporary art in Mariupol.

The *Kuindzhi Gallery* was destroyed. It kept the originals of works by Ivan Aivazovsky, Tatiana Yablonskaya, Mykhailo Deregus, and other world-famous Ukrainian artists. The fate of these paintings is still unknown. But according to the head of the National Union of Artists of Ukraine, at the time of the shelling, there were no original paintings by Arkhip Kuindzhi. There were only copies by A. Yalansky and O. Olkhov.[24]

The *Tu!* platform is an urban space created in 2015 to fight against the war. Their motto has been relevant to our country ever since. They took a quote from the correspondence of Freud and Einstein: 'everything that works for culture works against war'. In the period up to 2022, they held lectures, creative performances, and exhibitions. In the new setting, the *Tu!* platform promotes its Emergency Assistance Fund. They raised about $30,000 and transferred that money to help families in Mariupol. Thanks to the activities of the platform, more than 200 residents of Mariupol received assistance. The Foundation helps not only financially, but also with evacuation and volunteer support.[25]

We have received news not only about everyday looting by the Russian army of the Ukrainian population but also of exhibition spaces. Russian troops are robbing the archival and cultural funds of museums that did not have time to evacuate. They take the exhibits to Donetsk for evaluation and will take the most valuable exhibits to Russia.[26]

West

Since the war started, one of the authors of this article has moved to Lutsk. Life in the city is as normal as it could be in these circumstances. It is a beautiful historical city and is home to The Korsaks' Museum of Contemporary Ukrainian Art. The cultural and entertainment centre where the museum is located was transformed into a temporary shelter for up to 500 refugees and organises a one-day course 'Tactical Medicine and Combat Training'.[27] The museum created the Art Battalion, an art marathon that will last until Ukraine's victory. They invite musicians, artists, poets, philosophers, and writers and organise daily concerts, literary meetings, performances, and classes, which are free of charge for anyone who wants a distraction and to enjoy the therapeutic properties of art.[28]

The Lutsk gallery of the National Union of Artists of Ukraine stopped its exhibition activity but stayed open. Volunteers are making camouflage nets for the Ukrainian army. There is also an art therapy class and the paintings of those who attend are hung on the walls of the gallery.

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21 'In the Kharkiv metro, the art studio has started classes with children who live there because of the war' (*Suspilne Media*, 29 March 2022) <https://suspilne.media/223005-u-metro-harkova-hudozna-studia-rozpocala-zanatta-z-ditmi-aki-tam-zivut-cerez-vijnu/> accessed 10 April 2022.

22 Oksana Kovalenko and Yevhen Spirin, '"The Russians are destroying everything. There are no intact houses". Mykola Khanatov the head of the Popasna Military Administration about life in the almost completely destroyed city' (*Babel*, 21 April 2022) <https://babel.ua/en/texts/77898-the-russians-are-destroying-everything-there-are-no-intact-houses-mykola-khanatov-the-head-of-the-popasna-military-administration-about-life-in-the-almost-completely-destroyed-city> accessed 11 April 2022.

23 Hugo Bachega and Orysia Khimiak, 'Mariupol theatre: 'We knew something terrible would happen'' (*BBC News*, 17 March 2022) <https://www.bbc.com/news/world-europe-60776929> accessed 11 April 2022.

24 Sarah Cascone, 'A Mariupol Museum Dedicated to One of Ukraine's Most Important Realist Painters Has Reportedly Been Destroyed by Russian Airstrikes' (*Artnet News*, 23 March 2022) <https://news.artnet.com/art-world/russian-airstrike-destroys-mariupols-kuindzhi-art-museum-2088890> accessed 16 April 2022.

25 'Emergency Fund' (*Tu!*, 28 March 2022) <https://tu.org.ua/news/fond-ekstrenoi-dopomohy/> accessed 16 April 2022.

26 Vera Perun, 'In Mariupol Russians rob museums, exhibits taken to Donetsk for an assessment', - Andryushchenko' (*LB*, 26 April 2022) <https://lb.ua/culture/2022/04/26/514762_mariupoli_rosiyani_grabuyut_muzei.html> accessed 29 March 2022.

27 'Refugee Assistance Center in Adrenaline City' (*MSUMK*, 2022) <https://msumk.com/en/tsentr-dopomogy-bizhentsyam-pratsyuye-v-adrenalin-siti/> accessed 20 March 2022.

28 ''Art Battalion' in MSUMK!' (*MSUMK*, 2022) <https://msumk.com/en/art-bataljon-u-msumk/> accessed 25 March 2022.

In Ivano-Frankivsk, the art space Assortment Room has stepped up its efforts to preserve Ukrainian art. In times of peace, they planned to hold many residencies. Now they are evacuating private collections and helping artists. The up-to-date information is that they have received 30 requests, implemented 10 of those and could move works by 17 artists to bunkers. These total around 400 artworks.[29]

Lviv galleries did not stop their exhibition activities after the outbreak of the war, and further adjusted their efforts to humanitarian projects. With the beginning of the war, only one gallery stopped working in Lviv (the *Veles* gallery, since its owner temporarily went abroad).

Art collectors

Information about private collections was gathered through collectors with whom the gallery collaborated, as well as from open publications on social networks. The majority of the collectors requested anonymity. The situation with private collections is currently in flux and is solely dependent on the success of the Ukrainian armed forces.

The unexpectedness of the Russian invasion of Ukraine predetermined the fate of many private collections. Most of the collections of contemporary art at the time of the beginning of the war were in Ukraine in their places of permanent storage. None of the collectors we interviewed believed in the possibility of a full-scale Russian invasion. The only exceptions, where the art objects were moved in advance, were those in the collections of the diplomats. Following the announcement of the US citizens' evacuation, the procedure of exporting the valuable property of all foreign citizens began. Some foreign citizens evacuated their private collections partially, they tried to quickly sell some items by offering them to Ukrainian auctions and other private collectors. To our knowledge, these attempts were not successful.

The majority of contemporary art collections are located in the largest Ukrainian cities including Lviv, Kharkiv, Odesa, and Dnipro, with Kyiv taking the lead. Private houses are typically clustered around large cities in the suburbs where collectors frequently reside and store their collections. The general situation at the moment is that there is no mass departure of collectors from their homes in the western region of Ukraine, and they do not see at this stage the need to evacuate collections. We should note that in conditions when hostilities are rapidly approaching and evacuation is not planned, art objects are usually not taken along as first priority. Human instincts are triggered to take what is necessary for survival in the coming hours and days. These are clothes, food, medicines and fuel. It is only possible to bring small works of art with you in such circumstances. For collectors who lived in the suburbs of Kyiv and Kharkiv, the time to get ready for evacuation was sometimes calculated in several minutes.

In the Kyiv region, most of the collections have not been evacuated, since Russian troops already reached the northern suburbs of the city on 24 February 2022, the first day of the invasion. In the first days, there were individual manifestations of panic among the population, and leaving the city was hampered by huge traffic jams. One of the clients of the gallery, who lives in the suburbs of Kyiv, said that the workers of his estate put his collection in the basement. For some time, they were monitoring the house, but as soon as the battle broke out in the village, they abandoned the house. After the liberation of the suburbs of Kyiv, it was possible to find out the fate of his collection. Most of the items survived; only a few paintings were damaged. The Russian soldiers who settled in the house were not interested in art, since the house also kept a large collection of wines, which they completely drank and plundered. Another collector left his home near Kyiv and now has a Russian tank in his yard; he has yet to return and has no knowledge of what has been going on inside the house. We only know of a handful of cases when collections of contemporary art were partially evacuated from Kyiv when the war broke out. The collection of a private museum belonging to Igor Ponamarchuk's family was partially evacuated. He has both antique and contemporary paintings in his collection. When the war started, he was able to transport a portion of the collection from Kyiv to Lviv in the west of Ukraine.

Fig 15. *Evacuation of the collection of Boris Grinev from Kharkiv. <https://m.facebook.com/story.php?story_fbid=4823419781046832&id=100001365722862>.*

The situation is especially difficult in Kharkiv and its environs, as the city was subjected to massive shelling by heavy artillery and airstrikes. Collections were not taken out of this city and the situation will be clear only after the end of the war. At the moment, we know that several collections of contemporary art are intact. One of them contains a painting by Ivan Turetskyy, purchased from the gallery *Portal 11* at the exhibition. We discovered its fate through the research for this article. According to a publication by Boris Grinev, a well-known Kharkiv collector, his collection of contemporary art was evacuated with the help of volunteers and territorial defence. One of the volunteers, Anton Khrustalov, later died because he was shot by the Russian occupants.

Given the intensity of hostilities, the Kharkiv, Kyiv, Sumy, and Chernihiv collections are in the greatest danger. Border areas are suffering the most at this time. Regarding Odesa and Dnipro

29 Olga Klim and Ilona Zakharuk, "Assortment Room' helps to evacuate works of art from different cities of Ukraine' (*Suspilne Media*, 2 March 2022) <https://suspilne.media/213108-asortimentna-kimnata-dopomagae-evakuuvati-tvori-mistectva-z-riznih-mist-ukraini/> accessed 29 April 2022.

collections, we can say that they were in relative safety up to this moment, but the situation changed as, after 2 months of the war, rocket attacks on Odesa and Dnipro intensified. All art objects located in Mariupol shared the fate of the city. Part destroyed, part looted and taken to Russia. Regarding Western Ukrainian collections, we can say that they are in relative safety at the moment, but the situation may change.

Art objects located in the suburbs of Kyiv and Kharkiv may have been lost or significantly damaged since these territories were occupied for a long period and were a zone of active hostilities. The widespread looting and vandalism by Russian forces is a major issue. Hundreds of instances of looting and cruelty committed by the occupying troops have been documented on social media. It can even be assumed that some of the art stolen by Russian soldiers in Ukraine will later appear on sale in Russia. Therefore, it is critical to compile a list of stolen works of art from private collections in order to track them down in Russia. It is already clear that after the war, many pieces of contemporary art will require restoration. It will be possible to assess the total damage to private and museum collections of contemporary art only after the end of the war.

Auction Houses

Ukrainian art is sold through both international auction houses and several Ukrainian-based auction houses.

Goldens auction house (in the past *Golden Section*) is one of the leading auction houses in Ukraine. It has not held any auctions in Ukraine after the full-scale Russian invasion. In collaboration with the Swiss international auction house *Koller* they have organised a charity auction of Ukrainian modern art titled 'Have a heart', taking place on the platform of the Swiss partner. *Koller* claims that all of the proceeds will go to the artists who created the works.[30] *Goldens* has also organised an NFT project to support artists, illustrators, and designers, as well as get money for donations to support the Armed Forces and purchase humanitarian aid. The auction team has announced an open call for everyone to create designs for beads that are transformed into tokens. A collection of NFTs called *Namysto* (which refers to a piece of traditional necklace jewellery) is published and promoted by the *Goldens* on the NFT marketplace *OpenSea*. Percentages of the proceeds go to artists and charities.[31]

The Kyiv-based auction house *Dukat* specialises in Ukrainian books, Ukrainian art of the first half of the 20th century, national unofficial art of the 1950s–1990s, and contemporary art. Their plans had to be postponed because of the war. Recently *Dukat* has announced a charity auction of a painting called *Flowers Grew around the Fourth Block* from a series of works by artist Maria Primachenko, dedicated to the Chernobyl tragedy. The painting was presented by the art collector Igor Ponamarchuk, from his family collection. All proceeds will be given to the Serhiy Prytula Charitable Foundation.[32]

From 5 to 17 April, the auction house *Arsani* was planning to hold a pre-auction exhibition 'Classical and Modern Art' within the walls of the National Museum of Taras Shevchenko in Kyiv. The auction was supposed to take place online on 16 April.[33] Although the situation in Kyiv was becoming more stable in April, the war was not over yet and these plans were postponed or cancelled. As *Arsani* is based both in Kyiv and in Kharkiv, we do not have information about the condition of the auction house exhibition space in Kharkiv, where fighting is going on at the moment.

During the pandemic and lockdown, an initiative to support artists by the gallerists and collectors Marat Gelman and Yevhen Karas became very popular. This is a group on Facebook named Сіль-Соль *(Salt-Salt)*, an accessible marketplace of contemporary visual art directly from artists in the low-price range. It attracts many young artists and a large audience of buyers due to its affordability and low barriers to entry. This initiative continues working now, and although there might be some delivery delays, artists continue posting their works and receiving demand for them. *Salt-Salt* has also successfully organised a charity sale of 82 artworks and transferred 200 000 UAH (≈7000 USD) to the fund helping the arm 'Come Back Alive'.[34]

The painting *My Hut, My Truth* by Maria Primachenko was sold for €110,000 at the Benefit for Ukraine's People & Culture charity auction in Italy. The starting price was €1000. Among other lots, there was a work by Ukrainian artist Alina Zamanova and works by foreign artists. All proceeds will be sent to help Ukrainian culture; to the Museum Fund of Ukraine, the Maria Primachenko Family Fund, '100% of Life' and others.[35]

The Ukrainian Institute of Modern Art (UIMA), located in Chicago, together with the online marketplace Artsy has organised an online auction, 'Impact: Artists in Support of Refugees from Ukraine', on April 14, featuring submissions from Ukrainian and non-Ukrainian artists. It aims to raise cultural awareness, fund Ukrainian artists, and provide support relief for refugees fleeing Ukraine. Artsy is donating a portion of the Buyer's Premium to the organisation in the USA, which provides aid to people affected by the war in Ukraine and gives support to displaced families. Donations collected by UIMA will be distributed to non-profit organisations among which is the Ukrainian Emergency Art Fund.[36]

Export

Ukraine had a reasonably liberal system for exporting contemporary art objects before the war. Ukraine has no tariffs on the export of works of art less than 50 years old. Special export permits are not required, although the customs authorities require a document confirming that the item is not older than 50 years. This document is issued by art museums in each regional centre and is not difficult to obtain. The delivery of art objects was carried out by many world postal services, as well as local organisations and private contractors.

Since the beginning of the war, major global companies have suspended delivery of art objects on the territory of Ukraine.

30 'HAVE A HEART' (*Koller International Auctions*, 19 April 2022) <https://www.kollerauktionen.ch/en/ibid-archive.htm> accessed 22 May 2022.

31 'Namysto' (*OpenSea*) <https://opensea.io/collection/namysto> accessed 22 May 2022.

32 'Charity auction 'Primachenko flowers for ZSU'' (*Dukat*, 2022) <http://www.dukat-art.com/en> accessed 29 April 2022.

33 'Arsani Auction House' <https://arsani.art/en.html> accessed 30 March 2022.

34 'Saltandpepper' (*Facebook*, 2022) <https://www.facebook.com/groups/saltandpepper.art> accessed 10 April 2022.

35 Victoria Alekseenko, 'A painting by Maria Primachenko was sold at a charity auction in Italy for €110,000' (*D1*, 23 April 2022) <https://d1.ua/na-blagotvoritelnom-auktsione-v-italii-za-e110-tysyach-prodali-kartinu-marii-primachenko> accessed 28 April 2022.

36 'Impact: Artists in Support of Refugees from Ukraine' (*Artsy*, 2022) <https://www.artsy.net/auction/impact-artists-in-support-of-refugees-from-ukraine?sort=sale_position> accessed 14 April 2022.

Many purchased items will not be delivered outside of Ukraine for an indefinite period. Victoria Adkozalova, one of the artists who responded to our survey wrote: 'I gave one of the works bought by a collector from the USA on February 23 to the DHL branch, and, unfortunately, it could not leave the country and stayed in Kyiv'.

The problem also arose from the rapid evacuation of private collections that were under the threat of destruction in regions with active hostilities and bordering them. Under these conditions, local companies and private contractors were the fastest to adapt and were able to establish new land routes for the export of art to Europe. Since airmail is not working during the war and sea transportation is blocked, only land routes along government-controlled highways are used. But not everyone can use the services of such logistics structures, as this requires personal contacts and a history of relationships. It also retained the ability to send works of art abroad with the help of the national operator *Ukrposhta*. But this service has significant restrictions on the dimensions of the sent items.

Naturally, in such conditions, there is practically no possibility of full-fledged insurance of art objects. Any sending of items from the occupied territories is not possible. The removal of art objects from the zone of occupation is associated with a great risk for life. Although we are aware of several examples of the private evacuation of work from besieged or occupied cities, those are exceptions.

Preservation and destruction of street art

The war destroys Ukrainian cities, streets, and houses with shells. Among the affected buildings are universities, theatres, museums, and even residential buildings and hospitals. Our cultural heritage and art are at risk of being destroyed. Street art suffers first because it decorates the exterior and is not protected from vandalism. The murals were not ready for mines, bullets, and aerial bombs. Just like civilians. Some of the works of famous Kharkiv street artist Gamlet Zinkivskyi will no longer be seen. Since 2014, he has completed at least four projects in Mariupol but this city has now been reduced to rubble.[37] Fortunately, most of the artist's works have survived in his hometown of Kharkiv and we hope they will not be destroyed in future battles in the east of Ukraine.[38]

Sculptures located in open spaces are at an increased risk of destruction since they cannot even be moved to the basements of houses. There are many cases of the production of reinforcing structures for outdoor sculptures that could be at greatest risk. These were mostly made by activists who understand the importance of saving cultural heritage. The cultural and educational project 'Ukrainian Modernism', dedicated to researching, preserving, and promoting modern architecture and monumental art in Ukraine created an initiative to protect the stained-glass windows of the pearl of Kyiv modernism at the funicular. They raised funds to strengthen all 12 stained glass windows from enemy shelling as they are very vulnerable to shock waves and debris.[39]

At the beginning of the war, a portal was created where volunteers leave photographs of cultural objects damaged by shelling. This is called the cultural loss map.[40] It is important because in the future, according to the initiator's plan, it will be a single reference book for invoicing the Russian Federation for reparations at the end of the war.

NFT art

The art industry is actively helping Ukraine; it organises projects where all proceeds go to the charities. Several of these projects are based on the sale of NFT art.

A project by the Holy Water tech company united 500 Ukrainian artists who created artworks for their charity NFT collection, presented in a virtual exhibition. On 1 April 2022, they donated to Ukraine's official crypto wallet more than 61 thousand US dollars.[41] A project named 'Museum of War' by the Ukrainian blockchain community and the Ministry of Digital Transformation of Ukraine also partnered with Ukrainian artists. This project's goal is to preserve memories of current events, provide information to the digital community, and collect funds to help Ukraine. It is selling NFTs where each token is a combination of news information and an illustration by Ukrainian artists. The money raised will be used to support the Ukrainian army and civilians.[42]

The Ukrainian team *FFFACE.ME* has created a collection of three non-fungible tokens in support of Ukraine. 'At a time like this, there is a very strong creative impulse. We are aware that today the task of the creative class is not only to support Ukraine financially but also to form a cultural image of the country, which will not only be remembered but will become fashionable. This is how the concept of the *Ukrainian Power Artifacts* NFT collection came about. In it, each of the lots is literally the object of force in which we put our strength, formed during the bombing, evacuation and psychological tests. Buyers of each of these artefacts will receive this momentum and become stronger, just as the buyer of the original art object receives a part of the author's soul', says the team *FFFACE.ME*.[43] All proceeds from the sale of this collection will be sent to support the Armed Forces.

The Ukrainian Emergency Art Fund

The non-governmental organisation Museum of Contemporary Art (MOCA), in partnership with independent Kyiv-based media agency *Zaborona*, *The Naked Room* art gallery, and the National Art and Culture Museum Complex *Mystetskyi Arsenal* established the Ukrainian Emergency Art Fund. It is a very important initiative in dealing with the consequences of the Russian invasion and helping the Ukrainian art community. The fund facilitates support and administers donations offered by international artistic and charity organisations, as well as from private donors. First, it provides vital

37 'Gamlet Zinkovsky's new work in Mariupol' (*Izolyatsia*, 16 December 2015). <https://izolyatsia.org/ru/project/zmina/new-work-hamlet-zinkovsky/> accessed 14 March 2022.

38 Gamlet Zinkovsky, 'Map of Murals' (*Kharkiv*) <https://find-way.com.ua/ru/oblasti/kharkovskaya/kharkov/gamlet-zin-kovskij-karta-muralov-khar-kov> accessed 14 April 2022.

39 Ukrainian modernism, 'Let's protect the stained-glass windows of the Kyiv funicular from enemy shelling!' (*Instagram*, 22 March 2022) <https://www.instagram.com/p/Cbaq-0SNLVI/> accessed 22 March 2022.

40 'Map of cultural loss' (*Ukraine Cultural Fund*, 2022) <https://uaculture.org/culture-loss/> accessed 27 April 2022.

41 'Buy NFTs to Save Ukraine and Stop War' (*Holy Water Tech*, 2022) <https://holywater.tech/> accessed 27 March 2022.

42 'THE NFT-MUSEUM of the war of Putin's Russia against Ukraine' (*META History Museum of War*, 2022) <https://metahistory.gallery> accessed 27 March 2022.

43 'FFFACE.ME has created a collection of three NFTs in support of Ukraine' (*Vogue UA*, 15 March 2022) <https://vogue.ua/article/culture/art/ffface-me-stvorili-kolekciyu-iz-troh-nft-na-pidtrimku-ukrajini.html> accessed 27 March 2022.

financial aid for artists and cultural workers who remain in Ukraine and urgently need support to ensure a basic standard of living and security. They intend to support the continuity of research of curators, theoreticians, researchers, and other cultural workers. Then it aims to globally promote contemporary Ukrainian culture as a powerful instrument for the protection of the values of democracy and freedom in the world.[44]

Conclusions

As our study makes clear, the art industry in Ukraine is now focused on ways to support the country. At this moment there is no emphasis on the economy of the art industry while all agents in the Ukrainian art market have to also think about their future.

There are initiatives to help individual Ukrainian artists. Many galleries abroad have organised open calls for Ukrainian artists, they relocate them and exhibit their works in their spaces and at Art Fairs. This benefits artists and foreign galleries, while there is an increasing interest in Ukrainian art and culture. For some artists, during the war, there was an opportunity to express themselves outside of Ukraine, because there has been more interest in the topic of Ukraine in particular and our country in general. This creates new opportunities after the war.

Most projects happening now are created in collaboration with international partners. As the Ukrainian art industry consists of a fairly closed society, social ties and trust are required for international projects. In our own experience, such projects are more likely to happen when the parties have already been personally acquainted with each other. Since the two years before the war were overshadowed by the pandemic crisis, participation in international projects such as the art fairs was almost impossible, and therefore international connections between galleries and other art agents became weaker. Because strong connections are essential now, many projects cannot be implemented quickly and efficiently.

Domestic primary agents of the art market, the private galleries, struggle now. Most galleries had to stop their exhibitions. When people are worried about their future, customers' ability to buy art shrinks and the domestic demand for art is predicted to decrease. At the same time, the ability to participate in international events is limited because of travel restrictions. The initiative of the Ukrainian Emergency Art Fund is very important at this moment, but we expect that private galleries will be one of the most affected parties as a result of the war, and some of them will cease to exist. In some cities, they are simply destroyed and their collections are destroyed. Many galleries will also lose their sources of income from sales at exhibitions and art fairs.

The situation with regard to the collection of Ukrainian art is likely to change. Ukrainian art will become more interesting and accessible to Western collectors. At the same time, the economic situation will narrow the ability of the domestic collector to buy art and this will negatively affect the domestic art market.

There is a problem that Ukrainian art is often sold under the title of Russian art, i.e., in Russian art departments in auction houses. This needs to be changed now, and Ukrainian art has to be identified as a separate segment. Ukrainian art cannot be sold in the auctions under the name or in the section 'Russian art', as this violates the definition of an independent and sovereign country. Ukrainian artists are often mislabelled as Russian, especially Ukrainian born artists during the time of the USSR, for example Kazimir Malevich. Malevich called himself a Ukrainian in his diaries.[45] But, as part of the imperial policy, Russia has always tried to appropriate the Ukrainian cultural heritage. During the war, we see another example of Russia's barbaric attitude towards Ukrainian art and its institutions. We expect that one of the consequences of the war will be the complete emergence of Ukrainian art from the shadow of Russian art and its recognition as national and original. There will also be a process of revision of Ukrainian art and its complete rethinking as an important part of contemporary European art.

The war is a powerful cultural phenomenon that will radically change the direction of the art market and contemporary Ukrainian art in general. Depending on the results of the war, the art market can expect either a long stagnation or a rapid renaissance and the emergence of new works and art projects. We believe in victory.

44 'Ukrainian Emergency Art Fund' <https://ueaf.moca.org.ua/> accessed 25 March 2022.

45 Tetyana Filevska, *Kazymyr Malevych: The Kyiv Period, 1928–1930* (Rodovid Press/kmbs 2016).

A Fictional War

(Which the West Can't Win)

Lesia Daria

Lesia Daria is a writer, journalist, campaigner, and volunteer. She is a communications adviser at the Ukrainian Institute London, and in Surrey where she is active in her local community, she is helping Ukrainian refugees to settle into life in the UK. Previously Lesia worked as a journalist in Washington DC, Kyiv, London, and New York, and lived in Paris, Minsk, and Istanbul. She holds a BA from the University of Virginia and an MSc from the London School of Economics and Political Science.

In Lesia's three-in-one poem A Fictional War*, two voices speak in separated monologues but are also integrated and juxtaposed. The poem confronts the battle of narratives (lived, reported experience versus Russian lies) that rage alongside and form a critical part of the war and brutal violence in Ukraine.*

Small boy in Bucha:

This is only a special operation

I had a toy rabbit

A project of denazification

Mama said don't look

Ukraine must be stripped

They shoot for no reason

In order to be subdued

It's only a short walk

Fascists must be eradicated

In the car, we'll be safe

We will infiltrate and exhaust them

Mama ran but tripped

This is our sphere of influence

By a broken door a Russian soldier

We will purge their ranks

In the shelling I stopped short, hid

We can immobilise you

My hands covered my ears

We will tie your hands

But you can't stop your eyes from seeing

And so we have our way

Still, I heard her screams

It is you who encroached on us

And the shots that made her stop

Crimes a figment of your imagination

Then they came looking for me

As we obliterate a nation, we do not target civilians

In the rubble, I played dead

Yet you cancel our great Russian culture

My rabbit was buried

We have ballet, we have Pushkin!

They don't bury anybody, not ours or theirs

We have bullets, we have Putin!

Darkness so long, I finally went to find mama

We have nuclear options too

Behind the door she lay, arms out, not quite right

Yet you seize our yachts and villas

What is this rule of law?

I could not see her face, I could not

We decry your cynical lies

I hid in the woods until Ukrainians came

We are always ready to negotiate

They gave me water and black bread

For our long term security, which is paramount

And a blue and yellow blanket

For our total domination, we will choose

Now I am here

There is no truth, only fake news

And I so miss my mama

As ever we win, with our great Russian fiction

Who do you think has the last word?

(composed April 2022)

No Place Like Home

An Emigrant's Epic Tale

Lesia Daria

Lesia Daria is a writer, journalist, campaigner, and volunteer. She is a communications adviser at the Ukrainian Institute London, and in Surrey where she is active in her local community, she is helping Ukrainian refugees to settle into life in the UK. Previously Lesia worked as a journalist in Washington DC, Kyiv, London, and New York, and lived in Paris, Minsk, and Istanbul. She holds a BA from the University of Virginia and an MSc from the London School of Economics and Political Science.

Her poem No Place Like Home *explores the shared human longing for a home, not only as a search for a refuge or place to settle, or a return to where one is from, but also as a feeling of belonging and rootedness.*

I broke the rules

when they asked

Is there still no place like home?

Probably they wanted a reasoned reply

(academics and bureaucrats like certain forms)

regarding migrants and immigrants versus war-torn refugees,

insights on nations, nationalities, notes concerning cross border trends,

socio-political citations, a case study or two,

not me saying

        well, it depends

        what you mean by home

or at any rate what I mean (since you asked me)

and that no definition or survey will ever do

since to get at universal truth

you'd have to ask all the residents of Earth,

the sum of human existence through Time –

        the lady on the corner, the homeless man,

                        even those with no place to go –

because everyone's got their streets

and I can only tell you mine.

I've got the streets of Philadelphia, for starters,
the '80s video, before the '90s song,
the roads of my neighbourhood and the ones downtown
where bums rolled in trash bags and steam rose from grates,
beaver-clad prostitutes, Society Hill dates,
a Center City far from the Greater Northeast
which wasn't so great.
So Lana and I would hop in the Fury,
sail down past Frankford on I-95,
park at Race, strut South Street
pretend we weren't afraid of guys
or in awe of punks.
Then back, past the Boulevard
where Chargers raced Trans Ams
revved up by tough kids who'd flunk their exams,
past Krewstown and Famous where we fought for pastrami
fresh bagels and lox, the joy of the deli
with pickles in barrels and corned beef and rye,
our pale numbered tickets just holding the line –
elbows got in first, as the Irish died of thirst
while Ukrainians scooped up herring
as soon as it came in store
and Jews hustled *gefillte* and everyone agreed
the whitefish salad was to *die* for!
Lana ate orange crackers stuffed with peanut butter
we'd sit in my room and plot our future
wondering where we might someday end up.
Alone, in the backyard I breathed in giant oaks,
centuries of Penn's Woods
that made my parents buy the abode
without ever stepping inside.
We'd moved on up, from duplex to split level
aluminum siding that groaned in the night,
the immigrants' dream realised, in flight
to a 30-year mortgage, fixed
on Flagstaff Road.
But I wanted to run from sad shopping malls,
the endless Journey
and Bruce and Bon Jovi
defining this accidental spot where I'd been born.

So I'd jog down Pine to Pennypack Park,
and sprint the forest for miles.
Last time I was in Philly though
I didn't get that far.
Stuck in Center City,
where cobblestones have witnessed much,
I watched a souped-up three-wheeler
pull up, park on yellow
engine running, rap blaring, the gangsta walked off
like he owned the whole town.
The cops were never gonna bother
him or his lady love, his gold chains signalling
he was in charge at 13th and Market
as she sat there blankly
stroking her chihuahua
with metallic fingernails
waiting to go home.

I've got the streets of Charlottesville, so many faces,
University of Virginia, '91 or '88,
fraternities no longer debate the penalty
for the odd car dumped in Mad Bowl,
convertibles out in force for the Foxfield Races
that parade of a thousand coats and ties,
then back to the Tavern
where students and tourists and townspeople meet.
But not really. White lies.
There was always us versus townies
and which side of the Tracks
where Dave Matthews crooned
to anyone who'd ask
if it was worth it,
or if truth came by Lynyrd Skyryrd
or foresight from R.E.M,
ragged student apartments signalling the end
of the world as we knew it.
Rugby Road, Main Street, University Avenue
The Stadium, The Lawn and not-even-kidding-you
Nameless Field.

Lovers passing colonnades
where cobblestones have witnessed much,
promising to return married and rich enough
for their college town.
Last time in Charlottesville though
I didn't get that far.
Stuck at reunions
I watched a love-of-my-life
eye his German army wife
as he pontificated like he owned the whole town.
I was never going to bother
him or his lady love, their golden rings signalling,
the barricades would be up
and trouble if you interrupt,
as she sat there blankly waiting
for him to wind up
so they could return
to wherever they call home.

I've got the streets of Paris, like a proper cliché,
Avenue Victor Hugo in the 16th arrondissement,
thanks-but-no-thanks to Madame Dupont
I made lifelong friends with my new brother Laurent
who passed notes under my door.
I came to comprehend *madeleines*
though my addiction was *pain au raisin*
that extravagant wheel of pastry
when we lacked francs to go around,
and one cup of coffee by the Sorbonne
bought us three hours in from the rain.
Vaugirard, Odeon, Rue de Varenne,
I fell for all of it but never fit in
with accent or boyfriend or necessary act,
but Xav and I worked out a silent pact:
me as arm candy in return for a ride.
Scooting round and round the Arc de Triomphe
I dreamed of an *appartement* one day
in the 7th, with tall windows and faux balconies,
or in the Marais,
but not with him.

The Wall was already coming down fast,
places beckoned beyond this France
and Xav would never leave his maman's chateaux
or the Rue de Commerce.
Last time in Paris though
I didn't get that far.
Streets seething yellow, I'd seen it all before,
holed up near the Jardin I played lady love
to my husband's retirement quest
peering through the vitrines of *agents immobilier*
as I watched the Mideast hawkers
unfurling their wares
waiting patiently for a sale
so they too could go home.

I've got the lanes of rural Ukraine in my mind,
where there are no streets or numbers
or names
only deep rut alleyways.
Tractors lie still, the Soviet Union's cracking
like dried mud under its own weight.
We hide our rented Opel in an uncle's garage
though why would *Intourist* agents follow us?
What's so interesting about diaspora?
I dodge relatives, and superlatives,
slip into the house
where my grandfather was born.
Now that's something
– all the same time it's not much:
three rooms, no plumbing,
what do you want from 1904?
Nearly 90 years have passed,
it's still a hovel like so many more,
the lucky few have run off
(Run Baba Run! Run Dido Fast!)
to the U.S.
that novel place where huddled masses
are supposed to earn their lawns.
But most of the world lives like this –
without mod-cons.

I reach the back room,
spy my photo on the wall
I am here.
But why?
And for how long?
I don't really belong
I have no rights, no memories here
no future.
Yet here I am.
And importantly, others think of me
here.
All of the sudden I know
that by any twist of fate
this might have been home.
Last time in western Ukraine though
I didn't get that far.
Stuck in Lviv
where cobblestones have witnessed much –
like my father's birth but not childhood,
relegated to camps –
I thought maybe it's genetic,
this impulse for risk,
fleeing the frenetic scene like the wind,
leaving behind regrets
for a greater unknown.
But I got grabbed by a slick uncle
who talked like he owned the whole town,
said the village wasn't worth the bother
modern Ukraine deems huts like that a shed
and his eyes flitted to potential lady loves
sitting at the bar
tapping their metallic fingernails
waiting to go home.

I've got the streets of Washington DC –
what you do after graduation with your fancy degree,
early 90s. Group House. Drug dealer chef in basement stench,
might as well make these digs home,
at least someone cooks, makes rent.
I'm working non-profit a few bucks a day

promoting democracy and freedom of press
but already I've the sense it's misshapen, bent –
the politics, the money, the hope already spent on the streets
though they meet at right angles.
We're square at 3rd and H, not far from G,
moderately safe from shootouts, but not really.
This is Capitol Hill
where Koreans lock up early
and I'm living on tuna and Ritz.
The city seethes troubled, misplaced souls,
and I'm drinking Sunday nights to forget
and prove I'm no suited stiff,
still hoping for a lucky break to carry me away
unlike Lana, who's left the world
and found that better place.
But I never found solace in that bullshit phrase
so I thought I should keep trying.
Last time I was in DC though
I didn't get that far.
Driving past Eastern Market, down Pennsylvania, up K,
past Georgetown, we got all the way to the Palisades
to Sherier Place, the porched residence
where many years hence I'd brought home my daughter.
DC and I had a thing – we went at it more than once,
but my kids weren't interested where it all began,
the only house that mattered was the white one
where the guy talks like he owns the whole town.
The feds weren't gonna bother
him or his lady love,
their gilded chains signalling
they can buy their way out.
But one day the clock might strike the hour
when she strokes her chinchilla fur
with metallic fingernails
wanting to go home.

I've got the streets of Kyiv under my skin
buried in snow and dark passageways,
what you get for smoking dope with artists
who wander around for three days.

Where the hell have you been? my friends are appalled.
At Kyrill's I think, or somewhere else,
just taking my god-given right to fuck off
in this fucked up world.
But the universe is unforgiving
so most days I report to the office on Karl Marx
where the papers say they want the story,
but not really. A blurb on the zoo will do.
What's going on, *really*? I'll tell you.
Steal of the century! What you see is make-believe!
Can't put my finger on it, prove the sleaze
with facts or figures, the diseased race is on
and my silhouette is slipping through history
to rest behind cracked facades
and settle for what is of little permanence.
Streets too are rapidly changing their face,
one day it's Prospect *Pobedy*, the Prospect of Victory,
next it's Prospect *Peremohy* –
a victorious prospect for someone else.
Krasno-armeyska becomes *Chervono-armeyska*,
only to turn into a big *Vasylkivska* at some future self.
So much for the Red Army.
It's all happening now, this future of destruction
and what sense am I supposed to lend
to mad streets that double back onto themselves?
In my broken-paned *kvartira* on *Yaroslaviv Val*
I dodge my sodden landlord
and drink and throw parties.
Last time in Kyiv though
I didn't get that far.
Stuck in an airless Airbnb,
I went to see Kyrill's last show,
lifetime works at Arsenal, retrospective at fifty-two,
he used to strut like he owned the whole town
while I played his only lady love
though we both knew neither was true.
Kyiv was our playground but at some point
we all leave for good
and perhaps where they bury you
is the only real signal
you've finally made it home.

I've got the streets of London too –
first UK try you have to be quick and decide: North/South, East/West
the search is on *The Loot* to scoop that maisonette, Tufnell Park on the hill,
then Kentish Town, with someone else still.
There's always someone else, waiting in the wings
and somewhere else –
home is only a departure point
and a destination time
away from incessant rain and the bleak Northern line –
I make myself comfortable in these cracks
with or without heat or hot water
by Iceland and Pane Vino, Londis stocks what I need
for this tight life, dancing cheque to cheque
never guessing when the melody will be spent.
Last time in London though
I didn't get that far.
Stuck on South Western Rail
I barely made it to Waterloo,
my teen and her friends wanted Camden
to pretend they're not in awe of punks
or afraid of guys in general.
So we went to the Locks
but no one listened to my talk
like I owned the whole town,
about first gastropubs like the Lord Palmerston
or the houses on Hadley and Dartmouth Park Hill
which suddenly seemed ghost rentals
like the chippie whose name I couldn't distil
from the blurred gins of memory.
So I sneaked back alone, a different time
to a different pub, where the same people
slogged back their sorrows,
waiting for last call
still no conversion, signalling
at some dark hour
it's time to go home.

I've got the streets of Manhattan in my soul
no matter how briefly it goes,
you only need a month or so

to become a real New Yorker –
even a New York minute
to qualify your new sprinting pace,
nonchalance at green-haired transvestites
roller-skating in outer space
which is Central Park, a million miles away
from home, which is East Village, of course.
Ukrainian ghetto, lost family,
my entrance is coincidence
I get a tip at Bachynsky's
braving lines for *kovbasa*
home pops up, a five story walk up
not far from *Lys,* the Wily Fox, and *Veselka,* the Rainbow
in the city that never sleeps,
and 11th and 2nd or 54th dispense all I need
pumpkin coffee, cannolis, a salary, routine,
a million souls scurry without being seen
and I swear I'm going to make my mark on these streets.
Last time in Manhattan though
I didn't get that far.
Had to buy my son a skateboard
for enough toddler speed
to scoot from Tribeca to Central Park
a million degrees hot, no one wanted to walk
or eat *kovbasa*
But we got to the smoothie place,
then showed them uptown where Daddy and I got engaged.
Of this momentous occasion, no one cared
but the Korean grocers on 1st Avenue
still sold green tea ice cream
and the ladies at the salon
sat there stroking their phones
with metallic fingernails
waiting to go home.

I've got the streets of Istanbul too (believe it or not)
in an awesome leap of faith
to close a million-mile romance gap
though this five-year plan
won't work better than the rest

even if fiancé owns our love nest
and we walk like we own the whole town.
The streets are skinny, steep and dry
but also fluid, wide and wet,
cars stick at impossible angles while ferries glide past,
the metropolis seethes twelve million souls
trading, praying, drinking black tea,
the green-haired transvestites an anomaly
of *Cukurcuma*, where cobblestones have witnessed much,
yet not far from water's edge
in *Karakoy*, fish and insults hurled,
we live in childless euphoria
on Sesame Street,
RULER OF THE WORLD!
Or as Turks call it –
Susam Sokak, *Cihangir*.
My spouse-to-be is called away
to conquer foreign terrain,
so weekly I am left alone
to conquer mine and make home.
What's the word for beige in *Türkçe*?
I believe it is loneliness
and *bej* comes in many shades.
Slowly, slowly, millennia sing, and ruins sprout new life
we morph into the megalopolis
of Byzantium, Constantinople, Istanbul,
no one notes we're here, but we're alive,
it's the felines in charge, so I feed five.
That's the start of home, isn't it?
Your own space, and cats?
Learn the lingo, paint the walls, change the taps
We'll grow old here!
Our future kids won't know what hit them –
Anglo-Ukrainian-Americans abroad!
Home will be this view above the sea
the Blue Mosque's silhouette and Bosphorus sights,
away from the phosphorus lights and calls to prayer
feeding centuries of money-making din,
we'll name them Sophia and Konstantin.
They'll grow up with wisdom and permanence

which we so sorely lack
but which we hope
the act of procreation will confer.
Last time in Istanbul though
we never got that far.
We'd sold the flat for an English garage,
and the *Aygaz* man wasn't near
and the artichoke man wasn't there
and the *pide* man on the corner selling pizza and Coke
in hope of more tourists, looked broken, as cafes rolled inside
because government officials had spoken:
you must stay with tradition.
So only the price weary *balik* restaurant was open
and the man with the plastic bucket shop
sitting there waiting
for the sale of a single mop
so he too could go home.

Now I've got the streets of this old Surrey town
under my belt and my New Balance can take me
down St Mary's Road to boot camp
and over to Row's for a cup of tea
then back to Chestnut Hill House, refurbished
but unlikely to soothe a restless soul.
What is the final rest stop?
The soul coughed on staid concerns –
safe streets, nice houses, the stamp of good schools,
proximity to rail and air – we weren't fools, we guessed
a breadwinner needs to commute
and we might beat that great Duty
with rising prices, if we're astute.

But the real test is Time –
        when determines where, how much determines which,
some parts of the equation easy, others a bitch –
        toddlers want parks, a river with ducks,
                mothers want shops and ladies' night pubs –
we walked through the endlessly middle-class reasons
bought into it all –
and the soul said

it's the trees, stupid,
the change of the seasons.
You won't fall where ancient roots hold the earth fast
and soaring branches prop the sky
and from every window tangled silhouettes
of a thousand years ask
what's the value of searching forever?

Dig the soil, clear it out, pull apart but also *plant*,
with blackened fingernails make your mark
on reformed neat plots and past the park
beyond what's permitted, allotted, allowed,
walk the byways of Oatlands, the king's old hunting grounds,
even here dead ends rise, sometimes you must turn back,
no through-roads, no shortcuts, streets that don't quite connect,
but if you let your mind wander
you can get lost yet.

Last time I walked this Surrey town
I got this far:
Is there still no place like home?
Is it only where I happen to be?
Who are these citizens of nowhere, her or me?
Outside the grocery
the same scarfed lady sits,
loved or not, hard to tell,
with blackened fingernails
each day she gives the *Big Issue* its big sell
and I wonder where she lives
or merely spends the night
so sure I could bet my whole life
she too would say yes:

There's no place like it.

We're all waiting – searching –
for anywhere
to call home

(composed: autumn 2019, performed live: summer 2020)

In Conversation with **Mariya Ionova (MP), Member of Ukrainian Parliament**

Yevdokia Sokil & Constance Uzwyshyn

Mariya Ionova wears many hats. She is a Member of the Parliament of Ukraine, holds a bachelor's degree in Finance and Credit and a master's in Global Business and International Economy, is a wife and mother of two children – and above all, is a fierce Ukrainian patriot. Over her eight-year tenure in Parliament, she has collaborated with others in government to secure Ukraine's integration with Europe and to assist Ukrainians impacted by the ongoing Russian war. Since 2014, when Russia annexed the Crimean Peninsula and launched a hybrid campaign in the Donetsk and Luhansk regions of Eastern Ukraine, she has regularly visited the contact line to deliver aid and support to internally displaced Ukrainians. In addition, she is advancing legislation to promote women's rights, to prevent and combat domestic violence and the protection of children.

On 15 April 2022 – 52 days after Russia's invasion of Ukraine on 24 February 2022 – we spoke to Ionova about her priorities as an elected official in wartime, her view of the West's response to Russia's war on Ukraine, and her predictions for how the war will end.

***CJLPA*: When you were elected to be a member of Ukraine's Parliament, the Verkhovna Rada, did you ever imagine you would be serving your country during a time of war?**

Mariya Ionova: Yes and no. I was first elected in 2012, and I was very active in questions of European integration during the Revolution of Dignity and Euromaidan].[1] The war for us started in March 2014 when Russia annexed Crimea and occupied Luhansk and Donetsk. The West did not want to escalate the war by putting boots on the ground. We had been fighting for six months and we were asking for sanctions. Russians were killing our people; I remember when President Petro Poroshenko [elected after Viktor Yanukovych's removal] was working 24/7 on creating an international coalition and asked for a UN peacekeeping mission. He also worked on strengthening our Armed Forces together with our partners, and signed association agreements: legislative agreements to put the European Union and NATO integration into our constitution. This was a strategic course in his presidency. Because of this, when Russia invaded Ukraine again on 24 February of this year, we did not falter. Our armed forces, Ukrainian people, government, and Parliament work in solidarity, and we are brave.

After that, we visited the front lines in Eastern Ukraine and meet regularly with IDPs [internally displaced persons] to provide humanitarian assistance.

1 Protests over then-President Volodymyr Yanukovich's decision not to proceed with European Union integration in favour of closer ties with Russia, that resulted in his removal in 2014.

Fig 1. *Mariya Ionova 2022 © Mariya Ionova.*

***Fig 2.** In the town of Avdiivka, (left to right) Iryna Geraschenko (MP), Rebecca Harms (MEP) and Mariya Ionova (MP) 2022 © Mariya Ionova.*

On 24 February, we were expecting war. But we did not expect such horror, such inhumanity, such cruelty, that there would be such crimes against women and children, girls and boys. Pure brutality. You can't find the words when you see a seven-year-old boy watching his mother get raped and dying. Today, my colleagues and I are not only Members of Parliament, but we're also volunteers in our communities. We are people who love our nation, our country, we love our people. And we are full of rage at the same time. We will not be OK until this settles in the courts. We need justice. We are working on the diplomatic front, on humanitarian aid and securing weapons for our military.

***CJLPA*: Without sharing any details that might put you or your loved ones at risk, what steps have you taken to protect your safety and the safety of your family?**

MI: On 23 February I was in Parliament, and I felt it was wrong that my family was at home in Kyiv. I really couldn't function at work from worry. So, in the evening, I called Myron [husband Myron Wasylyk, a Ukrainian-American advisor to the CEO of Naftogaz of Ukraine] and said 'please be ready in one hour, we're leaving for Western Ukraine'. When we arrived at five in the morning in Lviv the day after, the bombing started in Kyiv. My mom and aunt also arrived two days later, and then I went back to Kyiv while my family stayed in Lviv, and then to the Ukrainian/Hungarian border. I am worried about my mother; she has cancer and now must look after my children while my husband and I fight for Ukraine.

Since then, I've been travelling to Zaporizhzhia, Dnipro, Ivano-Frankivsk. We are donating humanitarian aid from the USA and Canada. In our party [European Solidarity], we have a network of women that I work with closely: Jana Zinkevych, Sophia Fedyna, Nina Yuzhanina, Tac, Viktoriya Sumar, Iryna Gerashchenko, Ivanna Klympush-Tsintsadze and Iryna Friz. They are all strong, intelligent, and brave women. I'm so proud of these women, but it's also heart-breaking what they're doing. Iryna Friz, the first Minister of Veterans in Ukraine, in the past 53 days of the war, has sourced 328+ tonnes of humanitarian aid for Ukraine, including bulletproof vests.

I don't think about my security. I have my responsibilities and I must do them. There is no safe place in Ukraine. Today in Lviv, seven people including a small child were already killed and 15 badly wounded. My father and my brothers are in Kyiv, they are volunteers in different places. The men are trying to do what they can.

***CJLPA*: As a Parliamentarian, in a time of war, with the country under martial law, what are the most important actions the Parliament is and should be taking right now?**

MI: Now our priorities are hostages and civilian hostages. There are more than 1,000 civilian hostages, and 500 of those are women, including local representatives, journalists, and civil activists. The conditions for them are not, shall we say, according to the Geneva

Fig 3. Near Mariupol in Shirokino, 809 metres from an enemy fire point. Members of Ukrainian Parliament (left to right) Ivanna Klympush-Tsintsadze, Iryna Geraschenko, Mariya Ionova, with Ukrainian soldiers 2022 © Mariya Ionova.

Convention. They need medical attention. On this list of hostages is paramedic Yulia "Tayra" Payevska – her daughter Anna-Sofia Puzanova won a bronze medal at the Invictus Games. Yulia was working as a paramedic in Mariupol from the first days, and the Russians kidnapped her. We must highlight her name. They've made up stories about her. It's just terrible.

We also have a list of 40 children who were kidnapped and taken to Russia, most of them from Mariupol. We know the exact address of where they are in Russia. But these children have relatives in Ukraine. One boy, Ilya, his mother was killed in Mariupol, but his grandmother is in Uzhhorod. Another boy, Maksym, 15, is an orphan who was studying in college in Mariupol and was wounded. He also has relatives in Ukraine. Another girl, 12-year-old Kira Obedinksy, her father Yevhen Obedinksy was the former captain of the Ukrainian men's water polo team, and he was killed in Mariupol. She's been taken to Donetsk, and they want to give her to a Russian family, but Kira has a grandfather in Ukraine. Each has a personal story. As mothers we all can imagine our own children in these stories. This problem has to be named: Russia is a country that is kidnapping children.

***CJLPA*: We have heard reports from Ukraine's government and the media about atrocities being committed against Ukraine's people – executions, rape, abductions. What can you tell us about the situation on the ground that Ukraine's allies may not be aware of?**

MI: The list of 40 children represents those where we have the exact address where they are being held, where we have a complete history and detailed information. But there are many, many more cases where we don't yet have all the details. Especially in occupied territories, to which of course we don't have access. All we have on those cases is information that the Ministry of Defence is collecting, and that which the Ombudswoman on Human Rights gets on their phone hotline [about missing or kidnapped individuals]. There are over 4,000 criminal cases that are open but, unfortunately, we don't have the volume of legal professionals to prosecute them all. There are still bodies that have still not been identified after 50 days of war. Where there is rape of women and children, 99 percent of these victims are not ready to speak to law enforcement institutions, they are afraid to speak now. And that's also a problem. But we are asking our international partners for assistance.

There has also been evidence that people are dying of starvation and dehydration. In Mariupol, in Bucha, there are elderly people who have been blocked in their houses for weeks. In Bucha, they were finding that [Russian troops] killed families, five bodies in a yard. In all, thousands killed. We have to get all this documented and get this to the International Court, and it has to be punished. That's why we are calling this a genocide.

Fig 4. *Members of Ukrainian Parliament Mariya Ionova and Iryna Geraschenko in front of a bombed building 2022 © Mariya Ionova.*

***CJLPA*: How would you rate the response from the international community so far to these atrocities?**

MI: All the European countries and America were teaching us about democratic values [before Russia's latest invasion]. Now it's their turn to show us how they defend those values. It is the responsibility of the free world. If they will not help us, he [Putin] will not stop. He has 150 million people. He doesn't care how many Russian people will be killed. And he will go further. There are no red lines for him. The free world was not ready to defend their values. They didn't have a strategy. Our strategy is that Russia must be defeated, Putin must be punished. He is a war criminal. The Western community is not ready for this. For us, there is no grey, only black and white. We are paying with our lives. That is why we are demanding weapons to defend ourselves.

So, we say, ok, if you won't give us a no-fly zone, at least give us military equipment. The problem is all these countries waited to give us assistance. They were sure we would fail. That is why they didn't have a strategy of support for us. When we showed the whole world that we fight, when we showed our resistance, we understood that they don't have a strategy on Russia. They would like to trade with Russia as business as usual. And we also heard realpolitik. Now realpolitik is the whole world watching online how we have been raped and tortured and killed.

***CJLPA*: How should the world be supporting Ukraine?**

MI: Our humanitarian request is weapons. We don't need masks, soap, food when we are under shelling, under bombardment. We need weapons. And sanctions. There are 330 Russian banks. Do you know how many were turned off from SWIFT? Six. Now after Bucha they increased, but not 330. They find loopholes. Why didn't they sanction sooner? What about Russian information sources? Why are we not expelling Russian diplomats? At least half of them? And we still have discussions in the United Nations, to be or not to be. He [Putin] uses this weakness. He's inspired by this weakness. I understand democratic procedures, but he is going crazy. He's killing and attacking every day. Where is international order? Where are international rules? Why are we five steps behind? Why is he making the rules, setting the agenda? Why not strong democratic countries? What are you waiting for?

***CJLPA*: Do you believe Ukraine will win this war against Russia?**

MI: We have already won. By spirit, by unity in our country. By being a brave nation. We will not fail. The alternative is we will be killed. We will not give up. This is why we've already won. We hear [Russia's] is the second biggest army in the world, and our army has shown that when you have spirit and love and value freedom, you will fight. It's a historical chance for all the world. We have repeated this historical circle for centuries. We need to get other

Fig 5. *In Verkhovna Rada (Ukraine's Parliament) Members of Ukrainian Parliament Mariya Ionova, Iryna Friz, Iryna Geraschenko, and Ivanna Klympush-Tsintsadze 2021 © Mariya Ionova.*

nations to help prevent this and this criminal Putin, and that's why we're asking other countries that he needs to be completely isolated from the free world. And if the free world wants to do this, it's their choice. But we will not give up. There is no alternative for us. What he's doing to Mariupol, he will do with the whole of Ukraine. He wants to erase us from the whole world – our genes, our language, our land, our history. World – are you ready to respond?

***CJLPA*: What else do you think Western audiences need to know about Ukraine?**

MI: The whole set of war crimes that are being committed in Ukraine now. We are not blaming the world. We are not making accusations. Everyone makes their choice. But if we all together share the same values and principles, then all together we need not only words, but also actions. We must be united and fight. We are committed to this fight because we don't see another way. To be under the Russian Federation? No way! In Donetsk and Luhansk, Putin thought those were his people, but people were saying, no, we want to be here in Ukraine. You see, in Kherson, Putin failed. Ukraine is in favour of being our own country. We are a European, Atlantic country, in the European family. But if European countries share such values, they need to step up. We will do it ourselves if we need to, but the casualties will be huge. It's a question of security for the whole world. We are protecting the European Eastern border with our lives. We appreciate that all the world is standing with Ukrainians. But words are not enough. We appreciate words, but we need action. We are fighting for the world. Russia's war is against NATO also, it is against democracy. The best security guarantee is NATO membership. In this regard, I would like to take this opportunity and wholeheartedly thank the British people and the British government for their clear position on supporting Ukraine… and this position is becoming strong and stronger. Together we will prevail and of course Ukraine will win!

Constance Uzwyshyn is an expert on Ukrainian contemporary art. She founded Ukraine's first foreign-owned professional art gallery, the ARTEast Gallery, in Kyiv. Having written a masters dissertation entitled *The Emergence of the Ukrainian Contemporary Art Market*, she is currently a PhD candidate at the University of Cambridge researching Ukrainian contemporary art. She is also *CJLPA*'s Executive Editor and the Ukrainian Institute of London's Creative Industries Advisor.

In Conversation with Oleg Tistol, Ukrainian Artist

Peter Bejger & Constance Uzwyshyn

Oleg Tistol is one of Ukraine's leading contemporary artists, who works with stereotypes associated with Ukrainian everyday life and current affairs. His artwork cleverly juxtaposes Ukraine's historical past with current issues through day-to-day imagery. The results are alluring and provocative, yet playful. However, since the beginning of the Russian invasion into Ukraine, Tistol has sought safety from the bombs by living in his basement art studio with his wife, daughter, and a friend. His art production has been greatly affected by this war and his unique perspective on 'freedom' and the release of the oppressive shackles of the Russian imperialistic narrative has had a profound effect on the work he now creates.

This interview was conducted on 14 April 2022.

Oleg Tistol: My apologies, the air raid sirens are howling now. There is noise from the street.

***Constance Uzwyshyn*: Tell us about the painting for the Journal's back cover (Fig. 1).**

OT: The shadow was a very important theme for me before the war. Actually, we have lived with this feeling…the war has now lasted eight years [a reference to the initial invasion by the Russians in Donbas and annexation of Crimea in 2014]. That is why somehow this shadow is from the distant past, so I created a big exhibition from it (figs. 2, 3 & 4).

Fig 2, 3 & 4. Mariana, Constance, EN *(Tistol 2021, acrylic on canvas, 200 x 140cm). from Exhibition Oleg Tistol; Europe. 14 September – 14 December 2021, UkrEXIM Bank, Kyiv. © Tistol.*

Fig 1. March-22. Self-Portrait *(Tistol 2022, acrylic on canvas, 200 x 140cm).*
© Tistol.

***Fig 5**. Nadiya Drawing the Shadow of Tistol for the painting, (*March-22. Self-Portrait*).*
© Tistol.

This was a premonition, a photo document, a painting more important and striking than a photo. If I was going to do a portrait now of Peter, for example, I would make a shadow, and this would be more of a document than some other vision.

Now, about this painting (fig. 1). To think about art was very difficult during this last month. I asked my daughter Nadiya to draw my portrait because self-portraits are a problem (fig. 5). Someone must draw the shadow. This was a difficult period, but it was positive in a sense as we had not spent much time together earlier. Nadiya and I were in one studio together all month and I understood that my shadows are not superfluous or arbitrary. This is something very important and serious to me; it is sort of a document. It was a very cold-blooded documentation and is the way I am today…it is how I stand. It's very important this shadow was done by Nadiya because throughout the month it was about survival and saving your life and those of your dear ones. This was the problem that had to be resolved and this is what the painting is about. What kind of war? You either feel it or you don't. I don't want to say anything about the war to the viewer. Either it's there or it isn't. Right now, I don't want to say anything about the 'katsaps' [a traditional Ukrainian derogatory term for Russians].[1] I don't want to say anything about the war. This is an issue for writers, journalists, and most of all, for the military.

***CU*: How would you translate 'katsap' into English? Is its very specific terminology impossible to translate?**

OT: 'Katsap' is in reality a Turkic word that has the meaning of 'butcher'. This is an ancient term. Even Solzhenitsyn[2] called them this. In this context, it is the most appropriate term. I know this word from birth. Ukrainian villagers know this term. We thought this term stems from 'tsap'. That is, an animal, sheep. But no. It means a killer. It means butcher. In Turkey, the butcher shops are

1 Regarding issues of Ukrainian versus Russian identity, the reign of Russian Tsar Peter I is considered by historians a crucial phase in the development of Russian imperial narratives and the appropriation of Ukrainian history, heritage, and culture by a centralising colonial power. See <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CP%5CE%5CPeterI.htm> accessed 22 May 2022; Orest Subtelny, *Ukraine: A History*, (2nd ed, University of Toronto Press 1994) 160-67.

2 Aleksandr Solzhenitsyn was a notable Soviet dissident and spoke out against communism. He raised awareness of the brutality of the repressive Soviet Union, particularly the Gulag system. He was imprisoned in the Lubyanka prison and then was sentenced to an eight-year term in a hard labour camp.

Fig 6. Ai – Petri 2022, No.1 *(Tistol April, May 2022, oil, acrylic on canvas, 45 x 100cm). © Tistol.*

Fig 7. April 2022 *(Tistol April, May 2022, oil, acrylic on canvas, 25 x 25cm). © Tistol.*

called 'kasap'.[3] This is not slang, and this is not an insult. I like very accurate cultural designations. And if I call a person by what they truly are, then you better understand the cultural context.

***CU*: I see in this painting you are standing on a crate, could you explain this?**

OT: This is a very old Soviet crate. Perhaps it was some military item. I have had this in my studio for a very long time. There are instruments inside. Tools for work. Why this crate? I intuitively felt that I needed this crate. On one hand this could be a pediment for a monument. This is ironic. I understand that I can't be a monument. But on the other hand, it provides an unevenness, an unpredictability. I am small, standing on this big crate. This does not even reflect fear, but an attempt to find our place. You understand that you are very small, that you are not confident in your place in any context. This was very important for me.

CU: This painting is evocative, so strong! Your palette presents the colours of the Ukrainian flag and your blue self-portrait, your shadow of Tistol, stands proud as you gaze into the golden horizon calmly holding a cigarette. I am very moved by the piece and for me it represents the spirit of Ukrainians.

3 Turkish word 'Kasap' *noun* means killer, slaughterer, meatman.

Fig 8. Reunion *(Tistol 1988, oil on canvas, 270 x 240cm). © PinchukArtCentre, Kyiv.*

***Peter Bejger*: How should one work today in light of present conditions? You have had a very long and successful career. How do you continue to work, or perhaps not work, during this time of war?**

OT: I have made the painting we were discussing (Shadow Paintings) as also nine small canvases (fig. 6 & 7). Today I was in the studio, and I understood that on some of these canvases I will do something completely different. In the next month I want to redo them. My career, my life, has transpired over 31 years in the Soviet Union and now, this summer, will mark 31 years in an independent Ukraine. The 24th of August, the Independence Day for Ukraine, is almost my 62nd birthday. I had an exhibition in Lutsk and Lviv in 2020 and it was called *Sixty Years of Independence*. I was born on 25 August. The Lutsk Museum staged a large exhibit for me, opening on my birthday, and I decided to call it that. My entire life has been a struggle for my own personal independence and an observation of the history of Ukrainian independence. This has always been a part of my art. My first known paintings were based on 'unification', Khmelnytsky, and the Battle of Poltava.[4] It is called *Reunion* (fig. 8). which is my first well known painting.[5]

After this painting, my artwork changed and was reactive to current affairs. Perhaps it would be shadows, or palms, or mountains, or perhaps God willing I will paint *Peter with a Cat* (figs. 9, 10 & 11).[6]

4 Cf. Serhii Plokhy (ed),*Poltava 1709: The Battle and the Myth* (Harvard University Press 2012).

5 Cf. Kristian Gerner, 'The Battle of Poltava as a Realm of Memory and a Bone of Contention' (2009) 31(1/4) 679-693.

6 In the mid-1990s. Tistol created *Ukrainian Money Project*. This project

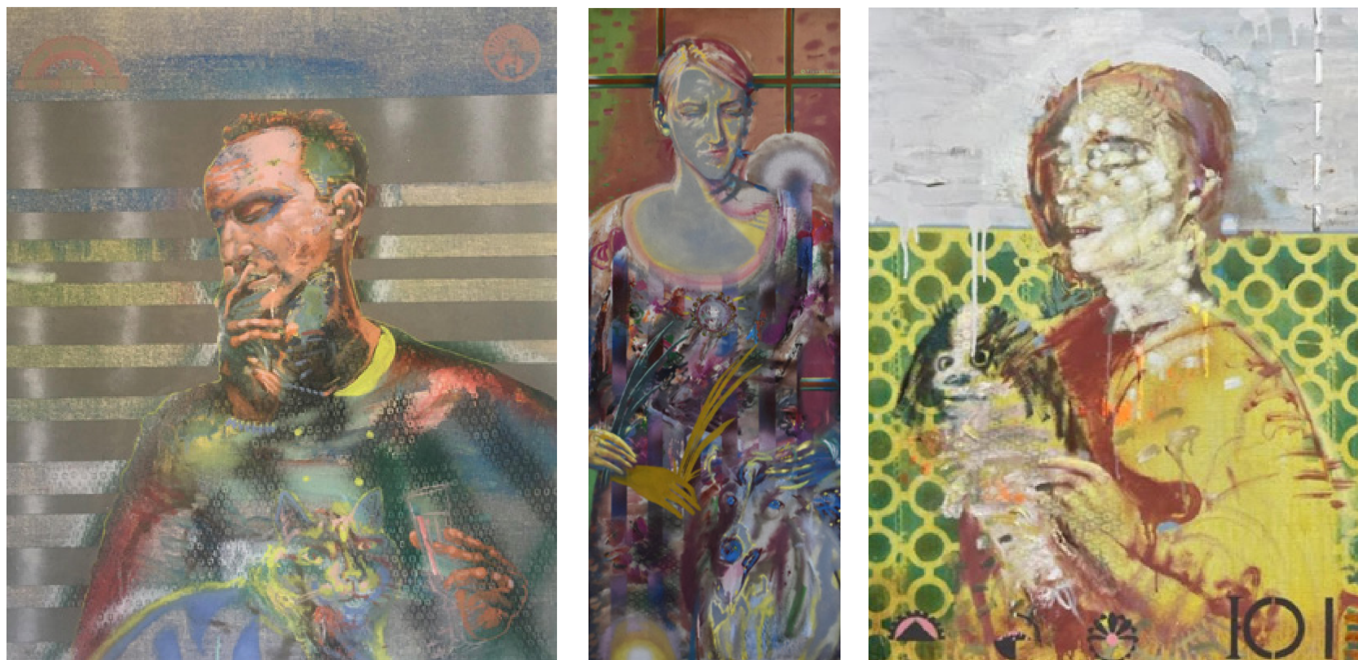

Fig 9. Peter with Erik *(Tistol 1997, oil on canvas, 90 x 75cm). © Peter Bejger.*
Fig 10. Roma Kusznir with Nestor *(Tistol 1997, oil on canvas, 140 x 55cm). © Roma Kusznir Hunter.*
Fig 11. Konstanzia Yu with Sushi: A Fragment from the Project for Money *(Tistol 1995, oil on canvas, 80 x 60cm). Private Collection.*

Now, my paintings will be something different and I delight in this. I like cultural attributes! That is, thirty years ago when I was explaining the meaning of *Reunion*, and Ukraine's independence, very few understood the history of Ukraine. Even twenty years ago only a few understood, or knew, the history of Ukraine.

I like the current discussion about Ukraine because of the war. I like the international context because everyone understands what is happening. The word katsap[7] is not an insult. No emotions here. It is an enemy. This is an attempt to delineate major cultural positions. Now everyone understands that Ukraine is very close to Western Civilisation, though I think there is only one civilisation. The war is cultural. A war between culture and anti-culture. What we have in this context from Russia is really a great error on the part of the global community. That is, the error has been committed during the last 200 years on what they see is 'the great Russian culture'. It is really a cargo cult culture process.[8] It imitates cultural processes, but it is done from completely different motivations.

coincided with Ukraine producing its own currency: a reference to Ukraine's independence and the step away from Russian domination. Tistol's money project embodies Ukrainian contemporary stereotypes and historical references. He specifically plays with intaglio printing to achieve a subtle offset print and cleverly adds vignettes, numerals, and lettering to create his own version of money art.

7 This is a play on the terms Fascism and Russia. Cf. Timothy Snyder, 'The War in Ukraine has Unleashed a New Word: Ruscism' *The New York Times Magazine* (New York, 22 April 2022) <https://www.nytimes.com/2022/04/22/magazine/ruscism-ukraine-russia-war.html> accessed 6 May 2022.

8 In another interview, Tistol elaborates on the cargo cult cultural process, stating that 'I think the majority of people now sadly realised that one is a culture and a cultural process and the other a cargo cult operation to abolish Mariupol in truth. All people finally understood this'. See 'КИЇВ. МАЙСТЕРНЯ ОЛЕГА ТІСТОЛА, БЕРЕЗЕНЬ, 2022' (*YouTube*, 30 March 2022) <https://www.youtube.com/watch?v=H3RfiIRUxmI> accessed 30 March 2022.

***PB*: I would like to ask you about identity. Ukrainian identity, and Russian identity. Perhaps you can explain your views on identity and the growth of Ukrainian identity since Ukraine's independence.**

OT: This is my personal interpretation: Ukrainian identity is not ethnic. It is about territory and cultural identity. On the Maidan in 2014,[9] there was a huge banner that proclaimed, 'Freedom is our Religion'. Everybody immediately understood that the first trait for Ukrainians is the striving for individual freedom. And thus, I am now against Ukraine joining the EU. I don't want to end up in a union with the French, Hungarians, and Germans. I want to be in one union with the British, the Canadians, and Americans. We have one mentality. I name these countries as those of personal freedom and individualism, the weight of the individual is very important. I don't like these bureaucratic countries. I am from Kozak[10] roots. This is an identity, striving for personal freedom, and that is why I speak sternly about civilization.

As for Ukrainian identity, this was understood very clearly during the war. There were very few people in Kyiv during the first month of the war and we all became very cognizant of one another, just like we did during the Maidan. People immediately asked each other, 'How can I help you?'. People were very solicitous to one another. All these volunteer services were very well organised, and we all looked after each other. This is the behaviour of free people. These are very straightforward values, and we have a union of people for whom these values are common. Somebody who has different values becomes a collaborator or leaves. This is an ancient village culture. And what is Ukrainian culture? A pursuit for more interaction and a beautiful, joyful life.

9 The Maidan, also known as the 'Revolution of Dignity', was a mass political protest in late 2013 and into 2014 in Kyiv that overturned a pro-Russian government and set Ukraine on a pro-European course.

10 Alternative spelling of Cossack.

Fig 12. Wine, from Series of Food *(Tistol 1988, mixed medium, 55 x 53cm). Private Collection.*

Fig 13. Caucasus-12 *(Tistol 2001, oil on canvas, 100 x 100cm). © Zenko Foundation.*

I now identify myself as a folkloric artist. Not by coincidence, we chatted earlier about the group DakhaBrakha.[11] This is folk music, ethno. Nadiya began her career as an ethno singer. I now feel that I am a very straightforward, let us say, ethno folkloric artist. What I do is folk, which has a relationship to European civilisation, to American. I am interested in these cultures, these cultural processes. Why do we need art? So, life would be beautiful.

***PB*: In the future, after this war, what is to be done with Russia? Russia is a neighbour. How do you live with this?**

OT: Seriously, over the last 100 years, there were four names for Russia. First there was the Russian Empire to 1917. Then it was called the RSFR, then SSSR, then the RF. Four names in just over 100 years. Geographic boundaries changed. Doctrines changed. But all in all, it remained the same. In the future, we can't talk about a country called 'Russia'. We don't know how many countries will emerge from it. What their relations will be. I am certain of this, because I am a very big specialist on katsaps. From 1984 to 1986, I was in the Soviet Army in a special unit in the nuclear forces. Yes, a specialised nuclear unit. It didn't even have a name, just a number: 31600. This number was on my military document. Nothing else was noted, and there were no references to aviation or rocket forces, only the number. They only took people from the deepest and middle part of Russia. I ended up there because I was an artist with higher education. They needed a specialist. All the other thousands of personnel were from the Urals, or Siberia, the same people who recently did what they did in Bucha.[12] I lived with them for two years in one barrack. I left from there a conscious Ukrainian. This did not happen after art school in Kyiv, nor after the art academy in Lviv, but after the Soviet army. I lived with them in close quarters, these katsaps, for two years in one setting, I understood we were aliens from different planets and two completely different cultural worlds. This is why I easily prognosticate their behaviour and their future. They will have many problems and will battle among each other. And for us geographically in Ukraine, we will have to control all this. They will be killing each other for quite a long time. Someone will call himself a chief or a leader and they will be battling each other. They will be battling for resources, food, or anything, and we will have to control this. I don't see any other variant. This can't be considered bad or frightening. God gave us this kind of neighbour. This is how it will end. There is no other variant. What is most important is to drive them away from us and not interfere. I think our war will end in Chechnya. It all started in Chechnya[13] and will end there. They [the Russians] strongly dislike Ukrainians, but they hate the Chechens more. Whether they want it or not, it will end there. They will have to resolve their internal problems and I am absolutely sure of that. There are already the first signs of this. After Ukraine, the weakest link is the Caucasus. This is why for many years I painted the canvas Kazbek (fig. 13), and why I gave explanatory texts to that from the *Kobzar* by [Taras] Shevchenko[14], from the poem 'Kavkaz' (The Caucasus).[15]

Everything is written there. Now Shevchenko is better understood in a broader sense. I was reading Shevchenko every day in the army. This book was like a Bible to me, and I read the entire library of his work. Every day a little Shevchenko was psychotherapy for me. This is why I consider myself an autochthone, not considering

11 DakhaBrakha is a world-music quartet from Kyiv that tours extensively and has a achieved a global audience with their unique 'ethno-chaos' style..

12 Flora Drury, 'Ukraine launches hunt for Russian soldiers accused of Bucha war Crimes' (*BBC News*, 29 April 2022) <https://www.bbc.co.uk/news/world-europe-61269480> accessed 2 May 2022.

13 See Andrew Higgins, 'the War that Continues to Shape Russia, 25 Years Later' *New York Times* (New York, 10 December 2009) <https://www.nytimes.com/2019/12/10/world/europe/photos-chechen-war-russia.html> accessed 6 May 2022; Anna Politkovskaya, *A Small Corner of Hell: Dispatches from Chechnya* (University of Chicago Press 2007).

14 Taras Shevchenko is Ukraine's national poet, an artist, and a seminal figure in the development of Ukrainian national consciousness. *Kobzar* is Shevchenko's first collection of poems and a powerful expression of Ukrainian cultural rebirth..

15 Rory Finnin. 'Mountains, Masks, Metre, Meaning: Taras Shevchenko's 'Kavkaz" (2005) 83(3) The Slavonic and East European Review 396-439.

Fig 14. Vita Brevis *(Tistol 2021, oil, acrylic on canvas, 260 x 200cm).* *© Tistol.*

my complex ethnic background. I am a typical Ukrainian because culturally this is the most important book for me and now everybody understands this.

***CU*: In your opinion, what is the identity of a Ukrainian?**

OT: To be Ukrainian is a conscious choice. If you want to live on this territory, with the rules we live by and with, you quickly become a Ukrainian. For example, the first guy who died on the Maidan was Serhiy Nigoyan,[16] an Armenian. He read Shevchenko. He was born into an Armenian family in Ukraine. He simply was Ukrainian: by mentality, behaviour, and the cultural code. You see this in 2014 in the Revolution of Dignity, known as the Maidan. This is dignity. This is not honour. Every Ukrainian has this feeling of dignity because otherwise you couldn't live with yourself among your own. Dignity unites us. This is reflected in behaviour by me and Nadiya. I very much like to engage with my equals, that is people who have similar values. This is a characteristic trait, something that is passed from one person to another, and you find this very much in Shevchenko. There is everything there about human dignity. This is a key Ukrainian term. This Revolution of Dignity, this is very important to study. We now have to carry it forward.

***PB*: We talked about Ukraine and Russia, now I would like to discuss the international community. You know that in the West now there are assertions we are in a post-national phase. We also search for identity, but it is often not built on national principles. This is a question about the role of nationalism and international relations. How can the international community support your struggle in Ukraine? There are very complex processes happening now in the West regarding nationalism and identity. I would like to hear your thoughts on what you see in the West and the international community.**

OT: First of all, there is not one fascist in the Ukrainian parliament. Not one communist. So, the problem of nationalism: we don't have ethnic problems here. What can you say about a country whose president is Jewish? Our Ukrainian nationalism is geographically cultural. There is a problem here in terminology. This word 'nationalism' in the Western world is very negative and I understand this. If this is about racism, then this is frightening but we don't have this problem. I mean this is a very minor problem that is almost not discernible. Now after 30 years when someone calls themselves a nationalist, this refers to a battle with a foreign enemy. One enemy. There is one enemy. You have to be very clear here with terminology. Ukrainian nationalism is not ethnic. It is absolutely not ethnic. I understand that American problem. I understand French historical problems. Here it is completely different. We are forming a cultural nation, and what other term can we choose but nation? I like the American project, an artificial nation. A group of wise people gathered together to create a nation of the future. This is the project of the United States. This is not a technical dream, but a cultural dream. This is the same for Ukraine's battle for national identity. This has an American sense in the national. When the national anthem is played, people of all colours stand. They are united for a way of life. This is the American dream. The Ukrainian dream is freedom and dignity. Period.

***CU*: How would you define who Ukrainians are?**

OT: Exotic! We are all exotic. I accept this. I know who I am, and from where I originate, and this is interesting for me and informs my creativity. However, this exoticism is very important within the civilizational process. That is, the rules of behaviour among people and cultural exchanges. Culture is simply the exchange of beauty. For what? For peaceful and fortunate co-existence. How does the so-called Russian culture differ? It is an instrument of expansion. In the beginning they bring you Dostoyevsky, and later a tank will arrive. Absolutely! Look at the map of this war. Look at where the katsaps have fathered and then where they are fighting. This is in the Russian-language territories. They are there where they thought they would be greeted. The Russians are not being greeted; they are being killed. But they came to where Russian is spoken.

As for the Ukrainian cultural process, Ukrainians dissolve into the world and know themselves from the inside that they are Ukrainian. This is for the children, the family, the parents. This is very important. When you are on the street you should be like everyone else, you respect those among who you live. This is a very important cultural trait, for a true culture. This is when you offer people some sort of beauty and you accept their beauty.

Something very important happened during this war. I have long felt this and so have many others also. Perhaps this doesn't sound very polite, but many Ukrainians absolutely don't care what the world thinks of them. Thirty years ago, when I was in Switzerland, I was addressed, 'Oh you're Russian'. I quietly listened and then said, 'Oh, you are German'. They were offended. I asked why you are offended. 'You write in German, speak in German. You are German'. It is different now. If, after thirty years of Ukrainian existence, and the war, somebody in Switzerland doesn't know about Ukraine, I wouldn't bother to explain. I will not speak. I am not interested.

16 See 'Remembering Heroes of Euromaidan: Serhiy Nigoyan' (*YouTube*, 25 January 2019) <https://www.youtube.com/watch?v=dYUIB0s1YJI> accessed 1 May 2022.

Now about the world context of Ukrainian culture, for example, for me, my favourite writers are Hemingway and Shakespeare, and my favourite music from my youth was by the Rolling Stones, Genesis, and Led Zeppelin. I was formed by all this. Well, I may be considered 'exotic', but for me all people are exotic. The more exotic the persona, the more interesting they are. If there is a trait in a person that I do not have, that is interesting for me. (fig. 15)

***PB*: I have a last question...a question on trauma. Ukraine is experiencing a tremendous trauma now with the war. Every nation has their own trauma. How does art deal with trauma? How can Ukrainian artists deal with this trauma?**

OT: It's actually the reverse. We have had 300 years of frightening trauma living one way or another within Russia. What is happening now: this trauma is like cutting off diseased parts. We are removing the trauma. The issue is sin. For example, I served in the Soviet army. If someone asks me about this time, I say I was a collaborator. Forty years ago, I was a collaborator and there was no other alternative. The issue is that these 'Russian' 'victories' from the past were done by the hands of Ukrainians and they were the best components of the 'Russian' army.

Now, this trauma, meaning Russification…I am delighted is no more. A year ago, I got into a taxi and Russian 'chanson' music would have been playing.[17] I no longer hear that. The trauma will not be with Ukrainians, it will be with the Russians. Those who call themselves Russian, will have a horrible trauma. It will be similar to what the Germans experienced in 1945. For Ukrainians, we will be exiting a trauma. It will never be necessary to explain why it's not worth reading Tolstoy or Dostoyevsky. We no longer have to participate in the propagandistic lie of the 'Great Russian Narrative'. Now everything has become clear. This problem of trauma: I no longer want to paint canvases of 'unification' or Russians. I am no longer interested. There are very many people from my circle, and my family, who now have to decide what to do with all those books of katsap classical literature. What should we do with these books? It is not necessary to just carry them out to the garbage. We need to tear off the covers so children will no longer read them. This is escaping the trauma. No matter how horrible this may sound…for eight years we couldn't throw out the books, because books are a treasure. But you have to understand that this is a horrible thing. It traumatises the mind. You can't give children *Mein Kampf* to read. You can't do that. It's the same here. This cultural cleansing is already being felt. There will be no need to pass legislation on language. Speak any language you want. It's just important you don't carry these ideas of slavery. So, this would no longer be the case. We have transcended the trauma. You can see this in people on the streets. You see this in social media, everywhere. Done! No more trauma. No more doubts. Nobody will no longer wonder if we are Europe, or not Europe. It's obvious we are Europe. This is geography.

OT: I would like to add a summary. This is very important. You may think this sounds horrible and cynical, but this war is very useful. This war had to happen. You don't want war, you absolutely don't want it, but it had to happen. We have to await the end, and there may be more frightening events, but this addresses the issue of cleansing. We have to win in this cleansing. And we will win, definitely.

Fig 15. Alien-25 *(Tistol 20, acrylic on canvas, 140 x 120cm).*
© Zenko Foundation.

In an informal discussion after the interview Tistol described the current mood in Kyiv.

OT: Well, it is more intensive now…there is a curfew and I have to still get to my mother. As for life here now, every day it's getting better and more peaceful. Cafes are reopening. People are coming out. There are still fewer people or children on the streets. But it is somehow better. The first month (after the start of the war) was very scary. But I understand how much we all love Kyiv. It was an absolutely empty Kyiv then, with the anti-tank barricades. I was very happy we didn't leave. There was a very important feeling that we had to live through all this here. I am now almost a Kyivite. I never before felt I was a Kyivite. I was from Vradievka. From Mykolaiv. I always felt I was a Southerner, now I feel that I am a Kyivan artist.

17 Russian chanson music derives its ballad-like music by using prison slang and references to criminal life and hardship; it appeals to emotional sentiment to a loved one.

Fig 16. Europe *(Tistol 2012, oil, acrylic on canvas, 200 x 200cm).*
© Tistol.

Fig 17. Europe - 2 *(Tistol 2020, oil, acrylic on canvas, 200 x 200cm).*
© Tistol.

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There Are Places in The Heart *(Gabriella Kardos 2020, oil on linen, 170 x 170 cm).*
© Gabriella Kardos. Photograph by Bindu Bhutani.

Man has places in his heart which do not yet exist, and into them
enters suffering, in order that they may have existence.

- Léon Bloy

March-22. Self-Portrait *(Oleg Tistol 2022, acrylic on canvas, 200 x 140cm).*
© Oleg Tistol.

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