St Andrews
Law Journal
Institute of Legal and Constitutional Research

University of St Andrews
FOUNDED 1413

The St Andrews Law Journal
Inaugural Edition – Issue 1
Winter 2020

ISSN 2634-5102

Published under the
Institute of Legal and Constitutional Research
71 South St.
St Andrews
Fife
KY16 9QW

(Revised on 4th September 2021)

ISSN 2634-5102

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Opening Remarks by the Co-Founders

Starting a student-led publication in the fourth year of studies is a dauting proposition for any student. What distinguishes the St Andrews Law Journal – we believe – is its ability to offer individuals from all social backgrounds, identities, and ethnicities, the chance to start an impassioned discussion on a matter of law. Our intention was to create a publication that can, at least, provide an accessible, inclusive, and direct platform for legal discussion at the University of St Andrews. We believe our progress, reflected in this first issue, has culminated in an admirable start to realising that goal. At the same time, we recognise a need to continuously refine and reappraise our vision for a characteristically 'St Andrean' corpus of legal works.
We take inspiration from other established bodies of legal study at St Andrews such as the 'Institute of Legal and Constitutional Research (ILCR)', the 'Civil Law, Common Law, Customary Law in Europe' academic group, and their associated projects. The support of the ILCR has been instrumental in our success, having presented our initial proposal in February this year to their Steering Committee, we were delighted to hear of our initiative's warm reception.

As the months proceeded, and the Coronavirus spread without respite across the globe, we found ourselves in an increasingly uncertain world in which social contact became both more difficult and less frequent. Despite the physical distance between us all this year, though we have endured, we have all excelled. Now that our year is fast approaching its twilight days, we take a moment to reflect on an exceptionally tumultuous year not with melancholy but with hope, inspired by the work and achievements of everyone who have offered their time to helping us achieve a respectable beginning to our small chapter in this university's history. As once noted by the eminent Theodore Roosevelt, 'Far and away, the best prize that life has to offer is the chance to work hard at work worth doing.' In this inaugural Issue of the Law Journal,

you shall find a reflection of exactly such 'work worth doing'. This corpus encompasses a variety of studies that exemplify the innovative ways our contributors have connected legal matters, such as court rulings, jurisdictions, legal precedents, and jurisprudence with the larger historic and contemporary considerations that weigh-heavily on each.

Filling the void of a lack of a proper faculty of law at St Andrews is not something we realistically claim to achieve. Though we are proud to associate with the ILCR and other groups dedicated to the edification of legal knowledge in the St Andrews academic community, we make no claim to our pedigree than that which our contributors and editors reflect in each Issue of the Law Journal. We hope that these works provide an inspiration for the multitudes of students at St Andrews, passionate about law and legal history, to start their own independent legal study with us in our future publications.

Yours faithfully,

Bianca Ritter and Oliver Roberts

Co-Founders & Co-Managing Editors

Forward by Professor Caroline Humfress

It is almost 600 years since the teaching of Civil Law was authorised (via papal approval) at the University of St Andrews. Legal and constitutional studies have a long and distinguished tradition here. The University's alumni and honourees include James Wilson (1742 - 1798), one of the Founding Fathers of the United States appointed by George Washington to the US Supreme Court; Millicent Garrett Fawcett (1847-1929), leader of the Constitutional Women's Suffrage Movement, awarded an LL.D from the University of St Andrews in 1899; and Elsie Howey (1884-1963), a Suffragette and activist with the Women's Social and Political Union. Since 1967 no-one has graduated from the University of St Andrew's with an LL.B, but we are exceptionally lucky to have a large and dedicated network of alumni who have gone on to study law elsewhere and to practice it professionally. Looking forwards - from the vantage point of 2020 - the future of legal and constitutional studies at the University of St Andrews looks exceptionally bright. This is due, in no small part, to the launch of the *St Andrews Law Journal*.

This publication of the *St Andrews Law Journal* has been driven forwards by the vision and hard work of an impressive and deeply committed student-led editorial board, with the support of the University of St Andrews' *Institute of Legal and Constitutional Research* (ILCR). The ILCR and the *St Andrews Law Journal* share the same commitment to fostering outstanding research on law and legal humanities. We both seek to encourage cross-disciplinary methodologies and approaches, stretching across the fields of law, history, international relations, economics, literature, classics, philosophy, anthropology and beyond. Most importantly, the ILCR and the *St Andrews Law Journal* share a commitment to fostering an equal and diverse St Andrews, where the voices of the under-represented and excluded are heard loud and clear. It is with particular pleasure, then, that we also welcome the *St Andrews Law Journal's* collaboration with *The Gay Saint* thanks to a paper contribution to this Issue of the Journal by of one of its writers. Together, we look forward to shaping and encouraging new generations of St Andrews' lawyers, policy makers, and future leaders.

Professor Caroline Humfress
Director, Institute of Legal and Constitutional Research
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Limits of Liability

By Jacob Joad

|Preamble|

This paper, The Limits of Liability, shall focus on the recent history of the concept of vicarious liability in Anglo-American common law from the 19th century to the present.

Vicarious liability – often called *respondeat superior* in the United States – concerns holding employers ('masters') liable for torts committed by their employees ('servants'), even when the employer is not at fault. In Anglo-American common law, it has been a principle for over 150 years.[1] There are references to the doctrine in cases dating back to the Middle Ages, but vicarious liability primarily evolved into its modern form in the nineteenth century. Such a development was driven by the necessities of the industrial age, with increasing technological and commercial development creating a more 'fertile' environment for claims involving the doctrine.[2] As time has worn on and businesses have become larger, however, vicarious liability has been applied in cases where the employee-employer relationship has been increasingly distant and the tort committed increasingly contrary to the tortfeasor's 'scope of employment'. Subsequently, organisations in England and the United States at present must be increasingly weary of their employees or 'servants'. This paper will first give a historical overview of the development of vicarious liability before analysing the reasons in case law which have led to this situation in Anglo-American law, drawing upon twentieth-century legal scholarship from both sides of the Atlantic which plotted and commentated on the increasingly liberal application of vicarious liability. The paper will then view three common justifications for vicarious liability, which lend to the reasoning for the development of the doctrine. Finally, the paper will look at very recent legislation, viewing possible issues for the doctrine in the near future.

The traceable development of vicarious liability in common law in England and the United States of America stretches back to the early to mid-nineteenth century. It was then when the basic principles were laid down as guidance for the application of vicarious liability. In the United States,

[1] Green, *Respondeat Superior*.
[2] Gilker, *Vicarious Liability in Tort*, 6-8.

Wright v Wilcox (1838) 19 Wend. (N.Y.) 343 established the principle that malicious intent by the servant in the course of employment removes the master's vicarious liability for the actions of their servant.[3] The court in that case also established the idea that a master is only responsible if it can be proved that the master assented to the servant's carrying out the tort.[4] In England, *Joel v Morison* (1834) established that the master was not vicariously liable if the servant acted "on a frolic of his own."[5] Essentially, England and the United States founded the doctrine on a similar 'test' – that is, the establishment of whether the servant was acting in the interest of their master or in the interest of themselves. Such a simple test received an initial, but mostly terminological, development in England in the 1860s, following cases including *Limpus v London General Omnibus Co* (1862), where "scope of employment" replaced "course of employment" (the latter used in *Joel v Morrison*) to ascertain whether assent from the master to the servant for their tort was implicitly given by being in the interest of the task(s) the servant was employed to do.[6] "Scope of employment" has since been a basis for determining the application of vicarious liability in English common law to the present. In America, malicious intent as an exemption from vicarious liability was overturned as a legal distinction soon after *Wright v Wilcox*, but malice was still considered when determining vicarious liability in courts.[7] Around the turn of the twentieth century, another distinction emerged affecting the application of vicarious liability in both England and America. Allan W. Leiser pointed out in 1956 that vicarious liability was applied more reluctantly in the United States when the servant had committed a wilful act, rather than a negligent one. The Michigan and Texas courts, in cases in 1911 and 1891 respectively, reasoned that wilful acts were less predictable than negligent ones and, as such, fall outside the scope of employment. [8] A different distinction emerged in English law. In *Lloyd v Grace, Smith & Co* (1912), no distinction between wilful and negligent acts was added. Instead, overturning the old precedent that, in the words of Willes J, the act must be

[3] *Master and Servant*, 186
[4] Brill, *The Liability of an Employer*, 4.
[5] (1834) 6 C & P 501.
[6] (1862) 1 H & C 526.
[7] *Master and Servant,* 186.
[8] Leiser, *Respondeat Superior, 338*-339.

"for the master's benefit", the House of Lords deemed that the fraudulent acts of a managing clerk in a solicitor's firm did not have to benefit the firm in order to hold the firm vicariously liable.[9] As such, the idea that vicarious liability should only be applied to cases where the master benefitted from the tort was removed from the law.

By the mid-twentieth century the exemption of wilful acts from vicarious liability was overturned in the United States, giving way to a definition similar to that in English common law. The wilfulness exemption to the doctrine was overturned in a Virginia case (among others) in 1948, where it was deemed that the master was vicariously liable if the wilful act was committed in the interest of the master's business. A more radical 'liberalisation' of the doctrine emerged in a 1955 Georgia court case, which saw the distinction move between determining whether the servant had *willingly stepped out of his employment*, to whether the servant's act was *sufficiently close in connection to their employment* to hold the master vicariously liable for it.[10]

This 'close connection test' has been the emphasis of vicarious liability cases in England since the end of the twentieth century. The change has shifted the paradigm of vicarious liability further away from the nineteenth century 'wilful' and 'master's benefit' considerations. *Lister v Hesley Hall Ltd* (2001) was a mark of this change. In this case, the warden of a boarding annex of a school was found guilty of sexually abusing the boys in the annex. A Court of Appeal decision rejected the initial claim of vicarious liability against Hesley Hall Ltd, but an appeal in the House of Lords found Hesley Hall Ltd vicariously liable for the sexual abuse of the boys by the warden, despite acting clearly outside the 'scope of employment'.[11] The doctrine of vicarious liability evolved in two ways in this case. *Lister* set the precedent that masters could be found vicariously liable for sexual abuse by servants and the opportunity to commit a tort – derived from the authority provided by their position as a servant – could lead to claims of the doctrine against employers. It must be noted that Lord Millett did draw upon the Australian case *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 to distinguish how the 'opportunity'

[9] [1912] UKHL 606.
[10] Leiser, *Respondeat Superior,* 340.
[11] [2001] UKHL 22.

component is negated when a supervisor to the tortious servant is present when the tort is committed.[12] Nevertheless, *Lister v Hesley Hall* created a precedent which left vicarious liability open to further expansion. Indeed, more recent cases and appeals in English courts, such as *The Catholic Child Welfare Society v Various Claimants and the Institute of the Brothers of the Christian Schools and others* (2012)[13] has demonstrated the result of this expansion. In this case (also called the 'Christian Brothers' case), the Institute of Brothers of Christian Schools was found vicariously liable for the sexual abuse of boys by the volunteers in the Institute (the 'brothers'), given the fact that the servants had been placed in relationships by the boys where there was a "significantly enhanced risk" of sexual abuse.[14]

Recent editions of legal reviews in the United States have highlighted a marked rigidity – compared to the English courts at least – in the application of the doctrine regarding sexual misconduct (the central issue of the 'Christian Brothers' case). Since the 1980s, courts in states including Georgia and Connecticut have dismissed vicarious liability claims involving intentional sexual misconduct by the servants.[15] The Californian courts in *Lisa M v. Henry Mayo Newhall* regarded "opportunity" to commit a tort alone insufficient for vicarious liability to hold; rather, an "emotional involvement" between the tortfeasor and victim and authority deemed as "coercive" are necessary for the doctrine to hold on the grounds of the 'scope of employment' angle. [16] Regarding religious 'masters', a doctrine has been established in the United States some call "church autonomy", whereby religious employers are treated (in a general sense) as not being liable for the torts of their servants. This doctrine is particularly pronounced with denominations like the Catholic Church, where sexual abuse by 'servants' is specifically forbidden. Some have questioned this doctrine, particularly since the aforementioned 'coercive authority' idea is very much applicable with many sexual abuse cases in the Catholic Church.[17]

[12] [2001] UKHL 22, para 81.
[13] [2012] UKSC 56.
[14] [2012] UKHL 56, para 85-87.
[15] Hornbeck, *Four Approaches*, 993-994.
[16] Sartor, *The Implications of Fearing v. Bucher,* 712.
[17] Hornbeck, *Four Approaches*, 997-998.

As such, 'opportunity' to commit a tort, derived from the authority invested in a servant by the master, has become an important part of Anglo-American common law decisions on vicarious liability. The 'church autonomy' idea in American common law puts vicarious liability under greater constraints than in English common law. Are these constraints necessary? Just because the Catholic Church specifically forbids sexual assault should not mean that vicarious liability should be treated differently. The secular laws of both England and the United States explicitly forbid sexual assault, so why should a Church authority be any different? Later in the paper, a significant American case challenging this unusual exemption will be discussed.
Before discussion of very recent legislation, an assessment of the various rationales for the doctrine of vicarious liability in Anglo-American common law should be made to fully understand why it exists in the expanded state it does today. Theories for the expansion of the doctrine are grounded in the fundamental idea that vicarious liability is ultimately a matter of public policy. Paragraph 40 of *Mohamud v WM Morrison Supermarkets Plc* (2016) made this much clear.[18] There is, though, a great deal of nuance to be considered within the sphere of public policy. Several theories have been suggested as to exactly why one might be held vicariously liable in increasingly extreme circumstances, which will now be discussed.
Firstly, arguably the most prominent theory justifying vicarious liability is that of the "deeper pockets" theory.[19] This idea is rather straightforward: it posits that vicarious liability is claimed against 'masters' because they are often much better placed to compensate the victim of a servant's tort than the servant themselves.[20] It must be noted that this theory is not considered as *per se* sufficient justification for the application of the doctrine[21] – indeed, if this were (absurdly) the case, litigation would rarely be needed for vicarious liability. It does, however, fit well as a theory into the wider 'public policy' framework of the doctrine. Punishment of the servant is dealt with separately to vicarious liability cases but may not yield civil compensation for victims of the servant's tort. As such, it is only right that the party best placed to

[18] [2016] UKSC 11, para 40.
[19] Luskin, *Caring About Corporate "Due Care",* 304. Leiser, *Respondeat Superior,* 341. Brill, *The Liability of an Employer,* 2. Sykes, *An Efficiency Analysis of Vicarious Liability*, 172.
[20] Brill, *The Liability of an Employer,* 2-3.
[21] Sykes, *An Efficiency Analysis of Vicarious Liability,* 172.

compensate for the actions of the servant – often the master – should offer compensation instead. As such, vicarious liability works to this end in that it compels the master to offer such compensation. The 'deeper pockets' rationale for vicarious liability is therefore understandable, though insufficient in itself as a reason for the expanding number of cases to which it is applied.

The second prominent justification for the doctrine is one based on fault. That a master has appointed a careless servant to a position of responsibility, or failed to supervise them appropriately, means that the master should therefore bear some of the burden of the servant's tort.[22] Indeed, the aforementioned Australian case *Deatons v Flew* – which has influenced English cases – the barmaid who committed the tort was being supervised and, subsequently, the bar was not charged as vicariously liable.[23] Though this justification is a sensible one, the implication for companies and other 'masters' is that they must ensure that their employees are constantly under authoritative monitoring from a superior in the company. In reality, how feasible is this? Businesses have to balance their human capital costs against the likelihood of a situation in which vicarious liability might arise. For example, in *Mohamud v WM Morrison Supermarkets Plc* (2016), Morrisons was held vicariously liable for the intentional assault of a customer by a petrol station attendant. Following a verbal altercation in the kiosk, the attendant left the kiosk to pursue the customer, whom he then assaulted.[24] As such, is it really economically viable for Morrisons to constantly employ a supervisor in every petrol station to avoid the costs of a vicarious liability claim? It is understandable that courts have to uphold the social responsibility firms should have in society, which consists of – on a basic level – ensuring that their employees should follow the law. In many occupations, however, the risk of serious torts being committed within the 'scope of employment' should be incredibly small. On the other hand, consider a counterfactual in *Mohamud* briefly. If it was held that Morrisons was not vicariously liable for the assault of a customer by a petrol station attendant, it might encourage a *laissez-faire* attitude among firms to the actions of their employees. As such,

[22] Gilker, *Vicarious Liability*, 231.
[23] [2001] UKHL 22, para 81.
[24] [2016] UKSC 11

this second justification is an essential axiom when making full case-by-case assessments of vicarious liability claims.

The third and final justification, closely linked with the second, is the deterrence idea. This idea suggests that vicarious liability has a net beneficial effect to society in that it encourages employers to be vigilant to their employees' behaviour and, subsequently, reduce the chances of tortious acts being committed by the employees to third parties.[25] Being the most able to influence the decision of their employees during their course of employment, it should be the responsibility of employers to protect against future harm. The deterrence argument is an important consideration in the application of vicarious liability to specific cases. In holding a 'master' as vicariously liable for their servant's actions, it sends a message not only to the master/employer in question, but *all* employers, that they should be wary of their servants' actions. The demerits of this approach to vicarious liability were partially discussed in the previous paragraph. Though there are many realistic measures which employers can take to prevent their employees from committing torts, business costs have to be measured against the likelihood of a serious tort occurring within the course of employment. This might seem like a very cold approach but, as a business, profit margins are naturally a vital consideration.

Following on from the third justification, should considerations about the 'type' of employer be made? With businesses, the profit motive means that it might not be in the best interests of businesses to try their best to protect against employees' torts, as the costs of protection might outweigh any compensatory payments from a rare vicarious liability claim. There is also the additional element regarding firms that as paid employees, it is not unreasonable to suggest that servants have considered the risk of losing their financial livelihood before – or during – committing a specific tort. How effective, then, is 'deterrence' as a motive against private businesses? The financial burden of deterring torts is their largest consideration. Voluntary organisations, however, do not have to bear the cost considerations of salaried employees. To increase supervision of servants in a voluntary organisation is not subject to the cost considerations of salaried employees.

[25] Gilker, *Vicarious Liability*, 241-242. @

As such, the 'deterrent' motive for enforcing vicarious liability should theoretically be more effective in voluntary groups than in businesses, as voluntary groups do not have to bear employment costs and can, as such, modify the structure of their organisations at a smaller expense than that of private firms.

It is clear that vicarious liability has expanded considerably from its nineteenth-century grounding, but some of this expansion is perfectly understandable. Common law is a system designed in such a manner so that law can move with the times. Indeed, vicarious liability has been, as Lord Philips said in 'Christian Brothers', "on the move."[26] But have the fundamental principles changed from the original essence of the doctrine? The 'scope of employment' test was the early basic foundation for vicarious liability, with the 'close connection' test seeking to provide a more expansive idea of 'scope', where actions were connected with opportunities presented by the authority of the employment. Recently, however, cases involving a vicarious liability claim have questioned the application of the doctrine to 'masters' beyond the form of a business constituting 'employer' and 'employees', including unincorporated associations, voluntary organisations, and the Catholic Church. To these groups, finding a 'close connection' is even more important, since the level of control that the 'masters' have over 'servants' who are not direct employees is not as clear *prima facie* as in a standard employment relationship.

Though vicarious liability has seen movement in the past two decades, two recent UK Supreme Court decisions might have brought this movement to a necessary halt. The judgments of *WM Morrison Supermarkets plc v Various Claimants* (2020)[27] and *Barclays Bank plc v Various Claimants* (2020)[28] were both given on the same day this year, holding that both WM Morrison Supermarkets plc and Barclays Bank plc were not vicariously liable for the torts of their 'servants.' In the former case, an internal auditor of Morrisons breached the Data Protection Act by sending the payroll data of over 100,000 Morrisons employees to three UK newspapers. The task he had originally been assigned to do was to share the payroll data with KPMG so that they

[26] [2012] UKSC 56.
[27] [2020] UKSC 12.
[28] [2020] UKSC 13.

could test their accuracy in an external audit. The Supreme Court held that the internal auditor was acting outside the scope of the tasks assigned to him, stating that the "opportunity" to commit the tort alone did not mean that Morrisons was vicariously liable.[29] In the latter case, a doctor, as an independent contractor used by Barclays Bank plc, was tasked with carrying out the medical examinations in Barclays's application process. The doctor sexually abused some of the applicants during the medical examinations. The Supreme Court held that Barclays was not vicariously liable for the sexual abuse by the doctor on the basis that his relationship with Barclays was not close enough to be construed as employment, hence representing the modern importance of indirect master-servant relationships in vicarious liability cases today.[30]

The significance of the UK Supreme Court's repudiating the continued expansion of vicarious liability is that the Supreme Court has now set definite limits of vicarious liability as a doctrine. There has been no change of the principles of vicarious liability which could warrant further expansion; indeed, 'scope of employment' seems as relevant a consideration now as it did in the nineteenth century. The 'close connection' test had to be made as a necessary consideration of how servants can abuse the authority handed to them by their masters. But the important principle of these decisions is that the courts of England will now be able to more clearly identify instances where vicarious liability should *not* be held. As such, it may help set the doctrine 'on ice' for a time, given that vicarious liability has expanded considerably since the nineteenth century and courts should be weary of 'overexpansion'. By bringing more 'master-servant' style relationships into the fold of vicarious liability, courts have the potential to inhibit judicial economy, even when public policy considerations are made.

The situation in American common law stands at a similar point. Though American courts have been reluctant in applying the doctrine both in instances of intentional torts and when religious employers are involved, cases like *Fearing v Bucher* 977 P.2d 1163 (Or. 1999) have put institutions of religious faith under greater scrutiny and suggests that the intentional torts

[29] [2020] UKSC 12.
[30] [2020] UKSC 13.

exemption is being moved aside.[31] 'Gig economy' jobs are set to be the new frontier of the vicarious liability doctrine. Though it is rare for firms hiring independent contractors to be held as vicariously liable unless there is a "high level of control",[32] people who work for firms like Uber straddle the line between independent contractor and employee. As a result, US courts have expressed difficulty in providing an exact definition for 'master-servant' relationships in this grey area.[33]

Anglo-American courts will undoubtedly continue to struggle defining the exact boundaries of vicarious liability, particularly with the increasing complexity of relationships which can be considered akin to employment. The largest recent developments have been about placing sexual abuse as being within the 'close connection' radius of vicarious liability tests. Religious employers have, as evidenced the judgments in *Fearing v Bucher* and 'Christian Brothers', found themselves increasingly within reach of vicarious liability. Courts have recognised that "spiritual authority" offered by roles in a religious organisation can lead to these 'servants' committing torts, subsequently meaning that religious organisations can equally be found vicariously liable as 'servants.'[34] Wilful torts and torts for the servant's benefit can now result in successful vicarious liability claims against masters, representing the largest contrasts in the doctrine between the nineteenth century and the present. Nevertheless, these aspects are still important considerations in cases today. In *Mohamud,* the fact that the servant told the third party not to return to the petrol station suggested that the servant was acting to benefit the master, ultimately contributing to the judgment that Morrisons was vicariously liable.[35] The two aforementioned 2020 UK Supreme Court decisions suggest that limits to the expansion of the doctrine are now being set – for the time being. In America, the blurring of the independent contractor exemption may lead to further expansion of vicarious liability. When deciding whether to expand the doctrine further, however, the courts should always remember *why* they are doing it. When holding

[31] Sartor, *The Implications of Fearing v. Bucher,* 690-691. Patrick Hornbeck, *Four Approaches,* 1030.
[32] Pager, Priest, *Redeeming Globalization*, 2490.
[33] Vazquez, *The Sharing Revolution*, 650-651.
[34] Hornbeck, *Four Approaches,* 1027-1028.
[35] [2016] UKSC 11, para 47.

organisations vicariously liable, courts must bear in mind the public policy implications of doing so. The actual tests for vicarious liability – the 'close connection' and 'scope of employment' tests – are of course vital to the outcomes of cases, but when judgments are on the fence, what really needs to be asked is whether the outcome of the case will actually deter future torts. The UK Supreme Court's recent judgments suggests that some 'limits of liability' may have indeed been set, but the proliferation of employers and 'servant' roles in the 'gig economy' means that those limits might yet be pushed further.

How Should the State Interact Constitutionally with Corporations which have significant power and influence over its population? Lessons from the Impeachment of Warren Hastings, 1788-1795

By Nathan Beck-Samuels

|Preamble|

How to maintain constitutional accountability over large corporations is an increasing theme in contemporary politics. The impeachment trial of Warren Hastings in 1788-1795 addressed this directly with the behaviour of the East India Trading Company. What lessons for today are illustrated by this historical trial?

The question how to maintain constitutional accountability over large corporations has been an increasing theme in contemporary politics. Governments and Courts across the globe have been addressing several constitutional issues in the last decade as a result of corporate behaviour. In North America, for example, Congressional hearings and investigations into tech companies have raised questions both around the integrity of freedom of speech online, and the exploitation of digital media platforms by foreign adversaries to influence democratic elections. In Europe, legislation such as the General Data Protection Regulation (GDPR) aims to protect digital privacy rights and address exploitation of user data on digital platforms. Furthermore, in Australia, proposed legislative attempts to address bargaining imbalances between media companies and digital platforms has highlighted the dangers of market monopoly. The notion as to whether these large and powerful corporations are 'too big to fail' or are dangerous to the stability of democracy raises serious questions for society. However, there is an important question which underpins these actions – one which is jurisprudential in nature: how should the State interact constitutionally with corporations which have significant power and influence over its population? History can provide a guideline to this question. The question as to how States can and should interact constitutionally with powerful corporations, and how States can constitutionally hold corporations accountable, was explored and discussed in the 18th century during the Impeachment trial of Warren Hastings – Governor-

General of Bengal – between 1788-1795. The nature of the trial stretched far beyond that of debating the actions of one colonial administrator, however, but that of the role and behaviour of the East India Trading Company (EITC) – one of the most successful, and powerful, corporations of the British Empire. Albeit in a colonial context, the EITC was accused of abusing power, disregarding human rights and dominating trade markets in India. What lessons can therefore be drawn from the 1788-1795 impeachment trial as to how governments, and courts, can and should interact constitutionally with large corporations in contemporary politics? What similar themes are addressed in both the historical and contemporary scenarios, and what aspects have changed over time? By analysing the impeachment trial as an historical case study, and comparing this with recent constitutional challenges, further insight can be achieved, and discussion encouraged, into the constitutional relationship between the State and corporations.

The first day of the Impeachment trial in Westminster Hall, London, on 13th February, 1788, demonstrated the extraordinary nature of the trial. The grounds around Parliament were bustling with spectators queuing to collect tickets to witness the trial. Amongst the 170 members of the House of Lords were 200 members of the House of Commons and several barristers, lawyers, and legal clerks. Even Queen Charlotte of Mecklenburg-Strelitz was in attendance.[36] The importance of the trial was not focused on the acts and misdeeds of Warren Hastings himself, however, but that of the company he represented – the East India Trading Company. Founded in 1600, the EITC was one of the first share-holder companies to arise from the Elizabethan era.[37] Conducting trade between Britain and India, the company had grown in size, scale and power across India by the end of the eighteenth century to become a dominant military, economic and governing power on the continent.[38] As a result, the behaviour of one of the Empire's largest companies was now under intense legal scrutiny. Members of the prosecution at the trial included that of Charles James Fox (a radical arch-rival to William Pitt the Younger); the playwright Richard Brinsley Sheridan; and Edmund Burke – a prominent

[36] Dalrymple, *The Anarchy*, pp. 307-308
[37] Keay, *The Honourable Company*, p. 9
[38] Stern, *The Company State*, pp. 3-6

Whig and political theorist known for his opposition towards taxation in the American colonies (and later the French Revolution).[39] The prosecution was influenced and encouraged by Sir Philip Francis – an Irish-born politician who previously served on the Supreme Council of Bengal at the time of Hastings' position as Governor-General. Francis took an instant dislike towards Hastings – accusing the Governor-General of extortion and corruption for his own financial gain. Francis' grudge grew further following an unsuccessful duel, in which he was wounded, against Hastings in 1780.[40] Cooperating with Burke, both he and Francis coordinated a five-year campaign in Parliament to investigate the behaviour of Hastings and the EITC in India and bring charges. With Burke's dramatic four-day opening oratory he laid out the accusations against Hastings before the anticipating crowd in Westminster Hall: "We have brought before you the head, the chief, the captain-general of iniquity…", said Burke in his opening speech, "…one in whom all the frauds, all the peculations, all the violence, all the tyranny in India are embodied, disciplined and arrayed."[41] Burke went on to accuse Hastings on twenty-two charges of indictment for high crimes and misdemeanours. These included acts of peculation, bribery, coercion in the province of Oude, and extortion against local princes such as the Nawab of Lucknow, Asaf ud-Daula and the Begums of Avadh to fund military campaigns against the Tipu.[42] [43] [44]

The impeachment trial against Hastings was not only as a result of his personal actions, however, but a last attempt by Parliament to address decades of EITC behaviour in India. The first attempt was in 1773 with the ratification of the East India Trading Company Act.[45] In response to reports of embezzlement and bribery, in addition to the company's financial ruin caused by widespread famine across the Indian continent, the Act sought to limit financial freedom through government oversight, prevent bribery and corruption with local leaders, establish British law in India, and restructure the management of the company (inaugurating Hastings as the Governor-General).[46] This proved to be a short-term solution, however. Abuses of power, corruption with local

[39] Burke, *On American Taxation*, p. 5
[40] Dalrymple, *The Anarchy*, pp. 249-250
[41] Burke, *The Writings and Speeches of Edmund Burke,* Vol. 6, pp. 275-276
[42] Marshall, *The Impeachment of Warren Hastings*, pp. xiv-xv
[43] Dalrymple, *The Anarchy*, p. 312
[44] Burke, *The Works of the Right Honourable Edmund Burke*, p. 424
[45] 13 Geo. III c. 63
[46] Bowen, *British India,* pp. 539-541

princes and the unsuccessful (and expensive) Second Mysore War between 1780-1784, forced Parliament to introduce a second Act in 1784.[47] The Act of 1784 (known also as Pitt's India Act) introduced direct administrative changes to the management of the company – establishing a 6-man privy council, a joint-governed board of State and corporate members and a President of Board which acted as Secretary of State (ultimately removing Hastings from his position as Governor-General).[48] [49] However, from the viewpoint of the prosecution, Hastings, because of his position, was ultimately culpable for the prolonged mercantile misdeeds of the company. The impeachment trial was therefore a platform for debate and scrutiny of the company's behaviour in India. "I impeach [therefore] Warren Hastings, Esquire, of High Crimes and Misdemeanours…", concluded Burke on a dramatic fourth day of his opening speech at the trial, "…I impeach him in the name of the Commons of Great Britain in Parliament assembled, whose Parliamentary trust he has betrayed…[and] whose national character he has dishonoured." The list of impeachable offenses stretched far beyond Britain, however: "I impeach him in the name of the people of India, whose laws, rights and liberties he has subverted, whose properties he has destroyed, and whose Country he has laid waste and desolate." Hasting's activities were, according to Burke, much more severe: "I impeach him in the name and by virtue of those eternal laws of justice…he has violated. I impeach him in the name of human nature itself, which he has cruelly outraged, injured and oppressed, in both sexes, in every age, rank, situation and condition of life."[50] In other words, Hastings and the company had robbed India. Not just for its resources and wealth to acquire financial gain and territorial expansion, but of the dignity and human rights of Indians and their communities.

Despite the pomp and circumstance of the trial, and vicious accusations led by the prosecution, Hastings was acquitted of all charges on 23rd April, 1795. Nevertheless, the trial provided a jurisprudential debate about how the State can, and should, interact constitutionally with corporations. More specifically, the prosecution facilitated a discussion as to how Parliament can hold

[47] 24 Geo. III Sess. 2 c. 25
[48] Ray, *Indian Society and the Establishment of British Supremacy,* pp. 520-521
[49] Bowen, *British India*, pp. 544-545
[50] Burke, *The Writings and Speeches of Edmund Burke*, Vol. 6, p. 459

corporations, which practice unchecked and conducting malignant behaviour, accountable. Perhaps one of the most important jurisprudential aspects of the trial was the accusation that the EITC had violated and ignored the human rights of Indians which were, as argued by the Prosecution, universal in nature. As stated by Burke during his opening speech, "the laws of morality are the same everywhere, and there is no action which would pass for an act of extortion, of peculation, of bribery, of oppression in England which would not be an act…in Europe, Asia, Africa and the world over."[51] Burke was accusing the EITC of violating the natural rights of Indians through its activities of commerce and trade – something which he argued should not be tolerated under any jurisdiction. Such natural right violations that Burke was referring to included that of the use of torture (taking away one's right to life), coercion (that of limiting one's liberty) and tax collectors ransacking villages and communities (impeding one's right to property). Indeed, Burke went further to say that the company was "more like an army going to pillage the people under the pretence of commerce than anything else."[52] Although the prosecution used the violation of natural rights by the EITC as an argument for impeaching Hastings, they were referring to an important constitutional aspect of the role of the State and its use of the rule of law – that of a duty to protect natural rights. The theory that the State has a responsibility to protect natural rights refers to the ideas of the Social Contract Theory – a philosophy developed during the Age of Enlightenment – that envisaged the State must protect the natural rights of people in return for the surrender of a part of their liberty to the State.[53] The concept had gained traction following the 1770s; the US Declaration of Independence in 1776, and later the US Constitution in 1789, both stress the importance of this doctrine.[54] Furthermore, the Declaration of the Rights of Man and of the Citizen in France, in 1789, had further promoted State protection of natural rights albeit at a constitutional level.[55] By bringing the EITC accountable through legal scrutiny before Parliament, the British State was performing its duty of protecting the natural rights of the people of India (and therefore acting in line with the social contract theory) against the

[51] Burke, *The Writings and Speeches of Edmund Burke,* Vol. 5, pp. 401-402
[52] As quoted in Dalrymple, *The Anarchy*, p. 310
[53] Alcock, *A Short History of Europe*, pp. 164-165
[54] Gosewinkel, *The Constitutional State*, pp. 950-951
[55] Hunt, *The Declaration of the Rights of Man and of the Citizen*, pp. 77-84

behaviour of the EITC. It must be noted, however, that although the people of India were not subjects of the British Empire at this time (as India was not under formal British rule until 1858), the EITC was ultimately answerable to the British parliament – therefore the argument of the prosecution still stands. The prosecution therefore highlights an important lesson from the impeachment trial of Warren Hastings; that the State will interact constitutionally with powerful corporations to protect the natural rights of citizens through legal scrutiny and upholding the rule of law.

Another jurisprudential aspect of the impeachment trial of Warren Hastings which demonstrated how the State interacted constitutionally with the EITC was that of the notion around the nature of Sovereignty and legitimate governance. The prosecution argued that the EITC was not a legitimate body to govern India as it did not have the necessary checks and balances which make a national government a legitimate governing body. Burke's dramatic opening speech again portrays this: "The Company in India does not exist as a nation…the consequence of which is that there are no people to control, to watch, to balance against the power of office." Furthermore, "[Hastings] has used oppression and tyranny in place of legal government."[56] Burke was suggesting therefore that, as the people of India had no influence nor power to change the management of the company, they could not apply a checks and balance system to remove the company if it conducted tyrannical behaviour. The company, therefore, had not the legitimacy from the people of India to govern Bengal. As a result, the company had no sovereignty over the region. Whilst this argument may refer to the works of Rousseau and his ideas that sovereignty can only be held in the people, this becomes particularly apparent when considering both the East India Trading Company Acts passed by Parliament in 1773 and 1784, respectively. Both Acts established greater parliamentary scrutiny and control over the financial freedom and administrative management of the company through joint governance (the equivalent of a modern-day public-private partnership). In doing so, Parliament (i.e. the State) had installed a checks and balance system against the company through the legitimacy of the British people (and therefore

[56] As quoted in Dalrymple, *The Anarchy*, p. 309

reaffirming the authority and legitimacy of British sovereignty over the company). Whilst this may represent colonial ambitions of the West at the time (by that of gradually legitimising British rule over India), it does provide an example of how the State interacts constitutionally with corporations which have conducted malevolent behaviour and has significant influence over a population – that of partly or completely nationalising companies so to provide a checks and balance system, and greater scrutiny, against the behaviour of the company.

When comparing the historical case of the impeachment trial of Warren Hastings with the modern-day, there are a number of stark differences which need to be mentioned. The first is that companies in the twenty-first century do not feature their own standing armies. The second is that, thanks to the development of Sovereignty and the rule of law through international organisations, formal colonialism no longer takes place in the twenty-first century. A third difference is that, as a result of deindustrialisation, the nature of how the majority of companies operate and conduct their services in developed countries has transferred from tangible to intangible economies. However, the European idea of the corporation has endured and outlived imperialism; the twenty-first century has an abundance of multinational corporations – some of which have a market capitalization larger than that of nation-States – that conduct their operations in multiple countries across the globe. What are the similarities, therefore, as to how States interact constitutionally with powerful corporations today, and has it changed since the impeachment trial of Warren Hastings?

The first jurisprudential lesson of the impeachment trial of Warren Hastings – that of the State interacting through the rule of law to protect natural rights – can be found in politics and international law today. The nature of these rights, and where these rights are situated, has shifted, however, from the tangible sphere in the case of the EITC to an intangible sphere on digital platforms (for example, the rights of life, liberty and property have been transferred into privacy, behavioural modification and consumer data in the intangible sphere). Nevertheless, the way in which the State has interacted constitutionally with corporations to uphold these rights has not changed since

the 18th century. A prominent example of where this has become apparent is the General Data Protection Regulation (GDPR) implemented by the European Union (EU) in 2018. The regulation attempts to address the harvesting and exploitation of consumer data by increasing the powers of the consumer to approve, prohibit and access their data on digital platforms – such as consumer consent to approve personal data use, protections against algorithms and a right to the erasure of data.[57] Article 1 of the policy bluntly represents the regulation's aim: "This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."[58] Although the EU is a supranational governing body made up of multiple sovereign States, it nevertheless demonstrates that the State (or in this case States) will interact constitutionally with corporations by protecting the natural rights of citizens – regardless of the nature of the sphere in which those rights are situated. Other examples where this is the case include that of the 2000 Personal Information Protection and Electronic Documents Act (PIPDE) in Canada, the 2018 Data Protection Act (DPA) in the UK (which enshrined GDPR into British law) and the 2018 California Consumer Privacy Act (CCPA) in California, United States, amongst others across the globe. How the State interacts constitutionally with corporations in this aspect has therefore not changed since the impeachment of Warren Hastings.

The lesson that the State will interact constitutionally to assert State sovereignty to provide a series of checks and balances against corporations which embody governing behaviour – as demonstrated by the impeachment trial – is an area which has changed, or become more complex, since the 18th century. As a result of privatisation policies in the 1980s and 1990s, the decreased responsibility of the State has changed its approach to addressing corporate behaviour which has significant influence (and therefore governance) over its population. Whereas partial or complete nationalisation was an approach used by the British State in the 18th century to regulate the EITC, nationalisation is now predominantly used as a means of providing

[57] Zuboff, *The Age of Surveillance Capitalism*, p. 481
[58] OJ L-119, p. 32

economic sustainability to corporations which provide essential services.[59] This has shifted to applying checks and balances through the authority of legislation only. Such an example is the GDPR introduced by the European Union as previously mentioned. However, the intensification of globalisation has made the approach of checks and balances through legislation more complex and difficult for States to address corporate governance. The jurisdictional legitimacy to change the behaviour of misbehaving corporations which originate from another State has made the debate political, and diplomatically complicated. An example where this is apparent is the current debate surrounding the proposed Treasury Laws Amendment Act in Australia. Intended to address bargaining imbalances between Australian media companies and digital platforms (such as Facebook and Google), the proposed bill (if ratified) will allow Australian media companies to bargain with digital platforms to pay for its media content by law.[60] From a jurisprudential point of view, the proposal is a demonstration of the State attempting to provide a checks and balance system, through legislation, to control the behaviour of an organisation which is outside State control. However, in this case, the State cannot directly influence, change or regulate the management of the company and therefore prevent its behaviour from repeating or occurring in other States. Jurisdiction ultimately lies with the State that the company originates from. The complexity of globalisation and jurisdictional legitimacy of the State to bring corporate behaviour to account suggests that two changes have occurred since the 18th century. The first change is that the responsibility of the State to apply checks and balances on corporations which behave in a malignant manner has, to some degree, increased since the 18th century. The second is that large corporations, which have significant governing influence over population, market, or workings of a State, will be subject to greater scrutiny from the jurisdictional Parliament to which the company is ultimately accountable.

The impeachment trial of Warren Hastings between 1788-1795 facilitated a jurisprudential debate as to how the State can, and should, interact

[59] An example of this is the partial nationalisation of the Royal Bank of Scotland by UK Government Investments in 2008.
[60] Parliament of Australia, *Treasury Laws Amendment Bill 2020, pp. 1-29*

constitutionally with corporations which harvest significant influence over a population. By scrutinising the behaviour of the East India Trading Company and its actions in India, the prosecution of the impeachment trial found two lessons as to how the State should interact constitutionally – that of upholding the rule of law to protect the natural rights of citizens, and the need to apply checks and balances by asserting State sovereignty through co-management of corporations. Such lessons are evident in the twenty-first century: States across the globe are introducing legislation aimed at protecting the natural rights of citizens against digital corporations. The intensification of globalisation, however, has changed the complexity of providing checks on corporate behaviour and raises questions around the jurisdictional legitimacy of States to hold global corporations accountable.

Truth or Consequences

By Claire Macleod

|Preamble|

This paper offers an overview of the 1950s American quiz show scandal that revolved around the 'rigging' of CBS and NBC programs The $64,000 Question and Twenty-One during an unprecedented transformation and rapid growth of the post-war American media landscape.

'I was involved, deeply involved, in a deception. The fact that I, too, was very much deceived cannot keep me from being the principal victim of that deception, because I was its principal symbol.'[61]

When Charles van Doren read out this prepared statement to Congress in 1959, his words would disillusion a nation. The dashing, young, Columbia professor had risen to fame through his success on a popular quiz show, *Twenty-One*, only to be forced to admit to the United States Congress that the game had been rigged and that America's intellectual heart-throb was a fraud. This revelation would not only shock and disappoint millions it would also prompt an amendment to the 1934 Communications Act making it a *federal crime punishable by imprisonment* to 'influence, pre-arrange, or predetermine' the outcome of 'a 'bona fide contest of intellectual knowledge'.[62] It is difficult for modern viewers, who are so accustomed to televised deception for the sake of ratings, to understand the impact this case had on the American audience. How gullible could they have been to think that a popular quiz show sponsored by Geritol (a pharmaceutical that cured 'tired blood') could be anything but a sham? For the last few decades, the 1950's quiz show scandal has been consigned to, as contemporary D.A. Joseph Stone put it, 'error-riddled chapters in nostalgia picture books about television'.[63] Recently, however, its ethical and legal precedent has been resurrected in light of growing concerns for the 'mass attention' paid to

[61] Congress, House, Committee on Interstate and Foreign Commerce, *Investigation of Television Quiz Shows*, 86th Cong., 1st Sess., November 2–6, 1959 (Washington, D.C.: U.S. Government Printing Office, 1960).
[62] 47 U.S.C. § 509
[63] Joseph Stone, Prime time and misdemeanors: investigating the 1950s quiz show scandal: a DA's account, (New Brunswick, 1992), p. 9.

companies like Google and Facebook whose algorithms inadvertently deceive large audiences for advertising revenue.[64] Yet, the extent to which the quiz show scandal is applicable, both ethically and legally, to modern legislation is contingent on its historical context and use in case precedent. Apparent in this bizarre episode of legal history is the considerable injustice of the scandal itself but also the difficulty in effectively legislating against mass deception.

According quiz show host, Jack Narz, 'the night that $64,000 Question was on, you could shoot a cannon down the street, 'cause nobody was on the street. Everybody was at home watching that show.'[65] This primacy of popular television programs are a feature of what Tim Wu referred to as the era of 'peak attention'.[66] Radio had laid the groundwork in the first half of the century but the rapid introduction of television and Nielsen ratings into American homes would expand both the size of the American audience and their advertising potential. In 1956, with 72 percent of American homes owning a television, broadcasters could command the attention of up to 82.6 percent of those viewers on a single program.[67]

The quiz show concept, originally conceived in radio, was introduced to television with William Paley's CBS program, *The $64,000 Question*. It became an instant success beating the former CBS heavyweight title, *I Love Lucy* within its first year and prompting copies from NBC.[68] The show's sponsor, Revlon, would experience a two hundred percent increase in sales and would keep close tabs on contestants' ratings and their effect on product sales. Revlon exerted pressure on the show's producers to keep highly rated contestants on television and to 'stiff' the duller contestants. When NBC created its quiz show *Twenty-One*, as producer Daniel Enright stated, 'the first show was not rigged and the first show was also a dismal failure. It was just plain dull.' According to Enright, 'the next morning the sponsor called

[64] Key argument in Tim Wu, *The Attention Merchants*, (New York, 2017), p. 207.
[65] Jack Narz interviewed in The American Quiz Show Scandal, Michael L. Lawrence, PBS Documentary (1991), https://www.youtube.com/watch?v=u6bPGl6y8qA&t=627s&ab_channel=TheDevil%27sGame, [1 November 2020]
[66] Wu, *The Attention,* p. 207.
[67] *Ibid.*
[68] George Brietigam, *Keeping it Real: How the FCC Fights Fake Reality Shows with 47 U.S.C. 509*, 22 CHAP. L. REV. 369 (2019)., p. 376.

[…] and told us in no uncertain terms that he never wanted to see a repeat of the previous night. And from that moment on, we decided to rig *Twenty-One*.'[69]

On both *Twenty-One* and *The $64,000 Question,* popular contestants would be given the answers and coached on how to behave in the 'isolation booth' so as to heighten the suspense. The most successful personality was, of course, the charming, clean-cut Charles van Doren who was brought on to defeat the uncharismatic Herbert Stempel. Van Doren 'was the kind of guy you'd love to have your daughter marr[y]' and, with his defeat of Stempel, would become the nation's intellectual hero.[70] This national adoration would be brief, however, for Stempel and other 'stiffed' contestants would inevitably come forward with the disillusioning truth.

The revelation came first from the CBS show, *Dotto,* when a stand-by contestant, Edward Hilgemeier, noticed a notebook of answers in the dressing room of another contestant. His would be the first verified accusation of quiz show fixing and would add considerable credibility to Herbert Stempel whose accusations against CBS had up until then been dismissed as the behavior of a 'sore-loser'. After several more accusations were launched against the programs, New York District Attorney Joseph Stone convened a grand jury that heard the testimony of one hundred and fifty witnesses including former contestants and network producers. Of these witnesses, at least one hundred denied the accusations and perjured themselves in front of the jury. After nine-months of testimony, the judge sealed the case only for it to be opened again by the US Supreme Court Subcommittee for Legislative Oversight. The Subcommittee would hear further testimony in Washington in October 1959 that saw Charles van Doren testify first to deny the rigging and then, in November 1959, confess his involvement. Ultimately, van Doren and a number of other contestants including a producer would be convicted of perjury but their sentences were

[69] *The American Quiz Show Scandal*, https://www.youtube.com/watch?v=u6bPGl6y8qA&t=627s&ab_channel=TheDevil%27sGame, [1 November 2020]
[70] *Ibid.*

suspended and none faced serious legal consequences.[71] Their punishments were handled in the court of official opinion which saw van Doren dismissed from Columbia and the producers (temporarily) exiled from the entertainment business. For their part, the sponsors emerged with doubled profits and zero consequences.[72] Meanwhile, the American audience was left feeling betrayed and disillusioned with the medium of television.

It was in this atmosphere of disillusionment that Congress passed 47 USC § 509 'Prohibited practices in contests of knowledge, skill, or chance' to prevent future 'crass frauds'. The most fascinating element of the quiz show scandal and trials was the apparent absence of any law that specifically prohibited fixing a game show. Yet, for the last sixty years, the application of the statute that emerged from the trials has been limited in scope and applicability.[73] Its weakness in practice was noted as early as 1966 when the producers of the show *Hollywood Squares* prompted celebrity guests with questions and answers in advance but were absolved of potential violation as the celebrities were not considered contestants and the 'inquiry revealed no evidence that the contestants themselves had been supplied with secret assistance.'[74] Despite this case clearly pre-determining the outcome of an 'intellectual contest' and deceiving an audience, the FCC sets a precedent for considerable administrative loopholes that allow for deception to occur so long as the contestant themselves are never *knowingly* given an unfair advantage.

In 1972, Gary F. Roth identified this administrative precedent as one of the key deficiencies in 47 USC § 509 as it is 'looking to the letter of the law in its practical context rather than the spirit of the law in its moral frame.'[75] If the spirit of § 509 was to prevent future mass televised deceptions for the gain of advertisers, its letter has so far limited its scope to preventing contestants from gaining specific advantages in a niche category of contests. More recent

[71] Stone, *Prime time*, pp. 3-6.
[72] Ibid. p. 329.
[73] Brietigiam, 'Keeping', p. 379.
[74] 14 FCC 2d at 976 (emphasis supplied), cited in Gary Franklin Roth 'The Quizzes and the Law: Fifteen Years after "Twenty-One" How Far Can They Go?', *Performing Arts Review* (1972), 3:4, p. 637.
[75] Roth, 'Quizzes', p. 638.

attempts to invoke § 509 have occurred in reality television programs but have been hampered primarily by the stipulation that the contest must be 'intellectual'. In 2001, a *Survivor* contestant claimed that the producers had tampered with the voting process to keep another contestant with more favourable ratings.[76] In 2013, one of the stars of *Storage Wars* claimed that producers had 'salted' the storage lockers with items that might enhance their interest. Both cases invoked 47 USC § 509 to no avail and both settled out of court.[77]

Kimberlianne Podlas reasoned that 47 USC § 509 does not apply to most reality shows today because of the notoriously difficult-to-prove stipulation of intent ('with intent to deceive the audience') and its specificity of 'intellectual contests' for which most reality TV does not qualify.[78] George Brietigam's investigation of the statute has shown that the FCC has occasionally investigated television shows for possible violation but that its limited interpretation of 'intellectual skill' (that excludes singing and stand-up comedy) often dismisses these complainants. It also primarily enforces 47 USC § 509 on rigged radio contests but private lawsuits from contestants rarely prove successful.[79] In essence, what Congress passed in the disillusioned post-scandal days of 1960 was legislation that functioned only in hindsight. 47 USC § 509 is, as Roth put it, 'a series of obstacles to past practices which can never be used again' and 'a conglomeration of vague and uncertain words which make most actions by quiz show producers capable of being misinterpreted.'[80]

The 1950s quiz show scandal and the limitations of 47 USC § 509 is, perhaps, a testament to what Google CEO Larry Page observed in 2013: 'Old institutions like the law and so on aren't keeping up with the rate of change that we've caused through technology….' Page went on to comment that 'A

[76] George Brietigam, 'Keeping it Real: How the FCC Fights Fake Reality Shows with 47 U.S.C. 509,' 22 CHAP. L. REV. 369 (2019)., p. 374.
[77] Lauren Etter, 'The Lawyers', *ABA Journal* 100, no. 12 (2014), p. 60.
[78] Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs "Illegal Contests" in Violation of Federal Law*, 25 *CARDOZO ARTS & ENT. L.J.* 141, 141–42 (2007), cited in Brietigam, 'Keeping', p. 374.
[79] Brietigam, 'Keeping', *p. 375.*
[80] Roth, 'Quizzes', p. 644.

law can't be right if it's 50 years old, like it's before the internet.[81] Television brought about an entirely new system of communication, entertainment, and deception in the short space of a decade. It was a new industry that quickly innovated to meet the demands of advertisers who had now inherited the systems of mass communication brought about by the 20th century wars. The quiz show scandal was a peculiar case of medium misuse that both preceded and precipitated industry legislation. The limitations of 47 USC § 509 are perhaps more understandable when considering the ad-hoc basis for their creation. An episode of mass deception that legislators could not have anticipated, limited in its applicability today by the industry's continual innovations for further deception.

[81] Jay Yarrow, 'Google CEO Larry Page Wants A Totally Separate World Where Tech Companies Can Conduct Experiments On People', 16 May 2013, <https://www.businessinsider.com/google-ceo-larry-page-wants-a-place-for-experiments-2013-5?r=US&IR=T?utm_source=copy-link&utm_medium=referral&utm_content=topbar> [8 November 2020]

Bilateral Investment Treaties

By Eamon Macdonald

|Preamble|

This paper, "Bilateral Investment Treaties: Liberal Tools Encouraging Greater Financial Direct Investment or Economic Nationalist Instruments?" will examine the legal arguments on how best to regulate Foreign Direct Investment, especially exploring the ramifications of the widespread use of Bilateral Investment Treaties (BTIs).

In November 1959, the Federal Republic of Germany and Pakistan signed a 'Treaty for the Promotion and Protection of Investments' with the stated intention of establishing 'favourable conditions for investments by nationals and companies of either State in the territory of the other State'[82]. Developed out of the Friendship, Commerce, and Navigation Treaties which had become commonplace in the 19th century, this seminal treaty between Pakistan and the Federal Republic of Germany came to be known as the world's first Bilateral Investment Treaty (BIT). The concept of the BIT is simple. Designed to establish and uphold the terms and conditions of Foreign Direct Investment (FDI), BITs are supposed to ensure equitable and fair treatment of investors in a foreign country. One of the key ways in which BITs achieve this is through their distinctive use of international tribunals as dispute resolution mechanisms, which ensure that an investor does not have to sue a host company or state in its own courts. As such, BITs have always seemed to be fundamentally liberal documents which promote international trade with an emphasis on fairness for all parties. Proponents of BITs have even gone as far to argue that they 'symbolise a commitment to economic liberalism'[83].

Sixty years on from the inaugural BIT between Pakistan and Germany, BITs have become a cornerstone of global trade with around 3,300 currently in existence, concerning virtually every country in the world[84]. In short, BITs are the primary source of international investment law to protect and promote

[82]Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962).

[83] Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty" *The American Journal of International Law* 92, no. 4 (October 1996): 628.

[84] Julia Calvert, "Constructing Investor Rights? Why some states fail to terminate bilateral investment treaties" *Review of International Political Economy* 25, no. 1 (December 2017): 77.

cross-border investment flows[85]. Despite their prominence in international trade, BITs are becoming an increasingly controversial tool. Recently, two major arguments have been used to cast aspersion on the value of BITs in today's global economy. Firstly, moral criticisms have been levelled against BITs from those concerned about the amount of power such treaties afford to wealthy investors and the ways in which such investors can manipulate BITs to take advantage of less economically developed nations. Further to this, political organisations have begun to question the legitimacy of the international tribunals which BITs employ as arbitrators of disputes. In 2020, these concerns prompted the European Union to terminate all existing intra-EU BITs. For some critics, BITs are much more 'useful foreign policy tools'[86] than treaties protecting capital invested overseas, and BITs have been seen as economic nationalist weapons. This essay seeks to explore the validity of the two central criticisms which have made the future of BITs seem so uncertain.

It will be suggested that an analysis of two key rulings on BITs, *Slovak Republic v Achmea* (2018) and *Phillip Morris v Uruguay* (2016), illuminates the failures and dangers of BITs. Ultimately, it will be argued that whilst not all of the thousands of BITs which constitute FDI are dangerous, BITs afford excessive protection to investors and sometimes facilitate the bullying of developing nations by developed nations or multinational conglomerates.

Proponents of BITs argue that the treaties offer vital substantive and procedural guarantees for investors, encouraging FDI without which today's globalised economy would never have materialised. Signatories of BITs, for example, are obliged to ensure that foreign firms are treated in the same way as domestic firms in a process known as 'national treatment'. Moreover, BITs offer genuine protection against expropriation, and massively reduce the frustrating protectionist measures often imposed by nations on foreign firms operating in their jurisdiction. One prime example of this is that, under BITs, governments are unable to force firms to use local materials in their products, and perhaps most importantly under a BIT foreign firms are able to freely

[85] Eric Neumayer, "Self Interest, Foreign Need, and Governance: Are Bilateral Investment Treaties Programs Similar to Aid Allocation" *Foreign Policy Analysis* 2, vol. 3 (July 2006): 251.
[86] Adam Chilton, "Reconsidering the Motivations of the US Bilateral Investment Treaty Program" *Proceedings of the Annual Meeting (American Society of International Law)* 108, no.1 (July 2014): 374.

move capital in and out of the country in which they are investing without any limits or caps.

Supporters suggest that BITs do not simply facilitate international trade and advance the liberal economic agenda in theory but point to the broader history of global economic growth as evidence of BITs practical and significant impact on world's economy[87]. Although BITs can trace their early developments to the late 1950s, they were not utilised as a major tool of international trade until the 1990s. Indeed, from 1959 to 1969 a mere seventy-four BITs were signed (this is around eight a year), with approximately half of these being concluded by Germany[88]. In the 1970s, there was a significant increase of nations signing initial BITs, with the UK, US, France, and Japan developing their inaugural BITs in the mid-70s. Between 1977 and 1986 153 BITs were agreed, doubling the rate witnessed a decade prior[89]. It was only in the 1990s, however, that BITs began to become the commonplace and mainstream international trade agreement that they are today. In 1996 alone 196 BITs were negotiated, more than in the entire sum of the previous decade and much more than the eight per year concluded in the 1960s[90]. The rise of BITs in the 1990s prompted contemporary commentators to acknowledge the treaties as 'one of the more remarkable developments of international law in the mid-1990s'. The 1990s not only witnessed the rise of the BIT, but also saw one of the most remarkable periods of economic growth in global history. Between 1991 and 2001 the US recorded its largest period of economic expansions ever, with 120 months of consecutive growth[91]. Looking at the economy from a more global perspective, the 1990s saw the ratio of assets owned by foreign residents to world GDP rise from 48.6 per cent in 1990 and 92.0 per cent in 2000, which represents around 5 times the peak reached earlier in the century[92]. It is no coincidence that the sudden proliferation of the BIT occurred at the same time as extraordinary global economic growth and a dramatic increase in international investing. As

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87 Sabine Selchow, "The Globalisation Discourse and the New World," in *Negotiations of the New World*, ed. Sabine Selchow (New York: Columbia University Press, 2017), 69–95.
88 See Vandevelde, "The Political Economy of a Bilateral Investment Treaty", 630.
89 Ibid.
90 Ibid.
91 Nicholas Crafts, "*The World Economy in the 1990s: a Long Run Perspective*" (Working Paper 87/04, London School of Economics, 2004) 1.
92 Ibid.

the USSR and its satellite states collapsed and opened up their markets it was the BIT which enabled Western countries to trade with these formerly communist states: without the BIT's insistence upon the use of international tribunals to resolve trade disputes, for example, it is difficult to imagine the US trading on a large scale with the Russian Federation out of fear of its allegedly corrupt legal system. Ultimately, the BIT played an integral role in the rapid globalisation and growth of the 1990s and was heralded as the document which allowed liberal economic policies of free trade and globalisation to occur.

More recently, however, this notion of the BIT as an intrinsically liberal tool has come under fire from liberalism's fiercest defenders. The European Union is widely acknowledged as one of the world's most dedicated supporters of liberal economic policy[93], and yet in 2020 the EU took the radical step of banning intra-EU BITs[94]. As previously mentioned, there are two mainstream arguments deployed by those who seek to see the decline of BITs. The first accusation is that Bilateral Investment Treaties frequently employ vague terms such as 'fair and equitable treatment', 'indirect expropriation', and 'umbrella clause', which are then exploited by wealthy investors to prevent less economically developed nations exercising regulatory control. This issue is exacerbated by BIT's insistence on using arbitral tribunals which are biased towards investors and which often adopt fairly expansive interpretations of the aforementioned vague terms. This, suggests Richard Chen, contributes 'to a jurisprudence skewed in favour of investors, as such arbitrators would naturally be more sympathetic to investor claims and have less appreciation for the regulatory needs of states'.[95]

The ability for wealthy investors to use BITs as vehicles through which to intimidate smaller nations was perhaps most shockingly exposed when Philip Morris International (PMI)– a globally renowned cigarette manufacturer – attempted to initiate litigation against Uruguay. In February 2010 the Uruguayan government introduced two new laws regulating the sale of tobacco

[93] Hubert Zimmerman, "Brexit and the External Trade Policy of the EU" *European Review of International Studies* 6, no. 1 (September 2019), 30.
[94] Julien Berger, *International Investment Protection within Europe: The EU's Assertion of Control* (London: Routledge, 2020), 1.
[95] Bruce Love, "Battle Royal Over EU's Bilateral Investment Treaties," *Financial Times,* September 13, 2019, 24.

due to public health concerns. First, the Uruguayan government banned the practice of selling one type of cigarette under multiple different packaging (a technique by cigarette companies designed to target a range of demographics), instead adopting the 'Single Presentation Requirement', whereby Article 3 of Ordinance NO.514, of the Constitution of the Republic, requires cigarette companies to sell only one unique presentation of each cigarette brand as of February 2009[96]. Second, by Presidential decree, Uruguay forced tobacco companies to display graphic health warnings covering 80% of cigarette packaging. The response to this legislation from the health authorities was overwhelmingly positive and the legislation was widely considered to be a good faith policy aimed at improving the life expectancy of Uruguayans. Philip Morris International, however, was badly affected by these policies, and were forced to withdraw 7 out of its 12 product brands from the Uruguayan market.

Subsequently, PMI engaged the Uruguayan government in a six-year legal battle, beginning a long-drawn out suit before the World Bank's International Centre for Settlement of Investment Disputes (ICSID), in a move which can be interpreted as more of an attempt to intimidate other countries than as a genuine attempt to win compensation for lost income: the Action on Smoking and Health (ASH), the oldest anti-tobacco organisation in the United States, said Philip Morris "had accomplished its primary goal… in launching the suit… six years and millions of dollars have been spent [by Uruguay] defending a non-discriminatory law that was intended purely to protect public health"[97].
Philip Morris International was able to take advantage of the ambiguities of the Switzerland-Uruguay BIT to mount a legitimate legal challenge against the government of the Republic of Uruguay. The global tobacco group argued that the 'Single Presentation Requirement', and the 80% regulation, were violating the fair and equitable treatment clause of the Swiss-Uruguayan BIT. Philip Morris claimed the group 'never questioned Uruguay's authority to protect public health'[98], but there was no evidence that they would lead to a decrease in ill-health caused by smoking. Without a legal consensus on the facts of the policies, Philip Morris suggested the decision was essentially an arbitrary one

[96] DeAtley, Bianco,, Welding, Cohen,*Compliance with Uruguay's single presentation requirement.*
[97] Casaldi and Eposito, *Philip Morris loses tough-on-tobacco lawsuit in Uruguay.*
[98] Mander, *Uruguay defeats Philip Morris test case lawsuit*.

and thus by logical extension an unfair one. Moreover, Philip Morris further argued that the 80% legislation did not leave sufficient space on a cigarette packet for the intended branding, PMI argued the Uruguayan government had essentially expropriated the firm's Intellectual property rights, specifically its trademark branding, thus violating the investment protection agreement between Uruguay and Switzerland, signed in 1991[99] Finally, the Switzerl-Uruguay BIT confirmed that each state should provide a stable regulatory environment in which firms are able to trade. Philip Morris argued that these arbitrary legislations implemented by Presidential decree were not in keeping with the stable regulatory environment clause.

After six years of legal battles, and over $38 million cumulatively spent on legal fees by both parties, a single vote won the case for Uruguay. This does not, however, represent a victory for BITs. Philip Morris spent $28 million dollars on legal fees but only sued for $25 million worth of damages[100]. Additionally, it is worth noting PMI's annual revenues exceed 80 billion dollars (USD) across 180 countries – far greater than the Constitutional Republic of Uruguay's 50 billion-dollar (USD) GDP[101]. Philip Morris never sought to use the case to genuinely seek compensation for the potential lost income caused by Uruguay's legislation as the case would have lost them millions of dollars either way. Instead, this case was used as a means of discouraging other, less wealthy nations from enacting anti-smoking legislation – for, despite its victory in the courts, the Uruguayan government was forced to pay millions of dollars in legal fees. Moreover, that this wasn't a unanimous decision from the arbitral tribunal: a dissenting opinion was expressed by an arbitrator, and that only a single vote won the case for Uruguay, both demonstrate the extent to which this was an exceptionally close call. It is extremely likely that PMI considered this ruling a significant victory in that it may well have deterred other small nations from enacting legislation[102].

The *Philip Morris v Uruguay* (2016) case makes the pitfalls or BITs abundantly clear. Philip Morris' case was only made possible through the

[99] Tobacco Tactics: from the University of Bath, *Latin America and Carribbean Region*
[100] Olivet and Villareall, *Who Really Won the Legal Battle Between Phillip Morris and Uruguay?*, ,
[101] Mander, *Uruguay defeats Philip Morris test case lawsuit*.
[102] Olivet and Villareal, *Who Really Won the Legal Battle Between Philip Morris and Uruguay?*

ambiguous and abstract terms of a BIT. Beyond this, the case was initially considered in a court of law in Uruguay but quickly thrown out. Only because of BIT's insistence upon the use of tribunals (in which the claimant appoints one third of the arbitrators), which are often biased towards firms did this case become so closely fought. Even if Philip Morris did not win the case on a technical level it is interesting to note that as of 2020 no other Latin American country, and very few other developing nation states, have implemented progressive tobacco control policies to the degree as Uruguay, which surely represents a victory for PMI. Nonetheless, in 2017, Uruguay's President Tabre Vasquez announced his government would introduce 'Plain Packaging' legislation – whereby all unique branding material (logos, colours, or promotional text) is removed save from text-name alone – joining only 6 other countries to do so – being Australia, the United Kingdom, Ireland, France, Norway, and Hungary[103].

The first major criticism of BITs explored in this essay has proved a solid foundation for further investigation. There is justification to suggest BITs can be weaponised by large firms to attack nation states' attempts to enact regulatory public policy. Crucially, it is not this flaw of BITs which has prompted the EU to take action against them, and which thus threatens their status as the major means of conducting international trade. Instead, the EU's concern with BITs is more political and revolves around the use of international tribunals as dispute resolution mechanisms. The EU's decision to terminate all intra-EU BITs was made following the European Court of Justice's decision on the *Slovak Republic v Achmea* case (2018)[104].

In 2006 the Slovak government began the process of de-liberalising its health care market and in doing so prevented Dutch insurer Achmea – who had only invested in the Slovak Republic because of its liberalised healthcare market – from distributing the profits it made whilst providing healthcare insurance in Slovakia. Following this, Achmea began proceedings against the Slovak Republic, arguing that the state had violated article 4 of the Dutch-Slovak BIT which allows firms the right to the 'free transfer of profit and dividends'.

[103] Tobacco Tactics: from the University of Bath, *Philip Morris vs the Government of Uruguay*
[104] International Institute for Sustainable Development (IISD), *EU Member States Sign Agreement to Terminate Intra-EU BITs*

Originally, an international tribunal agreed with the Dutch Insurer that the Slovak Republic had violated its BIT and ordered the state to pay €22.1 million in compensation[105]. The Slovak Republic, however, appealed the decision, not by disagreeing with the final judgement, but by challenging the tribunal's very power to make such a judgement, suggesting that the use of an external international arbitration tribunal to decide legal matters between two EU member states represented a breach of EU law. The European Court of Justice's judgement 'addressed three key features of the arbitration clause in the BIT that made it incompatible with the European Union's judicial system and the autonomy of EU law': 'disputes an arbitration tribunal may be called to resolve "are liable to relate to the interpretation or application of EU law (para.39.)"; investment tribunals were not internationally independent alternatives to domestic judiciary systems, but part of them (though not, however, part of the judicial system of the Netherlands or Slovakia); and finally, awards issued by investment tribunals must be addressed 'by means of a reference for a preliminary ruling', subject to review by an EU member state court[106]. From the perspective of the EU – and the European Court of Justice –BITs are means through which member states can create deals which the EU cannot rule on, primarily due to the incorporation of arbitration clauses in BIT agreements which necessitate cases be hear, per the New York Convention, 1958. The 'Preliminary Reference System' is thus the solution whereby the ECJ operates to preserve the integrity of the application of EU law to cases – in member-state judiciaries – where International Investment Law takes precedent over EU law. In the case of the Case C-284/16 *Achmea*/Dutch-Slovak BIT, the ECJ could not – at the time – invalidate the proceedings, however they could stem the enforcement of awards produced from the tribunal at the ICSID. . The European Court of Justice ruled in favour of the Slovak Republic. In doing so, the EU essentially declared the intra-EU BIT null and void, a decision reflected to a greater scale months later when 22 member-states agreed to the termination of all 196 intra-EU BITs.

[105] Ankersmit, *Achmea: The Beginning of the End for ISDS in and with Europe?*
[106] Ibid

The EU's position on Intra-EU BITs demonstrates the seriousness of the threat they believe BITs pose to judicial superiority over its member states. Indeed, a BIT may appear to promote liberal economic policy, but until they are regulated by well-established courts, rather than inconsistent and unpredictable international tribunals, states may see them as easier to break than other forms of trade agreement. It is important to note that BITs are often disputed: by 2015, 3,300 BITs had been signed, and 696 disputes surrounding BITs had been brought to tribunals (roughly 20% of all BITs are disputed).[107] BITs were developed in the wake of decolonisation and were designed to protect developed nations' investment in countries who had demonstrated economic nationalist tendencies, especially in terms of expropriation following independence. It is therefore ironic that the very same states (consider Germany's role in the EU and in the founding of BITs) have begun to be concerned that BITs are themselves furthering economic nationalist interests. BITs are not themselves inherently nationalist instruments, however; rather, they are open-ended agreements which can be easily interpreted and utilised by economic nationalists. As such, it is true that BITs played a powerful role in liberalising the global economy in the 1990s. This was mainly driven by the liberalising instincts of the political powers of that era. Now, a resurgence of economic nationalism has led to BITs being used for economic nationalist purposes. BITs are neither economic nationalist instruments nor vehicles through which liberal economic policies can be achieved, but poorly regulated, open-ended treaties through which economic actors of all persuasions hope to achieve their end goals.

[107] Raphael Lencucha, "Is It Time to Say Farewell to the ISDS System" in *International Journal of Health Policy Management* 6, no. 5 (May 2017): 290.

Detention of Private Persons by Private Persons as a Delictual Wrong: Liability for Deprivation of Liberty in Scots Private Law

By Dr. Jonathan Brown

|Preamble|

Jonathan Brown is a lecturer in Scots Private Law at the University of Strathclyde in Glasgow. Previously he was a lecturer in law at Aberdeen's Robert Gordon University. Jonathan considers himself to be a private law generalist and dabbling legal historian. His recent publications include work on medical jurisprudence, the law of defamation and the relation between the Roman law of slavery and modern Scottish human trafficking legislation. The present essay is intended to provide a modern account which places acts amounting to wrongful detention effected by private persons within the taxonomy of iniuria.

Introduction

'False imprisonment' is, in English law, a strict liability tort.[108] It is thus actionable regardless of the mind-state of the perpetrator,[109] regardless of whether or not the victim suffers any demonstrable 'loss' or 'damage'[110] and indeed regardless of whether or not the 'victim' knew that they had in fact been falsely imprisoned.[111] To adopt the English lawyer's term of art, the tort is actionable '*per se*'.[112] In general terms, conduct amounts to 'false imprisonment' if the perpetrator has imposed some constraint on the freedom of movement from a particular place ordinarily enjoyed by another individual.[113] Conceptually, 'false imprisonment' falls, as a 'cause of action', under the umbrella of the 'form of action' known as 'trespass to the person',[114] albeit unhappily so in the view of some learned authority.[115] While it has been said that the 'categorisation of trespasses to the person is an ongoing source of

[108] *Regina v. Governor of Her Majesty's Prison Brockhill Ex Parte Evans* [2001] 2 A.C. 19, at 26 *per* Lord Slynn

[109] Although this proposition is now complicated by the fact that the courts require the act amounting to physical imprisonment to have been 'intentional' – see *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245, *per* Lord Dyson JSC at para.65

[110] *Ibid*., para.64

[111] *Murray v Ministry of Defence* [1988] 1 WLR 692, at 703a-c *per* Lord Griffiths

[112] *Lumba*, para.63

[113] *Collins v Wilcock* [1984] 1 WLR 1172, at 1177 *per* Goff LJ

[114] Mulheron, *Tort Law*, p.685

[115] *Wainwright v Home Office* [2001] EWCA Civ. 2081, *per* Buxton LJ at para.68

confusion',[116] it remains the case that 'the distinction [between actions of trespass and actions on the case] still continues to hold good'.[117] England may have buried her forms of action, but, to this day, those forms do continue to exercise an influence over Common law jurisprudence.

Scotland is not, in spite of its historical and ongoing political union with England, a Common law jurisdiction.[118] Indeed, Scots law knows of no 'torticle' by the name of 'false imprisonment'.[119] In Scotland, 'trespass' refers only to 'transient interference with another person's land [or sufficiently large moveable, such as a ship][120] without right to do so'.[121] The phrase 'trespass to a chattel' has been described as being 'perfectly unmeaning' by the Scottish courts[122] and the concept of 'trespass to the person' is likewise foreign to lawyers north of the Tweed.[123] This is not to say that Scots law does not afford protection to individual liberty in private law. Rather, it is simply the case that the juridical history of the protection of 'personality rights' in Scotland differs quite drastically from the schema which has developed in the Common law world.[124]

'Affronts to liberty' were termed by Stair 'the most bitter and atrocious forms of injury'.[125] The word 'injury', here, appears as a term of art and does not simply denote (as it typically does today) bodily harm suffered by a legal subject. Rather, it refers to what MacKenzie termed, in his 17th century *opus* on *Matters Criminal*,[126] 'contumely or reproach'.[127] This usage was common to Civilian jurisdictions in the Seventeenth century[128] and at this time (though not immune to influence from south of the border)[129] Scotland was unquestionably a part of the wider European legal family and subject only to

[116] Mulheron, *Principles*, p.685

[117] *Ibid*., p.686

[118] See the Hon. Lord Gill, *Quo Vadis Leges Romanorum?*, *passim*.

[119] Blackie, *Protection of Corpus*, p.160

[120] See Whitty, *Rights of Personality*, p.215

[121] Anderson, *Property*, para.10.18

[122] *Leitch & Co v Leydon* 1931 SC (HL) 1 at 8

[123] Whitty, *Rights of Personality*, p.215

[124] For the history of 'personality rights' in Scotland, see Blackie, *Unity in Diversity*, *passim*. For comment on the wider *ius commune*, see Blackie, *Doctrinal History*, *passim*.

[125] Stair, *Inst*., 1, 2, 2

[126] On the significance of the equivalence of crime and delict during this period of Scots law, see Blackie and Chalmers, *Mixing and Matching in Scottish Delict and Crime*, p.286

[127] MacKenzie, *Matters Criminal*, (1678), p.303

[128] Blackie, *Doctrinal History*, p.14

[129] Blackie, *Unity in Diversity*, p.104

limited Common law influence.[130] Thus, it is apparent that the term 'injury' here corresponds with the Roman idea of *iniuria* within the context of the *actio iniuriarum*.[131] This is significant: Due to the significance of the Scottish 'institutional writers',[132] it remains the case today that 'interference with the personal liberty of an individual which is not warranted by law will justify an *actio iniuriarum* for *solatium*'.[133]

The 'legal ancestor' of the Scottish action(s) for deprivation of liberty, in the context of private law and outwith the context of actions involving public authorities,[134] is therefore markedly distinct from that of the English concept of 'false imprisonment'.[135] This has a number of practical, as well as conceptual, implications. The purpose of this essay is to explore those implications through reference to the Covid-19 (coronavirus) pandemic and the associated lock-down(s) implemented to mitigate its effects. The facts arising from the localised lock-down imposed at Manchester Metropolitan University provide a useful case study; here, approximately fifteen-hundred students were sent an email by the University asking them to self-isolate for fourteen days to inhibit the spread of the Covid-19 virus. Many students later reported that they only became aware of the situation after security guards actively prevented them from leaving their halls of residence. In the immediate aftermath of this event, there have been reports that some students are considering legal action and seeking to raise claims of 'false imprisonment' against the institution.[136]

This essay consequently explores the possibility of factually analogous claims succeeding in Scotland (not a mere matter of fancy, given reports of comparable situations in this jurisdiction),[137] with specific reference to the doctrinal differences between the English law of 'false imprisonment' and the Scots law of delict pertaining to deprivation of liberty effected by private

[130] At least insofar as the substantive law is concerned: Sellar, *A Tale of Two Receptions*, *passim*.

[131] MacKenzie divides the classification of 'injuries' into those which are 'real' and those which are 'verbal', consistent with D.47.10.1.1 (Ulpian, citing Labeo) and later Civilian jurisprudence: See MacKenzie, *Matters Criminal*, Tit. XXX, I (p.304)

[132] Of which, see Paton, *Evaluation of the Institutions,* p.201

[133] Walker, *Delict*, p.681

[134] See Reid, *Personality*, paras.5.02-5.03

[135] English common law knows of no analogue to the *actio iniuriarum*: Descheemaeker and Scott, *Iniuria*, p.2

[136] Speare-Cole, *Manchester Students Under Lockdown*, *passim*.

[137] Brooks and Adams, *Banned from Socialising*, *passim*.

persons (as opposed to state officials).[138] In so doing, the essay seeks to fit the Scots action(s) for the redress of affronts to 'personal liberty' within the wider schema of the law of delictual liability. This, it is submitted, is necessary not only to ensure the coherence of the legal system as a whole, but also to ensure that actions to recover compensation for deprivation of liberty are understood by the legal profession and wider public alike. In the absence of such understanding, injustice may arise from the success of unmeritorious claims, from the failure of logically meritorious claims, or indeed from the failure to raise potentially successful claims in the first place.

'Liberty' as an aspect of *Corpus* and the *Actio Iniuriarum*

'*Actio injuriarum* afforded a strong and efficient protection against injuries to immaterial interests … [it] was adopted from the Romans in order to provide protection against interference with man's (non-material interest) in his dignity and honour'.[139] *Iniuria* in the sense of the *actio iniuriarum* did not simply mean 'wrongdoing' in the broadest sense of that term,[140] rather it denoted hubristic conduct[141] which infringed another person's recognised non-patrimonial (*i.e.*, 'dignitary')[142] interest(s).[143] It was – and is – thus conceptually distinct from actions to repair 'loss' [*damnum*] that have as their ancestor the *lex Aquila*.[144] There, *iniuria* could be demonstrated by pointing to the defender's *culpa*,[145] but to succeed in an *actio iniuriarum* a pursuer would need to demonstrate that the defender had behaved contumeliously.[146] Should

[138] Interactions between state officials (such as police officers) and private individuals have been described as 'paradigm case[s]' of wrongful invasion of 'liberty' as a protected interest and there is a considerable body of Scots authority (based on the Act Anent Wrongous Imprisonment 1701) on this topic – of which, see Blackie, *Protection of Corpus*, p.160; Reid, *Malice and Police Privilege*, *passim*. This essay, however, is focused on less paradigm cases; those which arise where a private individual, with no express state authority (in the form of public legislation permitting the conduct), acts to infringe the liberty interests of another private individual.

[139] Zimmermann, *Law of Obligations*, p.1062

[140] Although that was the word's original meaning: Birks, *The Early History of Iniuria*, , p.163

[141] Ibbetson, *Iniuria: Roman and English*, p.40

[142] Whitty and Zimmermann, *Issues and Options*, p.3

[143] 'At a high level of generality, it would probably not be controversial to say that all *iniuriae* were offences against dignity in the broad sense of status or honour (*dignitas*)': Descheemaeker and Scott, *Iniuria*, p.13. Although Descheemaeker and Scott here identify *dignitas* with 'status or honour', there is a case to be made that *existimatio* would be the more fitting (in legal, not merely semantic) term to describe the highest-level dignitary interest protected by the *actio iniuriarum*, with *dignitas* operating functionally as a lower-level catch-all sub-category for personality interests which have not been singled out for specific protection.

[144] Descheemaeker and Scott, *Iniuria*, p.2

[145] Ibbetson, *Buckland on the Lex Aquilia*, p.53; G.3.202; D.9.2.44pr. (Ulpian)

[146] Though certain texts, *e.g.*, D.47.10.33 (Paul) appear to suggest that Roman law required conduct to be effected *adversus bonus mores* ***and*** for there have to been *contumelia* on the part of the defender, it is

this be proven alongside affront to a recognised 'personality interest', however, the defender would be obliged to make reparation, even if the pursuer did not suffer any pecuniary 'loss'.[147]

Within Roman law, all *iniuriae*, in the sense of the nominate delict, were said to pertain to a person's *corpus* [body], *fama* [reputation] or *dignitas* [dignity].[148] This triad was co-opted and popularised throughout the *ius commune* by Johannes Voet,[149] to the extent that Blackie termed *corpus*, *fama* and *dignitas* 'higher level categories… that are central in the general analysis of the more systematic jurists'.[150] Although affronts to each of these three interests are each actionable as *iniuria*, 'the protection in the Scots law of delict of a person's interest in his or her bodily integrity and physical freedom [taken together under the higher-level heading of *corpus*][151] from the early modern period on has been in different ways separated from the protection of other specific interests relating to the person'.[152] This has had the net effect of obscuring the place of *iniuria* within the framework of Scots law.[153] Unlike in South Africa, where *iniuria* clearly stands alongside the *lex Aquilia* and the 'action for pain and suffering' as one of the 'three pillars' of that jurisdiction's law of delict,[154] in Scotland the traditional view has long been that the law of delictual liability 'is founded upon a [unitary] concept of [broad] *culpa*'.[155] This concept of *culpa* is typically said to be derived from the *lex Aquilia*, although in contradistinction to the position in Roman law 'the word *culpa* in this [*i.e.*,

'more likely… that for Ulpian the impropriety of the [defender's] conduct was bundled up in his notion of *contumelia*, whereas for Paul the two requirements were treated as independent of one another, *contumelia* focusing on the subjective aspect of the [defender's] conduct and *adversus bonus mores* focusing on its social interpretation': Ibbetson, *Iniuria: Roman and English*, p.43

[147] See, *e.g.*, D.47.10.9.1 (Ulpian); the irrelevance of pecuniary 'loss' remains a feature of the modern Scots *actio iniuriarum*: Walker, *Delict*, p.40

[148] Dig.47.10.1.2 (Ulpian)

[149] Johannes Voet (1647-1713) was a Dutch jurist and the son of Paul Voet (1619-1677), who was also a jurist. Johannes Voet was the author of, *inter alia*, an authoritative *Commentary on the Pandects*: see Voet, *Commentarius*, 47.10.1

[150] Blackie, *Doctrinal History*, p.2

[151] See Blackie, *Protection of Corpus,* p.156

[152] *Ibid*., p.155

[153] This state of affairs was not unique to Scotland: '*corpus* was, in many ways, a victim of its own strength as a legally protected interest' throughout the jurisdictions of the *ius commune*. 'Its violation is so intuitively wrongful that it hardly needs to be channelled through the – a highly artificial – construct of *iniuria* for a remedy to be granted' – see Descheemaeker and Scott, *Iniuria and the Common Law*, p.15

[154] Brown, *Revenge Porn and the Actio Iniuriarum*, p.403

[155] MacCormick, *Culpa*, p.13

the Scots] context had a wide sense and expresses a liability for *dolus* and *culpa* in a narrow sense'.[156]

This view of the Scots law of delict as predicated entirely on *culpa* has fallen out of fashion. It emerged in the Nineteenth century and has since been invoked 'in cases where there has been a doubt as to the basis of liability'.[157] Nonetheless, it has been said by two of leading lights of Scots law[158] that 'it [is] no longer possible to argue that the law was based on one general underlying principle such as reparation for *culpa* or fault… different interests [are] protected in different ways often far removed from personal injuries cases which have hitherto been considered paradigmatic'.[159] This sage statement has the benefit of appearing as a statement of the obvious, if only in hindsight.[160] Rather than basing the sum of liability on one singular principle, Scots law has historically recognised a basic grammar of Aquilian liability and liability based on *iniuria*,[161] with some native nominate delicts (such as assythment) serving to redress harm effected to the health, limbs and life of oneself and one's family.[162]

In recognition of the fact that it cannot now be said that Scots law is predicated on a single principle, it is submitted that there is an impetus for Scots lawyers to return to the recognition of the place of the *actio iniuriarum* within the law of delict. The *actio iniuriarum* is acknowledged as an important 'legal ancestor' in many modern European jurisdictions,[163] although the process of codification has, in most European jurisdictions, severed the direct influence of Roman law as a 'living' source.[164] Scotland, like South Africa, is however (in a sense) a 'living system of Roman law', untouched by codification.[165] Hence, *iniuria* subsists in this jurisdiction not only as a 'legal ancestor', but as the prime source of liability in contemporary delictual actions

[156] *Ibid.*

[157] *Ibid.*, p.28

[158] The late Lord Rodger of Earlsferry and the late Professor Joe Thomson.

[159] Thomson, *Delict*, preface.

[160] It is a gift few possess, to state the obvious in such a way that the obvious only seems obvious after it has been stated.

[161] Blackie, *Protection of Corpus*, p.156

[162] See Black, *Delictual Liability in Scotland for Personal Injuries and Death*, p.53

[163] Reid, *Personality*, para.17.18

[164] Zimmermann and Visser, *South Africa as a Mixed Legal System*, p.3

[165] Descheemaeker and Scott, *Iniuria and the Common Law*, p.2

for assault[166] (including sexual assault and rape),[167] and (presently) defamation.[168] Indeed, in any action which seeks recovery of *solatium* in the absence of proof of *damnum*, the claim is logically predicated on an *actio iniuriarum*.[169]

While the ongoing relevance of the *actio iniuriarum* to modern Scots law has been questioned,[170] it is here submitted that development of the concept is preferable to the available alternatives. In the absence of native authority on any given subject, modern Scots practitioners tend to look to English (or other Common law) precedents,[171] which are typically deemed 'persuasive' authority by the judiciary. There are, however, manifest differences between the Scots law of delict and the English law of torts. Most significantly, 'there is no such thing as an exhaustive list of named delicts in the law of Scotland. If the conduct complained of appears to be wrongful, the law of Scotland will afford a remedy even if there has not been any previous instance of a remedy being given in similar circumstances'.[172] In contrast, within the Common law system, wherein 'the creation of a new tort is a bold, some would say irresponsible, exercise… to embrace something new within the concept of delict is so much easier'.[173]

There is thus 'little historical basis in Scots law for the kind of structural difficulties that have restricted English law'.[174] Scots lawyers should therefore be wary of importing Common law authorities into their jurisprudence, lest the character of the Scots law of delict be wholly and irretrievably changed. This sense of wariness should be further heighted in respect of areas of law where there is conceptual incoherence within the Common law tradition itself. As noted in the introduction to this essay, the nature of the tort of 'false imprisonment' is such that certain learned judges and commentators are of the

[166] Pillans, *Delict*, para.6.13

[167] MacLean, *Autonomy, the Body and Consent in Delict*, para.11.79

[168] Brown, *Defamation*, p.131

[169] Particularly given that the action and remedy of assythment was abolished in 1976 by the Damages (Scotland) Act: see s.8 of that Act (since repealed by s.16 of the Damages (Scotland) Act 2011, although no case has been made that this repeal has revived the action).

[170] Reid, *Personality*, para.17.12

[171] See Brown, *The Scottish Legal System*, *passim*.

[172] *Micosta SA v Shetland Islands Council* 1986 SLT 193, at 198 *per* Lord Ross

[173] Lord Hope of Craighead, *The Strange Habits of the English*, (Stair Society, 2009), p.317

[174] Reid, *Personality*, para.17.17; Reid here refers to the position in respect of informational privacy, but her point can be generalised.

view that it should not be categorised as a 'trespass to the person'. Rather, it appears that it would be better conceptualised as an 'action on the case'. In a jurisdiction such as Scotland, where these terms are meaningless, there is a risk that if case law concerning 'false imprisonment' is deemed 'persuasive' and thus received as law, then the structure of the law itself will break down. Instead of a principled and rational system, there would be only a pigeonhole arrangement of nominate actions. To abandon reason and make it the slave of alien precedent would be a retrograde step.

There is, however, a dearth of native Scots authority on the subject of deprivation of liberty effected by private persons. While it is not the case that 'wrongful detention by private persons now occurs only rarely',[175] as figures from the National Crime Agency in respect of human trafficking bear out,[176] it is nevertheless the case that private law actions concerning wrongful detention are rare.[177] It is consequently natural for Scots lawyers to seek guidance from the law of other jurisdictions when faced with problems arising from such matters. To argue that Scots lawyers should resist the importation of alien precedents into their system is not, however, to argue that they should resist the use of foreign precedents. Merely, it is to claim that for a foreign precedent to be deemed 'persuasive' by the Scottish courts it ought to be decided on the basis of principles which are consistent with the norms of Scots law. The English tort of false imprisonment, with its different history and jurisprudential background, is not analogous to the Scots action for the wrongful deprivation of liberty and consequently reliance on authorities concerning such could potentially introduce conceptual confusion, rather than clarity, to Scots law.

Though geographically distant from one another, South Africa has been described as Scotland's closest legal neighbour. This is due to the fact that Scotland and South Africa share a common uncodified Roman-Dutch heritage and have each (at various times, to various degrees) been influenced by the Anglo-American Common law.[178] South Africa has thus been able to build up

[175] As suggested by Reid: *ibid.*, para.5.48

[176] See National Crime Agency, *National Referral Mechanism Statistics – End of Year Summary 2018* (published 20/03/2019)

[177] See Brown, *Servitude, Slavery and Scots Law*, p.371

[178] Brown, *The Scottish Legal System*, p.59

a 'copious and vigorous case law' concerning the *actio iniuriarum*[179] and, given the conceptual and historical similarities between Scots and South African jurisprudence, this body of authorities could serve as a fruitful source of borrowing for Scottish lawyers.[180] There is little question, as there were in bygone days,[181] of the practical accessibility of such authorities: a great many are freely available via the South African Legal Information Institute (SAFLII) database.

In Scotland, 'since the earliest accounts of the law of reparation, infringement of liberty has been regarded as a "delinquence" which requires to be compensated'.[182] Comparably, in South Africa, 'it has long been settled law that the arrest and detention of a person are a drastic infringement of his basic rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper legal authorisation, such arrest and detention are unlawful.'[183] The South African actions for recovery of *solatium* in the face of wrongful arrest, detention (by private persons) and imprisonment (by state officials) is grounded in the *actio iniuriarum*.[184] Though the institutional connection to the *actio iniuriarum* is less clearly articulated in Scotland than in South Africa, in both jurisdictions the deprivation of a person's liberty is not actionable as a tort *per se*, but rather actionable on the basis of the delictual liability arising from interference with the detained person's dignitary interest in their *corpus*. 'Borrowing' principles and authorities from South African jurisprudence is, thus, less likely to do structural damage to the Scots law of delict than is borrowing from Common law authorities.

Deprivation of Liberty as *Iniuria*

As an action based on *iniuria*, in any claim for redress following deprivation of liberty, the pursuer must be able to prove that they have subjectively suffered 'affront'[185] (and so deprivation of liberty is not, logically,

[179] Reid, *Personality*, para.17.12

[180] See Burchell, *Personality Rights in South Africa*, pp.352-353

[181] See Blackie and Whitty, *Scots Law and the New Ius Commune*, p.80

[182] Reid, *Malice and Police Privilege*, p.175

[183] *Theobald v Minister of Safety and Security and Others* 2011 (1) SACR 379 (GSJ), at 389F

[184] Nkosi, *Balancing Deprivation of Liberty and Quantum of Damages*, p.66

[185] *Le Roux v Dey* [2011] 3 SA 274 (CC), para.143

actionable where the pursuer did not realise that they were detained)[186] in addition to establishing the objective wrongfulness of the defender's conduct.[187] Whether or not conduct is to be understood as 'objectively wrongful' turns on the question of whether or not said conduct is deemed juridically *contra bonos mores* [contrary to good morals].[188] This standard – though presented here in the 'decent obscurity of a learned language'[189] – is simply analogous to the familiar benchmark of 'public policy',[190] which is recognised as presently permeating the law of delict.[191] Although the courts in Scotland have not, in recent times, analysed acts amounting to the deprivation of liberty effected by private persons within the schema of liability for *iniuria*, it is here submitted that the extant Scots authorities on the subject (such as they exist) can be fit neatly within this framework.

It is said that to succeed in an *actio iniuriarum* there must be *animus iniuriandi* [intention to injure] on the part of the delinquent.[192] To say such has been described by Zimmermann, however, as an 'ahistorical generalisation'.[193] While it is the case that a delinquent must possess *animus* in order to be capable of effecting the delict of *iniuria*, *animus* here does not mean simply 'intention' but rather to the broader ability of a person to form an 'intention' as a matter of law.[194] In other words, *iniuria* cannot be inflicted by one who is insane or of nonage.[195] It can only be inflicted by one who is capable of understanding the wrongfulness of their actions, even if as a matter of subjective fact the individual in question does not in fact appreciate the wrongfulness of said action.[196] Consequently, in spite of what the terminology of *animus iniuriandi* implies, the need be no design to actively cause affront. *Iniuria* may be inflicted by one who affronts the personality interests of

[186] Cf. D.47.10.3.2; see also Ibbetson, *Iniuria: Roman and English*, fn.41

[187] *Ibid*., para.70

[188] Strauss, *Bodily Injury*, p.182

[189] Johnston, *Res Merae Facultatis*, p.141

[190] Strauss, *Bodily Injury*, p.182

[191] See Pillans, *Delict*, preface

[192] Erskine *Institute*, 4.4.80

[193] Zimmermann, *Obligations*, pp.1059-1061

[194] Ibbetson, *Iniuria: Roman and English*, p.40

[195] D.47.10.3.1 (Ulpian)

[196] D.47.10.3.2 (Ulpian); although Ulpian here suggests that one need not be aware of the wrongdoing for it to be actionable, in D.47.10.11.1 it is stressed that an *actio iniuriarum* will not lie where there is dissimulation on the part of the 'victim'.

another through misplaced zeal as much as where one has acted with an express design to injure.[197]

It is for this reason that in *Stevens v Yorkhill NHS Trust*,[198] the pursuer's case was permitted to proceed to probation notwithstanding the absence of any claim of malice, intention or '*animus iniuriandi*' on the part of the defenders. This ostensible oddity can be rationalised on the grounds that the core of the *actio iniuriarum* is the *contumelia* displayed by the wrongdoer. *Contumelia* – hubristic disregard of a recognised personality interest – cannot be effected through simple negligence, but it is quite apparent that one might recklessly disregard another's rights.[199] Hence, conduct might be actionable as *iniuria* where it is unthinking (as where one acts without thinking about the interests of others),[200] but not where the alleged perpetrator is incapable of thinking.

An *actio iniuriarum* thus occurs where a delinquent, who is *compos mentis*, hubristically acts to the subjective and objective affront of another person's recognised personality interest(s). Liberty, as an interest which falls under the 'higher-level' category of *corpus*, is manifestly a recognised and protected personality interest. Consequently, affronts to liberty are, in Scots law as in South Africa, 'injurious' in the technical sense of that term. As such, in Scots law the act of hubristically depriving another of their liberty is actionable *sine damno* – that is, without proof of loss. *Solatium*, rather than 'damages',[201] is payable as recognition that a wrong has been committed by the delinquent.[202] That *solatium* is payable *sine damno* ostensibly marks a point of similarity with 'false imprisonment', but this point of analogy should not be stretched too far. An *actio iniuriarum* does not give rise to liability '*per se*' in the Anglo-American sense. Rather, that *solatium* is payable *sine damno* is a

[197] The paradigm exemplar of such would be where a physician provides medical treatment without the consent of, or against the wishes of, their patient. Here, the benevolent intention of the doctor is irrelevant; in disregarding the patient's personality interests, even in the perceived best interests of the patient, the physician commits iniuria in the form of assault: see Brown, *When the Exception is the Rule*, p.37

[198] [2006] CSOH 143

[199] See the discussion in Smith, *Damn, Injuria, Damn,* p.126

[200] David Ibbetson, *Iniuria, Roman and English*, p.40

[201] 'Though typically conflated or taken together, [damages and *solatium*] are conceptually separate: damages repair instances of *damnum* (loss), while an award of *solatium* affords reparation for non-patrimonial injury or affront: see Brown, *Defamation*, p.131

[202] 'It should be noted that 'in principle solatium for "hurt feelings" caused by affront based upon the actio injuriarium is a different animal to the solatium that can be awarded to a claimant for physical or psychiatric injury': *Stevens*, para.63

relic of the history of the *actio iniuriarum* as a penal delict.[203] In recognition of the aversion of modern Scots law to private penal remedies, however, *solatium* was 'effortlessly reinterpreted as being purely compensatory when the time came for legal writers to fit the *actio iniuriarum* into the modern theory of Scots delict law'.[204]

'Unlike officials operating under statutory authority, private persons do not enjoy any form of privilege and thus malice need not be proved in order to establish liability' for depriving another of their liberty.[205] It is sufficient for the pursuer to show that the detention was 'wrongful'.[206] This, it is submitted, corresponds with the framework of liability based on *iniuria*; the threshold for what amounts to contumelious conduct is lower where one acts without grant of legal authority. A police officer or other such state official who infringes the liberty interest of a private person does not axiomatically commit a legal wrong, for they enjoy a privilege which ordinary persons do not.[207] Hence, the courts require more than proof of the mere act of detention where the alleged wrongdoer is a state official.[208] Where the defender is a private person, however, the 'wrongfulness' of the act will be presumed in the absence of vitiating factors.[209] In other words, where the alleged delinquent is a state official, the onus is on the pursuer to prove that the defender's conduct was positively *contra bonos mores*. Where the alleged delinquent is a private person, it is for the defender to demonstrate that their conduct was not *contra bonos mores*.

The formal need to demonstrate the objective 'wrongfulness' of the act complained of marks the modern Scots action for wrongful detention as a child of *iniuria* rather than of strict liability. While in practice the ease with which

[203] 'In Scots law, the *solatium* awarded by courts to the successful claimant under *iniuria*… was originally regarded as being entirely penal': Descheemaeker, *Solatium and Injury to Feelings*, p.73

[204] *Ibid.*

[205] Reid, *Personality*, para.5.50

[206] *Smith v Green* (1853) 15 D. 549; *MacKenzie v Young* (1902) 10 SLT 231

[207] This is not to say that a private person who detains another *necessarily* commit a wrong: one may legitimately act to protect one's proprietary interest (Bell, *Principles*, §2032) or where there is 'moral certainty' that a crime has been committed: SME, *Criminal Procedure*, (2002 Reissue), para.101. Such considerations are, it is submitted however, a mere vitiation of the general rule that deprivation of liberty is *contra bonos mores*; the wrongfulness of deprivation of liberty, in other words, has to be weighed against other public policy considerations, such as those stemming from the law of property or from the general proposition that people in society should not commit crimes.

[208] See *Whitehouse v Gormley* [2018] CSOH 93, para.164. See also Lindsay *Relegated No Longer?*, *passim*.

[209] See, *e.g.*, Reid, *Personality*, para.5.54

'wrongfulness' might be established in cases against private persons, in the face of the presumption thereof, is such that one might describe liability for such as 'strict' *de facto* if not *de jure*,[210] the temptation to categorise wrongful detention in this manner should be resisted. To do so would, as occurred in respect of the delict of defamation, have a deleterious effect on the coherence and rationality of Scots law.[211] When faced with novel problems arising out of conduct amounting to deprivation of liberty, Scots lawyers should consequently avoid looking to Anglo-American precedent. Instead, comparative consideration of South African authorities would allow for the development of a more coherent and principled framework which is in keeping with the spirit of Scots law.

Conclusion

The above discussion, as indicated in the introduction, is not mooted as a matter of idleness. It is of considerable practical importance given the reports of the alleged 'detention' of students in their halls of residence in universities throughout the United Kingdom. While there exists the possibility that actions based on 'false imprisonment' might succeed throughout in the UK's Common law jurisdictions, the legal position is conceptually different in Scotland. Indeed, as discussed in this essay, that position is so different due to fundamental dissimilarities between Common law jurisprudence and the Mixed jurisprudence of Scotland that Scots lawyers must be wary of taking any 'lessons' from court judgments concerning the tort of false imprisonment. Liability for deprivation of liberty in Scotland is not 'strict' and so facts which give rise to a right of reparation in the Common law may not necessarily do so in Scots law.

Universities, though (autonomous) public bodies, are private 'persons' in terms of the law of delict; hence they can sue (and be sued) in their own name. Within the context of the subject-matter of this essay, they have no special status in private law and nor do their security staff. Hence, university employees do not enjoy any privilege to detain private persons; *prima facie*

[210] This position would thus mirror the development of the Scots common law pertaining to defamation: See Blackie, *Defamation*, p.634

[211] See the discussion in Brown, *Defamation*, *passim*.

detention effected by university security staff is consequently unlawful. This presumption of wrongdoing is rebuttable, however. Provided that the detainer can show that their conduct was not contumelious – in other words, that what they did was not *contra bonos mores*, *i.e.*, contrary to public policy – then they might escape liability for their actions. In practice, this would be a very difficult thing for the detainer to prove, since, any argument to the effect that the ends justify the means will not defeat a claim of *iniuria*. One who hubristically infringes the personality interest(s) of another commits a wrong, regardless of their subjective benevolent intent. At best, it may be argued that the *de facto* confinement of students who are expected to self-isolate due to their exhibiting Covid-19 symptoms is not *contra bonos mores*, since it is in keeping with public policy to prevent the spread of infectious disease.

The key practical difference between the law of Scotland and that of the rest of the UK lies thus in the fact that for an instance of wrongful detention to be actionable in Scotland the pursuer must logically have suffered a demonstrable subjective affront. Consequently, evidence that the pursuer was not aware of or bothered by the detention, or that they passively and pleasantly acquiesced in it, will not give rise to a right of reparation. This is in contrast with the position under the nominate tort of false imprisonment, where a right of reparation does arise even if the purported 'victim' was unaware of their predicament.[212] The implications of this distinction in cases of mass detention are manifest. While in the Common law, proof that one student has been in fact 'falsely imprisoned' in their halls of residence would logically mean that every other student confined to those same halls would have a right of action, in Scotland the onus is on each individual pursuer to demonstrate that they knew of and were affronted by the fact of detention.

Like the Roman jurists, the English judiciary have in the past demonstrated a studied 'ability not to extend conclusions to the point of absurdity.'[213] Faced with a preponderance of claims for damages from those who have suffered no meaningful harm, in circumstances in which the deprivation of liberty may be deemed in the 'public interest', the English courts

[212] *Murray v Ministry of Defence* [1988] 1 WLR 692; *Meering v. Grahame-White Aviation Co. Ltd.* (1920) 122 LT 44, pp.54-55, *per* Atkin LJ.

[213] Watson, *Roman Slave Law*, p.25

may rule against recoverability on grounds of public policy, notwithstanding the internal logic of the rules pertaining to strict liability. The position in Scotland has the potential to be more principled: While the courts may act so as to achieve the same practical outcome, by predicating the law pertaining to deprivation of liberty upon *iniuria* as opposed to some strict liability nominate action, particular claims may be allowed or denied depending on their own merits, without abandoning the internal logic of the law. Here, one is reminded of the title of the *festschrift* for Professor George Gretton: There is *Nothing so Practical as a Good Theory*.

Rudolf Nureyev: A Legal Case Study of the KGB's Pursuits against Defectors

By Katherine Montana

|Preamble|

This article will investigate the legal investigation against Rudolf Nureyev that led to his defection, as well as the legal limitations placed upon him by the USSR after permanently settling in the West. It will also track the legal pursuit of restrictions against the dancer by the KGB that lasted for almost his entire life.

'One day, he is going to stay behind somewhere for good.'[214]

These words, spoken by the Leningrad Kirov Ballet's artistic director in 1959, could not have been more prophetic. On the trip back home from a competition in the West, rising Soviet ballet star Rudolf Nureyev accidentally missed the train from Kiev to Leningrad. Two years later, the dancer fulfilled Boris Fenster's prediction.[215]

Yet, despite the prediction by Fenster, it has been noted that Nureyev was likely not planning on defecting when he stepped on the plane from Leningrad to Paris.[216] When trying to understand why Soviet artists would want to leave and stay away from their home country, some analysts use a more retrospective viewpoint by comparing defectors' lives in the West, and noting that it was more liberating than their previous lives in the Soviet Union.[217] Though it is clear that Rudolf felt as if he was strangled artistically in the USSR, evidence suggests that it was the KGB's pursuits against him, both before, during and after his defection, were what made him decide to stay away from his country for almost the entirety of his adult life. This essay will use the story of this ballet dancer to argue that the KGB's pursuits against defectors of the Soviet Union led to many not returning to their country not simply due to wanting to continue pursuing a life in the West, but to escape their harassment and punishments.

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[214] 'Interview with Alla Osipenko', Interview by Julie Kavanagh in Julie Kavanagh, *Rudolf Nureyev: The Life* (Great Britain, 2007), p. 76.
[215] Kavanagh, *Rudolf Nureyev*, pp. 75-77.
[216] Diane Solway, *Rudolf Nureyev: His Life* (New York, 1998), pp. 234-236.
[217] Kavanagh, *Rudolf Nureyev*, pp. 112-113; Christopher Andrew and Vasili Mitrokhin, *The KGB in Europe and the West: The Mitrokhin Archive* (1999, London), p. 481; 'Interview with Rudolf Nureyev', Interview by Mavis Nicholson, Thamestv, *Afternoon Plus*, https://www.youtube.com/watch?v=kczUuX285n0 [accessed 4 October 2020].

Unsurprisingly, defection was and continues to be a legal minefield. Though the defections that bridged the gap between the dramatic Cold War split of the communist East and capitalist West are no longer an issue today, defections still take place all over the world. For example, there are many cases of North Koreans defecting to South Korea, and (occasionally) vice versa.[218]

In 1961, Nureyev walked away from KGB guardsmen, informing Parisian policemen that he wanted to claim political asylum. Although a case against him had likely begun years before due to his many appreciations regarding Western culture and dismissive attitude towards Communist organizations. (He once stated to an undercover officer that the All-Union Leninist Young Communist League was not worth joining), However, it did not suddenly end when he decided to stay in France.[219] The records of the Komitet Gosudarstvennoy Bezopasnosti still mostly remain a secret, yet copied reports smuggled out by other defectors and interviews with former members of the USSR allow us to paint a fairly accurate picture of the organization's proceedings against Nureyev. The complicated legalities of international law made the KGB's pursuits against Nureyev extremely complex, but the strong desire to punish the dancer's disobedience and make an example out of him inspired the organization to skirt around French laws potecting asylum seekers and begin an intricate series of pursuits to not only try to bring him home, but end his career. This intricate series of covert pursuits by the KGB is due to the fact that nine years before his defection, France had become a part of the Convention Relating to the Status of Refugees, ensuring that an asylum seeker's 'personal status' was protected under France's laws.[220]

Born on a Russian train in 1938, Rudolf Nureyev can truly be described as a maverick. His talent for the art of dance allowed him to train with and

[218] Byung-Ho Chung, 'Between Defector and Migrant: Identities and Strategies of North Koreans in South Korea', *Korean Studies*, 32 (2008), pp. 1-27.
[219] Kavanagh, *Rudolf Nureyev*, p. 112.
[220] 'Convention relating to the Status of Refugees', *United Nations Human Rights: Office of the High Commissioner*, (28 July 1951), < https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx> [accessed 13 November 2020].

become a member of the prestigious Kirov Ballet, but his outspoken- often belligerent- and curious behaviour constantly got him into trouble. From refusing to dance unless he got to wear Western-style costumes, to openly disobeying and cursing at his instructors and superiors, Nureyev was viewed by the government as a threat.Due to the previously listed international regulations regarding political asylum seekers, there was almost nothing the KGB could do to legally force defectors home.[221] Therefore, the organization resorted to scare tactics, persuasion, threats, and physical harm to both punish and lure former USSR citizens back. Arguably, this harassment made the KGB, an organization designed to defend the Soviet Union from what was considered potentially dangerous outside influence, ironically end up encouraging citizens to defect to and remain in this outside world.[222] Rather than enticing the population to remain loyal to their country, the KGB caused great fear of potential arrests or execution, which in effect inspired those who had defected to continue to stay away. To support this argument, this essay will analyse the case and pursuits against Nureyev that not only forced him to leave his country but discouraged him from coming back. This notion of a self-fulfilling prophecy is proven by the fact that the strength of the KGB's power actively parallels Nureyev's desire to stay in the West, and with its weakening in the late 1980s, the dancer finally returned home.

Nureyev was clearly fascinated with the West, yet biographers Julie Kavanagh and Diane Solway note that this does not prove that he was necessarily planning on leaving the USSR before his sudden defection.[223] His career as a dancer in the Kirov was becoming more prominent, his connections to his family in Ufa, a city in southern Russia, were strong, and he had an intimate relationship with his dance teacher's wife, Xenia Pushkin. His ties to the Soviet Union were secure, and the potential for greater freedom in the West does not wholly explain his desire to stay away. This is evidenced by his desire over his years at the Kirov to bring Western-style dances and costumes

[221] Susan L. Carruthers, 'Between Camps: Eastern Bloc Escapees and Cold War Borderlands', *American Quarterly*, 57:3 (2005), pp. 926-928. (actual 911-942); Charles B. Keely, 'The International Refugee Regime(s): The End of the Cold War Matters', *The International Migration Review*, 35:1 (2001), pp. 303-314.
[222] Leonid Shebarshin, 'Reflections on the KGB in Russia', *Economic and Political Weekly*, 28:51 (1993), p. 2829.
[223] Kavanagh, Rudolf Nureyev, p. 118; Solway, *Rudolf Nureyev*, pp. 234-236.

to the East, proving that though he admired the West, he wanted to bring its culture to the USSR rather than simply leave his home country. Arguably, he ultimately had to be pushed to stay away for so long, and the KGB's suspicions, case, and pursuits against him achieved this.

We know that suspicions against him had begun, at minimum, a short while before he left for Paris. In an interview with the Kirov's former prima ballerina, Gabriela Komleva noted that the decision to let Nureyev go to Paris was a complicated one, for he 'always created tensions with the KGB'.[224] Additionally, when a woman in charge of observing the Kirov for its upcoming tour insisted that Nureyev was 'her star' and 'the best dancer of the world' and should be allowed to go to Paris, the Minister of Culture stated that, 'there have been some problems.'[225] Because of his talent, however, he was eventually allowed to go on tour to the West, but not without supervision from the KGB. In an interview with his friend Tamara Zakrzhevskaya, the former citizen of the USSR noted that before he even left the airport in Leningrad, Nureyev was worried that he was under suspicion.[226] When he started to blatantly ignore the rules of the tour, his file started to grow, and the KGB officer on the tour, Vitaly Strizhevsky, made snide remarks to put him down.[227] Kavanagh notes that his new friend Pierre Lacotte swears that there was no plan to keep Nureyev in the West, but the KGB wrote off Lacotte and the French police in Nureyev's trial (in which the defendant was absent) as the plotters of some kind of conspiracy that kept him away from the USSR.[228]

Arguably, this scapegoating of the French was used to shift the blame away from the KGB itself, for if they had not pushed Nureyev to the point of no return, he likely would have not continued to stay away from the Soviet Union. During the KGB's height of power, which aligned with the USSR's political and academic prominence during the Cold War, this idea of scapegoating foreigners as conspirators of treasonous activity is also evident

[224] 'Interview with Gabriela Komleva', Interview by Richard Curson Smith, BBC, *Rudolf Nureyev: Dance to Freedom*.
[225] 'Interview with Ariane Dollfus', BBC, *Rudolf Nureyev*; Kavanagh, *Rudolf Nureyev*, pp. 105-106.
[226] 'Interview with Tamara Zakrzhevskaya', BBC, *Rudolf Nureyev*.
[227] Solway, *Rudolf Nureyev*, pp. 144-146; BBC, *Rudolf Nureyev*.
[228] Kavanagh, *Rudolf Nureyev*, pp. 120, 138; Solway, *Rudolf Nureyev*, pp. 234-236.

in other cases against those who were considered traitors.[229] There are several examples of this, but the most notable one references ballerina Natalia Makarova's defection to Britain nine years after Nureyev's own defection. After she defected, KGB files noted that the English media could be a culprit in her increasingly treasonous behaviour.[230] By pinning blame on foreign forces, the organization ultimately failed to acknowledge their own role in scaring defectors from returning with their intense tactics.

The KGB's pursuits against Nureyev came to a climax the day that the Kirov was going to leave Paris for the next part of their tour in London. Strizhevsky had previously reported his behaviour to the Central Committee of the Communist Party, which led to the dancer being told that instead of going to London with the group, he must return to the USSR. It was then that Nureyev, understandably upset and worried, walked away from Strizhevsky and announced his plan to seek asylum. Kavanagh notes that the dancer's excitement for London with the Kirov and his panic at not being able to go proves that his defection was unplanned, and without their suspicions culminating in a case against Nureyev and rousing panic, the rising star likely would have gone back home to Leningrad.[231]

However, this was not the end of the case against him, but the beginning of a series of more nuanced and frightening approaches that arguably forced the dancer to stay away from his home. *The Mitrokhin Archive*, a series of KGB spy files smuggled out of the Soviet Union by Vasili Mitrokhin, proves this. Files note that the organization sent undercover spies to the West, who threw sharp objects on the stage during his first show in Paris, and the most sinister pursuit was an attempt to end his dancing career through physical assault.[232] Though these plots did not succeed in halting his career, it is clear that the KGB were not willing to give up on making an example of the dancer. With the rise of these strong and harsh approaches by the KGB towards Nureyev, the star's desire to go back home arguably diminished more and

[229] Mark Solovey, 'Introduction: Science and the State During the Cold War: Blurred Boundaries and a Contested Legacy', *Social Studies of Science*, 31:2 (2001), pp. 165-170.
[230] Andrew and Mitrokhin, *The KGB in Europe and the West,* pp. 481-482.
[231] Kavanagh, *Rudolf Nureyev*, p. 120.
[232] *Ibid*., pp. 9, 480-481.

more. Though there is evidence he missed his family and friends in the USSR, the KGB's tactical pursuits that dodged international legal restrictions arguably scared him from returning. One of these attempts by the KGB was to lure him home. Mitrokhin notes that in directing those close to him to write letters that would purposefully make him homesick, the KGB hoped he would decide to come back to the Soviet Union.[233] Ironically, this approach actually pushed him further away, for Nureyev suspected that these letters suggested insincerity. In fact, it has been noted that his friend from East Germany wrote a follow up letter to the ones that begged him to come home that told Nureyev that in actuality, it was not ideal for him to return.[234]

Evidenced by Mitrokhin's smuggled notes and statistics, the KGB's power increased under the steady control of First Secretary Nikita Khrushchev in the early 1960s, which allowed the organization to subsequently increase pressure on its defectors.[235] Throughout the later years of Nureyev's career in the West, which coincided with the decline of the Communist Party and KGB's power in the East, his desire to return home proved stronger. This diminishment in power is evidenced by Mitrokhin noting that in later years, plots against artistic defectors weakened, and aggressive pursuits were no longer seen as essential.[236] This displays the notion that the KGB's pursuits to both punish the ballet star and bring him home actually pushed him away, and their declined efforts due to the slow dissolving of the USSR's power allowed Nureyev to finally feel comfortable to ask to return. In 1987, First Secretary Mikhail Gorbachev was informed that Nureyev wanted to return home to say goodbye to his mother.[237] By allowing this visit during the years that the KGB and Communist Party were growing weaker, Gorbachev proved that the intensity of the case and pursuits against the dancer were in fact what ultimately kept him away from his home.

[233] *Ibid*., pp. 480-481.
[234] Kavanagh, *Rudolf Nureyev*, pp. 206-207.
[235] Amy Knight, 'The KGB, Perestroika, and the Collapse of the Soviet Union', *Journal of Cold War Studies*, 5:1 (2003), pp. 67-69; Andrew and Mitrokhin, *The Mitrokhin Archive*, pp. 9-10.
[236] Andrew and Mitrokhin, *The Mitrokhin Archive*, pp. 727-728.
[237] Francis X. Clines, 'For Nureyev, An 'Inevitable' Return Home', *The New York Times*, New York City, 15 November 1987, p. 4 < https://www.nytimes.com/1987/11/15/world/for-nureyev-an-inevitable-return-home.html> [accessed 10 October 2020].

Rudolf Nureyev's case, as well as the legal approaches that the KGB used against him and other defectors, proves that defections were, and continue to be, extremely complicated affairs. Likely due to his understanding of the extent of the KGB's power in the 1960s, the dancer acknowledged that though he knew his decision to defect would likely be a permanent one, it did not necessarily mean he would be content in the West.[238] The amount of power that the organization held, which directly parallels the forcefulness of approaches against both potential defectors and those who had already left the Soviet Union, ultimately depreciated with the slow collapse of the USSR in the late 1980s and early 1990s, letting cases grow cold and approaches grow warmer. Despite the pursuits against him and his unpatriotic attitude towards the USSR, the country was ultimately his home, and his strong connections with his friends, family and hometown were proved when he jumped at the chance to say goodbye.

[238] Spoken to Patrick Thevenon, *Paris-Jour*, 21 June 1961 in Kavanagh, *Rudolf Nureyev*, p. 147.

Innovation and Medical Patents

By Dara Tuncel

|Preamble|

This essay will interrogate the legality of medical patents, arguing that one ought to reject the traditional utilitarian framework often used to justify IP law. Instead, this essay will turn to a more deontological justification for IP rights in UK law.

While normal patents already come under much scrutiny on account of having quite restrictive effects on the market, medical patents are highly controversial and easy targets because of their perceived ability to directly harm someone's right to life by gatekeeping life-saving medicine. Since the start of the AIDS epidemic there has been a particularly harsh backlash against the existence of medical patents, with some companies even voluntarily giving away required medication to poorer countries. With the advent of COVID-19, and the international rush of countries vying to secure distribution rights for a viable vaccine produced by private sector companies, it seems an especially prudent time to consider the validity and justification behind drug patents in the United Kingdom. This essay will critically analyse the argument that drug patents encourage innovation and are a net benefit to society. This argument is strong on two counts; it not only is within the spirit of historical and contemporary intellectual property law in the UK and EU, but it also is an argument that especially fits the field of medical IP law. This investigation will be composed of two parts. First it will go over the theoretical and empirical grounding behind the justification of medical patents. Before anything else it is essential to argue and prove that it is justified to give companies who develop new medicines almost monopolistic rights over the invention for a relatively long period of time. For the sake of brevity, it will analyse this through a utilitarian point of view. Second, it will then describe some key landmarks in British IP law and show how our argument is within the spirit of this legislation.

The first modern patent legislations worth mentioning – following the 'Paris Convention for the Protection of Industrial Property (1883)', which defines the types of most commonly used patent protections as 'Collective Marks':

Industrial Designs, Trade Names, Indications of Source, and Unfair Competition[239] – are the 'Patents and Designs Act (Hansard) 1919' (succeeding the 'Patents and Designs Act, 1907/Principal Act'), and the 'Patents Act 1949'. The 1919 Act, among other things, gave a sixteen-year monopoly to patents and allowed for the granting of compulsory licenses three years after the granting of the patent. For the time this was not an uncommon part of patent legislation. This was exacerbated by the 1949 act which, with sections 41 and 46, allowed for a compulsory license immediately after the granting of a patent on behalf of or in service of any Government department and any person authorised in writing by the British Crown[240]. Furthermore, sections 14 and 33 allowed for opposition to the granting of a patent and the ability to seek its revocation. The suggested grounds for opposing a patent; "*Lack of novelty, prior publication and ambiguous or imprecise specification*".[241] The reason for these specifications is clear. The act, though it may have unintentionally harmed innovation through the compulsory license clauses, still suggested that patents were meant to be "novel" and innovate. Similarly, the 1977 Patents Act shows some ways in which innovation is valued as an important part of patenting. Section '1(1) of the act includes two interesting requirements for the granting of a patent: "a) The invention is new; b) it involves an inventive step". Furthermore, Section '1 (2) a)' prohibits the patenting of a "discovery, scientific theory or mathematical method"[242]. One example of this is that though methods of identifying an illness are not patentable if done through the human body, a company can still patent *in vitro* determination of laboratory parameters. Furthermore, EPO case law later establishes, in a different interpretation, that '"diagnostic methods practices on the human body" should not be considered to relate only to methods containing *all* the *steps* involved in reaching a medical diagnosis, but to *all methods* practised on the human body which related to diagnosis or were of value for the purpose of diagnosis' (EPO TBoA T964/99, 2001, *Cygnus*), the caveat being that if one step had diagnostic importance and 'essential', then the procedure would be exempt

[239] World Intellectual Property Organization, *Summary of the Paris Convention for the Protection of Industrial Property (1883)*
[240] Legislation.Gov, "Patents Act 1949" < https://www.legislation.gov.uk/ukpga/Geo6/12-13-14/87/contents>
[241] Slin, *Patents and the UK Pharmaceutical industry between 1945 and the 1970s*, page.194
[242] Legislation. Gov, "Patents Act 1977" < https://www.legislation.gov.uk/ukpga/1977/37/section/1>

from patenting[243]. According to recent estimates, patents were granted, or applications filed for almost 20% of human genetic data, including data for monogenic disorders such as Cystic fibrosis, and more common predisposition genes such as breast cancer[244]. In summary, the current medical patents legislation ensures that patents are first and foremost innovative inventions – not discoveries – which deserve special protection. In the case of legislating and patenting medicine, it is clear novel drugs meet the criteria and spirit of the act. Novel drugs aren't simply new discoveries of existing product but are entirely new creations that required large quantities of capital and work to invent.

Novel techniques of medical practice and research should be delicately assessed to measure their quality and effectiveness prior to acceptance for clinical application. The *Utilitarian Framework* – or the 'egalitarian principle' – argues that for a practice (or law) to be 'good', it must produce the maximum amount of happiness and prosperity for all people. In the case of medical patents, utilitarianism promotes a systems of rewarding health care innovations vis-à-vis the possibilities of the public health care system[245]. This can, however, encourage the suggestion that medical patents are unjustified because the monetary reward received by companies for Research and Development (R&D) does not weigh-equally – in the sense of health-economical calculations – with the potential lives saved through either an insurance-cap based healthcare or free access to medicine via national tax-based subsidies. Utilitarianism, in this context, is not just a philosophical framework but also an economic and political one. Thus, understanding the true purpose of utilitarianism in the medical context is critical to determining whether current laws are acceptable, fulfil and go beyond historic ambitions. This is a primarily pragmatic framework, accepting that even if an act may result in some negative socio-economic consequences, patents applied to secure diagnostic tests – for example – can ensure that patients get tested, for prenatal or predictive purposes, and either received 'negative' outcomes – where the fear of disease is quelled – or 'positive' outcomes – where although

[243] Van Overwalle, *IPR Issues and High-Quality Genetic Testing*, p256
[244] Soini (et.al) *Patenting and licensing in genetic testing: ethical, legal and social issues*, p10
[245] Ibid, p34

a persons' outlook may be bleaker, there is hope in resolving the affliction thanks to early treatment. Thus, an advantage of the medical patent system is the guarantee of 'cyclical' development, unhindered by uncertain, or uncontrollable, business-motivated competition[246]. With this in mind, one sees the main counter argument in defence of medical patents: medical patents are acceptable as they allow for more lives to be saved in the long run than if they were to not exist.

Technological – and consequently theoretical – innovation is an integral incentive for companies to invest in new technology and to share this information publicly. For instance, if a company could choose to either spend a large quantity of capital to try and invent some new product or could copy from a less-capable competitor with sure success, the latter would always be wiser without the existence of patents. The company would be incentivised to hoard capital until it saw some blossoming new invention which it could take and better produce with its greater manufacturing capacity. With patent law, the company would be forced to at least buy out the owners of the patent, which would still encourage innovation in a roundabout manner – in the context of this paper, furthering the 'cyclicality' of medical patents. This argument is supported largely due to the high cost of capital that is required to constantly innovate in the healthcare industry. While estimates have varied, one source puts the mean investment required to bring a new drug to market at about $1.3 billion.[247] There are several important factors requiring the investment to be so expensive. First, new medicines have very lengthy R&D processes as well as difficult clinical trials. Additionally, many clinical trials fail and require new research and development for medicines. Consequently, it is important to create adequate monetary *and* moral incentives for innovation in the medical industry. Although companies may sometimes develop diagnostic tests without appropriate patent coverage, these sorts of tests are only done for basic experiments that have either a very low or decidedly scientifically unknown projected outcome. In some circumstances, companies may be excluded from entering relevant

[246] Ibid, p35
[247] Wouters (et.al). *Estimated Research and Development Investment Needed to Bring a New Medicine to Market, 2009-2018*, pp.844–853.

pharmaceutical markets if they do not provide the adequate incentives, and subsequently protections, for their R&D funding applications[248]. Despite the obvious mechanisms attempting to provide rigidity to the medical patents sector, drug manufacturers are increasingly 'anti-generic medication' – what this means is that companies are resulting to a number of tactics to undermine the '1984 Drug Price Competition and Patent Term Restoration Act', which gave pharmaceuticals exclusive protection rights as a result of new drug innovations. Companies who successfully developed new therapies through the 1984 Act were well placed to assert monopolies on the markets, however, this was offset by an aggressive expiration schedule which encouraged any and all drug companies to manufacture non-brand name versions as "generics"[249]. Two common ways pharmaceuticals are undermining the widespread accessibility to generics are "pay for delay" agreements (where companies pay generic manufacturers to not release drugs), and "Citizens petitions" (where applications can be made, by corporations, to authorities such as the American FDA to deny or delay approvals of generics)[250]. The jeopardization of "generics" reflects a pharmaceutical industry allowing monopolies to run rampant – it runs counter to the 'cyclicality', the ideology behind the patent system itself: increased prosperity for inventors due to market monopoly realisation, enhanced reputations, recovered R&D costs and increased welfare prosperity for those chiefly benefitting from their inventions[251]. Under the Utilitarian framework, it seems best to create laws that would save the most amount of people over the longest period of time. Forcing pharmaceuticals to innovate in line with the practices established through the 1984 Drug Price Competition and Patent Term Restoration Act would likely be more beneficial than dismantling long-standing patent laws, leading to one-time injections of cheaper medicine into the market and subsequent 'free-flows' of less certifiable products.

While the theoretical argument is grounded in legislation and ideology of 'common-good' regulation, further broader study in empirical data is

[248] Soini (et.a), *Patenting and licensing in genetic testing*, p.35.
[249] Fox, *How Pharma Companies game the System to Keep Drugs Expensive.*
[250] *Ibid.*
[251] Gubby, *Is the Patent System a Barrier to Inclusive Prosperity? The Biomedical Perspective.*

required to better contextualise the problems of medical patent reforms. According to data gathered by Brownyn H. Hall and Dietmar Harhoff in their 2012 study, healthcare is actually one of the few industries where the argument for utilitarian reform of patent rights is shown to be accurate, and desirable. It is generally recognised that the pharmaceutical industry is one of the few parts of the economy which sees a tangible increase in innovation due to patent rights.[252] Furthermore, one study, detailed by Duncan S. Gilchrist in his 2016 work, examined the effect of "First-in-Class Exclusivity" in the USA to determine how they impact subsequent production of drugs by medical companies.[253] There are two interesting takeaways from this study: First, it is suggested that an extra year of exclusivity and protection could lead to the subsequent net production of 25-30% subsequent entry, or 0.2 units/more drugs. From this, it is also implied that a standard deviation change (i.e. about 3 years) in the exclusivity period could have drastic effects on drug innovation. An exclusivity period one standard deviation shorter is expected to lead to 0 in the average class, and an increase by one standard deviation is expected to double the number of subsequent entries. It might be pointed out that this is not a direct measure of innovation. For instance, it could be the case that this is merely showing the introduction of small "updates" to existing drugs which warrants the renewal of a patent. While scepticism is appreciated, this is a difficult argument to prove or disprove. It is still useful to prove that good patent protection can show an increase in drug production, whereas bad protection can show a decrease in production.
An important part of this increase in production is the fact that new medicines require high research and development costs. This, in turn, requires strong patent rights in order for the product to be profitable. To view it in another way, it seems that we can use research and development as a sign of innovation in the medical field. Indeed, if we follow the literature, this is another benefit of strong patent rights. Sunil Kanwar and Robert Everson, in their 2003 study, used cross-country data to examine the relationship between strong patent rights and levels of research and development.[254] They argued that based on their data, a strong set of patent rights led to a

[252] Hall and Harhoff, *Recent Research on the Economics of Patents*, pp.548-9.
[253]Gilchrist, *Patents as a Spur to Subsequent Innovation? Evidence from Pharmaceuticals*, pp.189-221
[254] Kanwar and Evenson, *Does Intellectual Property Protection Spur Technological Change*, pp. 235-264.

direct increase in research and development spending. In fact, they even argue that the link could be stronger, had they been more careful in separating countries which only had strong rights *De Jure* and countries which had strong rights *De Facto*. Albert G.Z Hu and I.P. L Png expand on this idea, in their 2013 study, by instead examining the effect of IP law on economic growth.[255] While they argued that strong IP rights could contribute to increased economic growth, they also advocate for a more nuanced view. It is argued that IP rights are most valuable for highly developed countries with particularly manufacture-focused economies. In particular it was important for countries with large patent-intensive industries (such as drug development). These two articles further advocate the benefits of a theoretical, utilitarian-minded approach to medical patents. While the Evenson article proves the beneficial effect of strong patent law on research and development, the Hu study shows that good IP law is essential for the strong economic growth of patent-intensive industries like the medical sector.

Returning to the "generic" drugs problem, this highlights the longstanding 'balancing' problem between monetary and moral incentives – it would be beneficial to explore more empirical examples of where this problem has exacerbated the issues of accessibility to the drugs themselves, and compromised the desired 'cyclicality' of medical patents. Such is traditionally called the "free-rider" problem: wherein companies which have not had to bear high research and development costs can take inventions and sell them for cheap, while profiting since they don't have to make up for earlier research costs. James Bessen, et.al, collect a variety of data in their 2011 study, to emphasise how especially problematic this imbalance is in the medical industry.[256] First it has been proved that two years after generic alternatives have entered prices drop to 37% of original value. This is perhaps why there is such a discrepancy in patent pursuits between medical companies and other sectors - as they suggest, firms applied for patents on 79% of pharmaceutical products as opposed to 36% of product innovations

[255] Hu and Png, *Patent Rights and Economic Growth: Evidence from Cross-country Panels of Manufacturing Industries* pp.675-698.
[256] Bessen and Meurer, *Do Patents Perform Like Property?* p.15.

and 25% of process innovations. This seems to align with other research into this field. For instance, one paper suggested that a patent could cause a 40-50% increase in the returns of an invention.[257] With this in mind it should be easy to see why strong patent rights are important to the continued innovation and growth of a pharmaceutical company. In fact, there is even good reason to believe that weaker patent rights, on top of curbing innovation, could lessen access to important medicine. An analysis by Peter M. Cockburn, et.al, of this trend covers the launches of 642 new drugs across more than 70 countries. The 2016 paper argues that on-top of the ordinary costs of new drugs, every country's sale application has its own set of necessary and expensive costs, which puts even more pressure on drug companies to increase revenue. It is part of this which puts so much importance on patents and strong IP rights. It is then argued the best way to increase the diffusion and access to important drugs is to create long-lasting and strong IP rights.[258] While the UK currently does not have to worry about gaining access to important drugs – thanks in large part to the National Health Service platform and robust maintenance of it – it is very likely that substantial changes in current IP/Patent laws – were they to provide weaker and shortened protective durations – would only serve to harm access to new medicine.

In closing, perhaps more important than extrapolating the theoretical, utilitarian, model's integrity is analysing whether UK legislation actually follows this justification for medical patents. It is important to recognise that medical patents already have a long (and controversial) history in UK legislation. The first recorded patent for medical remedy in England was introduced by John Dickson in 1620, and relates to *"certain commodious instrument called a back stall, back franie, or back skreene, for the ease and re liefe of such sick persons and others as are, or shall be, distempered or troubled with heate of theire backes through continual keeping or lye ing on theire beddes. "*. Subsequently, in 1726 we can see Benjamin Okell's "Doctor Bateman's Pectoral drops".[259] These examples are brought up, not because they prove a link between the theoretical model but because they point to a

[257] Jensen (et.al) *Estimating the Patent Premium; Evidence from the Australian Inventor Survey*, pp.1128-1138.
[258] Cockburn (et.al) *Patents and the Global Diffusion of New Drugs*, pp. 136-164.
[259] "Early Medical Patents" The British Medical Journal, Vol. 2, No. 667; (1873).

continued tradition in our legal system of patenting medical inventions. This tradition has faced criticism long before the modern criticisms of expensive medicines. In the 1930s there was a great atmosphere of debate in the medical community over the ethics of patenting medicine. At its height 'The Conference of Medical Patents' (made up of representatives from the Royal Colleges of Physicians and Surgeons and the Medical Research Council) declared that "the granting of further patents in the medical field is undesirable in the public interest". The reason given is that patents hinder research and discovery.[260] Interestingly, an exception was created for "synthetic preparation of new substances".[261] This distinction is suggested to be based on the difference between the two categories of therapeutics. While patenting the use of biological material (e.g. vitamins, toxins, viruses) was seen to decrease innovation in the field, it was admitted (with German labs being used as an example) that synthetic patents could actually foster progress in the medical community.[262] This isn't strictly a legal source, though the arguments used align not only with our theoretical model but with the legislative model present in modern-day UK.

To conclude, it seems that medical patents in their current form provide sufficient benefit to jurisdictions such as the United Kingdom. Theoretical arguments, advocating a more utilitarian, fair and crucially 'cyclical' model of regulating medical patents, are well-evidenced by historic problems with balancing monetary and moral obligations of inventors and pharmaceutical corporations in accordance with 'fair' legislative precedents on what constitutes a 'patent' within the context of multilateral and the medical sectors. While pharmaceutical market price-regulations are in some jurisdictions – like the United States of America – offering outdated security on investments, or unfairly expensive to the chief consumers of the sector's products because of longstanding industry manipulation and exploitation, it is difficult to argue that they are unjustifiably utilitous, or that this is a good enough reason to dismantle patent rights altogether. One preferable solution would be for countries leading in average investment in scientific R&D to subsidise the production of important medicines while also unifying global

[260]"Conference on Medical Patents *Unanimous Conclusions*"; *The British Medical Journal*, Vol.1, No. 3725; (1932).
[261] *Ibid.*
[262] *Ibid.*

standards for drug testing, and manufacturing, similar to the precedents established in the '1984 Drug Price Competition and Patent Term Restoration Act'. Though this wouldn't completely solve the price issue, it would dramatically decrease the price of medicines by putting a time-cap on monopolies and reintroduce true beneficial cyclicality into the pharmaceuticals market.

Legal Rigidity and Digital Fluidity

By Sarah Graham

|Preamble|

This paper shall focus on the transformative nature of technology, namely in facilitating criminal and terrorist activity and the unique challenges to regulation. The Internet requires a re-examination of static concepts of territorial boundaries and legal jurisdictions which contribute to uncertainty in regulation.

The Internet demands a re-examination of traditional frameworks of law and international relations, where static conceptions of territorial boundaries and legal jurisdictions are contrasted by the fluidity and affordances of the Internet. This juxtaposition of rigidity and fluidity suggests that the Internet might pose distinct challenges to legal governance systems while concurrently, legal systems and state values might be upheld and propagated through Internet regulations. Asking questions of how legal systems regulate Internet spaces uncovers a fundamental reconsideration of sovereignty and the traditional conception of the state. By interrogating these questions to identify actors in this debate and evaluating relevant legal cases, this article reveals the role of powerful state and non-state actors who disproportionately influence the values espoused and upheld by the relationship between the Internet and legal tradition. Before presenting and evaluating two case studies, the historical vision of the Internet and notions of territoriality and sovereignty are considered.

A Concise History of the Net

Although actors have sought to dissect, regulate, and assert authority over the Internet in recent decades, a brief history of the Internet reveals the formative notions of autonomy and individual liberation characterize the network. The Internet can be understood as the open and flexible network underpinned by domain naming systems, routing systems, and related technology systems owned by service providers which transmit information through TCP/IP packets to endpoints.[263] Oversimplifying the Internet process demonstrates the original visons on the internet as a “Stupid

[263] Hunsinger, “Critical Internet Studies.”

Network," premised on cheap, underspecified infrastructure to enable increased user control, liberating innovative energy. [264] Using this definition of the Internet itself, the historical development of the Internet can be illustrated.

The development of this network is the product of historical contingency and idealistic visionaries. Through the union of United States Department of Defense projects and communities of university researchers, the cyber architecture was designed with a degree of autonomy and grounded in an idealistic notion of radically free information sharing and problem solving.[265] However, as with any new frontier, the Internet presented a new landscape for regulation and governance. American cyberlibertarian John Perry Barlow's *A Declaration of Cyberspace* encapsulates the initial articulation of the debate between the cyberspace's independence and imposed governance. The declaration disavows notions of consent of the governed, asserting to governments of the industrial world that their hostile, colonizing legal concepts of property, expression, and movement have no application in cyberspace. [266] Barlow's manifesto which rejects Internet governance in response to the US Federal Communications Commission and the Communications Decency Act (CDA) of 1996 provokes questions of independence and (inter)national influence, illustrating that although the Internet is initially both open and global, regulations and borders are subsequently applied to these spaces, as both the physical infrastructure and users exist within governed states.

Negotiating Impressions of Digital Sovereignty

Responses to the history and propagation of the Internet ask if the state has in fact "been killed by the Internet." Though the influence of cyberspace has demanded reconsiderations, scholarship tends to reject such theatrical assertions, instead offering a more nuanced understanding of the Internet as influencing the specific notions of sovereignty and territoriality which are instrumentalized by powerful actors. Sovereignty, as invented in inherently Western statist terms, is defined as the externally recognized

[264] Isenberg, "The Dawn of the Stupid Network."
[265] Rheingold, *The Virtual Community: Homesteading the Electronic Frontier*.
[266] Barlow, "A Declaration of the Independence of Cyberspace."

authority over a state's affairs. Within this, international legal sovereignty refers to mutual recognition of domestic legal authority.[267] In contrast to Barlow's declaration that governments "have no sovereignty [in cyberspace]," cyberspace is situated within the existing state framework and is therefore subject to notions authority and territoriality. While Internet spaces might enable transnational platforms, the Internet and its infrastructure exists in actual physical locales. [268] This material reality endures within the prevailing systems of governance which has divided the planet into mutually exclusive territories[269]. Using this framework, one might therefore ask what institutions govern the Internet?

Through the historical narrative of the Internet and recent legal cases, multiple actors can be identified as contending for authority and governance in cyberspace to create a multistakeholder model. In addition to institutions such as the Electronic Frontier Foundation (EFF) who exercise expertise and specific routes for cyber progression, the Internet Corporation for Assigned Names and Numbers (ICANN) is a force for governance. ICANN, registered as a non-profit in the United States, promotes technical coordination as an epicenter of the Internet community. However, ICANN is critiqued for American influence and the favoring of corporate interests. This thus reveals a second set of actors exerting control- technology corporations such as Google, Apple, Microsoft, and Facebook who through varying methods shape the Internet and its endpoints to suit their goals. Lastly, conventional state governments have sought sovereign authority over the internet within their territory through a variety of measures. Frequently cited are China's "Great Firewall" and Russia's sovereign RuNet which regulates and filters content flows to effectively assert control in authoritarian contexts. Ultimately, the abovementioned sovereignty negotiates authority with these varying actors within the statist system. Legal systems therefore must contend with both state and non-state actors in cases of cyberspace, as revealed in the cases of *ACLU v. Reno* and *LICRA v Yahoo!*

The negotiation between the unrestrained freedom envisioned within the Internet with notions of governance remains the focus of this article,

[267] Krasner, *Sovereignty: Organized Hypocrisy*.
[268] Chaves, "The Internet as Global Platform?"
[269] Mueller, *Networks and States*.

firstly examined in the case of *ACLU v. Reno*. As organization formative in the legal concepts of cyberspace, the EFF engages in political participation, litigation, education, and campaigns which seeks to ensure that legal provisions protect cyberspace as a separate space free from the intrusion of territorial government. As a legal intermediary, the EFF gained support of elite political libertarians with strong ties to corporations such as Microsoft and Hewlett-Packard who tried to create legal protections between the Internet and territorial government, namely the United States. Under the First Amendment of the US Constitution, where anything online might be considered speech, the EFF perceived the CDA as inadvertently constraining important online speech through its vague definition of indecency to regulate obscenities online. [270] Through a legal union between the EFF and the American Civil Liberties Union (ACLU), the case *ACLU v. Reno* resulted in a Supreme Court ruling of 7 to 2 which declared the CDA's vague provisions which unnecessarily "chilled" protected speech as unconstitutional. Important in this case is the assignment of distinct legal status for cyberspace communications, notably premised on Western, especially American, notions of protected speech and First Amendment protection. However, amid the absence of legal restrictions or protection online, cyberspace began to be shaped by specific articulations of the law and American principles of protected speech, effectively applying a set of standards to a perceived open Internet free from *any* legal concepts of expression or regulation. Ultimately, this historical vision reveals instead the underlying debates and iterations of values underscore Internet conceptions of sovereignty and territoriality which are constantly negotiated alongside existing legal structures and politics.

Secondly, the case of *LICRA v Yahoo!* demonstrates a challenge to a specific "brand" or articulation of legal values set out by American law. Although a bordered Internet is seen as been antithetical to the Internet's original idealism, traditional notions of state sovereignty prevail. LICRA, a French anti-Semite non-profit filed a civil suit against Yahoo US and Yahoo's French affiliate alleging that Yahoo allowed the posting of illegal Nazi and Third Reich memorabilia in violation of French code which prohibits the

[270] Wu and Goldsmith, *Who Controls the Internet? Illusions of a Borderless World.*

wear and sale insignias which recall organizations declared illegal in the Nuremburg Charter. As the case progressed through French court in 2000, it was confirmed that Yahoo's auction of such items through the site is prohibited, despite arguments made by Yahoo under the US First Amendment.[271]

Within this consideration between the sovereign state jurisdiction and the transnational nature of the Internet, this case reveals that states are capable of enforcing domestic law over foreign Internet companies operating within another state's borders, supporting to counterclaim that the Internet has not in fact "killed" the notion of the state. This case recalls the significance of freedom of expression and protected speech debated by the CDA of 1996. As the Internet is a transformative medium of communication and speech, these cases are a selection of numerous international cyber-related cases which reveal the underlying contestation over the governance and sovereignty of speech.[272] Here, each case illustrates competing notions of speech, where the American "cyberlibertarians" interpret the First Amendment as guaranteeing an absolute right to free speech while the European model adopts a framework that balances free speech with the right to be free from discrimination or harassment based on national identity or race.[273] These cases illustrate the nuanced differences of Western states between values and notions of protected speech as dictated by law must be negotiated through new mediums such as the Internet.

Conclusion

The cases of *ACLU v. Reno* and *LICRA v. Yahoo!* broadly reveal the role of powerful state and non-state actors as political intermediaries who disproportionately influence a set of values disseminated online; in this case, the intricacies of protected speech. This relationship is further negotiated in international settings, such as conventions which have sought to regulate cybercrime within appropriate applications of sovereignty and extraterritorial investigations.[274] Ultimately, American scholar Tim Wu encapsulates this

[271] "UEJF and Licra v Yahoo! Inc and Yahoo France."
[272] Wu and Goldsmith, *Who Controls the Internet? Illusions of a Borderless World*.
[273] Daniels, "Race and Racism in Internet Studies."
[274] For analysis of ICTs and international cybercrime see: Clough, "A World of Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonization."

argument by asserting that platforms structure who gets heard and what "brand of law" is applied in cyberspace despite its decentralized governance structure. This illustrates which sets of underlying ideas of authority, state power, and ethics are espoused. Scholars have highlighted this system's domination of Western, specifically American, information industries to situate themselves and the Internet as essential service platforms which shape a broad, single cyberlaw underpinned by narrow articulations of the United States First Amendment. Despite this, challenges such as *LICRA v Yahoo!* to this potentially pervasive and monolithic brand of cyberlaw suggests that legal systems maintain core notions of sovereignty and a bordered Internet.

Ultimately, interrogating the questions engendered by the debate between legal rigidity and digital fluidity reveals that although the Internet and quandaries of protected speech remain largely confined by state structures, the general point of reference or comparison rests within an Americanized legal tradition and technical innovation. Both government institutions and private actors who seek to advance their goals dictate this relationship. This analysis opens additional intersections for consideration such as transnational companies including Google and Facebook who are materially located in California and what implications this has on their adherence to and shaping of national and international cyberlaw.

The Gender Recognition Act; Past, Present, and Future

By Lauren Pursey

|Preamble|

This article shall focus on the landmark 2004 Gender Recognition Act and associated legal cases. It will explore the legal rulings that lead to the Act being passed, the content of the Act and the impact this had on the transgender community in the UK, including subsequent legal issues.

The Original Act

The Gender Recognition Act (GRA) 2004 was, for its time, a landmark piece of legislature, which allowed transgender people in the UK to have their true gender recognised by law and addressed their legal rights in regard to marriage, pensions and inheritance.

The original act sets out the application process for a Gender Recognition Certificate (GRC), which, if granted, enables a transgender person to obtain a new birth certificate with their 'acquired' gender. Those eligible to apply include 'a person of either gender who is aged at least 18' on the basis they are 'living in the other gender', or have legal gender recognition in another country.[275] The criteria which an applicant must meet in order to be granted a GRC is as follows: the applicant must have a diagnosis of gender dysphoria, they must have lived in their 'acquired' gender for a period of two years prior to their application, and must declare their intention to live in their 'acquired' gender until death. The evidence required includes either a report by a registered medical practitioner in the field of gender dysphoria or a chartered psychologist in the same field, in addition to a report by another medical practitioner. These reports must detail the diagnosis of the applicant's dysphoria and include details of any treatment undergone as part of their transition.[276] The application is judged by a Gender Recognition Panel compromised of 'legal members' and 'medical members'.[277] If an application is successful, then a GRC is issued and the applicant's gender 'becomes for all

[275] GRA Section 1
[276] Section 3
[277] Schedule 1

purposes the acquired gender'.[278] However, if unsuccessful, an applicant may after 6 months make an appeal on a point of law.[279]

Background

The passing of the GRA culminated years of legal disputes surrounding transgender people's rights. I will focus on two key cases, the first of which is *Corbett v. Corbett 1970*. Arthur Corbett filed for a declaration that his marriage to a transwoman, April Ashley, was void as Ashley was legally of male sex.[280] The case is particularly uncomfortable to read. The judgement conveys transphobic bias and is intensely medicalised. Ashley is sometimes referred to by the wrong pronouns and the report details the invasive medical assessments she underwent for the trial, which involved 'an unusually large number of doctors'[281]. Judge Ormrod established four criteria to determine the sexual condition of an individual: chromosomal factors, gonadal factors, genital factors, and psychological factors.[282] The psychological factors were however disregarded, ruling congruent biological criteria as the deciding factor for legal sex. Therefore, the marriage was ruled void as the tests determined Ashley's legal sex as male.[283] The effects of this judgment were devastating to the transgender community, Ormrod's biological criteria continued as the basis to determine legal sex for over 30 years, preventing full legal gender recognition for all transgender people.

Christine Goodwin v. The United Kingdom is the most significant ruling in regard to the GRA.[284] Christine Goodwin, a transwoman, applied to the European Commission of Human Rights in 1995, alleging violations of Articles 8 and 12, of the European Convention on Human Rights 'in respect to the legal status of transsexuals in the UK and particularly their treatment in the sphere of employment, social security and marriage.' The key complaint was that transgender individuals in the UK for social security, national insurance and employment purposes were recorded as their sex assigned at birth. This meant

[278] Section 9 (1)
[279] Section 8
[280] Press For Change, 'Case Law: Legal Gender Recognition, (Corbett v. Corbett pdf)' p. 2, pp. 5-6
[281] PFC p. 7
[282] PFC p. 14
[283] PFC p. 19
[284] *Christine Goodwin v. The United Kingdom,* no.28957/95*,* ECH*R* 2002-VI (pdf)

Goodwin was ineligible for a state pension at 60 and the lack of legal recognition for her gender led to discrimination and unjustified difference in treatment.[285] The applicant argued that since rapid changes in scientific understanding and social attitude to 'transsexualism' were occurring, there was no reason for the UK to avoid implementing gender recognition laws.[286] The court reflected that, in previous cases such as *Rees v. the United Kingdom (1986),* the UK's refusal to alter birth certificates was not regarded as violating Article 8. The Working Group Report (April 2000), which highlighted the problems faced by transgender people in the UK and identified a potential solution of granting legal recognition of the 'acquired' gender, was evaluated as evidence of social change in the UK.[287] It was determined that, since Goodwin had undergone gender confirmation surgery through the National Health Service, it appeared 'illogical to refuse to recognise the legal implications of the result to which the treatment leads'.[288] The court unanimously upheld there was a violation of Articles 8 and 12 of the Convention. This ruling held the UK responsible for implementing a process by which transgender people could change their legal gender, leading to the GRA and disregarded Ormrod's criteria as determining legal sex.[289]

Interim GRC's and Subsequent Cases

The GRA is illustrative of the intersection of LGBTQ+ rights. Since same sex marriage was not yet legal in the UK, a transgender person who was married would have to choose between full legal recognition of their gender or their marriage. A successful married applicant would be issued an Interim GRC and was required to obtain a divorce in order to be issued with a full GRC.[290] This issue was brought before The European Court of Human Rights in 2006 in the cases *Parry v. The United Kingdom* and *R. and F. v. The United Kingdom.*

In the first case, the applicants had been married for over 40 years and stated their wish to remain as 'a loving married couple.'[291] One of the applicants had successfully applied for a GRC in 2005 but had only been issued with an

[285] pp. 2-5
[286] p. 18
[287] p.12
[288] p.23
[289] p.29
[290] GRA Section 4(3), Section 5 (a)
[291] *Parry v. The United Kingdom*,no.42971/05,ECHR 2006-XV (pdf)

Interim Certificate. In the second case, the applicants had married in 1998 and the second applicant wished to obtain a full GRC in order to have her gender legally recognised.[292] In both cases, the applicants complained under Article 8 of the Convention that the GRA represented an unlawful interference with private and family life, and under Article 12 that it violated their right to marry. They also complained under Article 14 that the provisions requiring divorce were discriminatory[293] and that they did not view a civil partnership, available under the Civil Partnership Act 2004, as a full substitute for marriage.[294]

Both applications were declared inadmissible, despite admittance that the applicants 'must, invidiously, sacrifice her gender or their marriage'. In those terms, there is a direct and invasive effect on the applicants' 'enjoyment of their right to respect for their private and family life'.[295] The court emphasised that Article 12 stated particularly 'men and women' have the right to marry 'according to the national laws governing the exercise of this right'. Therefore, Parry's marriage was void under Section 11 of the *Matrimony Causes Act 1973* and F's marriage would be void due to Section 5 of the *Marriage (Scotland) Act 1977*, since the legislations held marriage could only be between members of the opposite sex.[296] Additionally, it was ruled that, in regard to Article 8, a fair balance had been struck as, although the applicants had to divorce, they could still under the Civil Partnership Act acquire legal status for their relationships.[297]

Recent Developments

Following the legalization of same-sex marriage, the GRA has been amended so that transgender people who are already married can obtain a GRC without having to divorce. However, a controversial amendment was made requiring evidence of a statutory declaration by the applicant's spouse that they consent

[292] R. and F. v. The United Kingdom,no.35748/05,ECHR 2006 (pdf)
[293] Parry pp.5-6, R p. 7
[294] Parry p.9, R p. 3
[295] Parry p.10 , R p.12
[296] Parry p.5, R. p .5
[297] Parry p.10, R p. 14

to the continuation of the marriage after a full GRC is issued.[298] If the spouse does not consent, then only an Interim GRC will be granted.[299]

In 2018, the Government ran a consultation on reforming the GRA as, since 2004, only 4,910 people had legally changed their gender despite estimations that around 200,000 to 500,000 people in the UK are transgender.[300] Results showed many transgender respondents had not applied because they found the current process 'too bureaucratic, too expensive and too intrusive'.[301] 64.1% of respondents stated they felt 'there should not be a requirement for a diagnosis of gender dysphoria' and 80.3% of the respondents favoured the removal of the requirement of a medical report detailing all treatment received.[302] Reasons given for this include that these elements perpetuate 'the outdated and false assumption that being transgender is a mental illness'.[303] Additionally, 78.6% were in favour of removing the requirement for evidence of living in the acquired gender for 2 years and 64.7% thought changes needed to be made to the GRA to accommodate those who are non-binary. The Government announced in September 2020 very minimal changes, not in line with the above responses, which uphold the current requirements of the GRA. However, the application fee, which 58.5% of respondents were in favour of removing[304], will be significantly reduced and the process digitised.[305]

To conclude, I hope this exploration of the GRA has not only shown how far the UK has come in regard to transgender people's rights but has also drawn attention to how far it still has to go. While one would hope we have moved beyond the obvious bias of the Corbett v. Corbett ruling, much of the language used in today's legislation still seems somewhat outdated. The focus on the medical elements of the transition process is still predominant in legislature, despite transgender people expressing the barriers and stigma this creates, and the law still excludes those whose identities are not accounted for within traditional gender binaries. I would in particular like to draw comparison between the changes enabled by The Working Group Report and its impact in the Goodwin v. UK case and the recent government consultation which yielded

[298] GRA section 3 (6B)
[299] GRA section 4 (3)
[300] Consultation p. 1, 10
[301] Consultation p.11
[302] Analysis p.8
[303] Consultation p.21
[304] Analysis P. 9, 12
[305] Government Equalities Office. 'Statement'.

much less progressive results, revealing how transgender people's voices in the UK are still being overlooked in relation to the legislation which most impacts their lives.

The Insanity Plea

By Nikita Khandheria

|Preamble|

This paper will focus on an assessment of the plea 'not guilty by reason of insanity.' The piece will seek to interrogate how the mentally ill are treated by the judicial system, whether the NGRI plea is reasonable, and the ways in which the legislative system must adapt to ensure that mental health is prioritised.

Legislative representatives such as lawyers, judges, and even doctors are behind the curve in their understanding and recognition of the importance of motives, individual thought, and mental wellbeing. However, this lack of recognition and acceptance of mental health concerns is neither new nor unique to the generation past. People have always been visual thinkers and inherently question things they cannot see. Historically, the judiciary and legislative systems are not exempt from this tendency for being dismissive or suspicious of the mentally ill. Nevertheless, with mental health initiatives gaining traction in the widespread social consciousness, many have turned to question the plea 'not guilty by reason of insanity', a cornerstone ruling which has defined mental-health legislation for decades.

The *Plea of Insanity* has always been a legal ghost which consistently haunts the Supreme Court. Since its first usage, it has sparked debate over its justice as a punishment, its constitutional legitimacy, and the best approach to take in exercising such a plea. It is helpful to compare this to the approach taken for its more physical counterpart, 'Duress'. 'Duress' has been argued to be a mirror image of the insanity plea but is exercised in an external world rather than an internal space of legally acknowledged "mental insanity". Duress is called upon when a defendant faces a physical threat and is forced to commit a crime that they would not otherwise be committing. The legitimacy of duress as a legal plea has widely been accepted by both the public and the judicial system as an acceptable reason to receive judicial leniency. It is understandable that in cases of duress, a person does not have physical control and is being made to commit a crime against their own will, thus making it unjust to hold them accountable their actions. Many arguments for the insanity plea question what makes a mental entrapment different from a physical duress? Does an individual who has committed a

crime during a loss of mental control deserve the same leniency? In both cases, the acts are not representative of the person committing them. Unlike duress, the plea of insanity has been torn, questioned, and debated to no end. This evident double-standard centers around suspicion of the legitimacy of mental illness. If one is physically held and made to commit a crime it is forgivable, but if one is mentally influenced to commit a crime you risk the ultimate punishment. In almost all respects, the insanity plea is disregarded or understood as not comparable to its physical correspondent.

The disparities between the physical and the mental evaluation in law have frequently been discussed in previous papers. The question that this essay hopes to tackle is 'whether it is both legal and moral for this difference to exist'. To understand why there is this debate surrounding the insanity plea, one must to understand what it is and where it originated from. The insanity plea has its roots back in the 14th century. In 1313, a source discussing the mentally ill depicted them as 'witless' and a risk to their own society[306]. This unjustly created prejudice against those with mental illnesses. The inability to perform 'mundane' tasks and fear of being lost in one's self caused people to discriminate against the ill when it came to jobs, relationships and everything but accountability. This inherently unbalanced notation was carried into the 19th century and served as background for the M'Naghten case.

In 1834, a Scottish woodcutter by the name Daniel M'Naughten shot Edward Drummond, who he incorrectly believed to be the Prime Minister. Although his identification of his target was inaccurate, his shot was not. Drummond died five days later of a fatal wound caused by said accident. Rare as attempts on the Prime Minister's life were, the date remains in our history books as a momentous occasion due to the trial and verdict that followed. M'Naghten plead not guilty by reason of insanity. A case is set in stone when the defendant admits to the crime of which they have been accused, or so was thought in 1834. The plea of insanity, despite its present challenges, was even more difficult in the past. In order to enter a plea of "not guilty" and have a trial about the legitimacy of the crime (and the accountability of the defendant), the crime had to be confessed. By confessing

[306] Andrew Chung, Lawrence Hurley,"U.S. Supreme Court lets states bar insanity defense".

to the crime, a defendant forfeited their trial arguing over whether they were actually guilty[307]. Thus, pleading "not guilty" but accepting the crime meant forgoing your right to a trial about your actual act. This meant if they found the defendent not insane, they would be charged and imprisoned without any ability to reduce the sentence associated with the crime. As a result of this difficulty, lawyers have since been allowed to petition multiple pleas[308]. The jury address the insanity plea last, allowing the defendant first to be found guilty of the crime before pleading not guilty on the grounds of insanity. In the M'Naghten case, the initial "not guilty" plea was the cleverest and most effective way to spin the story, since they did not need a trial to know that M'Naghten was going to be found guilty. This was the best way to not prejudice the jury and the lords before proving to them that M'Naghten was in fact not of sound mind at the time of the crime. [309] Beyond the key difference in plea succession, the M'Naghten's trial followed a similar format to modern trials except with less specificity of demands. The defense after claiming the plea, (much like now), carried the burden of having to prove M'Naghten's insanity. This is another key area in which the plea of insanity is very unorthodox. In most circumstances, the prosecution must uphold the burden of proof to the court since as we are innocent unless proven otherwise. However, in the insanity plea it is the defense going against a general assumption: we are all sane until proven otherwise. It almost feels like a flipped trial.[310]

Proving insanity, thus, is as difficult as proving guilt. One cannot simply have a psychiatrist stand-in as an expert witness and offer their opinion on the defendant's mental sanity. Instead to prove insanity (like guilt), you require evidence from the past, present and sometimes future (such as appointments scheduled for a future date or prescriptions to be taken in the future). At the time of M'Naghten trial, the specificity of who could testify to his sanity was not established and so, his sanity was proven by calling upon the general populace -regardless of medical background- to testify that he was one of the

[307] Lord Justice Lloyd Jones, et al. 'Criminal Liability: Insanity and Automatism A Discussion Paper'.pp.167-168

[308] Sutcliffe, Eric. "Criminal Law: Plea of Not Guilty by Reason of Insanity: 174-83

[309] Slater, Eliot, H. B. Kidd, and Jeanne Johnson Smith. "M'Naghten Rules."

[310] Lord Justice Lloyd Jones, et al. Criminal Liability: Insanity and Automatism A Discussion Paper. P.124

'witless' and thus, should not be held accountable for a moment of mental incapacity. The job of the defense has perhaps become more difficult in the modern judicial system. In order to use the insanity plea, they are now required to cite psychiatric professionals who may have previously identified the defendant was suffering from a mental illness. This is often followed by a defense psychiatrist, who is not asked to assess the defendant's present sanity instead is asked to discuss the defendant's prior actions which can include not avoiding arrest, not trying to cover up the crime, or going to a public place while covered bloodstains to prove said insanity.[311] The M'Naghten trial was then sent to a vote by the House of Lords. The lords then were baffled by the main elements of the case, eventually finding M'Naghten not guilty by reason of insanity. [312] This major win for the mentally ill in 1834, led to a legal revolution in approaches to defendants with longstanding or temporary mental illnesses.

Soon, it became mandatory to hold an internal review by each individual country to assess how their judicial system fairs against the findings of the M'Naghten trial and the constitution. The M'Naghten trial established that if the defendant either did not know what they were doing at the time, or did not realize their actions were wrong, they cannot be held fully responsible for a crime.[313] Many countries have embodied this idea in their national judicial systems. However, in the United States this has not yet -and might never be- established federally. The Supreme Court of the United States, despite their time spent analysing and reevaluating said verdict, has kept the people waiting for concrete legislation. They have never offered a direct law but instead verdicts that could be thought of as tangential. Thus, in order to assess legality in the US one is forced to take individual laws infer what they would mean in relation to the plea and connect them to previous verdicts[314].

This can be seen in a few case studies such as 'Staples v the United States'. In this trial, the Supreme court found that a person's "mens rea" or motive carries a heavyweight on the verdict. [315] Thus, if a person did not

[311] All Answers Ltd. R v McNaughten M'Naghten Case Summary
[312] Slater, Eliot, H. B. Kidd, and Jeanne Johnson Smith. "M'Naghten Rules." p.11.
[313] Lilienfeld,Scott o and Hal Arkowitz. "The Insanity Verdict on Trial. pp.64-65.
[314] Andrew Chung, Lawrence Hurley,"U.S. Supreme Court lets states bar insanity defense".
[315] Lord Justice Lloyd Jones, et al., 'Criminal Liability: Insanity and Automatism A Discussion Paper'. p.122.

mean to kill their child, but instead save them from the demons she thought were inside them like Yates did in 'Yates v State' (a classic example of the insanity plea), would this mean they would be free to go? Despite this not being the motivating reason, Yates -a woman diagnosed with postpartum depression who tragically drowned her six kids in a tub in Kansas- as one of the 1% of individuals whose insanity cases have been ultimately acquitted.[316]

Relevant cases such as 'Ford v. Wainwright' which stipulate a court cannot put someone to death if they are not mentally sane because it is a violation of their 8th amendment right should be seen as an indication that the courts must legally recognise insanity as a reasonable plea.[317] Since the only element being debated is whether the courts recognize insanity (suggests the judicial system should consistently acknowledge the plea of insanity as legitimate. Continuing along the same line of reasoning and combining the two verdicts: 'basing verdicts on motives' and 'accepting that some people are mentally ill and not in control of their impulses and thus, have clouded motives' begs the question of why the supreme court might disregard the constitutionality and fairness of the plea. When these two principles are accepted, there is no reason for an ill individual to be held accountable for a crime they could not have had the ability not to commit. In the context of governance, when a governing body is required to take a firm legal stance, it sets a precedent which can just as easily be extrapolated to apply to cases beyond the scope of the cases they intended to address. Due to this, the United States Supreme Court, a federal body responsible for representing 328.2 million[318] has not formally taken a stance. This is incredibly significant because the first place to turn to investigate issues of legality is the Supreme Court. The constitution itself is a collection of national ideas which the Supreme Court must define in practice. As the US has not produced defining national legislation like the United Kingdom's Mental Health Act of 1983, the burden of choice shifts to the state legislatures. Thus, there are significant differences in which states have found the plea to be constitutional. Most states in the US have established some version of the insanity defense,

[316] Lilienfeld,Scott o and Hal Arkowitz. "The Insanity Verdict on Trial. 64-65

[317] Ford v. Wainwright, 477 U.S. 399 (1986).

[318] U.S. Census Bureau. Population Density

finding that it would be unconstitutional not to allow one to prove that they were not of the sane mind at the time of the crime. [319]

Nevertheless, like with every state-specific law there are states like Idaho, Montana, Utah, and Kansas that have gone in a different direction and fully discarded the traditional insanity defense. This produces a divide among states in relation to outcomes- if you were 'fortunate' enough to be in Houston like Yates when you drown your kids you would have a chance of surviving, whilst if you found yourself in Kansas when you shot your wife and child to death, you would be put on death row since in Kansas the plea of insanity would be inadmissible. Both the minority and majority group of states have had to find some onus and constitutionality in their claims, arguing that the other option is unconstitutional and incorrect thus, creating a zero sum game around the division of these rights; the more you allow the defendant the less 'safety' you provide to the public- restricting one's rights for the other. As we continue our study into whether the *Insanity Plea* should be considered both constitutional and morally correct, we need to look at why each state chose to have the laws the way that they did. On the majority side of the states, we have a group that believes sending these people to jail is restricting both their right to just punishment and safety (a constitutional right). In most cases, the purpose of punishment is to deter individuals from repeating offenses while rehabilitating them renter society. However, since this defense was made for 'people that are incapable of understanding their criminal actions and to help get them the treatment the need'[320] jail as a form of rehabilitation might not be the 'just' and most effective punishment. These people that do not believe that what they did was wrong would gain very little by sitting in a jail without active rehabilitation. By finding someone guilty and sending them to jail, the government would be denying them the right full-time treatment which might be a more effective course of action to help them understand societal standards and moral guidelines.

Further, this idea of restricting a person's right to treatment was found to be a breach of article 3 in Keenan V. United Kingdom, for exactly this reason. Putting someone in jail that is mentally ill has increasingly shown in studies a correlation to the risk they pose of hurting themselves or killing themselves.

[319] Andrew Chung, Lawrence Hurley,"U.S. Supreme Court lets states bar insanity defense"
[320] Lilienfeld,Scott and Hal Arkowitz. "The Insanity Verdict on Trial. 64-65

[321]Additionally, it is the responsibility of a justice system, who are aware likelihood of suicidal thoughts or actions increases without treatment in detention centers, to allow the defendant to prove that they are not fit to be imprisoned. A defendant must be able to defer or receive a more lenient punishment where they require additional mental support.[322] On the other side are the minority states, that are more focused on protecting the rights of the public and believe that an individual should be treated with leniency with regards to a crime simply because 'they do not understand what they were doing was wrong and get away with it' and because for the government to 'protect' them, allowing them on the streets is a violation of the public's 14th amendment right.

In essence, the *Insanity Plea* in its current form necessarily restricts either the rights of the public or of an individual. Several alternative pleas exist which try to balance the possible outcome of this increasingly difficult decision. An example of such is the hybrid plea, which allows defendents to plead 'guilty on grounds of mental insanity'. This plea has been adopted by 20 states in the United States and allows an 'ill' defendant to receive the treatment they need from their jail cell. This allows them to both serve time for the crime they committed and recover to be rehabilitated back into society, which some might argue is the primary role of the criminal justice system. However, as ideal as this solution or any other sounds, many critics still disagree with the punishment. In cases of mental duress or instability, the justice system regularly shows a double standard in convicting the defendant. Others yet again would argue that these mentally ill are not criminals and putting them in with criminals will turn them into criminals like it did in the Stanford prison experiment. Lenient convictions for those struggling with mental health are still a controversial feature of legislative systems worldwide. The answer is not absolute, but the discussion is increasingly relevant as societies seek to confront inherent biases surrounding mental health.

[321] Sherry Colby,"Does the Constitution Require the Insanity Defense?"

[322] Sutcliffe, Eric. "Criminal Law: Plea of Not Guilty by Reason of Insanity: 174-83

Law and the Quest for Autonomy in the Western Tradition

By Martin Bernier

|Preamble|

This paper shall focus on the evolving features of autonomy and normativity in Western societies. The autonomy of Law as a product of deliberate will, regardless of other metaphysical or scientific considerations, is perpetually questioned in modern discussions of legality.

Attempting to provide a legal definition of democracy, the Austrian jurist Hans Kelsen depicted it as a regime which aim is to avoid the "torment of heteronomy". Making sure that the law is made by — or in the name of — the people that abide by it, the democratic regime indeed avoids the imposition of an external law to a body politic. However, fostering autonomy has not always been the primary role attributed to law, nor its only purpose in history. It is therefore necessary to interrogate the relationship between law and autonomy in the Western tradition. The line of questioning here is twofold; it must address the issue of the autonomy of law itself and then its ability, as a normative tool, to render a society autonomous. The aim of this article is to trace the links between the roots of the "rule of law" ideal — instituting the autonomy of law — and the will to envision law as a product of wilful human deliberation, thus proclaiming autonomy.

One must begin by considering the Greek roots of the rule of law and the role of the Gregorian Reform in affirming the supremacy and the autonomy of law. Increasing emphasis is then placed on the impact of the French Revolution in redefining law as the product of human reason, distinct from any other normative source. Finally, this investigation aims at questioning the persistence of this ideal today against the potential emergence of new overarching principles, such as economics, threatening the autonomy of human reason and its role in the lawmaking process. The first step in enquiring about the conceptual links between law and autonomy is to explain how the autonomy of law theoretically precedes the use of legal science in an effort to foster autonomy. In short, the autonomy of law can be defined as the ability of a legislative system to define its own rules and to avoid being ruled

by other laws. For instance, in a despotic regime, the law is not autonomous as it is subject to the will of the despot. The autonomy of law is therefore consubstantial to the idea of the rule of law. The rule of law means that all members of a society — including and especially the government — are subject to legal rules. This affirms the supremacy of law. Perhaps the most significant feature induced by this idea is that the lawmakers themselves are bound by the law. This guarantee is a prerequisite to ensure that law cannot be turned against the society by a governing minority and threaten its autonomy.

This idea of the autonomy of law has a long history in the Western tradition of legal thought. As Alain Supiot explains, we can trace back this ideal to Ancient Greece. In Plato's *Laws* for instance one can find the idea that the rulers must be the slaves and the servants of the laws.[323] Later on, the supremacy of the law in the West was strengthened as a consequence of the Gregorian Reform. Indeed, the works of Harold Berman have shown how, in the twelfth century, the pope's will to turn the Church of Rome into a state and to spread the canon law in Christian states led to an affirmation of the supremacy of the law. It was the coexistence in the same political communities of different autonomous legal systems — secular and canon law — that made the supremacy of law in these communities possible. This led to the idea that, as Berman states, "the supreme political authority —the king, the pope himself— may make law (…) but he may not make it arbitrarily, and until he has remade it —lawfully— he is bound by it."[324] This vision of the law is still remaining today in Western legal traditions where the autonomy of law and the necessity for the rulers to abide by it is no longer questioned.

If Ancient Greece teaches us, through the words of Plato, the importance of the rule of law, the democratic regime instituted in Athens was also the first to introduce the idea that a city is governed by the laws it has itself made, thus fostering autonomy. The linguistic shift from *thesmos* to *nomos* during the sixth and fifth centuries before Christ outlines this change from a law imposed

[323] Supiot, *La gouvernance par les nombres*, p. 81
[324] Berman, *Law and Revolution* II, p. 5

to the citizens to a law made by them.[325] This idea, as much as the idea of the rule of law, has crossed the centuries and was especially praised by the French revolutionaries of the eighteenth century. Indeed, we can read in the Declaration of the Rights of Man and Citizen that "the law is the expression of the general will" (Article 6). It therefore follows from this principle the idea that law is the product of wilful human deliberation and that it must be adopted after a reasonable debate.[326] Law is clearly understood here as a normative tool that must enable the society to determine its own governing principles and rules, without referring to any transcendental principle. The French revolutionaries thus promoted both the autonomy of law, affirming that " any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution" (Article 16 of the Declaration), and the use of law to render the society autonomous by determining rationally its ruling principles. The emphasis placed on reason in the quest for autonomy is especially important. In fact, a society can only be said to escape the "torment of heteronomy" when it refuses any external source of normativity. The French revolutionaries thus rejected the divine principles, turning rather to Deist rationalism, in order to truly found their laws in human reason. More specifically, the rationality praised by the revolutionaries and adopted by their successors was mostly rooted in individualism and utilitarianism. This was clearly visible in the Criminal Code enacted by Napoleon in 1810 for instance, where more emphasis was placed on deterring criminal acts by fear of penalties than on punishment.[327] This illustrates the will to regulate rationally the behaviours of the citizens rather than condemning acts for their intrinsic evilness or their noncompliance with moral standards dictated by religion.

After this historical overview of both the idea of the autonomy of law and its aim to foster autonomy in the societies it rules, it is necessary to study how these ideals survive today and to analyse which evolutions they went through. This paper shall focus on one aspect that has implied major changes in the way we conceive of the autonomy of law, namely the preeminent role taken by

[325] Supiot, *La gouvernance par les nombres*, p. 84
[326] Herzog, *A Short History of European Law*, p. 187
[327] Berman, *Law and Revolution* II, p. 12

economics in the normative order. This evolution was first analysed by Karl Polanyi in *The Great Transformation*, where he explained the huge impact of the disembedding of the economy on the British society between the eighteenth and nineteenth centuries. According to him, the economy used to be a sphere of social life among others, playing rather a minor role in it, but, following the development of capitalism, it began occupying a preeminent role in the organisation of the societies and even became overarching. The direct consequence of the growing importance of economics in law is that, instead of being seen as the product of wilful human deliberation, it is now argued by some that law should be determined in order to maximise individual utilities.[328] This is the approach praised by the 'Law and Economics' doctrine of the School of Chicago.

According to the supporters of this economic analysis of law, all citizens must be understood as rational actors attempting to maximise their utility[329] and the legal sanctions are seen as market prices.[330] The interesting feature of this evolution is that it does not completely reject the earlier principles according to which law should be based on human reason but it understands human reason only as economic rationality. This emphasis on economic rationality necessarily threatens the autonomy of the society as its members, as workers and consumers, are seen as mere commodities and automatons trying to optimise their behaviours. Moreover, the question here is the direction that the society chooses to follow through the laws it enacts. The Greeks for instance aimed at reaching a just city whereas the goal of most economic analysts of the law is to maximise productivity and growth. The problem with someone not respecting a contract is therefore not of a moral nature but rather that "without enforceable contracts, people have difficulty cooperating with each other, so productivity is relatively low".[331] The autonomy of law and its potential to foster autonomous societies is thus a major feature of the Western legal tradition but it is not exempt from questionings and threats. The virtue of wilful human deliberation is indeed competing today with powerful calculators and the divine law rejected by the French revolution could be replaced by the invisible hand of market theorised by Adam Smith.

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[328] Supiot, *Homo juridicus*, p. 26
[329] Shavell, *Foundations of economic analysis of law*, p. 1
[330] Cooter, 'Expressive Law and Economics', p. 585
[331] *Ibid*., p. 604

Special Thanks

We would like to dedicate this Issue - our inaugural full-edition publication - to Professor Caroline Humfress, in recognition of her guidance and tireless support of the St Andrews Law Journal.

This Issue required an immense commitment from our editors, they are: Jenna Lipman, Jacob Joad, Manhattan Murphy-Brown, Theo Wilson, Libby Hichens, Ryan Blackman Hodges, Nathan Beck-Samuels, and Mary Dodd. We are so grateful to them for making this Issue of the Law Journal possible!

A special commendation to Jenna Lipman for producing a host of incredible graphics for this edition of the Law Journal. Her talents are remarkable, and we are very lucky to count her among our editors.

Finally, we thank our talented contributors for producing insightful and daring articles which interrogate the way in which law has shaped the modern world. Your works provide the Law Journal with a mandate for multidisciplinary, extracurricular, learning that contributes to the wider corpus of legal studies at the University of St Andrews.

Bianca Ritter & Oliver Roberts
Co-Founders & Co-Managing Editors

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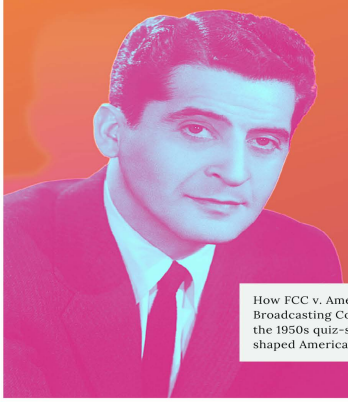

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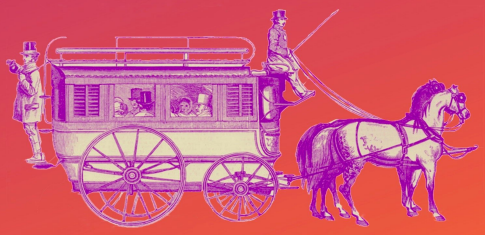

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