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EDITORIAL

With immense honour, excitement, and gratitude, we present the 50th edition of the Exeter Law Review. The aim of the Journal is to showcase some of the finest academic writing by both students and scholars. We are pleased that this year's special anniversary edition showcases this aim, featuring articles from current scholars as well as students from both Exeter Law School and elsewhere. The Journal and participating in the Editorial Board has shaped most of our time at Exeter Law School and our experience within it. Being on the Editorial Board has taught us the value of contributing to the academic community while developing essential skills that we will take with us into our future careers. We are fortunate to have had an incredible team of editors, and to the guidance from our predecessors, Scarlett and Nikolai, as we took on the responsibility of Co-Editors-In-Chief. We wish to extend the deepest gratitude to Dr Lisa Cherkassky for trusting us to maintain the high standard and quality of the journal while providing us with invaluable guidance and support. To Ella, Zoe, Michelle, Louis, Micaela, Nela, Caitlin, Annabel, Aoife, Akshaya, Rosie, Michelle, and Sneha: This edition of the Journal would not have been possible but for your hard work and dedication. Thank you for your commitment to the Law Review and for working to maintain its exemplary standards of scholarship. To our successors, Rosie and Nela, we send our heartfelt wishes for your success as you take on the responsibility in maintaining the quality, standards, and values of Exeter Law Review. Finally, we wish to thank the authors who have contributed to this year's edition. The articles contributed spanned a diversity of areas of law, across multiple jurisdictions. We hope you enjoy reading the contributions as much as we, this year's Editorial Board, have enjoyed curating them.

Courtney Jones and Matt Barrett
Co-Editors-In-Chief,
Exeter Law Review 2024-25

J.G.G v Trump: Due process is little more than illusory justice

Josh Bowman

ABSTRACT

Immigration, or more specifically "illegal" immigration, has been the subject of much public debate and controversy in recent years throughout the western world. A regular criticism levied at current immigration policy has been that "illegal" immigrants are afforded far too many legal protections; ultimately frustrating the state's ability to remove these individuals. Essentially, they are afforded excessive due process. However, public and political discourse often omits the potential legal consequences of these policies on the rights of everyday citizens. Framed simply: can you divorce the rights of immigrants from the rights of citizens? This article emphatically rejects this premise. Through dissecting the Supreme Court's per curiam judgement in JGG v Trump, this article exposes the flawed legal logic behind the majority's insistence on seeking habeas relief and thus vacating Judge Boasberg's TRO. More fundamentally, this article illuminates the Trump administration's deliberate and systematic assault on due process for immigrants and, by extension, its own citizens. Drawing on the treatment of the plaintiffs and parallel cases such as those of Mahmoud Khalil and Abrego Garcia, this article contends that the government's conduct manifestly undermined access to meaningful notice and fair adjudication - core tenants of due process rights. Finally, this article urges that the ratio decidendi created by JGG v Trump, in tandem with this administration's treatment of Mahmoud Khalil and Abrego Garcia, has set in motion the fatal undermining of due process rights for all Americans.

INTRODUCTION

Due process is an incredibly powerful legal doctrine; so much so that it enshrined within the US Constitution: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury … without due process of law'[1]

[1] US Constitution, Article V.

and 'nor shall any State deprive any person of life, liberty, or property, without due process of law'.[2]

Due process can be defined as 'a course of formal proceedings (such as legal proceedings) carried out regularly and in accordance with established rules and principles'.[3] Additionally, it may be defined simply as 'the legal right to be treated equally and fairly'.[4] Both definitions concur that due process encompasses some type of fair treatment within an established system of rules. Due process is fundamental to democratic government and more broadly the rule of law because, irrespective of the allegations made against an individual or group, those people have mechanisms and protections under which to contest those allegations. Whilst the legal system is certainly not perfect, due process greatly reduces the chance of these miscarriages of justice. The right to a fair trial, the presumption of innocence, and the right to appeal a decision are just a few examples of some of the protections afforded under due process.

This article argues that the Supreme Court's decision to overturn Chief Justice Boasberg's Temporary Restraining Order, pertaining to the prevention of the deportation of alleged members of Tren de Aragua, amounts to wilful ignorance of the Trump administration's flagrant disregard for the law. By vacating the TRO solely on the basis that the plaintiff's case encompassed the incorrect legal mechanism, the majority in the court deliberately failed to consider two key factors. Firstly, the plaintiffs were denied any meaningful due process at every stage of the proceedings by having their deportation expedited. This pattern of blatant disregard for due process can be further demonstrated by the ongoing Abrego Garcia and Mahmoud Khalil cases. Secondly, it ignores the rationale behind the TRO being made in the first place, namely that if the plaintiffs were deported, they would almost certainly face 'the risk of torture, beatings, and even death'.[5]

By ruling in this way, the Supreme Court appears to uphold due process. However, as will be demonstrated, this is only illusory in nature when considering the context surrounding this *per curiam* judgment. The potential consequences of this ruling could be dire, not only for the plaintiffs, but for American society more broadly.

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[2] US Constitution, Article XIV, section 1.
[3] "due process", *Merriam-Webster.com Dictionary* <https://www.merriam-webster.com/dictionary/due%20process> accessed 15/05/2025.
[4] "due process", *Cambridge Business English Dictionary*. <https://dictionary.cambridge.org/dictionary/english/due-process> accessed 15/05/2025.
[5] *J.G.G. v. TRUMP*, 1:25-cv-00766, (D.D.C. Mar 24, 2025) ECF No. 53 (pg 35).

I. THE SUPREME COURT'S DECISION TO OVERTURN THE TRO

On the 7th of April 2025, in a 5-4 *per curiam* decision, the Supreme Court vacated Chief Judge Boasberg's Temporary Restraining Order. The justice writing the majority opinion, unnamed due to the nature of the shadow docket, summarised the plaintiff's position, stating

> [t]he detainees seek equitable relief against the implementation of the Proclamation and against their removal under the AEA.[6] They challenge the Government's interpretation of the Act and assert that they do not fall within the category of removable alien enemies'[7] before concluding that the court '[does] not reach those arguments.[8]

The judgment argued that '[c]hallenges to removal under the AEA … must be brought in habeas'[9] because 'their claims for relief 'necessarily imply the invalidity' of their confinement and removal under the AEA' - even though they are not requesting release from confinement.[10] The rationale behind this logic appears at first glance to be relatively uncontroversial: the reason the plaintiffs are being deported is due to the AEA, if they argue that this statute is invalid then it is also surely true that, accordingly, their detention would be unlawful. Thus, habeas is the correct equitable relief in this instance.
However, this conceptualisation of the rationale ignores the nature of the application. Earlier, Chief Judge Boasberg summarised that:

> [u]pon information and belief, the government has transferred Venezuelans who are in ongoing immigration proceedings in other states, bringing them to Texas to prepare to summarily remove them and to do so before any judicial review—including by this Court. For that reason … they represent seek this Court's intervention to temporarily restrain these summary removals, and to determine that this use of the AEA is unlawful and must be stopped.[11]

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[6] Alien Enemies Act (1798) 50 U.S.C.
[7] *Trump v. J. G. G.*, 604 U.S. No. 24A931 (2025), pg 2.
[8] Ibid.
[9] Ibid 2.
[10] Ibid 3.
[11] *J.G.G. v. TRUMP*, 1:25-cv-00766, (D.D.C. Mar 15, 2025) ECF No. 1, [4].

Clearly, the focus is on preventing the use of the AEA to immediately deport the plaintiffs, hence the TRO. A court may then later decide whether the AEA is lawful and, if so, whether any of the plaintiffs constitute part of the class prescribed in the executive order. To unequivocally clarify: the plaintiffs may still be deported under other statutes, just not under executive order's interpretation of the AEA. The limited scope of the TRO affirms this, stating that 'pending further order of this Court, not to remove Plaintiffs, or any members of the putative class, from the United States pursuant to the Alien Enemies Act and any Proclamation invoking the Act'.[12] The emphasis here is on ensuring that due process is upheld, not to frustrate the government's ability to deport through other means. Egregiously, the government failed to even comply with Chief Judge Boasberg's TRO, in spite of its limited scope: '[d]espite Boasberg's ruling, 261 people were deported to El Salvador (on) Saturday, 137 of whom were removed under the Alien Enemies Act'.[13]

Additionally, the factual matrix of the case renders the Supreme Court's analysis incorrect. The plaintiffs, as previously mentioned, were already in custody whilst their immigration appeals were making their way through the courts. Vis-à-vis their detention, the plaintiffs did not at any stage entertain the notion that it was unlawful; merely that the use of the AEA to bypass their due process rights was. Therefore, they sought equitable relief on that basis. This rationale was affirmed by Chief Judge Boasberg's ruling, who wrote

> [i]n denying Plaintiffs meaningful procedural protections to challenge their removal, the Proclamation violates due process. The Proclamation on its face also denies Plaintiffs any time to settle their affairs before departing and thus violates the due process.[14]

The Supreme Court's ruling therefore appears to be founded upon an incorrect construct of the facts surrounding the plaintiffs' intentions behind this submission rather than an objective analysis of the facts.

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[12] *J.G.G. v. TRUMP*, 1:25-cv-00766, (D.D.C. Mar 15, 2025) ECF No. 3.
[13] Rosen J, 'Justice Dept. may invoke state secrets privilege in Alien Enemies Act deportation case' (*CBS News,* 19 March 2025) <https://www.cbsnews.com/news/justice-dept-alien-enemies-act-state-secrets-privilege-deportation-case/> accessed 17/05/2025.
[14] *JGG* (n 11), [103-104].

The Supreme Court, in spite of all of this, reinforces the right to due process by stating that '[f]or all the rhetoric of the dissents, today's order and per curiam confirm that the detainees subject to removal orders under the AEA are entitled to notice and an opportunity to challenge their removal'.[15] This is emphasised in Justice Kavanaugh's concurrence, writing '[i]mportantly, as the Court stresses, the Court's disagreement with the dissenters is not over whether the detainees receive judicial review of their transfers … The only question is where that judicial review should occur'.[16] This should however instil little confidence in the plaintiffs. Conversely, as will be demonstrated by Justice Sotomayor's dissent and the general conduct of the Trump administration, this right to due process would appear to be founded only in theory.

II. JUSTICE SOTOMAYOR'S DISSENT

In response to the majority ruling, Justice Sotomayor wrote a scathing dissenting opinion. Condemning the court's 'legal decision' as 'suspect', she criticised the majorities' omission when considering the impact of deportation, writing '[i]t does so without mention of the grave harm Plaintiffs will face if they are erroneously removed to El Salvador'.[17]
The danger the plaintiffs would face if deported to El Salvador is well documented, with Boasberg highlighting that '[n]eedless to say, the risk of torture, beatings, and even death clearly and unequivocally supports a finding of irreparable harm'.[18] Amnesty International concurs with these claims, writing that

> [r]eports indicate extreme overcrowding, lack of access to adequate medical care, and widespread ill-treatment amounting to cruel, inhuman, or degrading treatment. Additionally, Salvadoran organizations have reported more than 300 deaths of individuals while in state custody, some of them showing clear signs of violence.[19]

This high risk of irreparable damage formed a crucial component of the original TRO issued by Chief Judge Boasberg.

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[15] *Trump v J.G.G.* (n 7) p 3.
[16] *JGG* (n 7), 1 (Justice Kavanaugh).
[17] *JGG* (n 7), 2 (Justice Sotomayor).
[18] *JGG* (n 5).
[19] Amnesty International, 'Unlawful Expulsions to El Salvador Endanger Lives Amid Ongoing State of Emergency' (*Amnesty.org*, 25 March 2025) <https://www.amnesty.org/en/latest/news/2025/03/unlawful-expulsions-to-el-salvador-endanger-lives-amid-ongoing-state-of-emergency/> accessed 17 May 2025.

Although the *per curiam* judgment itself held that the appeal should have been brought under habeas, therefore not necessitating any comments concerning any other issues found in the application, not even addressing the due process issues nor the imminent risk faced by the plaintiffs in obiter appears convenient. If the majority had engaged with these issues, they likely would have been forced to condemn the administration's actions thus far, potentially stoking public opposition against the deportations. Thus, not engaging with these issues appears to be politically convenient for the conservative majority. Perhaps Justice Jackson's final remarks best summarise this issue:

> [w]ith more and more of our most significant rulings taking place in the shadows of our emergency docket, today's Court leaves less and less of a trace. But make no mistake: We are just as wrong now as we have been in the past, with similarly devastating consequences. It just seems we are now less willing to face it.[20]

Justice Sotomayor also criticises the 'regard for the Government's attempts to subvert the judicial process throughout this litigation'.[21] This issue arises repeatedly in her dissent, later writing '[m]ore fundamentally, this Court exercises its equitable discretion to intervene without accounting for the Government noncompliance that has permeated this litigation to date'.[22] Justice Sotomayor went onto condemn the government's conduct as 'an extraordinary threat to the rule of law'.[23] It is hard not to see why, since the government repeatedly ignored court orders:

> Far from acting 'fairly' as to the controversy in District Court, the Government has largely ignored its obligations to the rule of law. From the start, the Government sought to avoid judicial review, 'hustl[ing] people onto those planes' without notice or public Proclamation apparently 'in the hopes of evading an injunction or perhaps preventing them from requesting the habeas hearing to which the Government now acknowledges they are entitled.[24]

[20] *JGG* (n 7), 1 (Justice Jackson).
[21] *JGG* (n 17).
[22] *JGG* (n 17), 16.
[23] *JGG* (n 17), 17.
[24] Ibid.

The quotations in Justice Sotomayor's comment on this issue actually heed directly from Chief Judge Boasberg's earlier ruling on this case.

Within this case it is clear that the Trump administration sought to prevent the plaintiffs from receiving any due-process rights that are ordinarily afforded to them. If the plaintiffs had sought relief in habeas, as the Supreme Court has ruled the plaintiffs should have done, then they would have almost certainly been deported before they had the chance to make such an appeal. Justice Sotomayor's criticisms concerning the legal conclusion, but even more so her analysis of the conduct of the Trump administration during these proceedings, are completely accurate. Furthermore, they serve as a damning inditement of the administration's conduct prior to and throughout these proceedings.

III. THE TRUMP ADMINISTRATION'S CONDUCT IN CONTEXT

A. MAHMOUD KHALIL

Justice Sotomayor is absolutely correct to be concerned with the government's conduct more broadly. For example, Mahmoud Khalil, a famous Palestinian student activist, was arrested on the 8th of March 2025 by plain clothes ICE agents. Early on the 9th of March, his lawyer filed a habeas petition at 4:40am in New York, where the ICE Detainee locator said he was. After 9am, the locator updated to say that he was actually detained at the Elizabeth Contract Detention Facility in New Jersey. At 9:29am, his lawyer called this detention centre twice, but received no response. Around 12pm, Mahmoud Khalil was transported to JFK Airport, where at 2:45pm he took a flight to Dallas, unlike what Mahmoud Khalil's lawyer was told by ICE at around 1:20pm, that being Khalil was going to be detained in New Orleans. After arriving in Dallas at 5:30pm, Khalil then took another flight at 9:30pm to Alexandria, Louisiana, where on the 10th of March at 12:33am he was finally detained at the Central Louisiana ICE Processing Facility.[25]

The next development comes with the US District Judge Furman ruling on the 19th of March that '[i]n sum, the Court DENIES the Government's motion to dismiss Mahmoud Khalil's Petition but GRANTS its motion to transfer, albeit to the District of New Jersey, not to the Western District of Louisiana'.[26] This order was ignored by the Trump administration, with Mahmoud Khalil remaining in detention in Louisiana. More importantly, on the 11th of April,

[25] William Turton, 'Mohammed Mahmoud Khalil Arrest Timeline' (*William Turton Blog,* 15 March 2025) <https://www.williamturton.com/p/mohammed-Mahmoud Khalil-arrest-timeline> accessed 18/05/2025.
[26] *Mahmoud Khalil v. Joyce*, 1:25-cv-01935, (S.D.N.Y. Mar 19, 2025) ECF No. 78, pg 32.

'[i]n a decision that appeared to be pre-written, an immigration judge ruled immediately after a hearing today that Mahmoud Khalil is removable under U.S. immigration law'.[27] The ruling of the Louisiana judge is crucial in this case. Whilst probably not legally significant in the grand scheme of things, with Mahmoud Khalil's legal representation already filing appeals against the ruling, we can start to see a pattern emerging in the Trump administration's conduct. Justice Sotomayor mentioned in her per curiam dissent that

> [t]he Government may well prefer to defend against '300 or more individual habeas petitions' than face this class APA case in Washington, D. C. Ibid. That is especially so because the Government can transfer detainees to particular locations in an attempt to secure a more hospitable judicial forum.[28]

This suspicion is echoed by Donna Lieberman, head of the New York Civil Liberties Union, who told CNN 'I think that the government was pretty clear that it wanted to get Khalil out of New York City, out of New Jersey and into friendlier territory. That's why they spirited him off in the middle of the night to Louisiana'.[29] The judge's ruling demonstrates just this: a court residing in a jurisdiction sympathetic to Trump who will endeavour to rule favourably for the administration. The same can be said for the Supreme Court ruling in their ruling, forcing the Venezuelan immigrants to file for habeas in Texas: another jurisdiction sympathetic to the administration. This is but an aspect to the illusory justice that this article criticises.

B. ABREGO GARCIA

The case of Abrego Garcia is another clear example of the administration's conduct regarding due process. Detained on the 12th of March, he was illegally deported on the 15th of March to El Salvador. Robert L Cerna, in a declaration to the Maryland District Court on the 31st of March, stated that '[t]hrough administrative error, Abrego-Garcia was removed from the United States to El Salvador'.[30] The Supreme Court ruled unanimously on the 10th of April

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[27] Centre for Constitutional Rights, 'Despite Lack of Evidence, Louisiana Immigration Judge Rules Against Mahmoud Khalil in Deportation Hearing' (*Centre for Constitutional Rights*, 11 April 2025) <https://ccrjustice.org/home/press-center/press-releases/despite-lack-evidence-louisiana-immigration-judge-rules-against> accessed 15/05/2025.
[28] *JGG* (n 7), 15.
[29] Sanchez R and Pazmino G, 'Judge has ruled legal permanent US resident Mahmoud Khalil can be deported. What comes next?' (*CNN*, April 13 2025) <https://edition.cnn.com/2025/04/13/us/mahmoud-khalil-deportation-ruling-appeals> accessed 20/05/2025.
[30] *Abrego Garcia v. Noem*, 8:25-cv-00951, (D. Maryland Mar 31, 2025) ECF No. 11, [15].

that the Government is to 'facilitate' Abrego Garcia's release from custody in El Salvador',[31] upholding a previous ruling made on the 4th of April by District Judge Paula Xinis.
In spite of this, the government has seemingly ignored this order by the Supreme Court. This is particularly telling given his comments in an interview on his first 100 days in office with Terry Moran from ABC News:

> TERRY MORAN: You could get him back. There's a phone on this desk. PRESIDENT DONALD TRUMP: I could. TERRY MORAN: You could pick it up, and with all -- PRESIDENT DONALD TRUMP: I could TERRY MORAN: -- the power of the presidency, you could call up the president of El Salvador and say, "Send him back," right now. PRESIDENT DONALD TRUMP: And if he were the gentleman that you say he is, I would do that. TERRY MORAN: But the court has ordered you -- PRESIDENT DONALD TRUMP: But he's not. TERRY MORAN: -- to facilitate that -- his release-- PRESIDENT DONALD TRUMP: I'm not the one making this decision.[32]

Donald Trump contradicts himself: he would use his Oval Office phone to call Bukele to return Abrego Garcia if he 'were the gentleman that you say he is' but simultaneously is not 'the one making the decision',[33] even though obviously not picking up the phone, as Moran suggested, is in itself a choice. Both positions clearly cannot be true at the same time.
The non-compliance of the administration has even been highlighted multiple times by the courts. District Judge Paula Xinis ruled on the 11th of April that the 'Defendants made no meaningful effort to comply'[34] with an earlier court order. On the 22nd of April, District Judge Paula Xinis ruled that

> Defendants' answer to Interrogatory No. 5 … reflects a deliberate evasion of their fundamental discovery obligations' and that '[g]iven the context of this case, Defendants

[31] *Abrego Garcia v. Noem*, 604 U.S. No. 24A949 (2025).
[32] 'FULL TRANSCRIPT: Trump's exclusive 100 days broadcast interview with ABC News' (*ABC* News, April 30 2025) <https://abcnews.go.com/US/full-transcript-trumps-exclusive-100-days-broadcast-interview/story?id=121291672> accessed 20/05/2025.
[33] Ibid.
[34] *Abrego Garcia v. Noem*, 8:25-cv-00951, (D. Maryland Apr 11, 2025) ECF No. 61, pg 1.

> have failed to respond in good faith, and their refusal to do so can only be viewed as wilful and intentional noncompliance.[35]

Additionally, 'Defendants' answer to Interrogatory No. 7 is vague, evasive, and incomplete'.[36] Since then, the government has argued that the information the court is seeking violates the state secrets privilege, with this appeal still ongoing at the time of writing. It appears that even if the administration does indeed make an error, bypassing any due process requirements, then it still will not comply with court orders to even "facilitate" an individual's return. One must wonder, as Circuit Judge Wilkinson rightly identified, '[w]hy then should it not make what was wrong, right?'.[37]

IV. CONTEXTUALISING DUE PROCESS

Considering all of the examples that have been reviewed, the "due process" that the Supreme Court ruled that the plaintiffs are entitled to in *JGG v Trump* is not founded in reality. Trump signed an executive order ordering the deportation of anyone found to be a member of Tren de Aragua early on the 15th of March, seeking to expedite the deportation process for anyone who met the criteria set without any due process. Regardless of Judge Boasberg's TRO and him ordering that '[y]ou shall inform your clients of [the Order] immediately, and that any plane containing [members of the class] that is going to take off or is in the air needs to be returned to the United States'[38] - the government flagrantly disregarded these orders, resulting in the illegal deportation of Abrego Garcia. Parallel to this, Mahmoud Khalil was detained on the 8th of March by ICE and within 30 hours, he was transferred from New York to Louisiana, all the while denying him contact with legal counsel.

Bearing this conduct in mind, the Supreme Court ruled to vacate Chief Judge Boasberg's TRO on the basis that the APA[39] was the wrong vehicle for the plaintiffs to seek equitable relief. Instead, the court contends that the plaintiffs should have sought relief in habeas. This is despite the fact that, had the plaintiffs originally sought such relief, they would have, in all likelihood, been deported - a situation which the majority in the Supreme Court did not even bother to consider.

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[35] *Abrego Garcia v. Noem*, 8:25-cv-00951, (D. Maryland Apr 22, 2025) ECF No. 100, pg 5.
[36] Ibid, 6.
[37] *Abrego Garcia v. Noem*, 8:25-cv-00951, (D. Maryland Apr 17, 2025) ECF No. 88, pg 2.
[38] *JGG v Trump*, Civil Action No 1:25-cv-00766 (DDC, 24 March 2025) ECF No 53, 9–10.
[39] Administrative Procedure Act (APA), Pub. L. 79–404.

The Supreme Court ruled the plaintiffs were entitled to due process, but this would have to take place wherever they are being held - rather conveniently jurisdictions which are sympathetic to Trump. Additionally, the applications would have to be made individually, meaning that, in Justice Sotomayor's own words:

> detainees scattered across the country must each obtain counsel and file habeas petitions on their own accord, all without knowing whether they will remain in detention where they were arrested or be secretly transferred to an alternative location.[40]

The consequence of this may have already been demonstrated by Mahmoud Khalil in Louisiana, where the judge ruled that he was eligible for deportation on the basis of 'a letter from Secretary of State Marco Rubio that made clear Mr. Mahmoud Khalil had not committed a crime and was being targeted solely based on his speech'.[41] Assuming that the notice of proceedings is given in a manner that the detainees understand, which even that is not guaranteed given the conduct of the administration thus far:

> J.L.G.O. was asked to sign papers in English, which is not J.L.G.O.'s native language. J.L.G.O. was told that the paper was to acknowledge his prior transfer from Orange County Jail. J.L.G.O. asked for a translated copy of the papers but was denied[42]

- then the fairness of these proceedings themselves is in question. The hearings would take place in courts sympathetic to Trump, raising concerns of judicial bias due to the political leanings of the courts. Even if a plaintiff won their appeal, it would almost certainly be appealed until it reached a Supreme Court which has demonstrated clear favour with the administration in its rulings.

This favour from the Supreme Court is not mere speculation but has statistical founding. From the 1st of May to the 23rd of June, the Federal District Courts ruled against the administration 94.3% of the time. However, the Supreme Court ruled for the administration

[40] n 28.
[41] n 27.
[42] *J.G.G. v. TRUMP*, 1:25-cv-00766, (D.D.C. Mar 15, 2025) ECF No. 3, [7].

in 15 of 16 cases, or 93.7% of the time.[43] To contextualise these numbers, Brown found that the Robert's Court (2005 – present), as of 2021, ruled in favour of the president 52% of the time, the lowest rate of any court.[44] To observe such favourable judgements from the Supreme Court in favour of the President is historically anomalous. To have this anomaly come from the Robert's Court, the least agreeable court since at least the Hughes Court, is even more unexpected. From these statistics, it is reasonable to conclude that the Supreme Court is ruling for the President at a rate that is historically unprecedented. This anomaly should raise concerns of whether judicial bias may be responsible and if this has permeated into the rulings in *JGG v Trump,* Mahmoud Khalil and Abrego Garcia.

In summary, the default position of this administration is to afford as little due process as possible: expediting proceedings to either deport them before judicial review can take place, such as Abrego Garcia, or, where the legal status of the individual is stronger, to transfer them to jurisdictions favourable to the administration, such as Mahmoud Khalil. Even when this tactic is eventually frustrated by the Supreme Court, that same court still confers a sizeable advantage to the administration by ruling that the individuals in question must individually apply for habeas relief, with those individuals conveniently being detained in the same jurisdictions which are favourable to the administration. All of this, meanwhile, without considering the irreparable harm these individuals face if deported.

Even if an individual ends up winning their claim, it will almost certainly be appealed to other courts who look favourably upon the administration. This also assumes the administration, in the meantime, does not attempt to find another avenue under which to achieve its stated policy aims.

On balance, the due process afforded by the Supreme Court in *JGG v Trump* is illusory because of how skewed the potential process is in favour of the administration. Whilst at least now individuals are afforded some semblance of due process, in reality the atomisation of the proceedings, the overt court bias, and any potential future actions of the administration to bypass even this safeguard, renders this avenue virtually null and void for any individual trying to navigate it.

V. CONCLUSION

[43] Bonica A, 'The Supreme Court Is at War With Its Own Judiciary' (*On Data and Democracy*, 25 June 2025) https://data4democracy.substack.com/p/the-supreme-court-is-at-war-with accessed 15 December 2025.

[44] Brown RL and Epstein L, "Is the US Supreme Court a Reliable Backstop for an Overreaching US President? Maybe, but Is an Overreaching (Partisan) Court Worse?" (2023) 53 Presidential Studies Quarterly 234, pg 238.

JGG v Trump is a series of cases which fundamentally encapsulate the spectre of authoritarianism in America today. To quote Circuit Judge Wilkinson in respect to Abrego Garcia:

> [i]t is difficult in some cases to get to the very heart of the matter. But in this case, it is not hard at all. The government is asserting a right to stash away residents of this country in foreign prisons without the semblance of due process that is the foundation of our constitutional order.[45]

This synopsis perfectly encapsulates the mal intentions of the Trump administration. However, *JGG v Trump* ventures even beyond this. From incorrectly assessing the plaintiff's intentions, to not acknowledging the very real danger the plaintiffs faced if the TRO was never signed, to not acknowledging the administrations clear attempts to not comply with court orders, the *per curiam* judgment in *JGG v Trump* makes for grim reading.

The due process afforded to the plaintiffs is so fundamentally unfair that it may simply be regarded as illusory. Even more so if Trump decides to suspend *Habeas Corpus* with Stephen Miller, the White House Deputy Chief of Staff, describing the legal principle as a 'privilege that could be suspended to make it easier to detain and deport immigrants'.[46] Such an action would remove the last charade of legal protection for the plaintiffs. Only time may tell if this idea is effectuated.

Irrespective of this concern, the conduct of the administration and the Supreme Court should invoke deep concern, not only for the plaintiffs, but for wider American society. In an interview with Eric Cortellessa and Sam Jacobs, they asked '[w]ell, do you intend to send American citizens to foreign persons?' to which Trump replied 'I would love to do that if it were permissible by law. We're looking into that'.[47] Such an action would be completely unprecedented, with untold social and political ramifications both at home and abroad, reverberating around the world.

JGG v Trump illustrates both the executive branch's disregard for the courts and due process, and how the Supreme Court may manoeuvre in future to acquiesce to the administration's

[45] *Abrego Garcia v Noem*, Civil Action No 8:25-cv-00951 (D Md, 17 April 2025) ECF No 88, 2.
[46] RL King, 'What is habeas corpus and why might Donald Trump want to suspend it?' (*BBC News*, 11 May 2025) https://www.bbc.co.uk/news/articles/cwynl8jv4gjo accessed 15 May 2025.
[47] 'Read the Full Transcript of Donald Trump's "100 Days" Interview With TIME' (*Time*, 25 April 2025) https://time.com/7280114/donald-trump-2025-interview-transcript/ accessed 20 May 2025.

policy aims. Given all of this, I pose the average American citizen this question in the wake of *JGG v Trump*: why would your rights not be next?

I would offer that *First They Came* by Martin Niemöller perhaps would best portray the potential consequences that *JGG v Trump* and other cases like it could have if the Supreme Court continues to erode meaningful due process for immigrants and citizens alike:

> [f]irst they came for the socialists, and I did not speak out—because I was not a socialist. Then they came for the trade unionists, and I did not speak out—because I was not a trade unionist. Then they came for the Jews, and I did not speak out—because I was not a Jew. Then they came for me—and there was no one left to speak for me.

Predictive Punishment

Tatiana Dancy

ABSTRACT

Algorithms can predict the risk that a given offender will reoffend, on the basis of statistical observations about the relationship between certain attributes and proxies for criminal behaviour (e.g. arrest or conviction). The outputs of these tools inform a range of decisions within the realm of criminal justice across the world, including sentencing and parole. The data inputs captured by these tools, which can increase an individual's risk score and associated chance of harsher punitive treatment, include: financial stress; the criminal behaviour of friends or family; parental neglect; and experiences of domestic violence. For many of us, policies of predictive punishment cause an intuitive discomfort, which is often captured through the language of 'algorithmic inequality'. I argue here that this focus reveals only part of what's at stake for individuals when risk tools are used to dispense criminal justice. There are instrumental and other reasons to want decisions about institutional punishment to be responsive to our choices – specifically, to how we behave when faced with different options that we have the knowledge and resources to pursue. These reasons constitute a powerful case for limiting the variables that can influence punitive decisions.

I. INTRODUCTION

Beth is serving a custodial sentence for endangering safety at an aerodrome, after the climate protest that she organised gained unexpected momentum.[1] Having completed her tariff, she is now eligible for parole.[2] Beth's dossier contains two algorithmic components, each derived from the Offender Assessment System (OASys): a general reoffending predictor, and a violent reoffending predictor. Together, these components assess the likelihood that Beth will

[1] Aviation and Maritime Security Act 1990, s1,
[2] Prison Reform Trust, 'The Parole Board and Parole Reviews' (*Advice Guide*, 2024) < https://prisonreformtrust.org.uk/adviceguide/the-parole-board-and-parole-reviews/> accessed 29 May 2025.

be convicted of a crime of this nature in the future.[3] The output is a risk score, which forms part of the Parole Board's decision.

Prior to her conviction, Beth had no criminal record. She was a school support worker and volunteer sports coach, well-loved by her colleagues and pupils. However, certain factors increase Beth's OASys score: some of her friends also have convictions for protest-related offences; Beth is dyslexic and performed poorly in standardised school assessments; she is a casual worker, and can only afford temporary accommodation in an area with high rates of crime; finally, she suffered violent abuse by her previous domestic partner. Upon receipt of her risk score, the Board concludes that Beth is not a suitable candidate for transfer to open conditions. Parole is refused.

OASys risk scores have been used to inform penal decisions in the UK since 2001, and algorithms like it are in use throughout the world.[4] Risk scores are generated from a range of factors that include experiences of domestic violence, the absence of a nuclear family unit; having friends or family who commit crime; and a range of socio-economic indicia.[5] These factors influence decisions across the breadth of criminal justice, including: bail; sentencing (type and duration); prison security classification; assignment to rehabilitation programmes; parole; and community supervision.

For many of us, cases like Beth's cause an intuitive discomfort. This discomfort has been captured in literature through the language of 'algorithmic unfairness'.[6] In turn, these conversations have largely focused upon inequality, often termed 'algorithmic bias'.[7] A consensus has emerged that the goal of algorithmic justice is to ensure 'that algorithms are fair, i.e. that they do not exhibit a bias towards particular ethnic, gender, or other protected groups'.[8]

No doubt, algorithms like OASys can create or sustain unjustified differences between people. This concern is particularly acute where outputs are based on variables that relate to

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[3] *HM Prison Service Order Number 2205, Offender Assessment and Sentence Management* (2005) 1.

[4] E.g. COMPAS (the ('Correctional Offender Management Profiling for Alternative Sanctions') has been used by law enforcement and judicial officers in many US states to predict recidivism at an individual and population level. The LSI-R (Level of Service Inventory – Revised) tool is used in several Australian states to make corrective decisions about how to treat and when to parole prisoners.

[5] Don Andrews and James Bonta, *Level of Service Inventory – Revised Training Workshop Training Manual* (MHS, 2017)

[6] See e.g. Till Speicher and others, 'A Unified Approach to Quantifying Algorithmic Unfairness: Measuring Individual & Group Unfairness via Inequality Indices' (The 24th ACM SIGKDD International Conference on Knowledge Discovery & Data Mining, London, August 2018).

[7] Safiya Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (NYU Press, 2018) 26.

[8] Sandra Wachter, Brent Mittelstadt, and Chris Russell, 'Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR' (2018) 31 Harvard Journal of Law and Technology 841, 853.

human discretion, such as rates of arrest, conviction, or incarceration as a proxy for measurements of criminal activity. For instance, if the practice of arrest is influenced by preconceptions about who commits crime, basing sentencing decisions on predictions about who is likely to be arrested risks 'codifying prejudice'.[9]

But there are two reasons to think that this focus upon inequality may only reveal part of what's at stake for individuals when tools like OASys guide punitive decisions. First, we are not always precise about what we mean by 'algorithmic bias', and what it adds in any given case to the allegation that a decision does not conform to the reasons that justify a particular outcome. Second, there may be non-egalitarian reasons to worry about cases like Beth's – reasons that are not, or not only, about unjustified differences between the way in which certain groups are treated by the criminal justice system.

I argue here that we should look beyond equality, to the value of choice. There are significant instrumental and other reasons to want certain decisions that affect us, including decisions about institutional punishment, to be responsive to our choices – specifically, to how we behave when faced with different options that we have the knowledge and resources to pursue. These are reasons to want any behavioural prediction that influences these decisions (a prediction about what we will do) to be based upon our actions (what we have done, against a backdrop of knowledge and opportunity).[10] These reasons are a critical part of understanding what's at stake for individuals like Beth, whose punishment is shaped by facts that she could not have influenced – at all, or without significant cost.[11]

I argue here that they point to a single and urgent conclusion: accurate or otherwise, open-ended risk assessments should not inform penal decisions. Instead, we should conduct a robust enquiry into the predictive validity of a more limited range of variables for a given population – variables that are compatible with an adequate opportunity to avoid criminal punishment. This might include certain 'static' factors (e.g. the nature and severity of the offence in question, and any prior offence indicative of a pattern of offending)[12] and 'dynamic' factors (e.g. cooperation with judicial and corrective processes). Where the

[9] Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Broadway Books, 2016) 201.

[10] See e.g. T M Scanlon, *What We Owe to Each Other* (3rd edn, HUP, 1998) 263–264.

[11] e.g. giving up important relationships.

[12] Features that do not take into account changes in the offender's characteristics and circumstances that might affect an individual's need for support and likelihood of reoffending. See e.g. P Raynor, J Kynch, C Roberts, S & Merrington, 'Risk and need assessment in probation services: An evaluation' (Home Office Research Study 211, 2011).

decision is geared towards the imposition of more extensive punitive measures,[13] it should not include poverty, family criminality, or wrongs suffered at the hands of others.

II.PREDICTIVE ALGORITHMS IN CRIMINAL JUSTICE

In this part, I explain how statistical algorithms are used to make decisions about criminal punishment. The term 'algorithm' is most often used to describe rules for computers to follow and sometimes also to indicate a set of rules for humans to follow that can be reduced to numeric inputs. Statistical algorithms are a subset of these rules, developed on the basis of apparent correlations between facts within a dataset. Predictive punishment is the practice of allocating the burdens of criminal punishment according to the outputs of statistical algorithms.

A. STATISTICAL ALGORITHMS

We often make decisions about what to do against a backdrop of uncertainty: will this defendant reoffend, and (if so) will the nature of a future offence be violent or non-violent? How will this patient respond to a particular course of treatment, and what will happen if they are left untreated? Of a given pool of candidates, who is likely to do the best job, if hired for a specific role?

In these cases, our best chance of achieving our goals may be to extrapolate from the information that we do have – information about the outcome of cases that are, in some meaningful respects, similar to the one in front of us. When we do this systematically, by gathering relevant data and distilling predictive patterns, we call it the science of statistics – the practice of amassing numerical data for the purpose of making inferences about the wider population from which it was drawn.

This practice may reveal a correlation between some variables and certain facts about our dataset. If our study design is robust enough to give us confidence that this correlation will hold true when we apply our conclusions to the wider population, and if our proxy is close enough to our target variable, we may be able to make predictions about how a particular variable will be affected by the presence of certain facts amongst our dataset. When we reduce these observations to a predictive rule, simple or complex, we arrive at something that can be termed a 'statistical algorithm'.

[13] Including the denial of parole, and in contrast with therapeutic treatment.

The term 'algorithm' describes a set of rules to be followed in completing a task. A statistical algorithm is a particular sort of algorithm – a set of rules developed on the basis of perceived correlations within a dataset, which generates a predictive output. Algorithms are most often associated with computer programs, but the term is also used to describe rules that people can follow to make decisions, typically when variables are translated into numeric inputs.

For instance, the Vaginal Birth after Caesarean (VBAC)[14] calculator is widely used by obstetric physicians to predict the risk posed by vaginal birth for women who have already undergone one or more caesarean sections. The protocol, which can be used by a human or by an automated program, allocates points according to factors that include: maternal age; pre-pregnancy weight; height; prior successful vaginal delivery; and the presence of certain co-morbidities. A higher score means a higher predicted chance of a successful VBAC. Unlike OASys, there is no standard protocol for the way in which a VBAC calculation should inform practitioner recommendations.[15]

Statistical algorithms have been a key part of policymaking in a range of spheres for several decades. For instance, in addition to key medical decisions (e.g. obstetric and newborn treatment,[16] and organ allocation),[17] they are used for DNA match statistics and public resource allocation.[18] Yet, the growing scope of predictive decision-making raises new and acute reasons for concern. Modern tools can distill greater volumes of data at speed, and learning algorithms can develop their own predictive rules from datasets that are often too large or cumbersome to process using traditional means. Consequently, predictive tools are rapidly expanding into new realms of public and private decision-making. The focus of this article is upon criminal justice, to which I turn now.

B. STATISTICAL ALGORITHMS AND CRIMINAL JUSTICE

[14] Maternal Fetal Medicine Units Network, 'Vaginal Birth After Caesarean Calculator' (MFMunetwork.bsc.gwu.edu, 2023) <https://mfmunetwork.bsc.gwu.edu/web/mfmunetwork/vaginal-birth-after-cesarean-calculator> accessed 18 April 2025.

[15] American College of Obstetricians and Gynaecologists , 'Deciding Between a VBAC and a Repeat Caesarean' (ACOG.org, 2023) <https://www.acog.org/womens-health/experts-and-stories/the-latest/deciding-between-a-vbac-and-a-repeat-cesarean> accessed 3 June 2025.

[16] The Apgar score, a standardised assessment of a newborn baby's status at birth and the response to resuscitation efforts, is used to determine whether additional urgent medical attention is required.

[17] eg, the Model for End State Liver Disease: CA Moylan, CW Brady, JL Johnson, AD Smith, JE Tuttle-Newhall, AJ Muir, Disparities in Liver Transplantation before and after Introduction of the MELD Score (2008) 300 JAMA 2371.

[18] For instance, 'Street Bump' is an app launched by the Mayor's Office of New Urban Mechanics (MONUM) in Boston to gather and process infrastructural data, which relies on predictive algorithms to sift road repair data and prioritise resources.

I began with Beth – our eco-warrior protagonist, who is now eligible for parole from her custodial sentence. The Parole Board's decision is informed by Beth's dossier, which includes two predictive components derived from OASys, which together put a number to the likelihood that Beth will be convicted of another offence of this nature in future.

The goal of OASys is to 'provide standardised assessment of offenders' risks and needs', to inform 'individualised sentence plans and risk management plans'.[19] OASys was developed from three pilot studies performed in the late 1990s and early 2000s,[20] and rolled out as a single electronic system in 2013.[21] OASys now forms an 'intrinsic part of the UK Justice system'[22] - a systematic way for probation officers and judges to make decisions about the type, duration, and discontinuation of criminal punishment.

The predictive outputs of OASys are based on a range of factors about an individual's history and circumstances. Some of these are connected to the offender's prior divergent behaviour,[23] but many are not. They include: reading, writing, and numeracy problems;[24] learning difficulties;[25] the individual's childhood experiences, including their relationship with their parents;[26] whether they have 'associates linked to offending behaviour',[27] whether their accommodation is permanent or transient, and the 'suitability of location' of that accommodation;[28] and even whether the individual has been either the perpetrator or the victim of domestic violence.[29] These factors, and a range of others that relate to prior offending patterns, character, and circumstances, are used to produce a score that ranks the individual's risk of reoffending.

Prior to sentencing, the pre-sentence report (PSR) is the vehicle through which that score influences the court's decision. The PSR is 'an expert assessment of the nature and causes of

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[19] Mia Debidin (ed) *A compendium of research and analysis on the Offender Assessment System 2006-2009* (Ministry of Justice. 2009) 1.

[20] Philip Howard, Danny Clark, and Natasha Garnham *Evaluation and validation of the Offender Assessment System (OASys).* (2006) An OASys Central Research Unit Report to HM Prison Service and National Probation Service.

[21] Debidin (n 19).

[22] Melissa Hamilton and Pamila Ugwudike, 'A "black box" AI system has been influencing criminal justice decisions for over two decades – it's time to open it up' (*The Conversation*, 26 July 2023) <https://theconversation.com/a-black-box-ai-system-has-been-influencing-criminal-justice-decisions-for-over-two-decades-its-time-to-open-it-up-200594> accessed 18 April 2025.

[23] Including criminal behaviour, substance misuse, and 'risk-taking behaviour': Ministry of Justice, *Identified needs of offenders in custody and the community from the Offender Assessment System* (2019) 6.

[24] ibid.

[25] Debidin (n 19) Appendix J.

[26] ibid. This factor disappeared from the revised version (see 246).

[27] Ministry of Justice, *Identified needs of offenders in custody and the community from the Offender Assessment System* (Ministry of Justice 2019) 7.

[28] ibid 6.

[29] Debidin (n 19) Appendix J.

an offender's behaviour, the risk they pose and to whom' and 'an independent recommendation of the sentencing option(s) available to the court'.[30] The PSR can affect the macro decisions (e.g. type and duration of sentence, and post-release supervision), and has a more decisive impact on granular decisions about the corrective environment, including prison security classification, assignment to rehabilitation programmes; prison transfers, and arrangements for visits and escorts.[31] Absent of good reason, a PSR must be obtained and considered for any adult offender (though in practice this occurs less often that the threshold implies),[32] and must include an OASys assessment.[33]

Post-conviction, an offender's OASys assessment is reviewed at certain fixed times, prior to a transfer to open conditions, and on the occasion of any 'significant event that changes the risk management and/or sentence plan'.[34] For determinate sentences (those with fixed end dates), the offender's OASys assessment is reviewed by their Community Offender Manager shortly before release, to inform post-release supervision decisions. For indeterminate sentences (those without fixed end dates) the offender's OASys assessment is reviewed 24 weeks before their Parole Eligibility Date (PED), and informs two kinds of periodic decision about parole.

First, a 'pre-tariff sift' occurs six months prior to the PED, at which stage the Public Protection Casework Section determines which cases proceed to pre-tariff review. Cases are withheld where there is deemed to be 'no reasonable prospect of success' at review,[35] and one of the factors that precipitates this conclusion is a high/very high OASys score. Once a case proceeds to review, the offender's dossier includes the OASys assessment, which is considered by the Parole Board as part of its determination regarding whether the offender poses a continuing risk to the public.

OASys is just one of several risk assessment tools in use across the world, and throughout criminal justice. For instance, the Level of Service Inventory – Revised (LSI-R) system is used by corrective services across Australia to make risk assessments that form the basis for

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[30] Ministry of Justice, *Pre-sentence report pilot in 15 magistrates' courts* (2021) <https://www.gov.uk/guidance/pre-sentence-report-pilot-in-15-magistrates-courts> accessed 22 April 2025.
[31] HM Prison Service Order Number 2205, Offender Assessment and Sentence Management (2005) 9-10.
[32] s30 Sentencing Act 2020. Unless, having regard to the circumstances of the case, the court considers it unnecessary to do so.
[33] *OASys Guidance Document* 29. See also HM Prison and Probation Service, D*etermining Pre-Sentence Reports* PI 04/2016 (2024) 1.16, and HM Prison and Probation Service Public Protection Group, *Risk of Serious Harm Guidance 2020 v 3* (2023).
[34] Prison Reform Trust, 'Offender Management and Sentence Planning' (July 2022) <https://prisonreformtrust.org.uk/adviceguide/offender-management-and-sentence-planning/> accessed 18 April 2025.
[35] ibid.

case planning for several thousand offenders each year. The tool captures 54 datapoints that relate to the individual's characteristics and circumstances, including 'criminal friends', family involvement in crime or drugs, 'financial problems', living in a 'high crime neighbourhood', 'unsatisfactory accommodation', and frequent changes of address.[36] The total score is used to calculate risk of recidivism. Offenders receiving medium-maximum scores are targeted for 'high intensity interventions', which include increased supervision and monitoring.[37] That score also forms part of the pre-release report, which informs decisions about whether, and under what conditions, an offender should be granted parole.

In the US, the predictive 'Correctional Offender Management Profiling for Alternative Sanctions' (COMPAS) system is used at multiple stages of the criminal justice process, including: pre-trial plea negotiations; 'jail programming' requirements; community referrals; sentencing, supervision, and probation recommendations; and the frequency and nature of post-release contact with the justice system.[38] COMPAS software includes three assessments (the General Recidivism Risk scale (GRR), the Violent Recidivism Risk scale (VRR), and the 'full assessment') which involve predictions about recidivism.[39] The facts that count towards Equivant's full assessment of a given individual include: whether they were raised by their 'natural' parents, and whether and when those parents separated;[40] the involvement of family or friends in 'antisocial' activities; neighbourhood crime rates;[41] access to medical insurance;[42] residential instability;[43] and financial stress.[44] Since 1998, COMPAS has been used to process more than four million defendants across five states and 11 counties within the US.[45]

This article focuses upon the use of predictive algorithms, often termed 'actuarial risk tools', in the context of criminal justice. This is not because criminal justice is the only or most prevalent context in which the outputs of predictive algorithms are used to make decisions about how to treat people, but rather because institutional decisions within this context can

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[36] Epic.org, *Level of Service Inventory – Revised Training Workshop Training Manual* (2017).
[37] Alessandra Raudino and others,, *The Community Triage Risk Assessment Scale, A Statistical Model for Predicting Recidivism among Community-Based Offenders* (NSW Research Bulletin 2018) 38.
[38] See further Tatiana Dancy, *Artificial Justice* (OUP 2023) ch 4; Monika Zalnieriute, Lyria Bennett Moses and Gavin Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) MLR 425.
[39] ibid.
[40] Northpointe Institute for Public Management, *Measurement and Treatment Implications of COMPAS Core Scales* (2009) 13.
[41] ibid 10.
[42] ibid 22.
[43] ibid 10, 16.
[44] See generally: Equivant, *Practitioner's Guide to COMPAS Core* (2019) and Northpointe Institute (n 40).
[45] 'How many jurisdictions use each tool?' (*Mapping pretrial injustice*) <https://pretrialrisk.com/national-landscape/how-many-jurisdictions-use-each-tool/> accessed 15 Feb 2025.

give rise to significant consequences for those affected. In what follows, I turn to what is at stake for those whose corrective journeys are shaped by the outputs of predictive algorithms.

III.CHOICE

I began with Beth, the schoolteacher at the helm of a disruptive climate protest. Beth has been denied parole, partly because she received a high OASys risk assessment score. Certain facts influenced that score, including her dyslexia and poor performance in standardized school assessments; the relative instability of her job and living situation; the location of her accommodation; the criminal background of her friends and the fact that she was the victim of multiple episodes of domestic violence.

The focus of conversations about algorithmic justice has been almost exclusively around inequality – how algorithms cause or sustain unjustified differences between people, and what action can be taken to address this.[46] A consensus has emerged that the goal of algorithmic fairness is to ensure that algorithms 'do not exhibit a bias towards a particular ethnic, gender, or other protected group'.[47] There are very good reasons for this focus, which captures not only the immediate impact of a decision upon its subject, but also the wider systemic impact of denying opportunities or privileges to certain groups of individuals. I turn to these reasons in the final part of this article.

Nevertheless, the goal of this part is to argue that inequality is not the only ground for concern about the use of algorithms to make significant decisions about how to treat people, particularly in the context of criminal justice. In what follows, I argue that there are also important non-egalitarian reasons to be concerned about predictive punishment in the context of cases like Beth's, for whom various socio-economic, relational, and neurological factors are at play. These reasons relate to the value of choice – the value of having certain decisions that affect us, including decisions about institutional punishment, turn upon how we behave when faced with different options that we have the knowledge and resources to pursue.[48]

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[46] Often termed 'algorithmic bias'. See, eg, Safiya Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (NYU Press 2018) 26; Till Speicher and others, 'A Unified Approach to Quantifying Algorithmic Unfairness: Measuring Individual & Group Unfairness via Inequality Indices' KDD 2018: The 24th ACM SIGKDD International Conference on Knowledge Discovery & Data Mining, (KDD 2018, London, United Kingdom, 19-23 August 2018) August 19–23, 2018, London, United Kingdom.

[47] Sandra Wachter, Brent Mittelstadt, and Chris Russell, 'Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR' (2018) 31 Harvard Journal of Law and Technology 841, 853.

[48] Below, I explain that an opportunity may not be adequate if it requires us to give up certain other important goods. To this extent, the point is not just that it must be possible for us to the burdens of criminal punishment; it is that we must have sufficiently valuable opportunities to do so.

A. THE VALUE OF CHOICE

There are different accounts of the way in which choice relates to the justification for policies that impose burdens on people – policies that require people to act in certain ways, or which exclude them from certain benefits. According to one view, we are responsible for actions only when we have chosen to bring them about, and have the power to 'legitimate outcomes by giving consent'.[49] According to this 'will-based' account of choice, we can give up our right not to be blamed or punished for our actions by choosing to do (what we know to be) wrong.

A different account looks to the quality of the choices that we have, rather than to the nature of the choices that we make. This 'value of opportunity' account is not concerned with moral opprobrium – the blame or criticism that follows from the judgment that someone has chosen poorly.[50] Rather, it is concerned with the conditions under which practical burdens can be justified[51] – when and why we can require people to do certain things or exclude them from certain benefits. The argument is that there can be circumstances in which having the chance to avoid practical burdens by choosing appropriately can be a precondition of justifying some policy or policy decision.

This account begins from the premise that we can have good reasons to want the chance to affect what happens to us by making a choice. These reasons may be instrumental: I may, for instance, derive more satisfaction from a professional or personal relationship that I have had the chance to forge. However, there are also non-instrumental reasons to value having a meaningful opportunity to choose. These include what Scanlon terms 'representative' reasons:[52] we may want the chance to choose a hairstyle or outfit, how to celebrate important moments with our loved ones, or (like Beth) when and how to protest decisions to which we are opposed. These reasons 'for wanting to see features of ourselves manifested in actions and their results'[53] can apply to us even if exercising these choices does not make our lives better, as ways of expressing our personality, tastes, and preferences.[54]

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[49] T M Scanlon, 'Responsibility and the Value of Choice' (2013) 12 Think 9, 10.
[50] ibid.
[51] Scanlon, *What We Owe to Each Other* (HUP 1998) 251–252; Emmanuel Voyiakis, *Private Law and the Value of Choice* (Bloomsbury 2017) 248–249.
[52] Scanlon (n 51) 251–252; Voyiakis (n 51) 119–120.
[53] Scanlon (n 51) 252.
[54] Voyiakis (n 51) 120.

Finally, there are countless situations in which people are, depending upon the context, expected to make choices for themselves. These might be choices about political participation (e.g. how to vote), how to spend leisure time and who to spend it with, which career or faith (if any) to pursue, and so on. If these choices are generally available, denying them to some people can reflect a judgment, or can be seen by others to reflect a judgment, that those people 'are not competent or do not have the standing normally accorded an adult member of the society'.[55]

This sort of 'symbolic'[56] reason was at play in arguments for women's suffrage during the late 19th century. In 1867, John Stuart Mill spoke before the UK House of Commons in favour of extending the right to vote in general elections to women. He argued that there are reasons not to categorise women 'with children, idiots, and lunatics',[57] incapable of forming a sensible 'opinion about the moral and educational interests of a people',[58] reasons that count irrespective of whether women suffer any 'practical inconvenience' from their exclusion from the political process.[59]

This last category of reason can be comparative and has both an instrumental and non-instrumental component. The claim is that someone might have good reasons to object to a policy that denies them the same opportunities to affect the course of their lives as others have, where this labels them as too 'immature or incompetent' to make these choices well.[60] This can be objectionable on its own terms, and where these judgments have the effect of creating unjustified differences in status, by signalling that some people are not competent to manage important privileges or opportunities.[61]

So, there are different sorts of reason to want what happens to us to be responsive to our choices. We will see that there can be powerful reasons of each kind to want to have the opportunity to avoid the burden of some social policy by choosing appropriately, which make it harder to justify a policy that denies such an opportunity.[62]

B. CHOICE AND CRIMINAL PUNISHMENT

[55] Scanlon (n 51) 253. See also Voyiakis (n 51) 120.
[56] Scanlon (n 51) 253.
[57] ibid.
[58] John Stuart Mill, 'On the Admission of Women to the Electoral Franchise', (Speech in the House of Commons, 20th May 1867).
[59] ibid.
[60] Scanlon (n 51) 254.
[61] Mill (n 58); as Mill put it, enfranchising women would eliminate an 'unworthy stigma' obstructing the social and professional advancement of women.
[62] Scanlon (n 51) 256–267.

Policies of criminal punishment aim at an important social goal – keeping people safe and their property secure (as Scanlon has put it 'protecting ourselves and our possessions').[63] The chosen strategy for achieving that goal entails a 'zone of danger' – a risk that some people will be required to bear a burden. That burden will fall somewhere on a scale from relatively minor (e.g. a small fine or demerit points) to life-changing (e.g. the loss of certain rights, privileges, and freedoms).

There are different kinds of reason to want an adequate chance to avoid straying into that zone of danger. The most obvious are instrumental;[64] criminal punishment in various forms is amongst the most significant institutional burdens that we can be required to bear, and we have good reasons to want to improve our chances of avoiding it. This is particularly true of carceral punishment, which entails the loss of social, political, and economic rights and privileges that play a key role in our ability to thrive as part of society.[65]

Other reasons are non-instrumental. For instance, criminal penalties can limit the scope that those affected have to express their tastes and preferences. Indeed, carceral punishment is in many ways designed to have this effect.[66] It is in the nature of the punishment that those affected are constrained in the ways in which they can express 'who they are and what they like'.[67]

Finally, we also have symbolic reasons to want the opportunity to avoid criminal punishment by choosing well. We give people these opportunities by making criminal punishment depend upon the actions that people take when they have meaningful choices about what to do. In this way, we signal that they have a certain sort of rational competence; they can (regardless of whether they do in practice) guide their actions in accordance with the rules. By contrast, if we make criminal punishment depend on facts that fall largely outside the scope of an individual's rational competence (e.g. financial stress, low income, or underemployment), we signal the opposite – that those who lack financial means or opportunity are less capable of making the choices necessary to stay within the bounds of the law.

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[63] ibid.
[64] Scanlon (n 51) 251; Voyiakis (n 51) 119.
[65] There is very little evidence that those burdens play a positive short or longer-term role in the lives of those who suffer them, and a good deal of evidence to the contrary. See e.g. Francis T Cullen, Cheryl Lero Jonson, and Daniel S Nagin, 'Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science' (2011) 91 The Prison Journal 48S.
[66] e.g. prisoners in closed institutions often wear uniforms, follow routines, eat meals from a range of limited options, occupy identical cells, and spend their free time in a range of restricted ways.
[67] Voyiakis (n 51) 120.

So, if punishment is part of the menu of institutional responses to crime, we have powerful reasons, including instrumental ones, to want it to turn upon how we act when we are presented with meaningful options about what to do, that we are adequately equipped to pursue. In *Hazardous Waste*, we saw that the process of ensuring that residents are equipped to protect themselves against the risk of harm required officials to give them adequate notice, and to secure the area with safety barriers and signs. In this context, ensuring that individuals have an adequate opportunity to avoid the burdens of criminal punishment requires states to publicise a set of clear and comprehensible rules, and to create and sustain a set of background conditions that support people to follow them.

The effect of using tools like OASys, COMPAS, and LSI-R can be to deny individuals this opportunity – a sufficiently valuable chance to avoid the burdens of criminal punishment by choosing appropriately. We have seen that in each case risk scores are generated from (inter alia) facts that are wholly or partly outside the influence of those affected, including socio-economic disadvantage, the behaviour of friends and family, and experiences of violence or abuse. These risk scores feed into decisions about whether someone is sent to prison in the first place, and if so, for how long, when they are released and under what conditions, and the nature of their corrective environment. In Beth's case, they are determinative of the decision not to transfer her to open conditions.

Put simply, if we take two offenders whose circumstances are otherwise equivalent, the individual who has experienced poverty or domestic violence will receive a higher risk score. That risk score can in turn drive the decision to allocate a more severe sentence, to deny parole, or to increase post-release supervision requirements. This practice might cause some intuitive discomfort, and not just on grounds of equality. Binns describes this discomfort as a concern about the use of variables that are 'not the result of personal choices' to assign the burdens of criminal punishment.[68] Binns' goal, developed in a related piece,[69] is to situate these objections within a conceptual scheme of luck egalitarianism.[70] But there may be a broader significance to these concerns, that the facts upon which decisions are based should be appropriately responsive to the choices that we have.

By using facts of this nature – poverty, experiences of domestic violence, and so on – to inform the risk scores upon which corrective decisions are based, we make the burdens of

[68] ibid.
[69] Reuben Binns, 'On the apparent conflict between individual and group fairness' (Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency, Barcelona, January 2020).
[70] ibid.

criminal punishment (to this extent) inevitable for those whose characteristics and circumstances correspond to these facts. Beth remains in prison because she has received a high OASys risk score; that risk score is affected by facts that she could not influence at all, or without significant cost. This practice clearly has instrumental ramifications for Beth, and for those affected by the outputs of risk tools, who may be subjected to a range of more extensive criminal sanctions. It also signals that those who have these 'criminogenic' characteristics are simply more criminally inclined – in other words, less able to resist the sort of poor choice that attracts punitive consequences.

This criticism is not one that applies to algorithms as such; rather, it concerns the scope of the predictive exercise. The algorithmic approach adopted by OASys, LSI-R, and COMPAS is open-ended: the only eligibility criterion for the facts encompassed by these risk assessments is proven predictive value. The datapoints captured by these tools are chosen because of evidence that they are 'criminogenic' – that that they correlate to criminal activity, without more. Thus, the objection is to the use of certain kinds of datapoints, which are captured by this sort of (unrestricted) algorithmic enquiry.

There are alternative models of risk assessment, which adopt a far more prescriptive approach to the list of facts that can influence predictive outputs. For instance, the Public Safety Assessment (PSA) is the pretrial risk tool most widely used across jurisdictions within the US.[71] The PSA was developed by the Laura and John Arnold Foundation (LJAF) in tandem with criminal justice researchers, and consists of a publicly available scoring and weighting formula. The PSA captures nine primarily 'static' (historic and unchanging)[72] factors that relate to: the nature of the current offence; the offender's criminal history; and any failure to appear for trial. The offender's age is the only demographic characteristic captured.

Whether these facts have sufficient predictive value for all groups within a given population must be proven. There is a significant body of data evidencing that exclusive or predominant use of certain static risk factors may have less predictive value than hybrid (static and dynamic) models.[73] Whilst the PSA has been shown to predict criminal wrongdoing,

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[71] Advancing Pretrial Policy and Research, 'About the Public Safety Assessment (Advancingpretrial.org, 2025) <https://advancingpretrial.org/psa/factors/> accessed 3rd June 2025.

[72] Features that do not take into account changes in the offender's characteristics and circumstances that might affect an individual's need for support and likelihood of reoffending. See e.g. Peter Raynor, Jocelyn Kynch, Colin Roberts, and Simon Merrington, 'Risk and need assessment in probation services: An evaluation' (Home Office Research Study 211, 2011).

[73] Guy Giguère, Sébastien Brouillette-Alarie, and Christian Bourassa, 'A Look at the Difficulty and Predictive Validity of LS/CMI Items With Rasch Modeling' (2023) 50 *Criminal Justice and Behavior* 118, 118; Michael S Caudy, Joseph M Durso, and Faye S Taxman, 'How well do dynamic needs predict recidivism? Implications for risk assessment and risk reduction' (2013) 41 *Journal of Criminal Justice* 458; William M Grove, David

including failure to appear for trial, 'fairly well',[74] evidence about potential racial and other disparities remains inconclusive.[75] Moreover, the predictive validity of a tool for a population that differs from the community from which predictive conclusions were drawn cannot be assumed, given a range of policing, forensic, corrective and other differences across the criminal justice system, and the wider social, economic, and political contexts.[76]

Yet, there is some evidence to indicate that dynamic factors do not always add significant predictive value to the risk assessment,[77] and corroborating evidence from the European, Canadian, US, and Australian contexts indicates that a much more concise list of variables may perform equivalently well.[78] Indeed, one study isolates criminal history as a powerful

Zald, Boyd Lebow, and Beth E Snitz Zald, 'Clinical versus mechanical prediction: A meta-analysis' (2000) 12 *Psychological Assessment* 19.

[74] Brian Brittain, Leah Georges, and Jim Martin,'Examining the Predictive Validity of the Public Safety Assessment' (2021) 48 *Criminal Justice and Behavior* 143.

[75] Samantha A Zottola, Sarah L Desmarais, Evan M Lowder, and Sarah E Duhart Clarke, 'Evaluating Fairness of Algorithmic Risk Assessment Instruments: The Problem With Forcing Dichotomies' (2021) 49 *Criminal Justice and Behavior* 389 concluded that the presence of racial discrepancies could not be eliminated from their analysis of the data. Matthew Demichele, Ian A Silver, Ryan M Labrecque, Debbie Dawes, Pamela K Lattimore, and Stephen Tuelle 'Testing Predictive Biases at the Intersection of Race-Ethnicity and Sex: A Multi-Site Evaluation of a Pretrial Risk Assessment Tool' (2024) 51 *Criminal Justice and Behavior* 850 concluded that the PSA was a valid and consistent predictor of failure to appear, new criminal activity, and new violent criminal activity' across six racial-ethnic and sex groups, and Matthew DeMichele, Peter Baumgartner, Michael Wenger, Michael, Kelle Barrick, Megan Comfort, and Shilpi Misra, 'The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky' (2020) 19 Criminology and Public Policy 409 found racial differences in predictive outcome but not 'disparate impact'.

[76] See e.g. Zachary Xie, Abilio Neto, Simon Corben, Jennifer Galouzis, Maria Kevin, and Simon Eyland, 'The Criminal Reimprisonment Estimate Scale (CRES); A Statistical Model for Predicting Risk of Reimprisonment' (2018) 35 *NSW Research Bulletin* 3; Andrew Day, Armon J Tamatea, Sharon Casey, and Lynore Geia, 'Assessing violence risk with Aboriginal and Torres Strait Islander offenders: considerations for forensic practice' (2018) 25 *Psychiatry, Psychology and Law* 452; Ching-I Hsu, Peter Caputi and Mitchell K Byrne, 'The Level of Service Inventory – Revised (LSI-R) and Australian Offenders: Factor Structure, Sensitivity, and Specificity (2011) 38 *Criminal Justice and Behavior* 600; Ian Watkins, 'The Utility of Level of Service Inventory – Revised (LSI-R) Assessments within NSW Correctional Environments' (2011) 29 *Corrective Services NSW Research Bulletin* 1; Ching-I Hsu, Peter Caputi, and Mitchell K Byrne, 'The Level of Service Inventory—Revised (LSI-R): A Useful Risk Assessment Measure for Australian Offenders?' (2009) 36 Criminal Justice and Behavior 728; Tracy L Fass, Kirk Heilbrun, David DeMatteo and Ralph Fretz, 'The LSI-R and the COMPAS: Validation Data on Two Risk-Needs Tools' 35 (2008) *Criminal Justice and Behavior* 1095;

[77] Guy Giguère and Patrick Lussier, 'Debunking the psychometric properties of the LS\CMI: An application of item response theory with a risk assessment instrument' (2016) 46 *Journal of Criminal Justice* 207.

[78] Ching-I Hsu, Peter Caputi and Mitchell K Byrne, 'The Level of Service Inventory – Revised (LSI-R) and Australian Offenders: Factor Structure, Sensitivity, and Specificity (2011) 38 *Criminal Justice and Behavior* 600; SA Arens, B Durham, M O'Keefe, K Klebe, and S Olene, Psychometric properties of Colorado substance abuse assessment instruments (Technical report). Colorado Springs, CO: Department of Corrections (1996). A study conducted on English male offenders indicated that a two factor solution (taking into account criminal conduct and "personal issues") accounted for the majority of variance: Clive R Hollin, Emma J Palmer, and Danny Clark, 'The Level of Service Inventory–Revised profile of English prisoners: A needs analysis' (2003) 30 *Criminal Justice and Behavior* 422-440. For the argument that a more concise (two or three factor) list of variables is apt, see Wagdy Loza and David J Simourd, 'Psychometric evaluation of the Level of Service Inventory (LSI) among male Canadian federal offenders' (1994) 21 *Criminal Justice and Behavior* 468.

single-factor variable.[79] Thus, a great deal more research is required to draw conclusions about the predictive utility of specific variables.[80]

I have argued thus far that there are good reasons to adopt policies of predictive punishment that give people sufficiently valuable opportunities to avoid criminal punishment by choosing appropriately. And I have argued that these reasons, which are not (or not purely) egalitarian, favour a more prescriptive approach to the inputs of algorithmic risk assessments in criminal justice – an approach that limits the predictive exercise to datapoints that relate to the nature and severity of the offence or any pattern of offending, and conformity with the justice system.

I turn now to the way in which egalitarian reasons bear on the nature and scope of predictive punishment. I argue that these reasons bolster the case for excluding socio-economic indicia from variables captured by the algorithmic risk assessments that feed into sentencing and corrective decisions.

IV. EQUALITY

Objections to policies of algorithmic decision-making are almost always expressed through the language of equality: algorithms 'reproduce structural inequalities',[81] embed 'human prejudice, misunderstanding, and bias', and 'codify discrimination'.[82] These objections often relate to the way in which algorithms distribute the risk of predictive error, as part of a wider

[79] Klaus-Peter Dahle, 'Strengths and limitations of actuarial prediction of criminal reoffence in a German prison sample: a comparative study of LSI-R, HCR-20 and PCL-R' (2006) 29 *Int J Law Psychiatry* 431.

[80] For a summary of assessments thus far that have focused in large upon the predictive value of the instrument overall, see e.g. Guy Giguère and Patrick Lussier, 'Debunking the psychometric properties of the LS\CMI: An application of item response theory with a risk assessment instrument' (2016) 46 *Journal of Criminal Justice* 207, and cited therein: Michael S Caudy, Joseph M Durso, Faye S Taxman, 'How well do dynamic needs predict recidivism? Implications for risk assessment and risk reduction' (2013) 41 Journal of Criminal Justice 458 and J Stephen Wormith, Mark E Olver, Hugh E Stevenson, and Lina Girard, 'The long-term prediction of offender recidivism using diagnostic, personality, and risk/need approaches to offender assessment' (2007) 4 Psychological Services 287. Hannah-Moffat and Maurutto have argued persuasively for a disaggregated enquiry into the predictive utility of different components of instrument, not merely the instrument as a whole: K Hannah-Moffat and P Maurutto, 'Youth risk/need assessment: An overview of issues and practices' (RR03YJ-4e). For a discussion of how different variables affect different communities see Alexander M Holsinger, Christopher T Lowenkamp, and Edward J Latessa 'Ethnicity, gender and the Level of Service Inventory-Revised' (2003) 31 *Journal of Criminal Justice* 309. In the German context, see Lena Greiger and Daniela Hosser, 'Which Risk Factors are Really Predictive?: An Analysis of Andrews and Bonta's "Central Eight" Risk Factors for Recidivism in German Youth Correctional Facility Inmates' (2013) 41 *Criminal Justice and Behavior* 613.

[81] Noble (n 7) 58.

[82] Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Broadway Books, 2016) 201. These policies embed 'human prejudice, misunderstanding, and bias into the software systems that increasingly manage our lives'; Noble (fn 13) 2.

systemic impact upon the various social, economic, and political dynamics that govern our lives.

In the context of predictive punishment, it is often emphasised that algorithms produce more false positives (or fewer false negatives) for certain groups of people than others, by replicating unjustified disparities in the human decisions upon which they are based.[83] Since we cannot measure 'true' rates of crime, predictions must instead use proxies (e.g. rates of arrest, conviction, or incarceration), which are influenced by policing practices. Thus, any unjustified differences between the way in which certain groups are treated by legal officials can be 'codified' by algorithmic predictions based on datasets that include these differences. In this part, I argue that when we think and talk about inequality in the context of predictive punishment, our focus should be wider than predictive accuracy and the distribution of predictive error. There are egalitarian reasons to object to the use of socio-economic indicia to allocate harsher criminal penalties that go beyond questions about who bears the brunt of predictive failures. These reasons relate to the stigmatizing differences in status that can arise from the signal that certain characteristics are 'criminogenic' – that those who have these characteristics are less able or willing to make the choices necessary to stay within the bounds of the law.

A. EQUAL CONCERN

We often use the language of inequality to describe differences between the lifespan or healthspan of people across the world, whether those discrepancies occur at an international, national, or sub-national level. The media often uses the label 'international life expectancy gap'[84] to describe differences in life expectancy between citizens of different countries. Those differences can be vast – some 59 years in Mali versus 76 in the US.[85] Yet, it is not clear that the *gap* between the figures is the problem. Certainly, the higher life expectancy in the US shows us that life expectancy could be much higher in Mali if the conditions were more favourable. But this is a reason to be concerned about the conditions that lead to low life expectancy in Mali *per se*, rather than a reason to be concerned about the difference

[83] See e.g. Julia Angwin, Jeff Larson, Surya Mattu, and Lauren Kirchner, 'How We Analyzed the COMPAS Recidivism Algorithm' (*ProPublica*, 23 May 2016) <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> accessed 20 January 2025.

[84] T M Scanlon, *Why does Inequality Matter?* (OUP, 2017) 11.

[85] <https://www.cdc.gov/nchs/fastats/life-expectancy.htm> and <https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=MW-ML> accessed 19 April 2025.

between life expectancy in Mali and the US.[86] The concern would remain even if the gap were made smaller by a declining life expectancy in the US.

No doubt, questions of justice are engaged in the background, not least with respect to the colonial diversion of natural wealth.[87] But these are not egalitarian in their essence.[88] Moreover, whilst comparative questions of justice arise with respect to the institutions that govern international trade and political relations,[89] these are not the concerns that seem to be raised by the bare fact of relatively low life expectancy in Mali.[90]

Compare another example. In the US in 2021, Alaska Native and black people had a shorter life expectancy (65.2 and 70.8 years, respectively) than white people (76.4 years). Black infants were also more than twice as likely to die as white infants.[91] These figures rase concerns of inequality to the extent that they owe their explanation to the fact that public institutions discharge their duties to provide healthcare more extensively with respect to certain groups than to others.[92]

The contrast between these examples reveals a special feature of the dynamic between citizens and states, which can make inequality objectionable. States are obliged to provide basic healthcare, educational, and infrastructural opportunities to citizens, and those with a sufficient claim to remain within state borders.[93] This comes with an absolute requirement: states must meet a minimum threshold in providing these goods. But it also has an egalitarian component. Where states are not (or not always) obliged to make sure that all citizens have the *same* access to important goods, they are obliged to give the interests of citizens equal weight.[94] Accordingly, they must also be able to justify differences between the levels of access that citizens have to the goods provided.

So, this 'duty of equal concern' permits (indeed, often requires) differences in treatment, as long as those differences can be justified.[95] For instance, at the height of the global COVID-19 pandemic, many states had to distribute vaccines amongst the relevant population. Faced with a sustained shortage of vaccines relative to population need and demand, a justified

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[86] Scanlon (n 84) 11.
[87] ibid 12.
[88] As Scanlon puts it, 'If I have less money than you do because hackers stole the money in my bank account, this is wrong, but not because of the inequality involved' ibid 12.
[89] ibid 12.
[90] ibid 12.
[91] <https://www.kff.org/racial-equity-and-health-policy/report/key-data-on-health-and-health-care-by-race-and-ethnicity/> accessed 19 April 2025.
[92] Scanlon (n 84) 12.
[93] Citizens, and a smaller group of those with an adequate claim to remain within geographic boundaries.
[94] Scanlon (n 84) 13.
[95] ibid Chapter 2.

policy of vaccine distribution required states to triage – to prioritise vulnerable patients for vaccination (e.g. older patients, and those with certain comorbidities).

So, the first egalitarian reason to be concerned about policies of algorithmic decision-making relates to the way in which predictive tools are developed and deployed. States have a duty of equal concern for the interests of citizens, which requires differences in treatment to be adequately justified. Where predictive tools use datasets that fail to capture important characteristics of the target population (or capture irrelevant characteristics), with the result that some people miss out on important benefits for no good reason, those justifications are wanting.

Algorithms like OASys, LSI-R, and COMPAS base predictions upon prior data about characteristics linked to criminality. Yet, we have already seen that we cannot measure crime directly, and must instead use proxies – arrest, conviction, or some other involvement within the criminal justice system. Those variables are directly influenced by policing practices: police patrol areas that are perceived crime 'hot spots' more often than other areas; higher patrol density translates into higher arrest rates; higher arrest rates mean higher conviction rates. Thus, the 'crime' statistics upon which algorithmic predictions are based reflect the perceptions of those who allocate police resources. If those perceptions include any element of unjustified preconception about who commits crime, policies of predictive punishment will 'codify' discriminatory practices.[96]

A great deal of high-profile writing levels precisely this allegation in relation to the COMPAS system. In 2016, ProPublica reported the results of a two-year study of some 10,000 defendants in Broward County, Florida. They found that the false positive rate was much worse for black defendants than it was for white defendants: twice as many of those whom COMPAS classified as highly likely to commit another crime, and who did not go on to do so, were black.[97] By contrast, the false negative rate was much higher for white defendants.[98] For these researchers, their findings were clear evidence that the software was 'biased against blacks'.[99]

Equivant have resisted this criticism on the basis that an equal distribution of the risk of error is not an appropriate goal for population data that displays meaningful differences in

[96] Cathy O'Neil, Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy (Broadway Books, 2016) 201.
[97] Angwin, Larson, Mattu, and Kirchner, (n 83).
[98] ibid.
[99] ibid.

incidences of the target variable amongst individuals with different characteristics.[100] Instead, they argue, the predictive values for two different groups should be the same *given* a high risk score. They term this 'predictive parity'.[101]

Other researchers have argued that there are a range of ways in which we might accommodate differences in baseline risk rates, and that satisfying predictive parity is incompatible with a balance in error rates at any given risk threshold, where the prevalence of the target variable differs.[102] For recidivism risk assessments, the result is that defendants in the higher prevalence group will generally receive greater penalties than defendants in the lower prevalence group – what the authors term 'disparate impact'.[103] The authors argue that the 'preferred approach' may be to aim at a balance in error rates without predictive parity,[104] or to facilitate predictive parity by allowing the risk threshold at which rates are compared to differ amongst groups.[105]

This debate about predictive accuracy has dominated the discourse around the justification for using COMPAS, but it faces similar obstacles to those considered above, in the context of overall predictive performance. Whichever calculation is adopted, it is just as hard to measure actual error distribution as it is to draw definitive conclusions about rates of crime. This is not only because we must rely upon proxies for criminal activity; we have also seen that we lack a great deal of reliable data that pertains directly to the question of recidivism.

Moreover, where reasonable objections to algorithmic decision-making offer persuasive alternatives, unaided human decision-making is not always such an alternative. Indeed, it is the relationship of dependence between algorithms and human decision-making that lends credence to the concerns about proxy discrimination.[106] The allegations about algorithmic discrimination can often be reduced to allegations that algorithms are 'just as bad' as humans:[107] when researchers directly compared the performance of humans and COMPAS, the conclusion was that each was 'equally fair', or 'similarly unfair' (depending on the metric

[100] William Dieterich, Christina Mendoza, and Tim Brennan, *COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity* (Northpointe, 2016).
[101] ibid 9.
[102] Alexandra Chouldechova, (2017) 'Fair prediction with disparate impact: A study of bias in recidivism prediction instruments' (2017) 5 Big Data 153.
[103] ibid 154.
[104] ibid 161.
[105] ibid.
[106] That those flaws are made more predictable is not itself objectionable.
[107] Julia Dressel and Hany Farid, 'The accuracy, fairness, and limits of predicting recidivism' *Science Advances* (17 January 2018) <https://www.science.org/doi/10.1126/sciadv.aao5580> accessed 20 January 2023.

adopted).[108] If they are cheaper, being 'similarly unfair' is no compelling case against using them.

Interestingly, the same study demonstrated that equivalent rates of predictive and distributive accuracy could be obtained by adopting a simpler algorithm, which limited focus to certain variables: age; sex; number of juvenile misdemeanours; number of juvenile felonies; number of prior (nonjuvenile) crimes; crime degree; and crime charge.[109] This outcome – comparable rates of accuracy with more granular control over the predictive variables included – corresponds to research addressing the type of predictive variable (static or dynamic) and brings us to questions that concern the justification for open-ended algorithmic risk assessment.

So, let us turn from the distribution of error caused by the use of variables that correlate indirectly to race (the dominant focus of criticisms of COMPAS)to the broader impact of predictive variables that relate directly to socio-economic circumstance.

B. EQUAL STATUS

There is a second egalitarian reason to be concerned about policies of algorithmic decision-making. This reason is often the focal point of conversations about algorithmic justice, particularly those that take place through the language of 'discrimination'. The allegation that algorithmic decisions have discriminatory effects has been made in a range of spheres, including: healthcare;[110] recruitment;[111] education;[112] and the discharge of civil and criminal justice.[113]

Discrimination is wrong when individuals are denied access to benefits on the basis of characteristics (e.g., race, nationality, sex, or gender) that do not support the attitudes and behaviours that the practices involve.[114] When these attitudes and behaviours are stable,

[108] ibid.
[109] ibid.
[110] See e.g. Sarah El-Azab and Paige Nong, 'Clinical algorithms, racism, and "fairness" in healthcare: A case of bounded justice' (2023) Big Data & Society 10.
[111] Alina Köchling and Marius Wehner, 'Discriminated by an algorithm: a systematic review of discrimination and fairness by algorithmic decision-making in the context of HR recruitment and HR development' (2020) 13 Business Research 795.
[112] René Kizilcec and Hansol Lee, 'Algorithmic fairness in education' In Waybe Holmes & Kaśka Porayska-Pomsta (eds) *Ethics in Artificial Intelligence in Education* (Routledge, 2022).
[113] Angwin, Larson, Mattu, and Kirchner (n 83).
[114] Scanlon (n 51) 26.

individuals experience a stigmatising loss of status, which can cause them to be denied access to important benefits across the breadth of their personal and professional lives.

The two kinds of egalitarian reasons considered here – equal concern and equal status – need not coincide. States can breach the duty of equal concern by actions that fall short of outright discrimination, and discrimination need not depend upon any prior allocative duty. But a failure to show equal concern is often precipitated by enduring and unjustified attitudes towards certain groups, and these ideas can, in turn, be formed and sustained by public ratification – laws and policies that marginalise the interests of some.

It bears emphasis that the problem does not stop with particular decisions or policies. Our opinions of those characteristics that make someone worth a particular opportunity—such as a job—are often formed from our prior experience of individuals performing those roles; this is precisely the observation that underpins policies of affirmative action. Thus, the exclusion of certain types of people from a particular role can have a long-term downstream impact upon the ability of those individuals to access roles of this kind.

This is the second egalitarian reason for objecting to policies that use statistical algorithms to make decisions about how to treat people. I turn now to the way in which these reasons apply to policies of predictive punishment. We have seen that the risk tools discussed in this article capture a range of predictive variables that relate directly to socio-economic circumstances. For COMPAS, this includes access to medical insurance, residential instability, and financial stress.[115] For OASys, this includes financial management, level of income, and reliance upon others for support, whether a person's accommodation is permanent or transient, and the 'Suitability of location' of that accommodation (so-called 'neighbourhood problems').[116] For the LSI-R, it includes financial problems, living in a 'high crime neighbourhood', 'unsatisfactory accommodation', and frequent changes of address.[117] In each case, these factors increase an individual's risk score, which affects the duration, nature, and conditions of any criminal punishment.

There are many reasons to be concerned about a policy that imposes criminal punishment on those who are socio-economically disadvantaged. The first was the focus of our discussion

[115] Northpointe Institute for Public Management, *Measurement and Treatment Implications of COMPAS Core Scales* (2009) 13.

[116] Ministry of Justice, *Identified needs of offenders in custody and the community from the Offender Assessment System* (2018) 6 <https://www.gov.uk/government/statistics/identified-needs-of-offenders-in-custody-and-the-community-from-the-offender-assessment-system-30-june-2021/> accessed 24 Jul 2025.

[117] Epic.org, *Level of Service Inventory – Revised Training Workshop Training Manual* (2017) <https://archive.epic.org/EPIC-19-11-21-ID-FOIA20191206-LSI-R-Training-Manual.pdf> accessed 24 Jul 2025.

above, about the value of choice: we have good instrumental and other reasons to want to have a meaningful opportunity to avoid criminal punishment by choosing appropriately. When we send someone to prison because they are poor, uneducated, or underemployed, we deny them this chance; we make criminal punishment inevitable for those who have these characteristics.

The second relates to the background conditions against which these choices are exercised: there are safeguards that enhance the instrumental value of choice, by making it less likely that people will choose poorly.[118] To defend a policy of criminal punishment, we need to show not only that the social goal (keeping people safe and their property secure) justifies creating the risk that some will bear the burden of punishment; we also need to show that enough has been done to protect people against incurring that burden.[119] This includes maintaining socio-economic conditions that 'reduce the incentive to commit crime by offering the possibility of a satisfactory life within the law'.[120] In this case, there is a special injustice to punishing someone because they lack the conditions that ought to be supplied as a prerequisite to justified institutional punishment.

Finally, there are additional concerns that relate to the messages that we send about the rational capacities of those affected, which have been the focus of this section. When we punish someone simply because they are poor, uneducated, or underemployed, we send a message: poor people make bad choices, particularly, they find it harder (for a want of alternatives, or some defect of character) to resist the lure of crime. This may be objectionable *per se*, and where it tends to reinforce those stigmatising differences in status which can lead to the unjustified exclusion of individuals from important benefits throughout their personal and professional lives: if poor people make bad choices, then perhaps they make bad employees, professional associates, and social partners. This tends to perpetuate precisely those cycles of disadvantage that can make it more difficult to create and sustain the conditions that enable people to live 'a satisfactory life within the law'.[121]

So, there are both egalitarian and non-egalitarian reasons not to adopt policies of open-ended algorithmic risk assessment in criminal justice. Above, I argued for a more prescriptive approach to the factors that influence the predictive exercise. Here, I have argued that there are egalitarian reasons that bolster the case for limiting algorithmic input data to facts that

[118] Scanlon (n 51) 263.
[119] ibid.
[120] ibid 264.
[121] ibid 264.

relate closely to the offender's criminal behaviour: the nature and severity of the offence; any prior offence indicative of a pattern of offending; and compliance with the justice system and post-conviction rehabilitation.

V. CONCLUSION

There are powerful egalitarian and non-egalitarian reasons for wanting our system of criminal justice to be responsive to how individuals behave when provided with sufficiently valuable opportunities to choose. We deny these opportunities when we use open-ended algorithmic risk scores to allocate criminal penalties. We do so by clothing the decision with an apparent legitimacy lent by the predictive success of its algorithmic components.

The goal of keeping people safe and their property may justify some sort of assessment about whether, and the degree to which, an individual poses a risk to the public. But there are limits to the burdens that we can justify imposing upon individuals for the sake of this goal. In this article, I have argued for a rigorous enquiry into the predictive accuracy of a more limited range of variables, which are compatible with the provision of an adequate opportunity to avoid the burdens of criminal punishment.

Hate Speech in the United Kingdom: Public Civility at the Expense of Democratic Legitimacy

Connor Gregory Dagg

ABSTRACT

Grounded in both normative theory and legal doctrine, this article critically analyses freedom of expression as a human right and its foundational role in democratic societies with the primary focus on the United Kingdom's legal framework through the lens of the Human Rights Act 1998. This article begins with an examination of the values and principles of democratic societies. It then highlights the inherent connection between democracy and freedom of expression, and argues for the principled application and robust protection of the right to expression and information. The article then exposes the tenuous protection of freedom of expression within the United Kingdom's constitutional arrangements and critiques the European Court of Human Rights' jurisprudence on hate speech, highlighting inconsistencies in its use of Article 17 and Article 10(2) to exclude or restrict controversial expression. This article culminates in a detailed examination of the United Kingdom's regulation of hate speech, through section 5 of the Public Order Act 1986. An analysis of the key cases of Percy, Norwood, and Hammond, demonstrates that lower courts have routinely prioritised public civility at the expense of freedom of expression. Despite legislative reforms intended to enhance freedom of expression protections, this article argues that the prevailing judicial approach advances a legal culture that permits the suppression of dissenting views, undermining the constitutive and legitimising function of freedom of expression in any democratic society.

INTRODUCTION

Democracy is never achieved. Its nature as a political system is inherently precarious, marked by the paradox of allowing expression that can undermine it or lead to its dissolution.[1] The creation and preservation of a truly democratic society is, therefore, a perpetual endeavour.

[1] Eric Heinze, *Hate Speech and Democratic Citizenship* (online edn, Oxford Academic 2016) 18.

Consequently, democracy, and the constitutions that support it, can be understood as part of an 'ongoing process of public discourse'.[2] The constitutive aspect of freedom of expression is often overlooked, not only as essential for democracy itself, but also as 'the indispensable condition of nearly every other form of freedom'.[3] Freedom of expression is not simply a defensive right against state interference, but a foundational mechanism that legitimises the process by which the collective will of a society is formed.[4]

A robust right to freedom of expression enables the contestation of harmful ideas by creating the conditions for rational debate.[5] Rather than suppressing illiberal ideas through law, a democratic society should cultivate a culture where these ideas are confronted and dismantled through debate. Accordingly, hate speech prohibitions risk obscuring harmful ideologies from critical engagement, thereby undermining the educational and emancipatory function of democratic discourse.[6] Without a public forum that permits the expression and contestation of all perspectives concerning the 'organisation and culture of society',[7] such a forum is hereafter referred to as *non-viewpoint-punitive public discourse*,[8] democracy loses its claim to legitimacy, and with it, the only moral justification for the obedience to the law.[9] This undermines social progress and the maintenance of liberal and democratic values.[10]

This article evaluates the protection for freedom of expression provided by the European Convention on Human Rights (the Convention)[11] and the Human Rights Act 1998 (HRA),[12] through an assessment of both the UK's and the European Court of Human Rights' (ECtHR) case law to examine whether the legal framework upholds the values of a democratic society. It challenges the notion that broad interferences with the right to freedom of expression can meaningfully be described as necessary in a democratic society, arguing instead for a conception of freedom of expression that is both constitutive of, and legitimising for, democratic society and governance.

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[2] ibid.
[3] Jo Eric Khushal Murkens, 'Democracy as the legitimating condition in the UK Constitution*'* (2018) 38 Legal Studies 42.
[4] Ronald Dworkin, 'A New Map of Censorship', (2006) 35 *Index on Censorship* 130.
[5] John Stuart Mill, *On Liberty* (Cambridge University Press 2012) 95.
[6] Edwin C Baker, *Extreme Speech and Democracy* (Oxford University Press 2009) 157.
[7] Eric Barendt and David Feldman, *Freedom of Speech* 'Public law' (2nd edn 2006) 189.
[8] Heinze (n 1).
[9] Dworkin (n 4).
[10] Mill (n 5).
[11] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[12] Human Rights Act 1998.

The first section will draw on ECtHR case law and academic works to examine the values underpinning democratic society. The second section explores both deontological and instrumental arguments for freedom of expression and its connection to democracy, demonstrating the necessity of open, inclusive, and uncensored public discourse. The third section critically examines the UK and ECtHR jurisprudence on freedom of expression and hate speech, assessing the extent to which national and supranational legal frameworks genuinely protect this essential right.

I. DEMOCRATIC SOCIETY: MINIMUM REQUIREMENTS AND IDEAL CONDITIONS

A. MINIMALIST AND MAXIMALIST DEMOCRACY

Democracy can embody many different principles and values. Democracy is an appeal to the sovereignty of the people, emphasising that nobody other than the citizenry can be responsible for binding laws and decisions.[13] The most minimalist conception of democracy is a system of government where citizens collectively decide political decisions,[14] including by whom and how they are governed.[15] As long as citizens are free to choose their government who make political decisions according to established procedures; any outcome of the citizens' vote, can be deemed democratic.[16] Typically, a democracy does not allocate every decision to a collective vote from the citizenry, rather citizens vote to elect representatives who then debate issues and enact legislation with their constituencies' concerns in mind. However, the typical value of democracy is more than a political arrangement but rather a system of institutions that can realise the 'common good'.[17]
In maximalist conceptions, the value of democracy comes from the hope that it will enable the realisation and protection of superior values desirable to all. The most normatively desirable aspects of life such as 'representation, accountability, equality, participation, justice, dignity, rationality, security' are all attributed to democracy.[18] Codified constitutions are indicative of maximalist conceptions of democracy because they specify certain values that even a majority cannot violate.[19] Liberalism and pluralism are key aspects of a

[13] Guenter Frankenberg, 'The Learning Sovereign' (2008) 31 Constitutionalism: New Challenges 17.
[14] Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, Chapman & Hall, Incorporated 2015) 225.
[15] Adam Przeworski, *Who Decides What Is Democratic*? (2024) 35 Journal of democracy 5.
[16] ibid.
[17] Schumpeter (n 14).
[18] Przeworski (n 15).
[19] ibid.

maximalist conception of democracy. The normative principles that liberalism ranks highly: personal autonomy, human rights, and toleration, contribute to a democratic society that facilitates a forum for citizenry to openly express themselves.[20] Liberalism involves the ranking of values, therefore, in a pluralist society the value of freedom of expression is of the utmost importance. Furthermore, both pluralism and freedom of expression serve a protective function against majoritarianism.[21] Voting is essential in a democracy, but the idea of democratic citizenship is greater than voting, it is participation in the creation and improvement of society.[22]

The Convention's preamble states that maintenance of fundamental freedoms is dependent upon an 'effective political democracy and… a common understanding and observance of the Human Rights'.[23] The Convention does not define democracy or 'democratic society',[24] however, ECtHR case law has elucidated certain values that embody the Convention's spirit and the concept of a democratic society.[25] Those values are: human dignity,[26] personal autonomy,[27] democracy and the rule of law,[28] pluralism,[29] tolerance and broadmindedness.[30]

B. IDEALISED DEMOCRATIC SOCIETY

While the minimalist and maximalist conceptions of democratic society have been established, this section analyses the values and principles that, when paired with democratic mechanisms, promote the evolution of a purely procedural democracy to one that actualises the ideal conditions of a flourishing democratic society. The ideal conditions for democratic society are equality,[31] and individual dignity.[32] These values foster a society that embodies the values listed above and possesses the most fundamental aspect of a democratic society:

[20] George Crowder, *Liberalism and Value Pluralism* (Continuum 2002) 11.
[21] Dworkin (n 4).
[22] Pierre Rosanvallon, *The Society of Equals* (Harvard University Press 2013) 260.
[23] ECHR, Preamble.
[24] Human Rights Act, sch 1, 10(2)**.**
[25] Janneke Gerards, *General Principles of the European Convention on Human Rights* (2nd edn, Cambridge University Press 2023) 118.
[26] *Pretty v The United Kingdom* no 2346/02 (ECtHR 29 April 2002) [65], [67].
[27] *Jehovah's Witnesses of Moscow and Others v Russia* no 302/02 (ECtHR 10 June 2010) [135]-[136].
[28] *United Communist Party of Turkey v Turkey* no 19392/92 (ECtHR 30 January 1998) [45].
[29] *Beizaras and Levickas v Lithuania* no 41288/15 (ECtHR 14 January 2020) [107].
[30] *Handyside v The United Kingdom* no 5493/72 (ECtHR 7 December 1976) [49].
[31] Rosanvallon (n 22) 256.
[32] Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing Ltd 2015) 27.

freedom of expression.[33] An idealised democratic society also requires a government that possesses restraint, responsibility, and self-reflection.[34] Analysing these values illustrates how they buttress each other, resulting in the unavoidable conclusion regarding the necessity of freedom of expression, and specifically, non-viewpoint-punitive public discourse.[35]

1. EQUALITY, DIGNITY, AND FREEDOM OF EXPRESSION

The work of Dupré and Rosanvallon further explores the values of a democratic society. Rosanvallon evaluates the quality of society that constitutes a democracy.[36] Whereas Dupré illustrates the necessity of human dignity within democratic society.[37] Individual autonomy and pluralism are fundamental to the respect of human dignity. The elucidation of these values underscores the necessity of non-viewpoint-punitive public discourse within a democratic society.

In his book, *The Society of Equals*, Rosanvallon evaluates the quality of society that makes up a democracy. Seeing the inequality of western societies, Rosanvallon posits that equality may be better actualised through social terms rather than purely in the economic or political realm.[38] Rosanvallon's 'society of equals' is established based on a 'classless society' and an aversion to the efficacy of 'equality of opportunity'.[39]

Rosanvallon's terms of singularity and reciprocity embody the manifestation of values like equality, dignity, individual autonomy, and pluralism.[40] Singularity, differentiated from autonomy or identity, is defined as 'the difference (of individuals) that… binds a person to others'.[41] Equality of singularities is a celebration of individual differences, and it is this diversity that 'becomes a standard of equality'.[42] The uniqueness of every individual inspires curiosity and a desire to understand others.[43] This equality of individuals 'marks the advent of a fully democratic age', where individuals participate in society based on their unique

[33] Heinze (n 1).
[34] Stephen Skinner *Lethal Force, the Right to Life and the ECHR* (Bloomsbury Publishing Plc 2019) Ch 7.
[35] Heinze (n 1).
[36] Rosanvallon (n 22).
[37] Dupré (n 32).
[38] Rosanvallon (n 22) 258.
[39] ibid 259.
[40] ibid 260.
[41] ibid.
[42] ibid 260-261.
[43] ibid.

characteristics rather than group homogeny.[44] The resulting basis of society reflects a shared philosophy of equality borne out of individual thought.[45]

Singularity is a relational variable, contrasting one singularity with others. Thus, a singularity can only become a vital force within a democracy that recognises the individuality of each citizen.[46] The denial of singularity; reducing an individual to their social category, inhibits the sovereignty of the people by impeding the fulfilment of a key principle of democracy. Establishing a society of equals requires the availability of the means to achieve singularity.[47] Singularity cannot be reached without the right to freely hold, share and receive ideas. Accordingly, this necessitates the removal of 'obstacles that limit the individual's view, confine him to his condition, and prevent him from hoping for a different future'.[48] Furthermore, Rosanvallon states the achievement is reflected through the ease of an individual to challenge decisions of the government.[49] The concept of singularity and its underlying values of individual autonomy, dignity and pluralism, exemplifies the necessity of a well-protected right to freedom of expression.

Reciprocity is understood as equality of interaction.[50] It is a relational good; it is produced and consumed simultaneously, and can only be enjoyed when shared.[51] The relational goods of the concept of reciprocity are respect and recognition.[52] Through respect and recognition, a society can be formed whilst maintaining individuality.[53] The protection of these relational goods is paramount to the maintenance of social life and individual rights.[54] Respect and recognition must extend to an individual's opinion. To deny an individual the opportunity to express their opinion, based on their viewpoint, constitutes a failure to uphold the relational goods.

Rights and duties must be the same for all if reciprocity is necessary for the flourishing of singularity; any institution or rule that disrupts equality of individuals is unacceptable.[55] Consequently, equality under the law commands 'that all men should also have the same

[44] ibid 261.
[45] ibid.
[46] ibid.
[47] ibid 266.
[48] ibid 267.
[49] ibid 269.
[50] ibid 271.
[51] ibid.
[52] ibid 272.
[53] ibid.
[54] ibid.
[55] ibid 273.

share in making the law'.[56] In a democratic society, rights are not granted by institutions, rather individuals confer rights upon each other to facilitate a social order based on individual freedom and responsibility.[57] Rights function as a constitutive principle within a society of equals,[58] especially freedom of expression, the only distinctly democratic right.[59] They are human rights because they extend to everyone equally, not just those whose viewpoint is widely endorsed. The role of the state is primarily to facilitate the relations of the citizenry, for they give the state democratic legitimacy.[60]

In her book, *The Age of Dignity: Human Rights and Constitutionalism in Europe*, Dupré discusses the rise of a 'richer version' of liberal democracy called 'dignity-democracy' which, among many features, is chiefly characterised by the inviolability of human dignity.[61] Dignity and democracy form a circle where human dignity can only manifest within a liberal democratic framework;[62] a liberal democracy will begin to wither once human dignity is not prioritised. This emphasises the 'constant process of democratisation' and the necessity of it being an open process further reflects the importance of upholding individual dignity.[63] Democracy cannot be characterized as a truly open process, nor can individual dignity be upheld, without non-viewpoint-punitive public discourse. It is the acknowledgement and respect of an individuals' dignity that stifles any notion that prohibiting expression is generally 'necessary in a democratic society'.[64]

2. IDEAL ATTRIBUTES OF GOVERNANCE IN A DEMOCRATIC SOCIETY

An ideal democratic society can only be realised by a state whose governance corresponds with the core values of democratic society. Through a cumulative reading of the ECtHR's case law, Skinner emphasises three ideal attributes that 'encapsulate the key minimum standards and qualitative aspects associated with democratic societies'.[65] In Skinner's view, an ideal democratic government is restrained, responsible and reflective.[66] Although these

[56] F. Hayek, The Constitution of Liberty (Routledge & Kegan Paul 1960) 103.
[57] Rosanvallon (n 22) 273.
[58] ibid.
[59] Heinze (n 1).
[60] Rosanvallon (n 22) 273-274.
[61] Dupré (n 32) 27.
[62] ibid 182-183.
[63] ibid 184.
[64] Human Rights Act, sch 1, 10(2).
[65] Skinner (n 34).
[66] ibid.

criteria are discussed in reference to possible violations of Art.2,[67] they are easily and intuitively applied to the constitutive role that freedom of expression encompasses in a democratic society. The right to life and freedom of expression each serves as a protective measure against the abuse of state power, empowering the citizenry to push back against the state when they feel the rights of themselves, or another, have been violated.

(a) RESTRAINT

Protection of democratic constitutionalism is based on restraint of the state, just as limitation of state power is necessary for the domestication of and adherence to human rights.[68] This is especially relevant for the right of freedom of expression and each citizen's ability to absorb and impart ideas. The strength of that freedom, and thus the democratic legitimacy of any given state depends on the scope of exceptions to freedom of expression and the limitations on judges and state agents to abrogate from such freedom.[69] Legal restraint and limitation of state power is necessary for any truly democratic objective and the rule of law. It is the restraint that gives the rule of law significance ensuring that state power is always used proportionately.[70]

(b) RESPONSIBILITY

Skinner describes responsibility as 'a question of regulation and culture, at both institutional and individual behavioural levels'.[71] Democratic culture is not embodied through the enactment of institutions or a written constitution, but rather one of public discourse.[72] A democracy should be conceived as an ongoing public discourse. Public discourse is the *Verfassung* of a democracy; the 'constitution *of* the constitution'.[73]

Skinner asserts that a responsible democracy respects human rights and dignity, both in principle and practice.[74] It is the commitment to these rights that shows democratic society accepts the value of all individuals and that such rights are something good rather than an

[67] Human Rights Act, sch 1, 2.
[68] Skinner (n 34).
[69] ibid.
[70] ibid.
[71] ibid 159.
[72] Heinze (n 1).
[73] ibid 7.
[74] Skinner (n 34).

'inconvenient obstacle' for the state.[75] A state's respect of human dignity is exemplified in their handling of expression and how they choose to contend with the public's spectrum of ideas. It is not undemocratic for a state to hold, and even advertise, certain values to the public.[76] However, when a state seeks to protect human dignity through punishment of unapproved viewpoints, it does not sacralise dignity but kills it.[77] Instead of dignifying the individual's autonomy, they are infantilised as someone who cannot contend with adverse ideas or opinions.

(c) REFLECTIVENESS

Skinner describes a democratic state as reflective when it is 'open to a process of inquiry and reform, recognising, when necessary, their own limits and fallibility, as well as the need to learn and evolve'.[78] Evaluation and evolution of institutions, laws, and state practice should be a part of any democracy, but this must begin with the rejection of anything undemocratic. Undemocratic regimes are not self-critical and never feel 'obliged to learn' unless it serves their interests, unlike a democracy, which Frankenberg describes as 'a learning sovereign'.[79] It is an openness to information and the willingness to guarantee freedoms of political communication that maintain democratic society.[80]

The second aspect of reflectiveness is the state's realisation of its capacity to learn and the capability to change for the future.[81] This ability to learn is only beneficial if it leads to practical consequences, echoing what was learned.[82] Respect for the republican and democratic principles ensures the transparency and publicity of learning, and that all concerned citizens may access the forums of which learning takes place.[83] It is openness of learning and the practical consequences which legitimises the application of rules within democratic society.[84] Both aspects of reflectiveness show that democratic society has a perpetual need to learn, democracy is never accomplished, instead it is a continuing discourse in which any aspect may falter but can be rectified.[85]

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[75] ibid.
[76] Heinze (n 1).
[77] ibid 203.
[78] Skinner (n 34) 160.
[79] Frankenberg (n 13) 19.
[80] ibid.
[81] Skinner (n 34).
[82] Frankenberg (n 13) 20.
[83] ibid 19.
[84] ibid 20.
[85] Skinner (n 34).

II. AN ARGUMENT FOR FREEDOM OF EXPRESSION IN PUBLIC DISCOURSE: THE INSTRUMENTALITY OF A DEONTOLOGICAL APPROACH

A. FREEDOM OF EXPRESSION AND ARTICLE 10

Democracy, diversity, tolerance, guarantees of human rights, and the quality and improvement of society are dependent upon an effective protection of the right to freedom of expression. Conversation that every member of society is entitled to take part in is often referred to by the courts as 'public discourse'.[86] The notion of public discourse cannot be construed too narrowly; according to Barendt, it must include any 'speech concerning the organization and culture of society'.[87] As long as such expression is conducted in a forum dedicated to democratic self-governance, it has one of the strongest claims to immunity from government interference.[88]

The Convention states: 'Everyone has the right to [freedom of expression]. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[89] Like many academics who insist upon the constitutive role of freedom of expression within a democracy,[90] the ECtHR has said that freedom of expression 'constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man'.[91] Despite this, the Convention treats freedom of expression as a qualified right, meaning that a state may interfere with the right if it is within the breadth of Art.10(2).[92] However, as the article argues, if freedom of expression is fundamental to democracy, then without a forum permitting all viewpoints, restrictions on expression cannot be considered 'necessary in a democratic society'.[93]

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[86] James Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from The Masses', in Ivan Hare, and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009).
[87] Barendt and Feldman (n 7).
[88] Weinstein (n 86).
[89] Human Rights Act, sch 1, 10(1).
[90] Murkens (n 3), Heinze (n 1); Lauriane Josende, *Liberté d'expression et démocratie: Réflexion sur un paradoxe* (Brussels: Bruylant 2010) 1; Hans Kelsen, *General Theory of Law & State* (New Brunswick, NJ: Transaction [1949] 2005) 288; Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Bros 1948) 27
[91] Handyside (n 30), [49].
[92] Human Rights Act, sch 1, 10(2).
[93] ibid.

Weinstein distinguishes between three types of limitations on expression: 'viewpoint-based', 'content-based', and 'content-neutral'.[94] Content-based restrictions are those the government seeks to regulate because of the message of the expression, whereas 'content-neutral' restrictions regulate expression for reasons unrelated to the message, often referred to as time, place, and manner restrictions.[95] Finally, viewpoint-based restrictions are based on the 'motivating ideology, opinion, or perspective of the speaker'.[96] It is antithetical for a democratic society to allow the state to prohibit hateful expression in public discourse, implicitly granting freedom to the 'state-approved viewpoints', while explicitly penalising expression of contrary viewpoints.[97] Non-viewpoint-punitive public discourse fulfils the democratically legitimising role by protecting political and ideological expression, without extending protection to more narrowly defined content-based restrictions such as commercial fraud, courtroom perjury, and, most pertinently to this article, discrimination or harassment.

B. LONGSTANDING, STABLE, AND PROSPEROUS DEMOCRACY

Heinze differentiates between liberal notions of human rights and prerogatives of democratic citizenship,[98] arguing that the categorization of freedom of expression within the rights regime allows expression to be interfered with in acquiescence of other rights.[99] According to Heinze, human rights and state security are often conflated with democratic citizenship, and while prohibition of hate speech can promote the status of other rights or state security, they can 'never promote a state's democracy'.[100] Freedom of expression is not necessarily more important to individual or collective welfare than other rights, but it is the only distinctly democratic right.[101] Therefore, Heinze does not believe viewpoint-based penalties are ever necessary because democracy's 'legitimating expressive condition… requires the citizen's prerogative of non-viewpoint-punitive expression within public discourse'.[102]

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[94] James Weinstein, 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech', in Ivan Hare, and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press 2009) 82–3
[95] ibid.
[96] ibid 81.
[97] Heinze (n 1).
[98] ibid.
[99] ibid.
[100] Ibid 6.
[101] ibid.
[102] ibid 80.

Heinze maintains that the states facilitation of non-viewpoint-punitive expression within public discourse is possible when a certain standard of a democracy is reached. Referring to such states as longstanding, stable, and prosperous democracies (LSPD).[103] Heinze classifies states as an LSPD if they 'maintain sufficient legal, institutional, educational, and material resources to admit all viewpoints into public discourse, yet remain adequately equipped to protect vulnerable groups from violence or discrimination'.[104]

Germany's Weimar Republic, post-Cold War Yugoslavia, and Rwanda are all examples of democracies in which hate speech has manifested in violence and discrimination.[105]

However, Heinze distinguishes these democracies from LSPDs because of their capacity to provide 'universal, pluralist primary education, to combat violence and discrimination against vulnerable groups, and to facilitate those groups' civic empowerment'.[106] LSPDs are never viewpoint-neutral, however, instead of mandating the states viewpoint on the citizenry, they employ pluralist and anti-discrimination policies to protect vulnerable groups.[107] Once a state, such as the UK, sustains the conditions of a LSPD, it can shift from a consequentialist approach to fully applying deontological principles in regulating expression.

C. DIGNITY AND POLITICAL PARTICIPATION

Dworkin's defence of a basic right of freedom of expression embodies many of the values of an idealised democratic society. For Dworkin, the right of freedom of expression is borne through the principle of dignity and equality. Dworkin's argument is entirely premised on the principle of dignity, which reflects Dupré's notion of 'dignity-democracy'.[108] Equality necessarily follows from human dignity, reflecting Rosanvallon's concepts of singularity and reciprocity. Singularity illustrates the uniqueness and individuality of everyone, and the equal respect that Dworkin believes they deserve as participants in forming the collective will.[109] Reciprocity reflects Dworkin's insistence on the necessity of equal political participation for democratic legitimacy; a voice and a vote are relational goods which are only fully enjoyed if they are shared between everyone, both produced and consumed simultaneously.[110]

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[103] ibid 69.
[104] ibid 70.
[105] ibid 207.
[106] ibid.
[107] ibid.
[108] Dupré (n 32) 27.
[109] Dworkin (n 4).
[110] Rosanvallon (n 22) 271.

Dworkin believes that freedom of expression is a basic right, thus, its virtue can be defended for reasons of basic principle.[111] For Dworkin, that basic principle is dignity. Dignity demands that any governmental imposition of collective or official decisions on dissenting individuals must be done so with respect to each individual as a free and equal member of society, without which would make such impositions illegitimate.[112] Another aspect to dignity within a democracy, is the protection of the 'discrete and insular minority'.[113] The tyranny of the majority is something that a principled application of freedom of expression can help address. Indeed, the Supreme Court has stated that 'one of the principal reasons for having constitutional rights is that the ordinary majoritarian political process cannot necessarily be relied on to protect minorities'.[114] Enforcing the majority's will is generally regarded as fair within a democracy, however, Dworkin believes that although 'majoritarian procedures may be a necessary condition of political legitimacy, they are not a sufficient condition'.[115] For Dworkin, a fair democracy requires what he calls a 'democratic background'.[116] This entails that every competent adult has a vote in deciding the majority's will, but more so, it also requires that each citizen has a voice.[117] Dworkin claims 'a majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals'.[118] Voice not only has an instrumental purpose in having your viewpoint heard and having the opportunity to convince others, but most importantly it dignifies the individual and confirms their standing as an equal and responsible agent of collective action. Dworkin claims that forbidding someone from protesting, arguing, or objecting before a decision is taken, means that the majority loses the right to impose their will.[119]

This principled approach is necessary because, as Dworkin recognises, freedom of expression is an inherent aspect of democratic society.[120] Dworkin appreciates the ills of hate speech and is cognisant of the deeply offensive and abhorrent views that a principled approach to freedom of expression will ultimately permit.[121] The existence and circulation of such ideas

[111] Dworkin (n 4).
[112] ibid.
[113] *United States v. Carolene Products Co*., 304 U.S. 144 (1938): In footnote 4 of the judgement.
[114] *Arorangi Timberland Limited v Minister of the Cook Islands National Superannuation Fund* [2016] UKPC 32, [2017] WLR 99, [2017] 1 WLR 99, [90].
[115] Dworkin (n 4).
[116] ibid 131.
[117] ibid.
[118] ibid 131.
[119] ibid.
[120] ibid 132.
[121] ibid.

make the creation of exceptions to the principle, like hate speech prohibition, a dangerous temptation. However, exceptions are made together with the forfeiture of any moral entitlement to force the collective will onto the citizenry.[122]

Protection of vulnerable minorities from the harm of sexism, racism, or intolerance is something that must always be strived toward, but 'we must not try to intervene further upstream'.[123] Intervening too soon in the process of collective opinion, for instance by forbidding any expression that can possibly contribute to unfairness or inequality, 'spoil[s] the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them'.[124] Furthermore, any exemption would destroy the principle; protection solely for mainstream views is not only pointless, but antithetical to a deontological approach to freedom of expression. Silencing contrary ideas may be tempting but not at the expense of the political and democratic legitimacy of the collective decision-making process.[125] Good intentions and immediate goals will always seem to justify compromising the principled application of freedom of expression, however, any compromise will defeat the entirety of its purpose and the power to exploit the compromise will hardly be a democratic endeavour.[126]

D. LIBERTY, DEBATE, AND TRUTH

In Mill's famous text *On Liberty*, he defines liberty as an absolute right, arguing for the limitation of government and societal power over the individual.[127] Within this text, also exists an incredibly powerful argument for freedom of expression, which Mill believes is necessary for social and intellectual progress.[128] To achieve meaningful progress we must ascertain the truth. According to Mill, we can only approach any semblance of truth through rigorous debate. Stifling opinion, then, is the surest way to impede its acquisition.[129] Like Dworkin,[130] Mill states that even if the government and the majority are completely in agreement, the power to coerce the population remains illegitimate: 'If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would

[122] Ibid 131-132.
[123] ibid 132.
[124] ibid.
[125] ibid.
[126] ibid.
[127] Mill (n 5).
[128] ibid.
[129] ibid 41.
[130] Dworkin (n 4) 131.

be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind'.[131] In a truly democratic society, excluding any citizen from the process of forming the collective opinion should render it illegitimate.

Mill's argument is tripartite. First, he states that regardless of our confidence, a suppressed viewpoint may still be true:

> They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure it is false, is to assume their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility.[132]

Second, it is rarely the case that one viewpoint is entirely true, and the other, entirely false.[133] Mill claims, 'there is a commoner case than either of these; when the conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth'.[134] Third, even when a viewpoint is not even partially true, there remains a benefit in allowing its expression.[135] For instance, understanding opposing views helps strengthen your own opinion:

> He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may be able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.[136]

Furthermore, without contending against converse ideas, the meaning and ability to defend our most sacred ideas or values is threatened:

> The meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere

[131] ibid 33.
[132] ibid 34.
[133] ibid 95.
[134] ibid 83.
[135] ibid 95.
[136] ibid 67.

> formal impression, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.[137]

Mill's argument is abundantly one of instrumentality; this is evident since he is even opposed to silencing objectively wrong opinions given their assistance in ascertaining the truth: 'We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still'.[138] The suppression of ideas within public discourse, regardless of their validity, delegitimises democracy and is harmful to society as a whole.

III. A CRITICAL ANALYSIS OF THE PROTECTION FOR FREEDOM OF EXPRESSION IN THE UNITED KINGDOM

A. FREEDOM OF EXPRESSION IN THE UNITED KINGDOM

The UK's framework for freedom of expression originates from membership in the COE and as a signatory to the Convention.[139] The HRA has the effect of domesticating the Convention into UK Law.[140] Therefore, judges must interpret UK law so that it is compatible with ECtHR jurisprudence,[141] and any public authority must act in a way that is compatible with Convention rights.[142] The HRA does not provide a constitutional guarantee for the right to freedom of expression, but it allows the courts to declare a statute incompatible with that right.[143] This is due to the doctrine of parliamentary sovereignty which is a cornerstone of the UK's constitution and inevitably frustrates any attempt to entrench the protection of civil liberties. Although the HRA has significantly changed the dynamic between the courts and public authorities, the constitutional protection of liberties and rights in the UK remains tenuous.[144] The effect of parliamentary sovereignty and the parameters of the Convention regarding Art.10(2) means that freedom of expression will never be an absolute right.[145]

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[137] ibid 95.
[138] ibid 34.
[139] Ivan Hare, *Extreme Speech Under International and Regional Human Rights Standards, Extreme Speech and Democracy* (Oxford University Press 2009).
[140] Eric Heinze, *Criminalising Hate Speech: A Comparative Study.* (1st ed., TMC Asser Press 2025) 424.
[141] Human Rights Act, s 2.
[142] ibid s 6(1).
[143] ibid s 4.
[144] Murkens (n 3).
[145] Human Rights Act, sch 1, 10(2).

B. THE EUROPEAN COURT OF HUMAN RIGHTS

The HRA requires that the UK's courts must 'take into account any judgment, decision, declaration or advisory opinion of the [ECtHR]'.[146] Although the ECtHR has reiterated its stance that freedom of expression is not only applicable to favourably received or inoffensive ideas, but also to those that 'offend, shock, or disturb'.[147] They have also stated inciting or justifying hatred based on intolerance or racism is not protected under Art.10.[148] When dealing with cases regarding incitement to hatred and freedom of expression, the ECtHR either approaches this through Art.17 which prohibits the abuse of rights, or Art.10(2) which lists the justifiable derogations from the right to freedom of expression. The former is typically engaged when the expression in question negates the fundamental values of the Convention,[149] whereas the latter is employed when the expression in question, although hateful, does not threaten the fundamental values of the Convention. A further obstacle for Art.10 protections is the doctrine of the margin of appreciation. This doctrine lacks precision and creates uncertainty regarding the protection of individual rights, especially in its application to Art.10 cases where the doctrine is particularly generous for states looking to suppress hateful speech.[150]

Hare believes that Art.17 is used by the ECtHR as a mechanism to prevent reliance on Art.10 to protect extreme or hateful views.[151] Hare states that the ECtHR's application of Art.17 is incompatible with their consistent statements that Art.10 protections apply to expression 'which offends, shocks, or disturbs the state or any sector of the population'.[152] Additionally, it's broad application oversteps its explicit boundary regarding expression that threatens the democratic values of the state.[153] Thus, allowing for the exclusion of Art.10 protection for any kind of hateful expression removes the need for the state to justify interference with Convention rights. This drastically reduces the ECtHR's ability to 'ensur[e] that any limitations are narrowly construed and convincingly established'.[154] All of this contributes to

[146] Human Rights Act, s 2(1)(a).
[147] *Handyside* (n 30) [49].
[148] Dirk Voorhoof and Hannes Cannie, Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights (2010) 72 The International Communication Gazette 417.
[149] *Seurot v. France* (2004) Decision on admissibility 57383/00; *Garaudy v. France* (2003) Inadmissibility decision 65831/01.
[150] Hare (n 139) 77.
[151] ibid 78.
[152] *Lingens v. Austria* (1986) 8 EHRR 103 [31].
[153] *De Becker* v. *Belgium* Appl. No. 214/56 (1958) 2 YB [279].
[154] Hare (n 139) 78.

the risk that the state may restrict expression of views that do not advocate mainstream values. Hare claims that 'If this is permitted to occur, the essential contribution which pluralism, tolerance, and broadmindedness make to the definition of a democratic society under the [Convention] is substantially negated'.[155]

C. REGULATION OF HATE SPEECH IN THE UNITED KINGDOM

Section 5 (s.5) of the Public Order Act 1986 (POA) constitutes the most direct form of hate speech regulation in the UK.[156] S.5 is incredibly wide in scope, prohibiting conduct that is likely to result in harassment, alarm, or distress.[157] A s.5 conviction requires the use or display of 'threatening or abusive words or behaviour, writing, sign or visible representation… within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby'.[158] The mental element of s.5 is fulfilled if the perpetrator intends or is aware that their conduct is 'threatening or abusive'.[159] Although there are three possible defences for such a charge, only the s.5(3)(c) defence of reasonableness is relevant. It is important to note that s.5(1) originally included conduct that was 'insulting' in addition to 'threatening or abusive', and this provision was later removed.[160] However, it will also be shown that this amendment to the law is superfluous, providing no genuinely substantive protection to freedom of expression within the UK.

1. PERCY V DPP

Percy was a peace demonstrator who stood on an American flag in a roadway, blocking a vehicle filled with American military personnel.[161] Percy was charged with obstructing a highway and a s.5 offence. The Magistrates' Court found her guilty, fining her £300 and an order to pay costs.[162]

[155] ibid; *Lingens* (n 152) [31].
[156] Heinze (n 140)
[157] Public Order Act 1986 (Public Order Act), s 5.
[158] ibid s 5(1).
[159] ibid s 6(4).
[160] Crime and Courts Act 2013 (Crime and Courts Act), s 57.
[161] *Percy v DPP* [2001] EWHC Admin 1125; [2002] Crim.L.R. 835 [2].
[162] ibid.

The District Judge found that the conduct was 'insulting',[163] and likely to cause 'distress' to the military personnel,[164] Percy was aware that her conduct was insulting,[165] and failed to prove that her conduct was 'reasonable'.[166] The District judge also found the limit on Percy's freedom of expression was necessary in a democratic society both for protecting the rights of others to be 'free from gratuitously insulting behaviour' and to 'have [one's] national flag … protected from disrespectful treatment'.[167] This conclusion was reached almost solely due to the fact that Percy's conduct was 'not the unavoidable consequence of a peaceful protest … but arose from the particular manner in which the defendant chose to make her protest'.[168] Under these circumstances, it is expected that the court would attempt to interpret the word 'reasonable' under s.5(3)(c) as to be compatible with Art.10,[169] and if not, issue a declaration of incompatibility.[170] Instead, the Divisional Court assessed whether a conviction would be compatible with Art.10, and if not, whether Percy's conviction be quashed through the employment of s.6 HRA.[171] This conflated the reasonable defence with the balancing exercise under Art.10.[172] Instead of Percy having to prove her conduct was reasonable,[173] the court decided that the conduct must be unreasonable in order to convict. In effect, a conviction under section 5 would only be justified if the outcome was compatible with the rights protected under Art.10.

Hallet J, having found that protecting individuals from insulting behaviour is a legitimate aim under Art.10(2), only left the question as to whether convicting Percy was a proportionate response to achieving this aim;[174] because due regard was not given to all the relevant factors in the proportionality assessment,[175] convicting Percy would be incompatible with her convention rights, so the court used s.6 of the HRA to quash the conviction rather than remit the case for a rehearing.[176] Percy only narrowly avoided conviction. The court neither found

[163] Public Order Act, s 5(1)(a).
[164] ibid s 6(4).
[165] ibid.
[166] ibid s 5(3)(c).
[167] *Percy* (n 161) [4].
[168] Andrew Geddis, Free Speech Martyrs or Unreasonable Threats to Social Peace? 'Insulting' Expression and Section 5 of the Public Order Act 1986 (2004) Public Law 853.
[169] Human Rights Act, s 3.
[170] ibid s 4.
[171] *Percy* (n 161) [7].
[172] ibid [27].
[173] Public Order Act, s 5(3)(c).
[174] *Percy* (n 161) [30].
[175] ibid [32].
[176] ibid [34].

her conduct to be reasonable nor fulfilled its duty to interpret s.5 in line with Convention rights.[177]

The court failed to make clear when or whether Percy's behaviour is permitted. Regardless of the outcome in this case, it appears that, given a similar set of facts where someone uses certain symbols and is aware that their use and subsequent conduct will be taken adversely by those targeted to see it, their Art.10 right will not outweigh the upset feeling of the targeted audience.[178] There is very little indication that a conviction wouldn't have arisen had a retrial been conducted.[179]

2. NORWOOD V DPP

Norwood was charged with a s.5 offence for displaying a poster in his window that depicted the September 11th terror attacks on New York's Twin Towers with the words 'Islam out of Britain-Protect the British People'.[180] The Magistrate's Court found the display of the poster to not be 'reasonable' and the District Judge found that the limits on expression posed by s.5 were in pursuit of a legitimate aim, necessary, and proportionate to that aim.[181] Norwood was convicted and fined £300.

Norwood appealed, arguing that finding the poster abusive or insulting was an error, and the District Judge failed to give sufficient weight to his Art.10 rights when deeming his conduct to not be reasonable. The House of Lords ruled in *Brutus v Cozens* that the threshold for 'abusive or insulting' is a factual question for the trial court to determine.[182] Agreeing with the approach, Auld L.J held '[Art.10] cannot bear in any reasoned way on whether the prosecution have proved … intentional or foreseen insulting conduct…'.[183] Thus, the success of this appeal depended entirely on whether it could be shown that no District Judge could have concluded that the poster was 'abusive or insulting'. [184]

The racial and religious elements of this case make this finding straightforward when appealing to Art.17, 9, and 14 of the 1950 Convention,[185] however, the utility of this case is its ability to illustrate the broad application of s.5 of the 1986 act, even in extreme

[177] Human Rights Act, s 3.
[178] Geddis (n 168) 4-5.
[179] ibid.
[180] *Norwood v DPP* [2003] EWHC 1564 (Admin); [2003] Crim. L.R. 888; [2003] 7 WLUK 79 (DC).
[181] ibid [9]-[13].
[182] *Brutus v Cozens* [1973] A.C. 854 Lord Reid [862].
[183] *Norwood* (n 180) [37].
[184] Geddis (n 168).
[185] ECHR.

scenarios.[186] Auld L.J's judgement creates an overall prohibition on insulting conduct that is likely to harass, annoy or distress others as a necessary limitation on freedom of expression: 'If the prosecution has proved, as it must to obtain a conviction, that an accused's conduct was insulting and that he intended it to be, or was aware that it might be so, it would in most cases follow that his conduct was objectively unreasonable'.[187]

Conduct which breaches s.5 is supposedly subject to a defence that it is 'reasonable',[188] however, for Auld L.J. these circumstances are 'difficult to envisage …'.[189] The consequence of this decision is the nullification of the protection of s.5(3),[190] removing Art.10 protections from expression that, either intentionally or recklessly, results in insult and mental upset for onlookers. [191]

3. HAMMOND V DPP

Hammond was charged with a s.5 offence for expressing disapproval for same-sex relationships with a sign.[192] A crowd surrounded and began accosting and physically assaulting Hammond, at which time two police officers intervened, requesting Hammond cease preaching and remove his sign from view. After refusing to comply with the officers, Hammond was arrested and subsequently convicted.[193]

Again, the court found that there was a legitimate aim in preventing disorder by convicting Hammond.[194] The Magistrates' Court ruled that Hammond's conduct 'went beyond legitimate protest… was provoking violence and disorder, [and] … interfered with the rights of others'.[195] Holding that 'the restriction of the appellant's right to freedom of expression… was a proportionate response' and that Hammond's 'conduct was not reasonable'.[196]

Hammond's appeal was dismissed by the Divisional Court where May L.J. concluded that the Magistrates' Court properly considered the applicability of s.5 and Art.10.[197]

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[186] Public Order Act.
[187] *Norwood* (n 180) [39].
[188] Public Order Act 1986, s 5(3).
[189] *Norwood* (n 180) [39].
[190] Weinstein (n 86).
[191] Geddis (n 168).
[192] ibid.
[193] *Hammond v DPP* [2004] EWHC 69 (Admin); (2004) 168 J.P. 601; [2004] 1 WLUK 95 (DC).
[194] ibid [19].
[195] ibid.
[196] ibid.
[197] ibid [33].

Following *Percy*,[198] in *Norwood* Auld L.J. held that Art.10 is only relevant in the assessment of the defence of reasonable conduct:

> a prosecution under [s.5] does not *per se* engage [Art.10]. It depends on the facts and the drawing of an appropriate balance of competing interests… in the absence of a challenge to the compatibility of [s.5] with the Convention, the mechanics of the Article's operation on a prosecution under it seem to me to be confined to the objective defence of reasonableness.[199]

However, May L.J. differed, stating that 'in determining whether a particular set of facts or circumstances should give rise to a finding that a sign of this kind was insulting… it would be appropriate to have Art.10 and its terms very much at hand'.[200]

Despite this, the two approaches to review are almost indistinguishable.[201] Just as in *Norwood*,[202] the proportionality of the lower court's decision was not considered, and instead the *Wednesbury* test was applied regarding whether the insulting nature of Hammond's conduct 'was a perverse finding of fact'.[203] On the grounds of Art.10 and Art.9, Hammond argued for his right to make public his personally religious views on same-sex relationships.[204] While expressing sympathy for Hammond and going as far to note 'the cardinal importance of [freedom of expression] in a democratic society such as ours',[205] May LJ proceeded to accept the lower court's assessment of s.5 and Art.10, omitting a novel factual analysis of whether their conclusion was correct, instead treating the matter as only reviewable regarding the 'reasonableness'.[206]

While not explicitly stating this, the Magistrates' Court in effect found the application of s.5 to be compatible with right of freedom of expression.[207] The effect of this judgement is to render Hammond with no effective way to express his beliefs on same-sex relationships in public.[208] According to Weinstein, the outcome of this case is 'patently inconsistent with the

[198] *Percy* (n 161).
[199] *Norwood* (n 180) [37].
[200] *Hammond* (n 193) [21].
[201] Geddis (n 168).
[202] *Norwood* (n 180).
[203] *Hammond* (n 193) [32].
[204] Geddis (n 168).
[205] *Hammond* (n 193) [33].
[206] Geddis (n 168).
[207] *Hammond* (n 193) [20], [27]-[28].
[208] Geddis (n 168).

fundamental right to participate in the discussion by which people in a democratic society debate matters of public concern'.[209]

D. ISSUES WITH SECTION 5

Even after the enactment of the HRA, when considering an individual's breach of s.5, Feldman's observation that courts are 'exhibit[ing] a preference for public peacefulness and the avoidance of incitement over freedom of expression' remains accurate for the lower courts.[210] Art.10 confers on an individual the right to freely express themselves until the state can demonstrate the necessity to interfere with that right.[211] S.5 inverts this approach: first the courts will consider how 'bad' the expression is, only then to consider if there is any 'good' reasons to allow it, resulting in a system that justifies convictions as a necessary limit on freedom of expression.[212] Furthermore, on appeal, the Divisional Court is presented with a factual finding that the appellant, intentionally or recklessly, acted in a manner likely to cause harassment, alarm, or distress, and that it cannot be considered reasonable.[213] The factual nature of these findings restrict the appellant court to only an assessment of whether the proper questions have been asked, and a reasonable outcome achieved.[214] Thus, the defendant's fate is based on the subjective judgement of whether their conduct crosses the line from annoying to conduct likely to cause harassment, alarm, or distress.

Since these judgements, the law was amended. Section 57 of the Crime and Courts Act 2013 removed the word 'insulting' in s.5(1) and s.6(4) of the POA.[215] A conviction now requires 'threatening or abusive' expression.[216] Whilst this seemingly addresses the issue that was just examined in this section, this conclusion cannot be accepted.[217]

Murkens highlights three areas of the law that still allow for punishment of insulting expression.[218] First, the POA offences of fear or provocation of violence,[219] and intentional

[209] Weinstein (n 86) 34.
[210] David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002) 769.
[211] Human Rights Act, sch 1, 10(2).
[212] Geddis (n 168) 860.
[213] ibid.
[214] ibid.
[215] Crime and Courts Act, s 57.
[216] Public Order Act, s 5(1), s 6(4).
[217] ibid.
[218] ibid.
[219] Public Order Act, s 4(1).

harassment, alarm, or distress[220] both retain the wording of insulting. Thus, Murkens states 'where the insulting words or behaviour are planned and malicious, a person could still be guilty of a criminal offence'.[221] Secondly, any expression that would have been punished for being 'insulting,' can still fall within the purview of 'abusive'.[222] This was emphasised by then Home Secretary, Theresa May,

> Looking at past cases, the [DPP] could not identify any where the behaviour leading to a conviction could not be described as 'abusive' as well as 'insulting'. He has stated that 'the word 'insulting' could safely be removed without the risk of undermining the ability of the CPS to bring prosecutions. [223]

This was demonstrated in *Abdul v DPP* where the defendants were convicted of a s.5 offence after shouting 'burn in hell', 'murderers', and 'baby killers' at soldiers returning from Iraq.[224] Despite the soldiers not being bothered by the demonstration,[225] the court held that 'the words shouted by the defendants were both abusive and insulting'[226] and were characterized by the judges as 'well beyond legitimate expressions of protest'.[227] Finally, legislation such as section 127(1)(a) of the Communications Act 2003 creates an offence for a message that is grossly offensive, and is sent by means of a public electronic communications network. [228] Then Director of Public Prosecutions, Keir Starmer, even attempted to curb the rise of s.127 prosecutions by issuing guidelines to establish a high threshold for launching a criminal prosecution. However, guidelines do not resolve the issue, and results in greater uncertainty and predictability regarding the right to freedom of expression.[229]

Since the HRA's coming into force, this deference to the trial court is inappropriate.[230] The Divisional Court is required to act in a manner compatible with Convention rights,[231] including the responsibility to ensure the correct interpretation[232] of the 'reasonable'

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[220] ibid s 4A(1).
[221] Murkens (n 3) 44.
[222] ibid.
[223] House of Commons, Hansard Debates, 14 January 2013, col 642.
[224] *Abdul v DPP* [2011] EWHC 247 (Admin).
[225] ibid [19].
[226] ibid [29].
[227] ibid [52] and [60].
[228] Murkens (n 3) 45.
[229] ibid.
[230] Geddis (n 168).
[231] Human Rights Act, s 6.
[232] ibid s 3.

defence.[233] Therefore the court must ensure the 'Convention-compatibility' when convicting anyone for their conduct, regardless of the trial court's ruling.[234] While the way in which s.5 is structured, weighs against individual dissenters, the court is still required to consider whether the defendants conduct should be considered reasonable.[235] As demonstrated above, the courts have held that Art.10 does not have this consequence because protecting an onlooker's right to be spared from mental distress, however converse to even a minimalist conception of democracy, falls within the justifiable limitations on expression under Art.10(2).[236]

Geddis believes that the court's view these lone dissenter's views as having a low probability of bringing about social change, and on the balance, the immediate harm of mental upset to observers is prioritised.[237] This 'pro-civility' approach claims that the state can legitimately interfere with the discussion of matters within public and political discourse to protect the sensibilities of the public.[238] This hinges on whether mental distress caused by contending with adverse ideas is matter of public importance.[239] Such an approach contradicts Rosanvallon's ideas of singularity and reciprocity essential to an ideal democracy, and undermines even the most minimal definition of democracy. Indeed, Mill rejects this, writing 'there is no parity between the feeling of a person for his own opinion and the feeling of another who is offended at his holding it, no more than between the desire of a thief to take a purse and the desire of the right owner to keep it'.[240] This is also endorsed by Lord Scott of Foscote in the *Prolife* case; 'Voters in a mature democracy… ought not to be offended by the fact that the policy is being promoted nor… by the content of the [promotion]. Indeed, in my opinion, the public in a mature democracy are not entitled to be offended by [such expression]'.[241] According to this view, as opposed to 'pro-civility', when confronted with another's views on the matter of public policy, observers should either learn to not be offended or be required to 'put up with any mental upset they may experience when exposed to such messages'.[242] This approach is necessary for any pluralist society, as Lord Scott said, citizens 'must be prepared to tolerate the existence and expression of a full panoply of beliefs

[233] Public Order Act, s 5(3)(c).
[234] Geddis (n 168).
[235] Human Rights Act, sch 1, 10.
[236] Geddis (n 168).
[237] ibid.
[238] ibid.
[239] ibid.
[240] Mill (n 5) 102.
[241] *R. (on the application of ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 A.C. 185 [98].
[242] Geddis (n 168) 863.

within their community; and inculcating this attitude amongst the citizenry at large is essential to the flourishing of a fully democratic social ordering'.[243] The cumulative effect of judicial deference, the ambiguous interpretation of 'reasonableness', and the ECtHR's margin of appreciation doctrine has led to a legal culture in the UK that prioritizes civility over pluralism. Even in the most minimalist conception, any democratic society worthy of the name must be committed to facilitating non-viewpoint-punitive public discourse. This is not merely a procedural flaw, but a structural one that undermines the right to freedom of expression where it is most essential.

CONCLUSION

This article has challenged the notion that interferences with the right to freedom of expression can meaningfully be described as 'necessary in a democratic society'.[244] Arguing instead for a conception of freedom of expression as both constitutive of, and legitimising for, democratic society and governance. Without a forum based on non-viewpoint-punitive public discourse, a state cannot credibly claim to be a fully legitimate democracy. This article has shown how both the domestic and European legal frameworks fall short of fulfilling this democratic imperative.

The conditions for an idealised democratic society were elucidated considering the values ascribed to democratic society in the judgements of the ECtHR. Several academic works built upon these values, highlighting their inherent tie to democracy and human rights. The values of democratic society, especially equality and dignity, are used to underscore the necessity and benefits of freedom of expression.

Drawing on deontological and instrumental theory, this article postulated that freedom of expression is not merely a liberty to be balanced against other rights but a constitutive element of democracy and its legitimacy. Demonstrating that freedom of expression facilitates the collective formation of the public will whilst guarding against arbitrary power by ensuring that all voices, particularly dissenting or unpopular ones, have a place in public discourse. Thus, the proportionality of restricting expression must be meticulous to ensure the conditions of democratic society are not undermined.

[243] *R. (on the application of ProLife Alliance)* (n 241) [98].
[244] Human Rights Act, sch 1, 10(2).

Critical examination of the jurisprudence of the ECtHR and the UK showed that while the ECtHR has consistently affirmed the importance of freedom of expression,[245] it contradicts these affirmations using the doctrine of the margin of appreciation, Art.10(2), and Art.17 of the Convention.[246] The ECtHR's willingness to exclude certain viewpoints undermines the Convention's supposed commitment to pluralism, tolerance, and broadmindedness.
This culminated in the evaluation of the UK's domestic courts application of the HRA in cases concerning the UK's most direct form of hate speech regulation; s.5 of the POA. The case studies of *Percy*, *Norwood*, *Hammond*, and *Abdul* illustrate how s.5, despite amendments, continues to criminalise expression based on subjective offence. Courts have conflated the POA's 'reasonableness' defence with an Art.10 proportionality analysis without applying the latter in a structured or explicit manner. The courts' failure to engage in a proportionality assessment and their deference to trial findings impede a meaningful defence of freedom of expression, particularly for dissenting and minority voices. This reflects a structural failure to recognise that protecting speech is necessary for a democratic society.

There are several reforms possible to realign the UK's legal framework to give effect to the democratic imperative. First, s.5 must be narrowed to limit liability to demonstrably threatening or inciting conduct; subjective thresholds like 'alarm' or 'distress' are uncertain and converse to the rule of law. Second, courts must be held to their duties under the HRA and assess the proportionality of interferences with freedom of expression. Third, the 'reasonableness' defence should be reworded to reflect Conventions principles; expression must be presumed lawful unless evidently unjustifiable under Art.10(2). If the UK's courts do not reorient their approach to freedom of expression as a democratic right, rather than a privilege for the majority, the democratic legitimacy of its institutions will remain compromised. A democratic society worthy of the name demands an active commitment to protecting the space for dissent, disruption, and disagreement.

[245] *Handyside* (n 30) [49].
[246] ECHR.

Re-Evaluating Common Intention Constructive Trusts in Contemporary Society: Relevance and the Need for Reform

How Compatible are Common Intention Constructive Trusts in Domestic Contexts with Contemporary Society, and How Should They Be Reformed?

Izzy Jolliffe

ABSTRACT

This dissertation undertakes a critical appraisal of the current Common Intention Constructive Trust (CICT) framework as applied to trusts of the family home. It endeavours to assess the compatibility of this framework with modern society. To achieve this, it highlights two critical areas of concern; i) the presumption that equity follows the law; and ii) the conceptual incompatibility between property and family law. The assessment of these topics is framed through the competing principles of certainty and flexibility, with emphasis on the growing importance of the latter in modern society. Lastly, this paper highlights the demand for reform and explores possible options such as amending the current law or introducing statutory legislation. After turning to different jurisdictions including Australia, New Zealand and Scotland, this dissertation argues that legislative reform is essential to improving the compatibility of the current law with modern society.

INTRODUCTION

THE CURRENT LAW

In domestic contexts, where there is an absence of express declaration of trust (*Goodman v Gallant)*[1] the common intention constructive trust (CICT) analysis is applied. Firstly, in the acquisition stage, it must be ascertained whether the parties acquired a beneficial interest in the property. In sole ownership cases, the claimant must prove a beneficial interest by express or inferred conduct with detrimental reliance, outlined in *Lloyds Bank v Rosset.*[2] In contrast, in joint name cases, there is a presumption of equal ownership unless rebutted, as formulated

[1] *Goodman v Gallant* [1986] Fam 106 (CA).
[2] *Lloyds Bank Plc v Rosset* [1991] 1 AC 107 (HL).

in *Stack v Dowden*[3] and *Jones v Kernott.*[4] Following acquisition, quantification determines the beneficial share of the parties by either express, inferred or imputed intention.
This underscores the role of CICTs in determining beneficial ownership upon the breakdown of a relationship. However, CICTs have been the subject of considerable criticism. The current framework suffers from traditional and outdated social assumptions, failing to adequately protect cohabitants and undervaluing the importance of non-financial contributions. These shortcomings highlight the pressing need of reform. Subsequently, this dissertation aims to prove that the traditional focus of CICTs on rigid property law values including certainty and predictability are incompatible and unrealistic in family context. Legislative reform is therefore imperative to align the law with the realities of contemporary domestic arrangements. Through this dissertation's analysis, it concludes that introducing a statutory framework, clarifying the importance of non-financial contributions and specific protections for cohabitants would improve the compatibility with modern society.
When answering this, several sub-questions were identified:

i) In the tension of and certainty in CICTs, which should take priority?
ii) If reform is needed, what form should this take? Amendments to the current law or legislative reform?
i) What insights can be drawn from other jurisdictions? Should a similar regime be introduced in the UK?

I. THE PRESUMPTION THAT EQUITY FOLLOWS THE LAW

A. THE PRESUMPTION THAT EQUITY FOLLOWS THE LAW REINFORCES THE ARCHAIC STRUCTURE OF CICTs, RENDERING THEM INCREASINGLY INCOMPATIBLE WITH CONTEMPORARY SOCIETY

In sole name ownership, the legal owner is presumed to hold the entire beneficial interest; in joint ownership cases, equal beneficial ownership is presumed. Whilst this presumption can be rebutted, the high evidentiary threshold can cause couples to be unable to prove a different common intention. Bray reinforces this stating, 'much will depend on whether that family

[3] *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 (HL).
[4] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 (UKSC).

home is jointly owner or owned in the sole name of one property'.[5] This emphasises the oversimplification of CICT analysis and largely ignores the socio-economic position couples may experience. Removing this formalistic starting point in favour of a single CICT regime would reduce hurdles for claimants. Instead of legal title, this regime could assess the actual realities of relationships, focusing on a materially communal or materially non communal approach. The presumption that equity follows the law significantly disadvantages cohabitants who lack the statutory protections that their marriage and civil partnership counterparts have. As Gordon-Bouvier observes, 'English law does not have a specific statutory regime for property redistribution upon cohabitation breakdown'.[6] Introducing a statutory regime with specific remedies for cohabitants would improve the compatibility of the law with modern society, where cohabitants operating similarly to marriages and civil partnerships are adequately protected in relationship breakdowns.

1. SOLE NAME AND JOINT NAME OWNERSHIP

The current separate regimes for sole and joint legal ownership are incompatible with modern society. Whilst ensuring a universal and predictable starting point, this is an entirely reductionist approach. Firstly, sole name ownership arises where there is one registered legal owner. Here, the non-legal owner must prove they acquired a beneficial interest in the property. *Lloyds Bank v Rosset* states the claimant must prove their arrangement 'expressed by the parties at the time'[7] or 'be inferred from conduct on the part of the claimant'.[8] This must be coupled with detrimental reliance reflected in *Wayling v Jones* where the claim failed as 'he was unable to prove that he suffered a detriment in reliance upon his belief'.[9] Whilst this starting point in sole name ownership offers predictability as it clearly demonstrates a default rule where parties can identify their legal position, it is overly simplistic in family property. This response is echoed by Bray, who states that 'it has always been highly artificial in the context of family life'.[10] Certainly, this presumption fails to appreciate the socio-economic position of parties. At the time of acquiring the property, a partner may not

[5] Judith Bray 'Cohabitation – The long slow road to reform' (2016) 46 Family law Journal 1428, 1429.
[6] Ellen-Gordon Bouvier 'Relational vulnerability: the legal status of cohabiting carers' (2019) 27(2) Feminist Legal Studies 163, 184.
[7] Lloyds Bank, (n 2) 110.
[8] Ibid.
[9] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 173.
[10] *Bray*, (n 5) 1431.

be in the financial position to contribute. Equally, power imbalances in relationships may result in one party assuming legal ownership and the other party contributing domestically. The law's strict financial focus emphasises the difficulties claimants may face. *Lloyds Bank v Rosset* reflects how even inferred conduct is limited to 'direct contributions to the purchase price' or 'by payment of mortgage instalments'.[11] This signifies the narrow consideration for how the claimant can prove they enjoyed a beneficial interest, largely excluding contributions such as domestic responsibilities.

Furthermore, in joint-name cases, the high threshold to rebut the presumption of equality similarly illustrates its incompatibility with modern society. Firstly, considering joint ownership, there is the presumption in *Jones v Kernott* that 'the parties intend a joint tenancy both in law and in equity'.[12] This presumption can however be rebutted by proving 'that the parties had a different common intention',[13] to be 'deduced objectively from their conduct'.[14] Therefore, in joint-name cases, there is a wider appreciation for non-financial factors, assessing common intention holistically. However, Lord Hope illustrates in *Stack v Dowden* that rebutting the presumption of equality demands an 'exceptional'[15] case. Probert emphasises the ambiguity of this, questioning 'how does the court know whether the case before it is exceptional or not'?[16] Therefore, whilst joint-name ownership may present less rigidity than its counterpart, partners are still disadvantaged by uncertainty in determining what contributions may fall into this exceptional category. Specifically for cohabitants, the high evidentiary threshold may result in unfair outcomes which ignore the parties' true intentions. Many couples may elect cohabitation over marriage or civil partnership to avoid the division of assets, but this regime nonetheless imposes a contrary presumption. Both regimes reflect an overemphasis on legal certainty, ignoring the social realities in family property and imposing high thresholds for claimants to meet when attempting to rebut the presumption.

2. A SINGLE REGIME?

[11] *Lloyds Bank* (n 2) 133.
[12] *Jones*, (n 4) [25] (Lord Walker, Lady Hale).
[13] ibid [51] (Lord Walker, Lady Hale).
[14] ibid.
[15] *Stack* (n 3) [33].
[16] Rebecca Probert, 'Equality in the family home?' (2007) 15(3) Feminist Legal Studies 341, 345.

The arbitrary division between sole and joint name regimes has prompted calls for reform, removing this separation in favour of a single regime. *Stack v Dowden* demonstrates some development towards this, criticising sole-name ownership. Indeed, Lord Hope argued that reform would make the law 'more flexible (and so better able to avoid injustice)'.[17] However, despite the expressed criticism surrounding the sole-name analysis, reform has remained untouched and division between the two regimes reinforced. This is demonstrated in *Thompson v Hurst*, which states that harmonising the regimes would be 'neither consistent with principle nor sound policy'.[18] Support for partitioning the regimes is emphasised by O'Mahony, stating the importance in property law of 'certainty, autonomy and predictability'.[19] Maintaining two distinctive regimes for sole-name and joint-name ownership upholds the importance of property law in CICTs, prioritising a predictable and simplistic starting point over an appreciation for the nuances of diverse relationships. Singer supports this view, maintaining that 'it is not a function of the law of trusts to achieve fairness'.[20]

However, arguments that the current regime imposes certainty and predictability are not entirely accurate. As previously mentioned in joint-name cases, *Stack v Dowden* emphasises how rebutting the presumption arises in 'exceptional cases'.[21] This illustrates the ambiguity still prevalent in the current CICT framework. Bray presents the problems cohabitants face as they, 'cannot predict how the property rules and principles will apply to their individual circumstances'.[22] Certainly, even within the rigidity of property law's approach, it is disconnected from the demands of modern society, resulting in ambiguity for claimants. Within this, they cannot determine the significance of their contributions, including non-financial and financial ones. The idea of joining the regimes is endorsed by Davidson and Gardner, who state that 'trusts of family homes are governed by a single regime, dispelling any impression that different rules apply to "joint names" and "single name" case'.[23] A single regime would improve clarity and flexibility, accounting for a holistic approach in determining beneficial interest in all circumstances.

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[17] *Stack* (n 3) [27] (Lord Hope).
[18] *Thompson v Hurst* [2012] EWCA Civ 1752, [20] (Etherton LJ).
[19] Lorna Fox O' Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 67(1) Current Legal Problems 409, 409.
[20] Samantha Singer, 'What provision for unmarried couples should the law make when their relationships break down?' (2009) Family Law (journal) 234, 235.
[21] *Stack* (n 3) [33].
[22] ibid.
[23] Simon Garnder, Katharine M. Davidson, 'The Future of Stack v Dowden' (2011) 127 LQR 1, 2.

Instead of the presumption that equity follows the law, a materially communal or non-communal analysis could be undertaken. Gardner demonstrates how materially communal relationships can be categorised where parties 'pool all their resources',[24] whereas a 'non-materially communal relationship is one without this profile'.[25] This approach demonstrates a consideration for a holistic array of contributions, considering the parties' conduct. For cohabitants who may have chosen not to marry so as to avoid committing to a shared beneficial interest, such an approach provides a significant benefit. Considering this, the law's current dual regime appears incompatible with contemporary society. The overly simplistic approach ignores the reality that many partners may not be able to financially contribute towards the initial purchase price. Equally, couples may be unaware of the importance of this when determining beneficial division of family property, specifically cohabitants.

3. THE VULNERABILITY OF COHABITANTS

Whilst all couples are impacted by the rigidity of CICTs, cohabitants are specifically disadvantaged. Contemporary society is categorised by a growing number of cohabiting couples. The Official National Statistics presents this rising trend with cohabitation increasing from 19.7% in 2012 to 22.7% in 2022.[26] Despite the increasing cohort of cohabitants, this group is particularly vulnerable upon separation due to the absence of any statutory regime similar to that of marriages and civil partnerships. There are statutory provisions for both latter, under the Matrimonial Clauses Act 1973 and the Civil Partnership Act 2004. However, similar protections have not disseminated to cohabitants.

Instead, cohabitants are forced to navigate the CICT framework; one which has been demonstrated as being overly artificial, complex, and focused on financial contributions. This issue is intensified with 'so many people in England and Wales [believing] in the common law marriage myth',[27] a fictious belief that there are automatic rights upon separation which award cohabitants interest in the family property. However, contrary to this belief, there is no

[24] Simon Gardner, 'Family Property Today' (2008) 124 LQR 422, 431.
[25] ibid.
[26] Office for National Statistics 'Population estimates by marital status and living arrangements, England and Wales: 2022' (2022) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2022#:~:text=The%20proportion%20of%20people%20aged,6.8%20million%20people%20in%202022> accessed 7 April 2025.
[27] House of Commons Women and Equalities Committee, *The Rights of Cohabiting Partners* (HC 2022-08, 92) para 24.

statutory regime for cohabitants. The absence of legal protection can therefore 'have profound consequences for cohabiting partners—many of whom do not realise the reality of their situation until it is too late'.[28] Certainly, this exacerbates the incompatibility of CICT with modern society. This can lead to unfair outcomes, for example cohabitants who contribute non-financially, who may not appreciate the vulnerability of their position, as financial contributions remain superior. Reinforcing the disparity of protections for cohabitants compared to marriages and civil partnerships further highlights the incompatibility of the current CICT framework with modern society. Indeed, Duncan, Barlow and James state that 'marriage in Britain gives partners substantial and automatic legal benefits which unmarried cohabitants do not possess'.[29] With many partners choosing cohabitation over marriage, the distinction between these relationships is diminishing. This underscores the unsatisfactory nature of the CICT framework; cohabitants are forced to rely on the artificial and rigid principles of property law. Even though long-term cohabitants are treated similarly to married partners, they are nevertheless excluded from statutory distributive remedies. Cohabitants may not have understood the importance of legal ownership, only to be left in a vulnerable position upon separation. This stance is echoed by Bray, presenting that 'instead of statutory rights cohabitants must rely on the complex rules of property law which are beset with technicalities'.[30] Bray goes on to emphasise the importance of reform, recognising that 'any such change would not be exclusively for cohabitants but it is this group that would stand to benefit the most'.[31] Therefore, reform is imperative to provide adequate statutory guidance for cohabitants, similar to marriages and civil partnerships.

4. REFORM

As discussed, it is imperative that the current CICT framework is reformed. Transitioning away from property law principles in favour of statutory protections for cohabitants would certainly provide a clearer regime. The effectiveness of statutory protections for cohabitants is demonstrated below. New Zealand have, in the Property (Relationships) Act 1976, assimilated de facto partners, defined under section 2D. Providing a de facto relationship

[28] ibid.
[29] Simon Duncan, Anne Barlow, Grace James, 'Why Don't They Marry? Cohabitation, Commitment and DIY Marriage' (2009) 17 Child and Family Law Quarterly 383, 384.
[30] Bray (n 5) 1429.
[31] ibid 1432.

surpasses the minimum duration requirement of three years in section 4(5), then the statutory distributive regime applies. Atkins explains the importance of assimilating de facto relationships into this statutory protection, explaining how it represents that 'their relationships are usually functionally very similar to marriages with similar needs and problems requiring resolution'.[32] New Zealand has progressively introduced more legal protections for cohabitants, as highlighted by the House of Women and Equalities Committee. The Committee notes that in New Zealand's approach, 'cohabitants (known there as 'de facto partners') are equated with spouses, provided they satisfy eligibility criteria'.[33] A similar approach can be seen in Australia, where the Family Law Act 1975 requires a minimum of 2 years under 90 SB (a) for statutory protections. However, despite including cohabitants, the minimum time duration appears arbitrary and perhaps unnecessary. This is reflected in Scotland's Family Law (Scotland) Act 2006. Contrary to the later, Scotland's Act carries no minimum time requirement. However, Scotland, unlike New Zealand and Australia, does not equate cohabitation to marriage or civil partnership. Rather, Miles highlights that 'Scots law deliberately does not equate separating cohabitants with divorcing spouses'.[34] Scotland maintains this distinction to prevent unfairly imposing marital obligations on cohabitants whilst still affording legal protection to these relationships. When considering why statutory reform is imperative, Cooke states that it 'will obviate the need to add any more slopes and peaks to the volcanic mountain landscape of the common intention constructive trusts'.[35] Similarly the Law Commission has emphasised recommendations for 'a new statutory scheme specifically for cohabitants on separation'.[36] The scheme would adopt Scotland's approach of 'not [equating] cohabitants with married couples or [giving] them equivalent rights'.[37] Equally, the Law Commission adopts the minimum requirement approach as in Australia and New Zealand, stating the reform would 'extend to couples who have not had children, but only where they have satisfied a minimum duration requirement'.[38]

[32] Ben Atkins, 'The Rights of Married and Unmarried Couples in New Zealand' [2003] 15 C.F.L.Q. 793, 794.
[33] House of Commons Women and Equalities Committee (n 27) 15.
[34] Jo Miles, 'Cohabitation: Lessons for the South from North of the Border?' (2012) 71 Cambridge Law Journal 492, 493.
[35] Elizabeth Cooke, 'Cohabitants, common intention and contributions (again)' (2005) Conveyancer and Property Law 1, 6.
[36] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para [1.1].
[37] ibid para [2.103].
[38] ibid.

This would be on an opt-out basis, allowing cohabitants 'to make and enforce their own agreements'.[39]

The Commission's suggestions have gained the support of the HCWEC who emphasise the importance of recognising 'the social reality of modern families and [protection of] people regardless of whether they are married, in a civil partnership, or in long-term cohabiting relationships'.[40] Nevertheless, despite this apparent progress, the minimum duration requirement regurgitates the arbitrariness of CICT. Rather than establishing thresholds such as this, adopting an approach similar to Scotland would ensure a universally applicable regime. However, advancing beyond the decision in Scotland, England and Wales should adopt a similar value to New Zealand and Australia, that all relationships are equal. With more couples opting for cohabitation over marriage, there is limited difference between relationship types anymore. Considering this, not affording the same statutory protections to cohabitants as individuals in marriages or civil partnerships clearly seems unfair and ill-suited to modern relationships.

5. CONCLUSION

Therefore, the current CICT framework, prioritising certainty and predictability over fairness and flexibility, is incompatible with modern society. Whilst a simple analysis, the dual regime of sole-names and joint-names is archaic. The fixation on financial contributions in sole-name cases highlights the inability of homemakers who may not contribute financially to gain a beneficial share in domestic property. Consequently, alternative forms of contribution such as childcare or home improvements are consistently overlooked. Alongside this, the ambiguity in joint-name ownership as to when the presumption of equality may be rebutted is problematic and vague. Partners may not be able to determine their legal position, unsure if their contributions constitute the 'exceptional circumstances' required by *Stack v Dowden.*[41] Removing this starting point would emphasise a shift in the law's emphasis on fairness and flexibility. Moreover, the failings of CICT specifically impact cohabitants, who currently lack access to statutory distributive remedies. In contrast, other jurisdictions which offer statutory guidance for cohabitants present a compelling case for statutory reform in England and Wales. Despite the Law Commission proposing a pragmatic approach to reform by allowing

[39] ibid.
[40] House of Commons Women and Equalities Committee (n 27) 23.
[41] *Stack* (n 3).

cohabitants the autonomy to opt into the regime, the Scottish approach goes further to address the needs of cohabiting couples. By not imposing an arbitrary minimum time requirement, Scotland affirms the value of all relationships, including short-term cohabitation. This inclusive approach appears preferable.

B. THE INCOMPATIBILITY OF FAMILY LAW AND PROPERTY LAW

1. INTRODUCTION

Tensions arising from the intertwined systems of family law and property law have caused the CICT framework to be shrouded in uncertainty and confusion. The property law approach focuses on enforcing certainty and predictability, a direct contrast to the flexibility offered by family law. The traditional property approach, with a staunch focus on financial contributions, is unrealistic in family relationships. This is reflected by Newnham, who illustrates how this 'seems strangely artificial in cases when the main purpose of the property has been to provide a family home; most couples have no knowledge of the law and are not influenced by property law's narrow referability rules'.[42] Subsequently, case law has experienced increased flexibility in CICTs; *Oxley v Hiscock* reflects this by considering what is fair in 'regard to the whole course of dealing'.[43] However, this gradual increase in discretion, whilst evolving the law in line with modern society, has led to tensions between the two principles of property law and family law. Consequently, perplexities as to the importance of financial contributions compared to non-financial contributions have arisen. Nevertheless, non-financial contributions are typically underappreciated by CICTs. Indeed, Wong recognised that 'domestic services provided by women are generally disregarded'.[44] Therefore, the continued ignorance towards non-financial contributions disproportionately disadvantages individuals who undertake homemaking and house-hold responsibilities, the majority of whom are women. Moving out of the property law arena and toward a statutory regime is therefore a necessary step to protect these individuals and ensure that non-financial contributions may be recognised within the CICT framework.

[42] Annika Newnham 'Common intention constructive trusts: a way forward' (2013) 43 Family Law (Bristol) 718, 719.
[43] *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211(CA) [69] (Chadwick LJ).
[44] Simone Wong 'Constructive trusts over the family home: lessons to be learned from other commonwealth jurisdictions?' (1998) 18(3) Legal Studies 369, 374.

2. THE INCOMPATIBILITY BETWEEN PROPERTY LAW AND FAMILY LAW

Property law's focus on certainty and family law's flexible framework are incompatible. Probert emphasises how the 'family home, almost by definition, lies at the intersection of family law and property law'.[45] Subsequently, this raises the question of whether 'interests in the home derive from family or property law?'.[46] Such tension between the two principles highlights the conflict between the CICT and modern society, caused by the ambiguity surrounding the importance of financial and non-financial contributions. Property law's approach is defined by Hayward, stating it is a body of law which 'often brings to the adjudication of ownership disputes the requirement of legal certainty'.[47] This approach emphasises the importance of easily identifiable factors, including financial contributions, and was embodied in *Lloyds Bank v Rosset*, where a lack of consideration of non-financial contributions was evident. Here, Mrs Rosset's domestic contributions were considered 'the most natural thing in the world for any wife',[48] with this behaviour being conducted 'irrespective of any expectation she might have of enjoying beneficial interest in the property'.[49] This demonstrates property law's disregard towards non-financial contributions. Whilst property law's influence in CICTs has resulted in legal certainty, it lacks applicability to modern relationships; by ignoring the indirect non-financial contributions, homemakers are disproportionately impacted.

In contrast, the approach in *Stack v Dowden* represents a more flexible attitude. Epitomising this, Lady Hale stated that 'context is everything and the domestic context is very different from the commercial world'.[50] This highlights family law's greater appreciation of contextual factors, including non-financial contributions, opening the law to flexibility. When considering what domestic contributions are, Bannister describes them as 'non-monetary contributions to family life such as homemaking and childcare and indirect monetary contributions'.[51] Considering this, family law's approach appears significantly more

[45] Probert (n 16) 341.
[46] ibid.
[47] Andrew Hayward 'Family Property and the process of familialisation of property law' (2012) 24 Child & Fam LQ 284.
[48] *Lloyds Bank* (n 2).
[49] ibid.
[50] *Stack* (n 3) [69] (Hale Baroness).
[51] Sam Bannister 'Domestic contributions as unjust enrichments: commodifying love?' (2021) 33 Child & Fam LQ 257.

compatible with modern society, offering a more inclusive perspective. Subsequently, women or those who are unable to contribute financially, but do so in other ways such as childcare, may be recognised under this approach. This is furthered highlighted by family law's presumption of equality, presented in *Stack v Dowden*, even where there may be unequal financial contributions. Lady Hale illustrated this, stating that 'each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally'.[52] As demonstrated, family law is not fixated on the importance of financial contributions, but rather takes a holistic approach to relationships, a direct contrast to the property law perspective. Moreover, suggesting that 'many more factors than financial contributions may be relevant to divining the parties' true intentions',[53] Lady Hale went further in *Stack v Dowden* to consider the expansion of the family law approach. The incompatibility between property and family law is therefore clear. Whilst property law focuses strictly on financial contributions, certainty and predictability, family law operates more holistically, considering a broader range of factors to include non-financial contributions. Failing to account for the diversity of modern domestic relationships, the rigidity of property law therefore appears outdated. Individuals are unlikely to order their financial and non-financial contributions in accordance with property law's inflexible principles. Therefore, the tensions between property and family law derive from their contradicting principles of certainty and predictability compared to flexibility and fairness. This reflects the archaic nature of property law, failing to consider how a more flexible approach is essential in contemporary society.

3. FAMILY LAW – GROWING IMPORTANCE

Whilst undeniable that family law has grown in importance, property law's strict focus on financial contributions remains paramount. However, continuously undervaluing non-financial contributions, CICTs appear incompatible with modern society. Hayward demonstrates CICT's deviation from rigid property law principles emphasising a 'modern, systematic process of interweaving family law-influenced principles into property law'.[54] Lady Hale reflected this sentiment in *Stack v Dowden*, providing a non-exhaustive list of

[52] *Stack* (n 3) [69] (Hale Baroness).
[53] ibid.
[54] Hayward (n 47) 285.

factors to be considered, including 'the nature of the parties' relationship; whether they had children for whom they both had to provide a home'.[55] Allowing outcomes to be determined in regard to a holistic array of factors, this introduction of non-financial contributions has certainly increased the flexibility of the law. Such an approach ensures all partners, whether homemakers or financial contributors, are considered in quantification. This illustrates a departure from the prioritisation of financial contributions, considering instead a wider approach to CICTs. However, family law has faced consistent criticism due to its ambiguity and inconsistency. Sloan stated that 'problems of uncertainty might well abound if a more holistic approach were taken',[56] emphasising that outcomes could become 'extremely difficult to predict before litigation'.[57] Subsequently, in the current CICT analysis, non-financial contributions continue to be undervalued compared to financial contributions. *Morris v Morris* further highlights this issue, determining that non-financial contributions without any accompanying financial contribution would 'only be found in exceptional circumstances'.[58] By failing to recognise common intention arising solely from domestic contributions, this perspective further reinforces the superiority of financial contributions. This specifically impacts stay-at-home parents, for example, who sacrifice employment to care for children. Their inability to contribute financially to family property will consequently increase their vulnerability in establishing beneficial interest. Probert reflects this concern, stating that 'even this more nuanced approach to financial contributions leaves non-financial contributions out of account'.[59] Thus, property law's traditional emphasis on certainty and predictability is consistently enforced over flexibility. As demonstrated by Fulbrook, 'financial contributions are by their very nature quantifiable, which is likely to make them much more attractive to judges'.[60] He further states that non-financial contributions are 'difficult to translate into evidence of their intentions'.[61] Such reasoning reflects the rigidity in property law's preference for clear, monetary contributions. Whilst this approach certainly offers the benefit of predictability, as financial contributions are easier to attach a monetary weight to, it is incompatible with contemporary societal norms. This calculation

[55] *Stack* (n 3) [69] (Hale Baroness).
[56] Brian Sloan 'Keeping up with the Jones case: establishing constructive trusts in 'sole legal owner' scenarios' (2015) 35(2) Legal studies (Society of Legal Scholars) 226, 234.
[57] ibid.
[58] *Morris v Morris* [2008] EWCA Civ 357, [23] (Gibson LJ).
[59] Probert (n 16) 349.
[60] Ben Fulbrook 'At what point does mine become yours? A critical analysis of the current law on Common Intention Constructive Trusts and Cohabitation' (2016) 4(1) IALS 27, 32.
[61] ibid.

disadvantages parties who may be unable to contribute financially or provide support to the family property through childcare or alternative responsibilities. Consequently, the current application of CICT principles, which significantly undermine the value of non-financial contributions, is in clear need of reform. It is essential that non-financial contributions are considered equally to financial ones in order to achieve fairer and more socially responsive outcomes. In doing so, all parties' involvement in family property would be considered, instead of ousting non-financial contributions from legal recognition.

4. THE SOCIAL INEQUALITY OF HOMEMAKERS, WOMEN AND COHABITANTS

As demonstrated, property law's focus on predictability and certainty unfairly disadvantages individuals, often women, who are unable to financially contribute but provide domestic support instead. Specifically, those who contribute to the family home in non-monetary ways, such as childcare or home renovations, find it difficult to gain a beneficial interest. *Burns v Burns*[62] exemplifies this unfairness, where Fox LJ dismissed non-financial contributions, stating that 'ordinary domestic tasks [are], in my view, no indication at all that they thereby intended to alter the existing property rights of either of them'.[63] The reduction of non-financial contributions is further elaborated in the statement 'It is only the bitterness engendered by the break-down of the marriage that so bizarre a notion would enter their heads'.[64] The normalisation of non-financial contributions highlights how they are consistently undervalued compared to their financial counterparts. This illustrates the traditional superiority of financial contributions, in turn disadvantaging those, particularly women, who provide domestic support to the family home.

However, it may be argued that *Stack v Dowden* represents a move towards recognising the roles and responsibilities of homemakers. Certainly, Lady Hale's judgment does gradually incorporate non-financial factors including 'whether they had children for whom they both had responsibility to provide a home'[65] and 'how they discharged the outgoings on the property and their other household expenses'.[66] Nevertheless, the weighting afforded to such

[62] *Burns v Burns* [1984] Ch 317, [1984] 2 WLR 582.
[63] ibid (Fox LJ).
[64] ibid (May LJ).
[65] *Stack* (n 3) [69].
[66] ibid.

non-financial factors remains ambiguous. Moreover, following this judgment, homemakers continue to face systemic disadvantages due to the favoured status of financial contributions. Indeed, this financial focus is supported by Wong, who argues that 'this is where a major weakness of the common intention approach lies. It fails to take into account the economic inequality between men and women'.[67] Certainly, whilst the role of homemaker is a role occupied by any partner, societal expectations typically place the burden on women. This reflects the vulnerability women face in trusts of the family home, where non-financial contributions are undervalued. Consequently, unfair outcomes may disregard domestic responsibilities and result in homemakers being unable to establish a beneficial share in the property. Bouvier reflects this, stating that 'the judicial tendency to commercialise male domesticity while emphasising the altruistic nature of female caregiving is symptomatic of the state's wider perception of care as gendered and privatised'.[68] Considering this, there appears a gendered expectation of women to conduct homemaking roles, despite having more financial freedom than before and options to enter the workforce.

The law's persistent refusal to fully acknowledge these contributions severely disadvantages homemakers, especially women. Moreover, as discussed previously, cohabitants who lack statutory protection are further impaired by the current legal framework. Consequently, in the absence of a statutory regime, cohabitants are especially vulnerable to the uncertainties and inequities inherent in CICTs. Property law continues to ignore the requirements of modern society where relationships are not formulated in contractual agreements. Non-financial contributions through the duration of partnerships should be valued equally to financial contributions. The current CICT framework therefore once again appears incompatible with modern society. Property law's fixation on certainty and financial contributions upholds archaic stereotypes at the expense of women and cohabitants, thus reinforcing the need for reform to equally consider financial and non-financial contributions.

5. REFORM

The incompatibility between the property law and family law approaches has proven to lack applicability in modern society, failing to protect cohabitating couples and failing to give

[67] Wong (n 44) 371.
[68] Ellen-Gordon Bouvier 'Relational vulnerability: the legal status of cohabiting carers' (2019) 27(2) Feminist Legal Studies 163, 184.

proper recognition of non-financial contributions. Accordingly, the current common intention constructive trust is in desperate need of reform, either by introducing its own doctrine or imitating that of another jurisdiction. New Zealand have implemented a policy of reasonable expectations, developed from *Gillies v Keogh*.[69] Here, reasonable expectations were central when assessing whether there was a reasonable belief of interest in the property. New Zealand's shift away from an exclusive focus on financial contributions has advanced the law by recognising a wider variety of factors relevant to determining beneficial interest in trusts of the family home. Wong summarises this approach, demonstrating that in New Zealand the 'claimant must show that (s)he has suffered some detriment or that the contributions have resulted in the enrichment of the defendant which is unjust'.[70] By considering what would be reasonable from the parties' perspectives, New Zealand's jurisprudence recognises that contributions to the family home are inherently subjective and contextual, this extends beyond a focus on quantifiable financial efforts. A holistic approach such as this reflects the realities of a contemporary society where non-financial contributions are equally important. Scotland's approach has also demonstrated progression to incorporating non-financial contributions, illustrated in the Family Law Scotland Act 2006. Section 28 (2)(b)(c) implicitly determines that the courts may require the defendant to pay in respect of any economic burden as they see fit. Further, sections 28(3)(a) and (b) allow the economic advantage and disadvantage of actions to be considered. Matters which the courts may determine include where the applicant may have derived an advantage from contributions made by the appellant, or where the appellant suffered economic disadvantage as listed in section 28(9)(b). Scotland has therefore incorporated non-financial contributions into its legislation. Miles emphasises the extension beyond financial contributions, summarising the act as '[responding] to economic advantage derived by one party from the other's contributions (direct, indirect and domestic as well as financial) and to economic disadvantage suffered by one party'.[71] Scotland's legislative framework emphasises the protection of both cohabitations and the inclusion of non-financial principles. The effectiveness of this regime in incorporating non-financial contributions into consideration is reflected in *Cow v Grant*. Mr Grant received 'an economic advantage from her non-financial

[69] *Gillies v Keogh* [1989] 2 NZLR 327 CA.
[70] Wong (n 44) 387.
[71] Miles (n 34) 493.

contribution',[72] emphasising the effectiveness of this regime in considering non-domestic factors and providing fairer outcomes. Moreover, as illustrated above, other jurisdictions have demonstrated how the balance between non-financial contributions and financial contributions can be achieved, whilst also protecting cohabiting couples.

Reforming CICTs in the UK requires dedicated legislation that explicitly recognises the importance of non-financial contributions. The House of Common reiterate the importance of this by stating that currently 'childcare and other non-financial contributions go largely unrecognised'.[73] It must be considered whether the law should amend the current principles of the common intention constructive trust or move out of the property law influence altogether, instead introducing a specific legislative regime. Overall, the current trusts framework lacks real-life applicability, and is often embroiled in the strict rules of property law and the outdated disregard for non-financial contributions. Legalities reform is urgently needed to combat the deficiencies in the current CICT framework ensuring fairer outcomes.

6. CONCLUSION

Therefore, the current framework of the common intention constructive trust is incompatible with modern society. Property law imposes strict contractual-like obligations onto familial relationships, focusing on direct financial contributions at the expense of homemakers. In contrast, family law has evolved to adopt a more holistic approach to common intention constructive trusts, considering the whole dealing, including non-financial contributions. However, whilst family law has grown in importance, affording greater fairness within trusts of the family law, there remains problems arising from incompatibility between these two bodies of law. Firstly, the different protections awarded for cohabiting and married couples disadvantages cohabiting couples when trying to establish beneficial interest. Furthermore, the CICT continues to undervalue and dismiss non-financial contributions. These tensions have confused the CICT, resulting in unfair outcomes. Seeking to improve the law's compatibility with contemporary relationships, doctrines implemented in New Zealand and Scotland to protect cohabiting couples and balance the importance of financial and non-financial contributions provide compelling routes for reform.

[72] *Cow v Grant* [2012] UKSC 29 [17] (Lord Hope).
[73] House of Commons Women and Equalities Committee (n 27) 12.

CONCLUSION

In conclusion, whilst the current CICT framework has certainly made progress towards compatibility with modern society, it still falls short of doing so effectively. The arbitrary nature of CICTs is reflected in the presumption that equity follows the law, carrying a high threshold which many claimants are unable to surpass. Specifically, this impacts cohabitants who may be unaware of their absence of statutory protections. Subsequently, individuals may not appreciate the importance of legal title on beneficial interest, instead believing they have established rights merely through their cohabitation. Reinforcing the incompatibility of CICTs, the prioritising of financial contributions continuously devalues the responsibilities of women. Instead of considering the variety of different roles and responsibilities in modern relationships, the court artificially prioritises financial contributions. Considering this, the current CICT framework is shrouded in complexities and superficiality.

Therefore, whilst CICTs remain under property law, the problems of artificial analysis and rigidity will not dissipate. Reform is essential to navigate away from property law and towards a fairer, more compatible framework. Combining previous discussions of reform throughout this paper, introducing specific statutory remedies for cohabitants is essential and would improve doctrinal clarity. Drawing inspiration from Scotland, a specific regime for all cohabitants with no minimum duration would improve protection for cohabitants. Moreover, with growing numbers of cohabitants, protecting this group of family relationships would crucially emphasise the law's commitment to adapting to social change. Within this framework, guidance on the importance of non-financial contributions could be reaffirmed, and the role of imputed intention clarified. In doing so, the law may address relationship breakdown's flexibly and fairly. However, whilst Scotland presents a solid foundation for reform, England should seek to combine the approaches of New Zealand and Australia. Considering all relationships equal, this would demonstrate compatibility with the growing number of cohabitants in contemporary society.

Trust as a Regulatory Principle: A Paradigm Shift in Cyberspace Regulation

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ABSTRACT

There are four parts to this article, which collectively evaluate the role that trust plays in regulating cyberspace. First, this article establishes a framework for assessing whether trust is essential to cyberspace regulation and defines key terms that set the parameters of its analysis. Next, this article critiques cyber-institutionalism, which theorises that legal mechanisms can regulate cyberspace without relying on any conceptions of trust. In the third section, this article advocates for a cyber-libertarian approach, which regards trust as an essential regulatory feature. Finally, this article applies the arguments developed throughout its analysis to critique an academic proposal for hate speech regulation in cyberspace and proposes an alternative model that places trust at the nucleus of cyberspace regulation.

INTRODUCTION

This article considers trust as an essential feature of cyberspace regulation. This argument unfolds in four sections. First, this article establishes a framework for assessing whether trust is essential to cyberspace regulation and defines key terms that set the parameters of its analysis. Next, this article critiques cyber-institutionalism, which theorises that legal mechanisms can regulate cyberspace without relying on any conceptions of trust. In contrast, this article advocates for a cyber-libertarian approach, which regards trust as an essential regulatory feature. Finally, this article applies the arguments developed throughout its analysis to critique an academic proposal for hate speech regulation in cyberspace and proposes an alternative model that places trust at the nucleus of cyberspace regulation.

I. ANALYTICAL FRAMEWORK

This section defines key terms relied on throughout this article to construct a framework through which to examine whether trust constitutes an essential feature of regulating

cyberspace. Considering that the term *essential* is an inherently relative concept, determining whether trust constitutes an *essential feature* of cyberspace regulation requires comparing the function it serves to other features of regulation (namely, law enacted by formal legal institutions and the scope it creates to introduce conceptions of trust in regulatory regimes). This analysis proposes a threshold to determine whether trust is an essential feature of cyberspace regulation: where regulatory ends cannot be achieved without trust (hereafter referred to as the 'indispensability threshold'). Correspondingly, trust is an essential feature where it is indispensable to achieving a regulated outcome which can be attained positively (i.e. by introducing a necessary element to regulation) or negatively (i.e. by filling a void in legislation). To apply this framework comprehensively, it is necessary to define key terms. This article builds upon Keymolen and van den Berg's definition of *trust* as 'positive expectations'[1] regarding the conduct of others formed through social norms. Furthermore, *cyberspace* is defined broadly as a non-physical realm through which users interact by exchanging 'data'[2] over computer networks. Like real spaces, user interactions create scope for antisocial behaviours that regulation seeks to thwart.[3] Correspondingly, adopting Black's broad construction, *cyberspace regulation* is defined as ordering, influencing or controlling user behaviour.[4] Understanding users to mean legal and natural persons, this analysis focuses on cybersecurity and hate speech,[5] rather than international cyberspace relations between states.[6]

Determining whether trust crosses the indispensability threshold necessarily requires considering the function that the law plays in cyberspace regulation and the scope it creates for the introduction of trust. This article juxtaposes two predominant theories regarding the degree to which trust is an essential feature of cyberspace regulation. The first, with which this analysis disagrees, is cyber-institutionalism.[7] Cyber-institutionalists regard the law enacted by formal institutions (such as governments) as entirely capable of regulating cyberspace, leaving no gaps for trust to fill, or necessary characteristics for trust to add.[8] Cyber-institutionalists regard the aims of regulation as forcing compliance. The second

[1] Esther Keymolen and Bibi van den Berg, 'Regulating Security on the Internet: Control Versus Trust' (2017) 31(2) IRLCT 188, 194.
[2] Andreas Liaropoulos, 'A Social Contract for Cyberspace' (2020) 19(2) JIW 1, 5.
[3] Bernard Jemilohun, 'Regulating Cyberspace: An Examination of Three Theories' (2019) 8(5) IJBMI 20, 20.
[4] Julia Black, 'Critical Reflections on Regulation' (2002) 27 AJLP 1, 25.
[5] Keymolen and van den Berg (n 1) 188.
[6] see Rex Hughes, 'A Treaty for Cyberspace' (2010) 86(2) IA 523, 536.
[7] Jemilohun (n 3) 22–24.
[8] Lawrence Lessig, 'The Zones of Cyberspace' (1996) 48(5) SLR 1403, 1403.

theory, which this analysis prefers but does not unconditionally endorse, is cyber-libertarianism.[9] Cyber-libertarians consider horizontal governance premised in trust necessary to fix the shortcomings of the hierarchical tendencies of legislative regulation.[10] Cyber-libertarians regard the aims of regulation as facilitating voluntary adherence. This article contends that cyber-libertarianism provides the preferred conceptualisation of trust as forming an essential feature in cyberspace regulation by attaining the indispensability threshold. The next two sections demonstrate the limits of cyber-institutionalism and the merits of cyber-libertarianism in turn, before proposing a model law in a practical exercise that substantiates the prominence of trust in cyberspace regulation.

II. CYBER-INSTITUTIONALISM: HIERARCHICAL REGULATION

This section examines cyber-institutionalism theory through the parameters established above, disagreeing with its construction of trust as a dispensable feature of cyberspace regulation. Cyber-institutionalists believe that 'control of cyberspace [is] better served by governmental regulation via legislation',[11] as formal legal institutions can regulate exclusively through the force of law. The predominant tenet of cyber-institutionalism is to consider legislative measures that invoke law enforcement mechanisms as providing the only effective means of regulating interactions in cyberspace.[12] Under cyber-institutionalism theory, the law can manifest as legislation or techno-regulation codifying rules into cyberspace.[13] Cyber-institutionalists believe the threat of *ex post* sanctions embodied in legislation can regulate behaviour without relying on trust.[14] Equally, techno-regulation is regarded as regulating conduct sufficiently by encoding rules into cyberspace that prevents undesirable conduct *ex ante*.[15] In both manifestations of cyber-institutionalism, trust fails to achieve the indispensability threshold to be considered an essential feature of regulation, as regulatory ends are considered attainable merely through the force of law, whether legislated or encoded, leaving no lacunae for trust to fill or active role to play.

[9] Jemilohun (n 3) 20–22.
[10] Neil Netanel, 'Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory' (2000) 88(2) CLR 395, 401–402.
[11] Jemilohun (n 3) 22.
[12] ibid 23.
[13] Lessig (n 8) 1408.
[14] Liaropoulos (n 2) 5.
[15] Keymolen and van den Berg (n 1) 189.

The preferred analysis provides that formal institutions cannot regulate cyberspace through laws alone, as the rigidity of legislation cannot capture the ubiquitous nature of cyberspace.[16] While the physical infrastructure supporting cyberspace exists in real space,[17] cyber activity and its perpetrators cannot be confined to particular legal jurisdictions. Consequently, the primary purpose of legislation, which is providing regulatees certainty regarding the feasibility of their conduct,[18] is severely diminished in cyberspace regulation. For instance, the (American) Digital Millennium Copyright Act 1998 is useful for the isolated purpose of advising intermediaries on when material infringing intellectual property rights must be removed from their websites to remain immune from suit.[19] Legislation regulating broader activities encounter three obstacles,[20] which are only resolved where trust features prominently in cyberspace regulation. The first issue with legislation is that it creates scope for strict textualists to comply with blackletter law while avoiding the normative ambitions of the particular regime, thereby facilitating a 'box-ticking'[21] exercise. The second issue is that burdensome legislation encourages users to evade engagement with regulation by avoiding legislated activities.[22] Finally, it is doubtful that legislative processes suitably address the idiosyncrasies of cyberspace.[23] Each criticism is substantiated in turn.

Assessing current cyberspace regulation demonstrates the accuracy of the three criticisms set out above and the need for horizontal regulation that places trust at its nucleus to achieve regulatory ends. The first criticism accurately describes the fallibility of precise legislation as being capable of satisfaction through box-ticking exercises that ignore normative aims.[24] This criticism manifests in the GDPR.[25] A policy underpinning the GDPR is to protect 'natural persons with regard to the processing of personal data,'[26] which the EU recognises as a fundamental right. However, outside of providing general principles for data processing,[27] the GDPR is not drafted in the broad manner characteristic of human rights legislation.[28] Rather,

[16] Lennon Chang and Peter Grabosky, 'The Governance of Cyberspace' in Peter Drahos (ed), *Regulatory Theory* (ANU Press 2017) 535.
[17] Alexander Tsesis, 'Hate in Cyberspace: Regulating Hate Speech on the Internet' (2001) 38 SDLR 817, 820.
[18] Chris Reed, 'How to Make Bad Law: Lessons from Cyberspace' (2010) 73(6) MLR 903, 911.
[19] Digital Millennium Copyright Act 1998, s 202.
[20] Reed (n 18) 912–13.
[21] ibid 908.
[22] ibid.
[23] ibid.
[24] ibid 904–05.
[25] General Data Protection Regulation [2016] OJ L119/1 (GDPR).
[26] ibid art 1(1).
[27] ibid art 5(1).
[28] Reed (n 18) 908.

the GDPR represents rights and obligations in a restrictive manner, making it possible to formally comply with cyberspace regulation through sharp practices that undermine the EU's policy ambitions.[29] For example, lawful data processing requires compliance with a purpose set out in article 6, which includes the provision of 'consent to the processing of [an individual's] personal data'.[30] In practice, cyberspace operators exploit article 6(1)(a) by incorporating pre-selected consent mechanisms on their websites that impose additional steps that users must take to withdraw the consent that would otherwise render data processing lawful.[31] Thus, rather than provide users the opportunity to make an informed choice to truly consent or make operators contemplate the necessity of data processing, the GDPR's restrictive drafting facilitates a box-ticking exercise that, paradoxically, achieves formal compliance with the GDPR in a manner that undermines its policies[32] to the detriment of, what should be, fundamental rights.

Relatedly, the second criticism that legislation discourages compliance where it is burdensome,[33] also manifests in the GDPR. The GDPR's complicated provisions make compliance expensive and disproportionately burdens smaller operators, discouraging investment and competition in lawful data processing practices.[34] The final criticism, that legislative processes are unsuitable to address the idiosyncrasies of cyberspace, is also accurate.[35] Hughes argues that the transnational nature of cyberspace requires international conventions to create regulation incapable of evasion.[36] However, calls for transnational regulation counterintuitively undermine the very foundations upon which cyber-institutionalism rests. An invariable limit of international conventions is the inverse correlation between the strength of their enforcement provisions and the breadth of ratification they achieve.[37] To attain the broad consensus that Hughes considers necessary, extensive concessions must be made between states with diverging political orders and legal traditions. The outcome of any harmonisation process would likely be a barren regime devoid of the substance necessary to effectively regulate cyberspace. While domestic legislation does not face harmonisation obstacles, it cannot address the anonymous nature of cyberspace

[29] Matthew Heiman, 'The GDPR and the Consequences of Big Regulation' (2020) 47 PLR 945, 948; Reed (n 18) 908.
[30] GDPR, art 6(1)(a).
[31] Reed (n 18) 910.
[32] GDPR, preamble [83]; see also Reed (n 18) 910.
[33] Reed (n 18) 912.
[34] Heiman (n 29) 950.
[35] Reed (n 18) 913.
[36] Hughes (n 6) 536.
[37] Chang and Grabosky (n 16) 543–44.

interactions that can avoid the enforcement mechanisms of jurisdictions through virtual private networks that mask the location of users.[38] Analysing cyber-libertarianism, the next section demonstrates that trust is an essential feature of cyberspace regulation as regulatory ends cannot be achieved without its imposition.

III. CYBER-LIBERTARIANISM: HORIZONTAL REGULATION

This section examines cyber-libertarianism theory through the parameters established above, arguing that its conception of trust as an essential feature of cyberspace regulation is accurate. Cyber-libertarians rely on two tenets that support horizontal cyberspace regulation which regards trust as achieving the indispensability threshold. Proponents of cyber-libertarianism argue that horizontal cyberspace regulation based on trust accommodates the dynamic and elusive nature of cyberspace activity more effectively than hierarchical regulation that relies purely on the force of law.[39] Thus, contrary to cyber-institutionalists, cyber-libertarians prefer markets, rather than formal legal institutions,[40] as the regulators of cyberspace.[41] Another fundamental distinction between the theories is their perception of trust as a means (cyber-libertarianism) or an end (cyber-institutionalism) of regulating cyberspace. Cyber-institutionalists assert that achieving trust is a consequence of the legislative process, or codification of rules, that removes dangers in cyberspace.[42] Nevertheless, even the staunchest proponents of cyber-institutionalism admit that legislation cannot eradicate all uncertainties,[43] and as the above analysis of the GDPR showed, prescriptive legislation is a complexity-inducing practice not suitable for cyberspace regulation. Correspondingly, a cyber-libertarian conception of regulation is preferred.

Despite its fundamental differences with cyber-institutionalism, it would be inaccurate to reduce cyber-libertarianism to a single expression as its conception of trust varies. Pure cyber-libertarians such as Reidenberg juxtapose formal legal institutions with '[t]echnological architectures'[44] that establish non-legal rules pre-conditioning access to

[38] Naftaly Minsky, 'Regularity-Based Trust in Cyberspace' in Sotirios Terzis (eds), *Trust Management* (Springer 2003) 19.
[39] Jemilohun (n 3) 21.
[40] Chang and Grabosky (n 16) 538.
[41] Liaropoulos (n 2) 1.
[42] Netanel (n 10) 409.
[43] Lucia Zedner, 'Too Much Security' (2003) 31(3) IJSL 155, 158.
[44] Joel Reidenberg, '*Lex Informatica*: The Formulation of Information Policy Rules through Technology' (1998) 76(3) TLR 553, 568.

cyberspace, constituting a '*Lex Informatica*'[45] premised solely on trust and voluntary adherence.[46] More forcefully, Post and Johnson argue that pure self-governance delegating all rule-making to cyberspace operators is the best approach to address the ubiquitous nature of cyberspace.[47] While the proposals of purists address the issues associated with cyber-institutionalism (above),[48] this analysis endorses a more hybrid approach than what Post and Johnson or Reidenberg propose. While this analysis agrees that cyberspace regulation cannot be considered a purely legal phenomenon,[49] the proposals of purists swing the pendulum too far in favour of decentralised regulation, which threatens to invoke regulation devoid of any objective criteria or enforcement mechanisms to influence, order or control behaviour. The preferred approach is a development of Lessig's analysis,[50] which regards the law and trust as two necessary components of regulation. Rather than depict formal legal institutions as the antithesis of trust, a hybrid approach more accurately regards governments and markets as co-regulators.[51] A hybrid cyber-libertarian model regards formal institutions as fostering horizontal regulation by interposing legal and natural persons as intermediaries in the pursuit of regulatory ends.[52] While this analysis has demonstrated why trust is an essential feature of cyberspace regulation in theory, it has yet to demonstrate how trust manifests in regulation in practice. The rest of this article is dedicated to this endeavour.

This article considers cyberspace regulation as creating a social contract that binds stakeholders (including government, legal and natural persons) through trust, establishing mutual rights and obligations.[53] The social contract envisioned combines Krygier and Drahos' '[t]ripartism'[54] thesis, which recognises that stakeholders play indispensable roles in regulation,[55] with Rousseau's social contract theory, which regards individual liberties as being surrendered to communities on the condition that formal institutions protect individual rights through law.[56] Contrary to Hobbesian and Lockean social contract theories,[57]

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[45] ibid 555.
[46] Jemilohun (n 3) 22.
[47] David Post and David Johnson, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48(5) SLR 1367, 1375–1376.
[48] Chang and Grabosky (n 16) 538.
[49] Post and Johnson (n 47) 1400–1402; Reidenberg (n 44) 568–569.
[50] Lessig (n 8) 1408.
[51] Chang and Grabosky (n 16) 542.
[52] Tim Wu and Jack Goldsmith, *Who Controls the Internet?* (OUP 2006) 68–69.
[53] Liaropoulos (n 2) 1.
[54] Krygier and Drahos, 'Regulation, Institutions and Networks' in Peter Drahos (ed), *Regulatory Theory* (ANU Press 2017) 6.
[55] ibid.
[56] Christopher Wraight, *Rousseau's "the Social Contract"* (Bloomsbury 2009) 34–38.
[57] Liaropoulos (n 2) 4.

Rousseau's thesis regards individual liberty as the genesis of government power, which can be revoked where government does not adequately safeguard individual rights.[58] Crucially, reference to social contract theory is not made for the same purposes on which traditional theorists rely (to legitimise the centralisation of power), but for the inverse proposition arguing that cyberspace regulation should be decentralised because the government cannot protect rights in its regulation of cyberspace solely through the force of law. Therefore, it is argued that trust is an essential feature of cyberspace regulation because it binds stakeholders to a social contract facilitating the horizontal regulation necessary to achieve regulatory aims in cyberspace.[59] Although poorly executed (analysed above), the GDPR implicitly relies on a similar conception of the social contract developed in this article, as its policies indicate that 'trust'[60] creates a strong regulatory framework involving 'natural persons, economic operators and public authorities'.[61]

It is the positive expectations held by each stakeholder that their counterparties will act according to social norms and influence, control or order the conduct of cyberspace users accordingly, which fosters effective regulation. Regulation with strong elements of trust encourages the voluntary compliance of regulatees to self-regulate and positively aspire to the normative aims established in regulation rather than merely avoid non-compliance where it is compelled.[62] Horizontal regulation influences regulatees to internalise norms, thereby co-regulating and self-regulating intuitively.[63] Thus, where hierarchical legislation creates no scope for trust, it provides a poor mechanism to influence, order or control individual behaviours as it relies on surface-level pressure addressing symptoms (i.e. expressions of hate) rather than causes (i.e. motivations for hate).[64] Taking a more pragmatic approach, cyber-libertarianism does not attempt to eliminate all uncertainties or dangers associated with cyberspace but to neutralise their effects through the delegation of regulatory authority to stakeholders.[65] Beyond the technological measures that foster trust in the cybersecurity infrastructure (such as passcodes or encryption),[66] regulatory ends are only attainable through trust in the application of horizontal regulatory regimes.[67]

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[58] Wraight (n 56) 34–38.
[59] Liaropoulos (n 2) 8.
[60] GDPR, preamble [7].
[61] ibid.
[62] John Braithwaite and Toni Makkai, 'Trust and Compliance' (1994) 4(1) PSAIJ 1, 1–2.
[63] ibid 2.
[64] Gordon Allport, *The Nature of Prejudice* (Addison-Wesley 1979) 470.
[65] Keymolen and van den Berg (n 1) 194–197.
[66] Helen Nissenbaum, 'Securing Trust Online: Wisdom or Oxymoron?' (2001) 81 BULR 101, 115.
[67] Keymolen and van den Berg (n 1) 196–197.

The essential feature trust plays in cyberspace regulation is already apparent in practice. Current regulation understands that the unpredictable nature of user interactions cannot be removed by legislation, but that its consequences can be mitigated by positive expectations (formed through social norms) that non-governmental stakeholders will influence, order or control the behaviours of legal and natural persons.[68] For instance, legal persons with the largest capacity to safeguard user interests in cyberspace (such as technology conglomerates) bear the positive expectations of government and natural persons that they will prevent antisocial behaviour and protect user data from attacks through anti-malware and oversight. Equally, natural persons bear the positive expectations of government and legal persons to report conduct violating the rules of particular cyberspaces to operators or report criminal activity to government, bringing cyberspace activities into the realm of real space law enforcement mechanisms. It is the mutual trust shared between stakeholders that each will fulfil the other's expectations, not legislation, that makes the majority of users comfortable interacting with computer networks.[69] The current reliance on stakeholders to regulate cyberspace constitutes an implicit outsourcing of authority by formal institutions to stakeholders through a social contract binding co-regulators through trust. That stakeholders are trusted to invoke enforcement mechanisms provided by formal institutions and hold fellow legal and natural persons to account is horizontal regulation that cyber-libertarians astutely regard as characteristic of cyberspace regulation wherein trust plays an essential function. The final section substantiates the claims of hybrid cyber-libertarians through a practical exercise.

IV. PRACTICAL EXERCISE

This section analyses an academic proposal for cyberspace regulation, arguing it can be improved through the provision of cyber-libertarian principles that create more scope for trust to feature in the regulation proposed. Building upon this article's examination of data protection regulation, this section substantiates the merits of the arguments made above in the context of hate speech. A particular concern for regulation is eliminating hate speech in cyberspaces, which provide cheap and readily accessible mediums to broadly distribute

[68] ibid 198.
[69] ibid.

harmful ideologies.[70] Tsesis argues the best approach for regulation is to create causes of action punishing hate speech that is perpetuated in cyberspaces.[71] Tsesis' recommendation is cyber-institutionalist in nature as it considers the threat of law sufficient to achieve the policy of eliminating hate speech. In making a recommendation for a legislative regime banning hate speech, Tsesis relies on Allport's inductive analysis, which argues that legislation prohibiting discrimination necessarily reduces prejudicial activity because discriminatory laws increase instances of prejudice.[72] However, echoing the concerns of cyber-libertarians, Lessig argues that legislation alone is ineffective in achieving regulatory ends because users can mask their locations to avoid enforcement jurisdiction.[73] To overcome such difficulties, Tsesis proposes legislation imposing American law in the jurisdiction where hate speech was posted or received.[74] As a technical criticism, Tsesis' proposal is fallible to encryption practices that make it impossible to trace cyberspace activity to an internet protocol address identifying the location of the network facilitating antisocial behaviour. As a related legal criticism, proposing to invoke domestic law in foreign jurisdictions creates obvious conflict-of-laws concerns. Therefore, if Tsesis were to retain a cyber-institutionalist approach, the only solution remedying the issues identified is to enact an international convention regulating cyberspace. The ineffectiveness of transnational regulation was discussed above. Consequently, resort to cyber-libertarian theory must be made.

The preferred approach to regulate against hate speech is through a cyber-libertarian model that considers trust an essential feature of regulation. Crucially, the flaws in Allport's analysis, on which Tsesis relies, are stark when assessed against hybrid cyber-libertarianism. By regarding cyberspace regulation as horizontal and achieved through a social contract binding all stakeholders by trust, what this analysis proposes is not what Allport labels a 'laissez faire [government] attitude',[75] but the intentional decentralisation of regulation that has proven most effective in regulating cyberspace. A preferrable legislative provision to Tsesis' proposal would impose on cyberspace operators and users the obligation to ensure that *cyberspace cannot be used in a manner to disseminate what a reasonable user would consider hate speech*. Despite its legislative basis, this model provision advances the hybrid cyber-libertarian conception of cyberspace regulation developed throughout this article. By

[70] Tsesis (n 17) 832.
[71] ibid 869.
[72] Allport (n 64) 468–469.
[73] Lessig (n 8) 1405–1406.
[74] Tsesis (n 17) 870–871.
[75] Allport (n 64) 469.

focusing on user behaviour rather than technology, the model provision is protected from technological advancements rendering its applicability moot.[76] Furthermore, the provision gives rise to horizontal regulation through a social contract premised on trust. Implicit in its drafting, the provision trusts that the legal persons who (in all likelihood) facilitate cyberspace will invoke the protections necessary to eradicate hate speech. Furthermore, by demarcating the legal standard of enforcement as *a reasonable user*, the provision demonstrates trust that natural persons who (in all likelihood) use cyberspace offer a sufficiently durable and objective standard on which the invocation of formal legal enforcement mechanisms in real space relies. By deferring to *a reasonable user* standard and relying on open-textured concepts rather than defining what *disseminate*, *hate speech,* or *reasonable user* should mean, the model provision demonstrates the positive expectations that stakeholders will not merely avoid unlawful behaviour, but aspire to a reasonable standard of conduct.

In both form and substance, the model provision contains all the elements of effective regulation from a hybrid cyber-libertarian perspective. In form, the model provision relies on legislation to communicate policy ambitions and delegates to trust the regulation of individual behaviour.[77] The provision communicates normative aims intelligibly through open-textured drafting that cannot be evaded through prescriptive box-ticking exercises. In this way, it addresses the criticism of the GDPR aforementioned[78] that encourages voluntary adherence rather than forced compliance. It is the encouragement of regulatees to comply with positive standards that align with their consciences, rather than permitting negative compliance by avoiding unlawful activity, that is the hallmark of successful horizontal regulation.[79] In substance, the provision demonstrates the essential feature that trust represents in cyberspace regulation. By imposing obligations on users and operators to ensure that *cyberspace cannot be used in a manner to disseminate what a reasonable user would consider hate speech*, the provision implicitly delegates to legal and natural persons the authority to co-regulate alongside government. The obligations placed on stakeholders reflects the positive expectations that government has towards the abilities of users to

[76] Reed (n 18) 929.
[77] Graham Greenleaf, 'An Endnote on Regulating Cyberspace: Architecture vs Law?' (1998) 21 UNSWLJ 593, 605.
[78] Reed (n 18) 931.
[79] Allport (n 64) 473.

internalise norms[80] and those of operators to regulate cyberspace.[81] These phenomena already manifest in current regulations of cyberspace (above). The proposed provision substantiates the essential feature trust serves in cyberspace regulation and provides a model for future regulation. This section's practical exercise substantiates the merits of hybrid cyber-libertarianism theory, which considers trust an essential feature of cyberspace regulation.

CONCLUSION

This article argued that trust is an essential feature of cyberspace regulation. First, this article established a framework through which to determine whether trust is an essential feature of the regulation of cyberspace and defined key terms relied on throughout its analysis. Thereafter, this article criticised cyber-institutionalism theory, arguing that formal legal institutions cannot regulate cyberspace exclusively through legislation that does not provide any scope for trust to feature. Consequently, this analysis argued that cyber-libertarianism provides the preferred conception of the regulation of cyberspace as it regards trust as an essential feature to remedy the deficiencies of hierarchically imposed regulation. Following this, using hate speech regulation as an analytical proxy, this article conducted a practical exercise that substantiated the importance of trust by criticising a cyber-institutionalist's proposal for hate speech regulation. Finally, this article proposed a more effective model provision regulating cyberspace under the preferred cyber-libertarian approach that places trust at the nucleus of its construction.

[80] Chang and Grabosky (n 16) 534.
[81] Liaropoulos (n 2) 6.