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FOREWORD BY IGOR SZPOTAKOWSKI

As someone who has recently joined the School of Law, it is a great honour to have been asked by the Managing Editor of the Leeds Student Law and Criminal Justice Review, Maria-Anda Busuioc, to write the foreword to its fifth volume. For a research-intensive institution such as the University of Leeds, a proud member of the Russell Group, it is vital that a culture of research and intellectual curiosity begins from the very start of a student's academic journey. In terms of research, the School of Law is home to four centres that exemplify its breadth and expertise: the Centre for Business Law and Practice (including the newly established Technology, Governance and Intellectual Property Law Group), the Centre for Criminal Justice Studies, the Centre for Innovation and Research in Legal Education, and the Centre for Law and Social Justice. These centres not only underpin the School's research excellence but also provide students with opportunities to engage in innovative, interdisciplinary, and impactful scholarship.

The idea of a student-led journal within the School of Law is therefore especially important. It not only promotes emerging talent but also provides a platform to showcase the diverse and wide-ranging research undertaken by our students. Much of this work originates in dissertations written at the University of Leeds, and this journal plays a valuable role in elevating and sharing those insights more broadly. It is particularly impressive that this initiative has continued now into its fifth volume, reflecting both the dedication of successive editorial teams and the enduring enthusiasm of our students for contributing to scholarly discourse.

The articles featured in this volume address a wide range of timely and significant legal and social issues, including refugee protection, the use of artificial intelligence in predictive policing, mental capacity, children's rights in the digital age, and gender norms in law enforcement. Collectively, they reflect the School of Law's commitment to promoting critical analysis, interdisciplinary

engagement, and practical reform, showcasing research that not only interrogates existing legal frameworks but also proposes meaningful solutions to contemporary challenges. Higher education is also undergoing profound change with the widespread use of generative Artificial Intelligence, which is reshaping the ways in which we write, research, and learn. In this context, student-led scholarship is more important than ever, as it encourages originality, critical thinking, and independence, qualities that cannot be automated and remain central to academic excellence, and which are especially close to our hearts here at Leeds.

The volume begins with an article by Sedek Abrahem, which critically examines how Western countries interpret Articles 1 and 33 of the 1951 Refugee Convention. The paper demonstrates that restrictive applications of these articles often prioritise immigration control over the protection of refugees. Abrahem uses the recent Rwanda Asylum and Immigration Bill as a case study to illustrate this trend, showing how responsibilities are outsourced to countries with weaker asylum protections. These practices, according to the author, compromise the Convention's humanitarian goals, justifying the need for reform to restore its original protective intentions.

The second article in the volume, authored by Swati Krishnakumar, explores predictive policing in the United Kingdom, revealing how such tools risk reinforcing bias while being presented as objective and efficient. The author calls for stronger statutory measures focused on protecting individuals, inspired by the European Union's Artificial Intelligence Act and surrounding legislation, to safeguard against discriminatory policing practices.

The next article, by Joseph Nicolle, examines the Mental Capacity Act 2005 in the United Kingdom, questioning whether it has fulfilled its promise of protecting and empowering individuals deemed unable to make decisions for themselves. The author critiques the law's distorted approach to autonomy and capacity, highlighting interpretive shortcomings in statute and case law, and

proposes reforms, drawing on international perspectives, to close both theoretical and practical gaps in safeguarding incapacitated individuals.

The volume continues with an article by Eva Wainwright, which examines the rise of family vlogging on YouTube and its impact on children's rights and safety. The paper shows that the merging of public and private spheres online often compromises children's well-being, as current laws in England and Wales prioritise parental rights and remain reactive to privacy breaches and exploitation. Wainwright argues that existing legal frameworks, including those governing child labour and the misuse of private information, are inadequate for the digital age. The author advocates for comprehensive safeguards to protect children from exploitation and ensure their rights are upheld.

Finally, Caroline Bjørnstad's article examines how gender norms in both domestic life and policing affect policewomen's ability to reconcile paid and domestic work. Through interviews, the study reveals that entrenched expectations around household labour and masculine policing cultures limit flexible work opportunities and contribute to stress and conflict for women officers. The article highlights the need for further research and organisational reforms to support work-life balance and improve the lived experiences of policewomen.

Many thanks to the authors and editors for their efforts in bringing this volume together. We hope that readers find the contributions thought-provoking and engaging, and that the volume sparks reflection, discussion, and further exploration of the issues raised. We hope you enjoy reading and reflecting on the topics presented.

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INTRODUCTION TO THE FIFTH ISSUE

This is the fifth issue of the Student Law and Criminal Justice Review. The board is fortunate to have access to such a high level of undergraduate and taught postgraduate research from which to select the papers included in the journal. This issue features papers by five of our undergraduate students. The papers selected are based on dissertations written by students and engage with a wide variety of topics, reflective of the research centres of the Law School: the Centre for Business Law and Practice, the Centre for Law and Social Justice, and the Centre for Criminal Justice Studies.

The journal represents a collaborative effort between postgraduate editors and taught students, working together to produce a journal available on HeinOnline and a small number of printed copies. This project provides a valuable opportunity for all involved; the postgraduate editors gain experience of editing and project managing, and the taught students get an opportunity to finesse already outstanding work and see it published.

We would like to thank Dr Clare James for her advice and assistance throughout the publication process. We would also like to thank the authors who allowed us to publish their articles as part of issue five, as well as the supervisors and all those who supported them in undertaking their dissertations. Similarly, we would like to thank the Management Support staff in the School of Law who assisted with the administration necessary for the printing of the journal. Finally, we would like to express our sincere gratitude to Dr Igor Szpotakowski for writing this issue's foreword.

We hope that you enjoy the fifth issue of the Leeds Student Law and Criminal Justice Review.

The Editorial Board September 2025

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To what extent do Article 1 and Article 33 of the 1951 Convention Relating to the Status of Refugees prevent Western countries from using it as an immigration control tool?

Sedek Abrahem

Abstract

This paper critically evaluates the restrictive application of Articles 1 and 33 of the 1951 Refugee Convention by Western countries, specifically focusing on the extent to which these articles prevent or facilitate the use of the Convention as a tool for immigration control. The research utilises a qualitative methodology, incorporating case law analysis and legislative reviews to dissect how Western nations interpret and implement these key provisions. Through this analysis, the paper reveals that the original humanitarian aims of the Convention are often compromised by national interests and restrictive interpretations that prioritise immigration control over refugee protection. The findings indicate that the ambiguous and outdated criteria within Article 1 of the Convention are exploited by Western nations to curtail the recognition of refugee status, thereby transforming the Convention into a regulatory mechanism for controlling immigration. Furthermore, the principle of non-refoulement, as outlined in Article 33, is often narrowly applied, enabling countries to circumvent their obligations to protect refugees. Notably, the use of Safe Third Country Agreements is examined as a strategy to minimise asylum responsibilities, a practice that reflects a deviation from the Convention's humanitarian goals. The Rwanda Asylum and Immigration Bill is used as a case study to illustrate this trend. The Bill demonstrates the outsourcing of asylum responsibilities to Rwanda, where significant issues in asylum procedures, including discriminatory practices and a high risk of refoulement, starkly contrast with the Convention's goals. These findings justified the need for reform to align the Convention with its original protective intentions.

1. Introduction

The interplay between international refugee protections and immigration control strategies embodies a complex array of legal and moral challenges. This paper examines how Articles 1 and 33 of the 1951 Refugee Convention either hinder or facilitate immigration control, with a focus on their application in Western countries using case law. Since entering into force on April 22, 1954, and having been ratified by 148 states including all European Union members, the Convention has been pivotal in shaping global refugee policies.[1] Originally crafted in response to the post-World War II refugee crisis, the Convention aimed to standardise the treatment of refugees. However, post-9/11 security concerns have significantly influenced its application, leading to a containment strategy aimed at preventing unwanted asylum seekers from entering or leaving their countries of origin in the West.[2]

Article 1 of the Refugee Convention specifies the criteria for recognising a person as a refugee, including having a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.[3] It is critical to note that the definition of a refugee in the Convention is declaratory.[4] This means an individual is recognised as a refugee when they meet these criteria, regardless of whether their status has been formally acknowledged by authorities. While official recognition is an important procedural step, it does not confer refugee status but rather affirms an existing reality.[5] Until such formal recognition is granted, individuals seeking protection are usually referred to as asylum seekers.[6]

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[1] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

[2] Cristina Saenz Perez, 'The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit' (2023) 35 International Journal of Refugee Law 304.

[3] Refugee Convention 1951, art 1(A)(2).

[4] Colinyeo, 'What Is the Refugee Definition in International and UK Law?' (*Free Movement*, 7 February 2024) https://freemovement.org.uk/what-is-the-legal-meaning-of-refugee/ accessed 10 December 2023.

[5] Ibid.

[6] Ibid.

The Refugee Convention provides definitions, rights, and fundamental principles for refugees, yet many of its terms are open to interpretation. Treaties are not self-enforcing, and the meanings of their terms are not always explicitly clear, interpreting key terms like 'persecution' vital for making asylum decisions. The Convention itself does not offer a precise definition of 'persecution', which is derived from the Latin word *persequi*, meaning to aggressively pursue.[7] Sole reliance on linguistic definitions is insufficient; dictionary meanings can differ, thus leaving the interpretation up to the signatory states and the international community.[8] The principle of non-refoulement, another critical element of the Convention, also lacks clarity, especially in its application at borders.[9] Although traditionally thought not to include border protection, the original French term *refouler* implies that such protection is indeed intended.[10] Furthermore, individuals displaced by food shortages, environmental disasters, climate change, or those affected by gender-based violence do not meet the Convention's criteria for refugee status yet remain vulnerable groups in need of international protection.[11] This gap underscores the need for a broader and updated definition of 'refugee' that aligns with modern global challenges and the dynamic needs of society. The law should ideally adapt and respond to the concrete needs of society, not remain static and disconnected from evolving circumstances.

The absence of a definitive international court to oversee the interpretation and implementation of the Refugee Convention results in varied interpretations and practices among nations.[12] Although the UNHCR provides non-binding

[7] David McKeever, 'Evolving Interpretation of Multilateral Treaties: 'acts Contrary to the Purposes and Principles of the United Nations' in the Refugee Convention' (2015) 64 International and Comparative Law Quarterly 405.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Emily Rose Mattheisen, "From Political Tool to Humanitarian Stalemate: A Critical Appraisal of International Refugee Law as a Global Protection Mechanism" (2012) American University in Cairo, Master's Thesis, AUC Knowledge Fountain.

[12] Ellen F. D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 Vand J Transnat'l L 279.

guidelines on how to interpret the Convention, it lacks the authority to enforce these guidelines.[13] Despite Articles 38 of the 1951 Convention and Article IV of the 1967 Protocol pointing to the International Court of Justice (ICJ) for resolving disputes over interpretation or application, no such cases have been referred to the court.[14] Consequently, nations have considerable discretion in how they interpret and apply the Convention, often shaping their interpretations to align with domestic policies.

The intentionally vague language of the Convention allows countries, particularly Western ones, to interpret its articles restrictively while maintaining that their interpretations are compliant with the Convention. Although this ambiguity was originally intended to allow the Convention to adapt to new situations and remain a "living instrument" responsive to contemporary realities and legal changes, the practice in Western countries often reveals a tendency to use this flexibility to minimise their obligations.[15] This paper demonstrate how these nations exploit the Convention's flexible terms to limit their responsibilities to refugees. Initially designed as a humanitarian tool, the Refugee Convention has increasingly been leveraged as a mechanism for stringent immigration regulation. This shift raises critical questions about the integrity and efficacy of international refugee law. By examining legislative adaptations such as the Safety of Rwanda (Asylum and Immigration) Bill and the Safe Third Country Agreement, alongside pivotal case law, this paper explores the tension between the original intent of the Convention and its contemporary applications.

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[13] Ibid.

[14] Achilles Skordas, 'EU Immigration and Asylum Law and Policy Droit et Politique de l'immigration et de l'asile de l'ue' (*The Missing Link in Migration Governance: An Advisory Opinion by the International Court of Justice – EU Immigration and Asylum Law and Policy*, 11 May 2018) https://eumigrationlawblog.eu/the-missing-link-in-migration-governance-an-advisory-opinion-by-the-international-court-of-justice/ accessed 10 December 2023.

[15] Alice Donald, Jane Gordon, and Philip Leach, *The UK and the European Court of Human Rights*, Research Report 83 (Equality and Human Rights Commission, Human Rights and Social Justice Research Institute, London Metropolitan University).

The critical analysis begins in section 1 with a thorough examination of Article 1, dissecting how its ambiguous and outdated criteria for determining refugee status are manipulated by Western nations to curtail the influx of asylum seekers. The scrutiny continues in section 2 with a detailed evaluation of Article 33, focusing on the principle of non-refoulement and its susceptibility to restrictive interpretations that limit the scope of protection offered to refugees. The exploration then culminates in section 3, which critically assesses the controversial Safety of Rwanda (Asylum and Immigration) Bill. This section explores how the Bill, under the guise of cooperation and safety, may further entrench the practice of outsourcing asylum responsibilities, thus challenging the foundational principles of the Refugee Convention. By scrutinising these key elements within the broader context of international law and human rights, the paper aims to offer insights into whether the Refugee Convention still serves as an effective framework for refugee protection, or if it has been co-opted as a tool to enforce immigration control. The aim is to affirm that the Convention must continue as a humanitarian treaty dedicated to safeguarding vulnerable refugees.

2. *Critical Examination of Article 1 Limitations and Exploitations in the West*

According to Article 1(A)(2) of the 1951 Refugee Convention, a refugee is:

> Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. [16]

[16] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1(A)(2).

However, this definition poses significant challenges that are critically examined as follows.

Part I will address the absence of a precise definition for 'being persecuted' within the Refugee Convention, which Western countries often exploit by imposing stringent and potentially restrictive interpretations to control the influx of asylum seekers. Part II will explore the limitations of the five specified grounds for persecution: race, religion, nationality, membership in a particular social group, and political opinion. These criteria are outdated and narrowly define who qualifies as a refugee, thereby excluding many who need protection. The discussion concludes by addressing the central question of the paper, arguing that the ambiguous, restrictive, and outdated nature of the refugee definition under Article 1 fails to prevent Western nations from manipulating it as a tool for immigration control.

A. Analysing the Ambiguity of 'Being Persecuted'

The absence of a precise definition for 'being persecuted' in the Refugee Convention gives Western countries a loophole that can be exploited, enabling them to use this vagueness strategically as a means of controlling immigration. This restrictive approach, as Rupert Colville has pointed out, is exemplified by the case of Thomas, a Liberian asylum seeker in Germany.[17] Fleeing violence perpetrated by an armed group, Thomas endured severe atrocities, including witnessing the murder of his father and the rape of his wife. Despite these horrors, his application was dismissed as 'manifestly unfounded' simply because his persecutors were not state officials.[18] His case was one of 1,850 similar rejections by Germany in 1994, a year characterised by the almost complete refusal of Liberian asylum applications, despite the country

[17] 'Refugees Magazine Issue 101 (Asylum in Europe) - Persecution Complex' (UNHCR UK) https://www.unhcr.org/uk/publications/refugees-magazine-issue-101-asylum-europe-persecution-complex accessed 7 December 2023.
[18] Ibid.

experiencing roughly 150,000 deaths due to civil conflict since 1989. [19] Similarly, in that year, Switzerland also rejected all 143 Liberian asylum applications. [20] This trend indicates a broader pattern among Western nations, where the approval of refugee status often depends on the persecutor's identity, irrespective of the intensity of the persecution. This is illustrated by the Austrian Federal Administrative Court's ruling that persecution must be linked to state authorities for it to be recognised, thereby asserting the fact that acts of persecution not associated with the state do not qualify for protection. [21] This restrictive interpretation of 'persecution' fundamentally undermines the core objectives of the 1951 Refugee Convention, which was designed to provide comprehensive protection and ensure that no one is forcibly returned to a place where they face persecution. This principle is highlighted by the European Council on Refugees and Exiles (ECRE) and further emphasised in paragraph 65 of the Refugee Handbook, which notes that persecution often stems from non-state actors outside governmental control. [22] Such a narrow interpretation has led to a 'protection lottery' in Western countries, where the determination of who qualifies for refugee status seems arbitrary and is often used as a tool to manage immigration.[23] This approach significantly reduces the number of people recognised as refugees and contrasts sharply with the Convention's broader mandate to protect all individuals facing significant threats. Thus, Western states must interpret the Convention in a manner consistent with its original humanitarian intent.

Conversely, Marianne Garvik and Marko Valenta have argued that Western nations have adopted restrictive asylum policies to safeguard their systems

[19] Ibid.
[20] Ibid.
[21] 'Research Paper on Non-State Agents of Persecution' (ELENA European Legal Network on Asylum 2020) https://www.refworld.org/reference/research/ecre/1998/en/20088 accessed 6 December 2024.
[22] 'Position on the Interpretation of Article 1 of the Refugee Convention - September 2000' (September 2000).
[23] Ibid.

from misuse whilst also aligning with the Refugee Convention.[24] This perspective is supported across Europe, as demonstrated on March 4, 1996, when European Union Member States endorsed a Joint Position calling for a stricter, unified application of the 'refugee' definition. [25] This approach insists that persecution must be connected, directly or indirectly, to state actions, a view reflected in French legal standards that disqualify non-state actors as sources of persecution under the 1951 Refugee Convention. French case law further clarifies that a state's inability yet willingness to protect does not meet the Convention's persecution criteria.[26] This interpretation was reinforced by the Conseil d'Etat in its November 22, 1996, ruling on the M. Messara case, where it ruled that the Algerian government's passive tolerance of terrorist activities, without active encouragement or approval, did not constitute persecution.[27] Similarly, Peter Dutton, former Minister for Immigration and Border Protection in Australia, asserts that the 1951 Refugee Convention explicitly excludes individuals who can obtain protection from their government from being classified as persecuted.[28] He contends that if third-party persecution were intended to be covered, it would be clearly stated in the Convention's original text. Marine Le Pen, leader of the National Rally in France, also supports this strict interpretation.[29] She advocates for tighter

[24] Marianne Garvik and Marko Valenta, 'Seeking Asylum in Scandinavia: A Comparative Analysis of Recent Restrictive Policy Responses Towards Unaccompanied Afghan Minors in Denmark, Sweden, and Norway' (2021) 9 Comparative Migration Studies, art 15.

[25] Union C of the E, '96/196/Jha: Joint Position of 4 March 1996 Defined by the Council on the Basis of Article K.3 of the Treaty on European Union on the Harmonized Application of the Definition of the Term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees' (*Publications Office of the EU*, 4 March 1996) https://op.europa.eu/en/publication-detail/-/publication/618bba6d-a109-48c9-afa2-2b3b394465dc/language-en accessed 7 December 2024.

[26] 'Research Paper on Non-State Agents of Persecution' (ELENA European Legal Network on Asylum 2020) https://www.refworld.org/reference/research/ecre/1998/en/20088 accessed 6 December 2024.

[27] Ibid.

[28] Senate Legal and Constitutional Affairs Legislation Committee, 'Migration Amendment (Complementary Protection and Other Measures) Bill 2015 [Provisions]' (February 2016).

[29] Clea Caulcutt, 'Marine Le Pen Scores Big Win on Toughened Immigration Bill' (*POLITICO*, 19 December 2023) https://www.politico.eu/article/france-marine-le-pen-scores-big-win-on-toughened-immigration-bill-macron/ accessed 7 December 2024.

asylum policies to ensure efficient and equitable processing, arguing that such measures are crucial to prevent the asylum system from being overwhelmed by economic migrants or individuals who do not meet the stringent criteria for asylum based on actual persecution.

Indeed, the Refugee Convention does not explicitly specify the perpetrators of persecution can be a third party or non-state agent. However, its preamble emphasises the importance of human rights in the refugee context, suggesting that excluding individuals facing persecution, regardless of the perpetrator, contradicts the purpose and objectives of the Convention.[30] Furthermore, there is no indication that the drafters of the Convention intended to restrict refugee status solely to those persecuted by governmental actors. As Legal scholar Paul Weis pointed out the travaux préparatoires suggest that Article 1A was meant to be broadly inclusive.[31] Thus, imposing such a limitation introduces a condition unsupported by the Convention, leading to restrictive interpretations that limit asylum claims. This issue is highlighted by the decision of the Finland Asylum Appeals Board on December 13, 1993, regarding a man from Lebanon identified as IC.[32] He fled clan violence, claiming Lebanese authorities could not protect him. Despite clear evidence of significant risk in Lebanon, his asylum request was denied because the persecutor was a clan and not a state agent.[33] Paradoxically, the board also acknowledged that IC could not safely return to Lebanon and needed protection.[34] This contradiction exemplifies how Article 1 vague wording allows some Western countries to manipulate the asylum system to their advantage, potentially endangering individuals like IC

[30] Ralf Alleweldt, 'Part One Background, Preamble to the 1951 Convention' [2011] The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.
[31] Paul Weis, 'The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis' (*UNHCR*, 10 April 2002) https://www.unhcr.org/media/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul-weis accessed 7 December 2024.
[32] 'Asylum Appeals Board Decision of 13 December 1993' (*Refworld*, 13 December 1993) https://www.refworld.org/jurisprudence/caselaw/finaab/1993/en/16294 accessed 7 December 2024.
[33] Ibid.
[34] Ibid.

who face serious threats yet are denied refuge due to technicalities in interpretation.

B. Evaluating the Limitations of the Five Grounds for Persecution

A critical limitation arises with regard to the five specified grounds of persecution: race, religion, nationality, membership of a particular social group, and political opinion. These categories significantly narrow the scope of protection, as eligibility under the Convention hinges on the presence of at least one of these grounds. As Emily Rose has argued, Western states have strategically interpreted these limited criteria to selectively grant refugee status, often excluding individuals who face serious harm from causes not explicitly covered. [35] This restrictive approach was clearly illustrated in *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* case, where the New Zealand High Court ruled that the impacts of climate change on Kiribati did not qualify for refugee status because the applicant did not meet any of the specified grounds of persecution set by the Convention.[36] [37] Similarly, in *R (Subramaniam) v Immigration Appeal Tribunal*, the Court of Appeal declared that gender-based violence such as rape did not fall within the Convention's parameters.[38] These cases highlight the limitations of the 1951 Convention's refugee protection definition, which fails to accommodate emerging categories of refugees, such as those displaced by environmental disasters or gender-based persecution. Consequently, these individuals often find themselves without the necessary protections, as they do not necessarily face persecution for reasons specified by the Convention, which underscores the outdated nature of its definition. It lacks the necessary breadth

[35] Emily Rose Mattheisen, "From Political Tool to Humanitarian Stalemate: A Critical Appraisal of International Refugee Law as a Global Protection Mechanism" (2012) American University in Cairo, Master's Thesis, AUC Knowledge Fountain.

[36] 'Ioane Teitiota V. the Chief Executive of the Ministry of Business, Innovation and Employment' (Climate Change Litigation, 29 June 2022).

[38] Rachel Helen Slater, 'A Jurisprudential Analysis of the Interpretation of "Persecution" under the 1951 Convention Relating to the Status of Refugees at the Domestic Level' (PhD thesis, University of Birmingham, 2014).

to encompass alternative forms of persecution, demonstrating a significant shortfall in universality. This limitation suggests that the 1951 Convention's criteria are insufficient for addressing the diverse and evolving challenges faced by modern refugees, exposing significant gaps in the Convention's scope.[39]

On the other hand, Jane McAdam emphasises that the provisions of the Refugee Convention should be understood within the context of its purpose and objectives, rather than being interpreted too literally or in isolation.[40] She argues that the ground of 'membership in a particular social group' is flexible enough to cover various situations and can be interpreted broadly without linguistic constraints. This approach was exemplified in the 1999 landmark UK case of Shah and Islam, where the court ruled that women facing gender-based persecution could be recognised as members of a 'particular social group' under the 1951 Refugee Convention. This recognition makes them eligible for asylum if their home state is unable or unwilling to provide protection. [41] This judicial interpretation is consistent with guidelines from the United Nations High Commissioner for Refugees (UNHCR), which stresses the importance of a sensitive approach when applying the Convention to cases involving persecution based on gender. [42] Furthermore, this approach acknowledges that a 'particular social group' is understood to consist of people who share an innate characteristic, a common background that cannot be changed, or a shared characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. This interpretation supports broader, more inclusive definitions within the framework of international

[39] Emily Rose Mattheisen, "From Political Tool to Humanitarian Stalemate: A Critical Appraisal of International Refugee Law as a Global Protection Mechanism" (2012) American University in Cairo, Master's Thesis, AUC Knowledge Fountain.
[40] Jane McAdam, 'The Enduring Relevance of the 1951 Refugee Convention' (2017) 29(1) International Journal of Refugee Law 1,9.
[41] Islam (A.P.) v Secretary of State for the Home Department; Regina (Shah) v Immigration Appeal Tribunal and Another (Conjoined Appeals) [1999] UKHL 20, [1999] 2 AC 629.
[42] 'Position on the Interpretation of Article 1 of the Refugee Convention - September 2000' (September 2000).

refugee law. Extending this interpretation, Rafiqul Islam contends that climate refugees could also be considered a particular social group, as they share the common experience of being displaced by environmental factors, thus meeting the Convention's criteria for such a group. [43]

Contrary to Jane McAdam's optimistic views, the UNHCR's guidelines on what constitutes a 'particular social group' are not legally binding and have not been universally accepted, as evidenced by numerous Western court decisions. For instance, in the United States' Matter of A-B-, it has been decided that asylum claims based on acts of violence, including gender-based violence, do not constitute prosecution.[44] Additionally, despite the precedent set by the case of Shah and Islam over three decades ago, gender-based persecution is not widely recognised in practice. Research by Women for Refugee Women, examining the experiences of 72 women fleeing gender-related persecution, found that 67 women had their asylum claims denied.[45] This suggests that the Shah and Islam decision, whilst often cited, does not broadly benefit other women who face similar types of persecution in the private sphere. Frances Webber, a prominent barrister who contributed to the Shah and Islam case, has noted that despite successful legal arguments for expanded interpretations of 'a member of a particular social group' to include gender-based persecution, the actual process of claiming this status remains challenging.[46] This difficulty is exacerbated by a widespread "culture of disbelief" within the UK Border Agency and among immigration judges, which significantly complicates the path to being recognised as a refugee.[47] Thomas Spijkboer's empirical study further supports

[43] Rafiqul Islam, "Climate Refugees and International Refugee Law," in An Introduction to International Refugee Law (2013) 223.
[44] 'Matter of A-B-' (*Matter of A-B- | Center for Gender and Refugee Studies*, 20 March 2023) https://cgrs.uclawsf.edu/our-work/litigation/matter-b#:~:text=The%20Matter%20of%20A%2DB%2D%20decision,A.B. accessed 7 December 2024.
[45] Kamena Dorling, Natasha Walter and Marchu Girma, 'The Experiences of Women Denied Asylum in the UK' (*Women for Refugee Women*, 5 June 2012) https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-reports-refused.pdf accessed 7 December 2024.
[46] Ibid.
[47] Ibid.

this view; in Dutch refugee applications, gender-based persecution such as rape is often dismissed as 'irrational violence' with no identifiable political motive or connection to a particular social group, significantly hindering the recognition of such cases under existing frameworks.[48]

Furthermore, in response to Rafiqul Islam's assertion that climate refugees could qualify as members of a particular social group, the UK's Nationality and Borders Act 2022 illustrates a different stance. The Act emphasises avoiding an overly broad definition of 'membership of a particular social group' that could diminish the importance of other asylum grounds provided by the Convention. [49] It mandates that a particular social group must be identifiable independently of any persecution faced; otherwise, it risks overshadowing other Convention criteria. This requirement complicates the argument that 'climate refugees, ' who are affected by climate-related displacement impacting over 376 million people, could fall under this category, as their situation is not currently recognised as a valid reason for asylum or refugee status.[50] Therefore, it can be argued that there is an urgent need for the Convention to address and resolve the limitations of its specified grounds for asylum, which currently appear inadequate for handling the complex and varied circumstances of modern-day refugees and are prone to misuse by Western countries.

To conclude, this discussion effectively addresses the papers question by revealing a concerning trend in which Western countries adhere to a restrictive definition of persecution requiring state involvement. This interpretation, as evidenced by case law, significantly limits access to asylum. Moreover, the

[48] Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate Publishing, Dartmouth Publishing 2000) 75.
[49] Colinyeo, 'What Is the Refugee Definition in International and UK Law?' (Free Movement, 28 November 2023) https://freemovement.org.uk/what-is-the-legal-meaning-of-refugee/ accessed 7 December 2023.
[50] (The concept of 'Climate refugee' - European parliament) https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf accessed 7 December 2023.

established grounds for persecution are outdated and fail to reflect the current challenges faced by asylum seekers. Therefore, the definition of refugee in the Convention needs to be augmented to better accommodate contemporary forms of displacement and persecution. Adopting this broader interpretation would align more closely with the humanitarian objectives of the Convention. Following this, the subsequent section will examine how Western countries have exploited loopholes in Article 33 of the Refugee Convention to evade their obligations towards Refugees.

3. *Article 33: A Barrier or a Facilitator for Restrictive Western Asylum Practices?*

The 1951 Refugee Convention places the principle of non-refoulement at its core. Article 33(1) provides that no contracting state shall expel or return ("refouler") a refugee to a territory where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. [51] However, this protection is contingent upon the individual being officially recognised as a refugee under Article 1's criteria.[52] Non-refoulement prohibits states from deporting refugees to places where they face threats to their life or freedom, including their country of origin. Whilst this principle specifically protects refugees within the Convention, its application extends to all migrants under broader international human rights law, imposing a duty on states to ensure the safety of any relocation destination.[53] Despite these provisions, challenges have arisen, particularly from Western countries exploiting loopholes to sidestep their obligations under Article 33(1). Part I of this section will explore how Western nations have adopted restrictive interpretations of Article 33(1), which, whilst

[51] Convention Relating to the Status of Refugees, 189 UNTS 150, art 33(1) (1951).
[52] Ibid.
[53] Jenny Poon, 'Non-Refoulement Obligations in EU Third Country Agreements' (*Non-Refoulement Obligations in EU Third Country Agreements | European Database of Asylum Law*, 28 March 2018)

claimed to be in line with the Convention's language, arguably undermine its humanitarian goals. Additionally, Part II of this section will look at the misuse of the Safe Third Country agreements by Western countries to shirk their responsibilities and offload them onto poorer nations. This tactic, as evidenced by case law, serves as a strategy to minimise asylum claims. The discussion will conclude by asserting that Article 33 of the 1951 Refugee Convention is failing to meet its humanitarian objectives. Western countries' restrictive practices and exploitation of loopholes for immigration control, underscore the urgent need for reform to ensure the principle of non-refoulement fulfils its intended purpose of providing robust protection for refugees.

A. Restrictive Interpretations of Article 33

The principle of non-refoulement, enshrined in Article 33 of the 1951 Refugee Convention, faces considerable challenges due to the Convention's non-self-executing nature and the absence of clear enforcement mechanisms. This lack of specificity offers states a wide latitude in interpretation, often leading to a narrow application of non-refoulement that seems at odds with the Convention's humanitarian intentions.[54] Such narrow interpretations hinge on the argument that non-refoulement obligations apply solely to individuals who have physically entered a state's territory, thereby providing a loophole for states to circumvent their international duties. This perspective was notably adopted by the *United States in the landmark case Sale v. Haitian Centers Council (1993)*.[55] In this case, the U.S. Supreme Court ruled that the interdiction and forced return of Haitian refugees at sea, outside U.S. territorial waters, did not breach the principle of non-refoulement. The Court's interpretation focused on the French translation of 'refouler' in Article 33(1) equating it to imply an act of repulsion or exclusion at the border, and thus not applicable to actions in

[54] Ellen F. D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 Vand J Transnat'l L 279.

[55] Sale v Haitian Centers Council, Inc 509 US 155 (1993).

international waters. [56] However, this interpretation overlooks the historical context of the 1951 Convention's drafting. The drafters did not explicitly consider extraterritorial application, largely because the refugee crises they were addressing were predominantly within Europe, involving overland movements post-World War II, and did not contemplate extraterritorial scenarios.[57] In his dissent, Justice Blackmun argued that the majority's presumption against the extraterritorial application of the Convention was both implausible and misapplied, resulting in an unduly narrow interpretation of the term 'return'. [58] The ruling in *Sale v. Haitian Centers Council* reflects a broader trend where states, such as the U.S., employ territorial nuances to limit their asylum obligations. This approach was prefigured by President Ronald Reagan's 1982 interdiction programme, which authorized the U.S. Coast Guard to intercept Haitian vessels in international waters, thereby preventing their arrival on U.S. shores. [59] Such policies underscore a systematic effort to geographically constrain asylum responsibilities. Andrew G. Pizor has argued that these restrictive interpretations fundamentally misrepresent the transnational essence of non-refoulement, which aims to protect refugees regardless of their location relative to potential asylum countries. [60] By adhering to such narrow views, states not only deviate from the Convention's explicit humanitarian goals, but also establish a perilous precedent that weakens the global refugee protection framework. Thus, one can argue that it is imperative that the Convention's provisions be reinterpreted and enforced in a manner that extends protection universally to all refugees, regardless of their geographical location. This approach necessitates moving beyond a narrow, restrictive application of the Convention's stipulations towards a broader, more inclusive interpretation. Such an interpretation aligns with the spirit and

[56] Ellen F. D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 Vand J Transnat'l L 279.
[57] Ibid.
[58] Harold Hongju Koh, 'Justice Blackmun and the "World out There"' (1994) 104(1) The Yale Law Journal 23-31.
[59] President of the United States, Executive Order No 12807, 3 C.F.R. 303 (1992).
[60] Andrew G Pizor, 'Sale v Haitian Centers Council: The Return of Haitian Refugees' (1993) 17 Fordham Int'l LJ 1062.

humanitarian goals of the Convention, ensuring the principle of non-refoulement is applied expansively to safeguard the rights and dignity of refugees globally.

Conversely, Hathaway's analysis posits that the restrictive measures adopted by states are entirely congruent with the language of Article 33 of the 1951 Refugee Convention.[61] He contends that the Convention's text does not explicitly forbid states from taking steps to prevent refugees from entering their territories initially. By closely adhering to the Convention's terminology, specifically the terms 'expel or return,' Hathaway argues, states can maintain sovereign authority over their borders.[62] He believes this interpretation is in direct alignment with the original intent of the Convention's drafters, who intentionally chose language that afforded states a degree of discretion in managing their borders. This is exemplified in the case of the European Roma Rights Center 2003, where the UK government had instituted a "pre-clearance" control at Prague Airport to prevent potential asylum seekers from boarding flights to the UK.[63] This action was taken following a significant increase in asylum claims from Czech nationals, many of whom were Roma. The Court of Appeals upheld this practice, noting that Article 33 does not confer upon refugees an unconditional right to enter the territory of another country.[64] The Convention outlines where refugees may not be sent, rather than obligating states to facilitate their departure from their home countries. This rationale supports the view that states are not required to facilitate the arrival of refugees and can legitimately implement measures to discourage their entry.[65] This stance as discussed above is mirrored in the U.S. Supreme Court's decision in Sale v. Haitian Ctr. Council, endorsing the proactive steps taken by states to prevent refugees from reaching their borders.[66] Hathaway has endorsed this

[61] James C Hathaway, *The Rights of Refugees Under International Law* (2005) 302.
[62] Ibid.
[63] European Roma Rights Ctr v Czech Republic, [2003] EWCA Civ 666.
[64] Ellen F. D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 Vand J Transnat'l L 279.
[65] James C Hathaway, *The Rights of Refugees Under International Law* (2005) 310-311.
[66] Sale v. Haitian Ctr. Council, 509 U.S. 158, 187-88 (1993).

viewpoint, arguing that implementing visa controls and various "non-entrée" measures does not breach the provisions of Article 33.[67] This perspective upholds the prerogative of sovereign nations to manage their borders and security, advocating for a controlled and territory-specific application of non-refoulement. Consequently, Hathaway's critique reinforces the notion that the restrictive policies implemented by states are well within the bounds of Article 33 of the 1951 Refugee Convention.

On the other hand, Ellen F. Dangelo has argued that certain practices, although not explicitly forbidden by Article 33 of the 1951 Convention, clash with its overarching purpose.[68] This viewpoint finds support in the discussions of the Ad Hoc Committee on Refugees and Stateless Persons on February 2, 1950, specifically during the drafting and negotiation stages of the Convention.[69] Representatives from France (Mr. Ordonneau) and the UK (Sir Leslie Brass) acknowledged that the principle of non-refoulement should cover not just refugees within a country but also those at its borders seeking entry. Sir Leslie Brass of the United Kingdom interpreted the discussions to mean that the concept of "refoulement" includes (a) refugees seeking entry, (b) refugees illegally present, and (c) refugees allowed entry on a temporary or conditional basis.[70] This broader interpretation suggests that states have an obligation not only to avoid expelling refugees but also to assess their protection claims upon arrival, thus allowing them access to the asylum process. Consequently, the term "expel or return" in the Convention was likely intended by its drafters to be broadly applied. This interpretation was reinforced by the Belgian co-sponsor, Mr. Cuvelier, during the 22nd meeting of the Ad Hoc Committee, who affirmed that the obligation of non-refoulement extends to a commitment 'not to expel or in any manner [return] refugees', covering 'various methods by

[67] James C Hathaway, *The Rights of Refugees Under International Law* (2005) 310-311.
[68] Ellen F. D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 Vand J Transnat'l L 279.
[69] United Nations, Ad Hoc Committee on Statelessness and Related Problems, 'First Session, 21st Meeting' (2 February 1950) UN Doc E/AC.32/SR.21, at 5.
[70] Ibid.

which refugees could be expelled, refused admittance, or expelled.' [71] Therefore, it becomes clear that the restrictive policies adopted by some states exploit the vague language of the 1951 Convention, undermining its spirit by preventing refugees from accessing borders and other entry procedures. Such actions are at odds with an accurate interpretation of Article 33 and customary international law. Hence, it can be argued that the 1951 Convention requires reform to align with its original goal and the drafters' intent of providing a safe haven for those fleeing persecution. This reform should be rooted in a collective commitment to human rights and dignity, ensuring that the Convention remains relevant and effective in offering protection to refugees.

B. Safe Third Country Agreement

Whilst the 1951 Refugee Convention establishes the principle of non-refoulement, which prohibits states from forcibly returning refugees to territories where they face serious threats to their life or freedom, it does not obligate states to allow refugees entry. [72] This gap has led to the adoption of Safe Third Country Agreement (STCA). These agreements require migrants to seek asylum in the first safe country they enter, rather than in their destination country.[73] Claire Klobucista and Amelia Cheatham, argue that such agreements can undermine refugee safety by potentially directing them to countries where their safety and rights are not guaranteed, thus violating the principle of non-refoulement.[74] This issue is exemplified by the agreement between the United States and Guatemala, known as the STCA, which was signed under the Trump

[71] United Nations, Ad Hoc Committee on Refugees and Stateless Persons, 'Belgium and the United States of America: Proposed Text for Article 24 of the Draft Convention Relating to the Status of Refugees' (2 February 1950) UN Doc E/AC.32/L.25.

[72] Ellen F. D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 Vand J Transnat'l L 279.

[73] Susan Gzesh, '"safe Third Country" Agreements with Mexico and Guatemala Would Be Unlawful' (*Just Security*, 11 February 2020) https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/ accessed 2 March 2024.

[74] 'Can "safe Third Country" Agreements Resolve the Asylum Crisis?' (*Council on Foreign Relations*) https://www.cfr.org/in-brief/can-safe-third-country-agreements-resolve-asylum-crisis accessed 2 March 2024.

administration.[75] This agreement mandates asylum seekers from El Salvador and Honduras to apply for asylum in Guatemala, a country reported by Human Rights First as unable to protect even its own citizens from persecution.[76] The UNHCR has documented over 30,000 asylum claims from Guatemalans in the U.S., highlighting issues such as indigenous persecution, domestic violence, and gang recruitment.[77] The case of *U.T. v. Barr* further illustrates the dilemma faced by asylum seekers under this agreement, being forced to choose between staying in Guatemala, where their safety is at risk, and returning to their countries of origin, where they face persecution.[78]

Thus, it can be argued that the Safe Third Country Agreement, such as those implemented by the European Union with non-EU countries, serve as a mechanism of migration control. These agreements aim to deter asylum seekers from reaching Europe by enabling the EU to sidestep its obligations under international law, including the principle of non-refoulement. Jenny Poon supports this view arguing that these agreements facilitate a process of chain refoulement, potentially leaving claimants in perpetual jeopardy as they are moved from one state to another. [79] Additionally, there are indications that the United States is seeking to establish Safe Third Country agreements with Brazil, El Salvador, and Honduras. [80] This suggests that the Safe Third Country

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[75] Ibid.

[76] Susan Gzesh, '"safe Third Country" Agreements with Mexico and Guatemala Would Be Unlawful' (*Just Security*, 11 February 2020) https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/ accessed 2 March 2024.

[77] Ibid.

[78] Francesco Arreaga, '"Safe Third Country Agreements" Violate the International Law Principle of Non-Refoulement' (2020) Berkeley Journal of International Law https://www.berkeleyjournalofinternationallaw.com/post/safe-third-country-agreements-violate-the-international-law-principle-of-non-refoulement accessed 29 March 2024.

[79] Jenny Poon, 'Non-Refoulement Obligations in EU Third Country Agreements' (*Non-Refoulement Obligations in EU Third Country Agreements | European Database of Asylum Law*, 28 March 2018). https://www.asylumlawdatabase.eu/en/journal/non-refoulement-obligations-eu-third-country-agreements accessed 2 March 2024.

[80] Zolan Kanno-youngs, 'Asylum Deal with Guatemala Is Contentious, despite U.S. Assurances' (*The New York Times*, 1 August 2019) https://www.nytimes.com/2019/08/01/world/americas/asylum-migrants-guatemala-trump.html accessed 3 March 2024.

approach is primarily employed as a strategy to decrease the number of asylum applications, rather than a genuine effort to uphold the standards of refugee protection and adhere to the principle of non-refoulement.

On the contrary, Mark Krikorian has emphasised the significance of safe third-country agreements in managing refugee responsibilities collaboratively between nations, stating that these agreements aim to distribute the obligations related to refugees more evenly, ensuring adherence to Article 33.1 of the 1951 Refugee Convention.[81] Notably, *Thabet v. Minister of Citizenship & Immigration*, saw the Canadian Court of Appeals affirming the validity of such agreements, contingent upon the partner country's adherence to Article 33 of the Convention.[82] This condition underlines the necessity of partnering with nations that not only sign the Convention but also implement Article 33 domestically to safeguard refugees effectively, thus fostering a pro-refugee protection stance.[83] The U.S.-Canada Safe Third Country Agreement exemplifies this approach, illustrating Krikorian's point that both countries offer a secure environment for asylum seekers through their comprehensive asylum systems. Krikorian further argues that a truly desperate individual would seize the first opportunity for safety. In contrast, choosing among options suggests a preference for immigration over immediate protection. Therefore, this agreement aims to prevent 'country shopping' arguably prioritizing those in genuine need.[84] Furthermore, The UNHCR supports the Safe Third Country Agreement, recognising the principle that while each State Party to the 1951 Convention is responsible for processing refugee claims, 'burden-sharing' arrangements that allow for the readmission and status

[81] Audrey Macklin, 'The Value(s) of the Canada-US Safe Third Country Agreement' (2003) Caledon Institute of Social Policy.
[82] 'Thabet v. Canada (Minister of Citizenship and Immigration)' (*Refworld*, 11 May 1998) https://www.refworld.org/jurisprudence/caselaw/canfca/1998/en/20183 accessed 3 March 2024.
[83] Zoe Wilkins, 'The Safe Third Country Agreement and Global Order' (2018) 9(1) Flux: International Relations Review.
[84] Audrey Macklin, 'The Value(s) of the Canada-US Safe Third Country Agreement' (2003) Caledon Institute of Social Policy.

determination in another country are acceptable. [85] These arrangements must ensure the protection of refugees and offer solutions to their issues, thereby making the STCA compatible with Article 33, provided the third country offers adequate protection against refoulement and upholds the refugees' rights under the Convention.[86] By implementing safe third-country regulations, countries create a strategic framework to tackle the challenges of large-scale refugee movements. This framework is designed to more efficiently allocate responsibilities related to refugee accommodation and ensure enhanced protection for refugees.[87] It seeks to balance migration burdens and highlights the importance of safeguarding refugees' rights and welfare as they navigate the complexities of international asylum procedures.[88]

Conversely, what is proposed theoretically frequently faces opposition in practical application. While the STCA may seem to support refugee protection on the surface, it serves as a loophole that Western countries exploit to evade their refugee protection obligations, thereby shifting these responsibilities onto countries in the Global South.[89] An illustration of this practice is Australia's 'Pacific Strategy'. [90] This policy involves deterring asylum seekers from reaching Australia by boat, instead processing them in offshore detention centres, such as those on Nauru and Manus Island in Papua New Guinea.[91] According to the latest figures, 872 asylum seekers, have been detained for periods extending up to five and a half years, as reported in a monthly report

[85] 'Background Note on the Safe Country Concept and Refugee Status' (*UNHCR US*) https://www.unhcr.org/us/publications/background-note-safe-country-concept-and-refugee-status accessed 4 March 2024.
[86] Audrey Macklin, 'The Value(s) of the Canada-US Safe Third Country Agreement' (2003) Caledon Institute of Social Policy.
[87] 'Can "safe Third Country" Agreements Resolve the Asylum Crisis?' (*Council on Foreign Relations*) https://www.cfr.org/in-brief/can-safe-third-country-agreements-resolve-asylum-crisis accessed 2 March 2024.
[88] Ibid.
[89] Jacqueline Lewis, 'Buying Your Way out of the Convention: Examining Three Decades of Safe Third Country Agreements in Practice' (2020) 35 *Georgetown Immigration Law Journal* 881.
[90] Amnesty International, 'Australia-Pacific: Offending Human Dignity - The "Pacific Solution"' (4 June 2021).
[91] Ibid.

on Immigration Detention.[92] Such prolonged detention raises serious concerns about the impact on detainees' mental health and well-being. Amnesty International has condemned the conditions in these detention centres as harsh and, at times, inhumane, accusing Australia of neglecting the fundamental dignity of asylum seekers. [93] Similar strategies are evident in the United States' Caribbean Plan,[94] the EU-Turkey Agreement,[95] and the UK's Rwanda Asylum Plan.[96] These involve agreements with third countries to prevent asylum seekers from arriving in the destination countries, often in exchange for financial aid, with the asylum processing occurring outside the territories of the countries initiating these agreements.[97] These practices highlight a strategic shift to the Safe Third Country rule, effectively transferring the burden of refugee protection from wealthier nations to poorer, transit countries.[98] This shift exacerbates disparities within the international protection system and imposes disproportionate responsibilities on countries that are less capable of providing comprehensive asylum and integration services.[99] Furthermore, these third countries may not be legally bound to offer the full spectrum of protections outlined in the 1951 Convention, including the crucial non-refoulement principle. The underlying problem is that the original Convention, though forward-thinking at its inception, did not foresee the modern

[92] Department of Home Affairs AG, 'Immigration Detention and Community Statistics Summary' (Australia Government Home Affairs, 2 February 2024).
[93] Amnesty International, 'Australia-Pacific: Offending Human Dignity - The "Pacific Solution"' (4 June 2021).
[94] 'Joint Statement of the 2023 Caribbean-U.S. High Level Security Cooperation Dialogue - United States Department of State' (*U.S. Department of State*, 15 December 2023) https://www.state.gov/joint-statement-of-the-2023-caribbean-u-s-high-level-security-cooperation-dialogue/ accessed 1 March 2024.
[95] Kyilah Terry, 'The EU-Turkey Deal, Five Years on: A Frayed and Controversial but Enduring Blueprint' (*migrationpolicy.org*, 8 April 2021) https://www.migrationpolicy.org/article/eu-turkey-deal-five-years-on accessed 1 March 2024.
[96] Hanne Beirens, Samuel Davidoff-Gore, 'The UK-Rwanda Agreement Represents Another Blow to Territorial Asylum' (*migrationpolicy.org*, 7 December 2023) https://www.migrationpolicy.org/news/uk-rwanda-asylum-agreement accessed 1 March 2024.
[97] Jacqueline Lewis, 'Buying Your Way out of the Convention: Examining Three Decades of Safe Third Country Agreements in Practice' (2020) 35 *Georgetown Immigration Law Journal* 881.
[98] Ibid.
[99] Ibid.

challenges of forced migration. The critical distinction it fails to make between prohibiting the return of refugees to danger and the obligation to admit refugees leaves a substantial loophole in international protection mechanisms. This loophole permits Western states to claim adherence to the Convention's provisions by not expelling refugees, yet without offering them any form of asylum or protection within their territories.

Whilst the Convention aims to shield refugees from being forcibly returned to places where they face severe threats, its noble goal is compromised by narrow interpretations and the strategic deployment of Safe Third Country Agreements by Western countries. These measures, though seemingly in line with the Convention's legal framework, have inadvertently twisted its humanitarian aims, often to the detriment of the very refugees it is designed to protect. The subsequent section explores the Rwanda policy, highlighting how the ambiguous wording and legal gaps in Articles 1 and 33 of the 1951 Convention allow for political manoeuvring. This enables UK legislators to devise laws that circumvent their responsibilities towards refugees, effectively repurposing the 1951 Convention as a tool for immigration control.

4. A Thorough Evaluation of the Safety of Rwanda (Asylum and Immigration) Bill

As elucidated in the previous section, there is a notable trend among Western countries to sidestep their responsibilities by relocating asylum seekers to third countries. The United Kingdom has now adopted this approach by delegating its asylum responsibilities to Rwanda, a move that threatens the integrity of the 1951 Refugee Convention. This strategy was initiated by Boris Johnson's Conservative government in April 2022 under the Rwanda Asylum Plan, a controversial scheme that involves deporting asylum seekers from the UK to Rwanda for processing under the Migration and Economic Development Partnership (MEDP). If deemed eligible, these individuals could potentially be resettled in Rwanda. The UK government has portrayed the MEDP as a

mechanism for safeguarding asylum seekers. However, on November 15, 2023, the UK Supreme Court declared this policy unlawful, determining that Rwanda could not be considered a safe destination for transferring asylum seekers.

In response to the Supreme Court's ruling, the UK government drafted a new treaty with Rwanda, the Safety of Rwanda (Asylum and Immigration) Bill, which incorporates additional safeguards and reaffirms Rwanda as a secure haven for asylum seekers. This chapter critically examines the revised Rwanda Bill. Part I explores Rwanda's asylum system's compliance with the 1951 Refugee Convention. While the Home Office asserts alignment with the Convention, investigations by the UNHCR highlight discriminatory practices within Rwanda's asylum framework, presenting a stark contrast to official claims. Part II evaluates whether the bill is an effective legislative solution or simply a political manoeuvre to garner voter support amidst widespread dissatisfaction with the Conservative Party's handling of the escalating cost-of-living crisis and other domestic issues. The discussion concludes by addressing the need for the 1951 Refugee Convention to evolve in response to Western countries repurposing it to suit their political agendas, thus undermining its foundational goals of protecting the rights and safety of refugees worldwide.

A. A Closer Look at Rwanda's Asylum System

The Rwandan asylum system exhibits discriminatory practices that undermine its effectiveness in protecting refugees from the risk of refoulement. According to guidelines published by the UNHCR and the Inter-Parliamentary Union, which emphasise the importance of allowing asylum seekers access to the territory and granting them a temporary right to remain until their claims are adjudicated, the current practices in Rwanda fall short of these international standards.[100]

[100] Country Information Note Rwanda: Annex 2 (UNHCR Evidence) (2021) https://www.gov.uk/government/publications/safety-of-rwanda-asylum-and-immigration-bill-supporting-evidence accessed 10 April 2024.

Investigations by the UNHCR have revealed that Rwandan immigration officials often improperly dismiss asylum applications at initial border checks, specifically targeting applicants based on their nationality. [101] This is particularly prevalent at Kigali Airport, where applicants from Libya, Syria, and Afghanistan are routinely turned away, in direct violation of Article 33 of the 1951 Refugee Convention.[102] This pattern not only demonstrates a systemic failure to uphold the rights of those seeking refuge but also suggests a deeper, institutional bias. Alarmingly, data from 2020 to 2022 indicate that Middle Eastern asylum seekers faced a 100% denial rate in Rwanda for applications from Afghanistan, Syria, and Yemen.[103] This stark contrast to the UK's acceptance rates of 98% for Afghans and 99% for Syrians underscores a significant disparity and suggests a deep-seated prejudice within Rwanda's asylum procedures against individuals from the Middle East, a region that continues to be a major source of global refugees due to ongoing conflicts.[104] These systemic discriminatory practices against Middle Eastern asylum seekers, based on their nationality, violate key provisions of the 1951 Refugee Convention. Particularly, Article 1 defines who qualifies for asylum, and biased treatment compromises this definition by imposing unequal standards that are not supported by the Convention, as outlined in section 1. This biased approach also undermines Article 33, as such discriminatory treatment substantially heightens the risk of refoulement, which is established in section 2. Consequently, individuals transferred from the UK to Rwanda could be unjustly deported to countries where they are at serious risk of harm or persecution due to their nationality. The documented shortcomings of Rwanda's asylum system suggest it is ill-equipped to handle asylum claims

[101] Ibid.

[102] Catherine Briddick, 'The end of the Rwanda Scheme? R (AAA) v SSHD [2023]' (2023) Border Criminologies Blog, University of Oxford https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/06/end-rwanda-scheme-r-aaa-v-sshd-2023 accessed 11 April 2024.

[103] Alice Donald, Joelle Grogan, 'What Are the Rwanda Treaty and the Safety of Rwanda (Asylum and Immigration) Bill?' (*UK in a changing Europe*, 21 March 2024) https://ukandeu.ac.uk/explainers/what-are-the-rwanda-treaty-and-the-safety-of-rwanda-asylum-and-immigration-bill/ accessed 10 April 2024.

[104] Ibid.

both efficiently and fairly. This is in direct contradiction to Clause 2(1) of the Safety of Rwanda (Asylum and Immigration) Bill, which requires decision-makers to automatically classify Rwanda as a Safe Third Country.[105] Such a mandate not only places undue pressure on officials but also forces courts and tribunals, under Clause 2(2), to disregard any evidence to the contrary, thereby shielding their decisions from judicial scrutiny.[106] This approach not only undermines the integrity of asylum decisions but also endangers the safety of vulnerable refugees.

Despite criticism, former Home Secretary Priti Patel defended the Bill asserting that the Convention obligates signatories to protect those seeking refuge but does not specify that protection must be provided within the UK. [107] According to Patel, relocating asylum seekers to a safe third country like Rwanda aligns with both the spirit and the letter of the Convention. Namely, she argues that processing asylum claims in another country does not equate to returning individuals to places where they face persecution.[108] Reinforcing this stance, the Home Office confirmed its collaboration with Rwandan authorities to enhance Rwanda's asylum system. A notable highlight of this effort was a comprehensive five-day training programme conducted from November 20 to 24, 2023.[109] This initiative, organized in partnership with the Rwandan Institute of Legal Practice and Development (ILPD), featured UK experts who trained Rwandan government officials, judiciary members, and representatives of the Bar Association on various aspects of asylum and legal processes, including ensuring there is no persecution based on sexual orientation, gender identity,

[105] Safety of Rwanda (Asylum and Immigration) Act 2023, cl 2(1).
[106] Safety of Rwanda (Asylum and Immigration) Act 2023, cl 2(2).
[107] Charles Hymas, 'There Is an Urgent Moral Imperative to Send Migrants to Rwanda, Says Priti Patel' (*The Telegraph*, 18 May 2022) https://www.telegraph.co.uk/politics/2022/05/18/priti-patel-will-tell-un-refugee-agency-stop-rubbishing-rwanda/ accessed 11 April 2024.
[108] David Cantor, 'Does the UK's Illegal Migration Bill Breach the Refugee Convention?' (*Refugee Law Initiative Blog*, 16 March 2023) https://rli.blogs.sas.ac.uk/2023/03/16/does-the-uks-illegal-migration-bill-breach-the-refugee-convention/ accessed 17 April 2024.
[109] *Country Information Note: Rwanda: Asylum System*, ver 2.1 (January 2024) 66.

or nationality.[110] A manual has also been developed to enhance the capabilities of officials in managing refugee laws and asylum claims effectively, focusing on the application of refugee law during asylum interviews, decision-making, and the crafting of well-reasoned, evidence-based asylum decisions.[111] The UK Home Office and the Government of Rwanda (GoR) have asserted that this approach will prevent the discriminatory application of the law based on nationality.[112] As signatories of the Refugee Convention, both the UK and Rwanda are committed to adhering to international standards in refugee treatment as stipulated in Clause 1(6) of the Rwanda Bill.[113] Furthermore, Clause 3(c) of the Bill mandates Rwanda to improve its procedures for handling protection claims by asylum seekers.[114] This includes implementing a caseworker model designed to enhance the efficiency and reliability of the process from start to finish. To ensure the fairness and quality of asylum decisions, Rwanda has committed to consulting an independent expert, not affiliated with the government, for at least six months before rejecting any claim.[115] This step is intended to prevent wrongful rejections based on nationality, addressing the UNHCR highlighted above. These enhancements, along with a commitment to better training and procedural integrity as highlighted by the current Home Secretary James Cleverly, are designed to alleviate UNHCR concerns and improve Rwanda's adherence to the Refugee Convention.[116] Additionally, during a debate in the House of Commons, Priti Patel highlighted that despite some minor flaws in the asylum system, which the UK Home Office is actively working to rectify, Rwanda is largely

[110] Ibid.
[111] *Government of Rwanda*, 'Country Information Note Rwanda: Annex 1' (Version 1.0, December 2023).
[112] Ibid.
[113] 'Safety of Rwanda (Asylum and Immigration) Bill' (*UK Parliament*) https://publications.parliament.uk/pa/jt5804/jtselect/jtrights/435/report.html accessed 17 April 2024.
[114] Safety of Rwanda (Asylum and Immigration) Act 2023.
[115] *Country Information Note: Rwanda: Asylum System*, ver 2.1 (January 2024) 45.
[116] Home Office, Letter from the Home Secretary to Lord Goldsmith, 11 January 2024 https://committees.parliament.uk/publications/42871/documents/213213/default/ accessed 12 April 2024.

considered a safe country, having successfully resettled over 130,000 refugees.[117]

Conversely, the effectiveness of solely relying on a mere five-day training session and a manual to rectify the deep-rooted deficiencies in Rwanda's asylum system is questionable. This scepticism is heightened by the fact that while the UNHCR verified that Rwanda's 2014 Law Relating to Refugees was compliant with international standards and comprehensive in its approach to fair claim processing without nationality-based discrimination, discriminatory practices persisted during that time.[118] For example, on March 24, 2022, two Afghan nationals at Kigali airport were denied asylum and subsequently refouled to Afghanistan, despite the risk posed by their associations with international forces. Additionally, on April 8, 2022, a Syrian national was deported to Syria via Turkey, ignoring the UNHCR's stressed need for protection.[119] These incidents demonstrate a profound disconnect between Rwanda's official asylum policies and their implementation. Consequently, one may suggest that the creation of another procedural document coupled with five days of training is unlikely to effectively tackle entrenched systemic challenges.

Furthermore, contrary to Petal's assertions, which Sian Norris has refuted, Rwanda has not resettled over 130,000 refugees.[120] Instead, it is merely providing shelter as they reside in refugee camps; by December 2021, nearly 30,000 refugees had voluntarily repatriated to Burundi.[121] The mere presence of a large refugee population does not inherently make a country safe, and this

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[117] Hansard, 'Global Migration Challenge', vol 712, debated on 19 April 2022.
[118] *Country Information Note: Rwanda: Asylum System*, ver 2.1 (January 2024) 9.
[119] Country Information Note Rwanda: Annex 2 (UNHCR evidence), Version 1.0 (December 2023) 127.
[120] Sian Norris, 'Doubts Cast over Home Secretary's Claim That EU Has Resettled Refugees in Rwanda' (*Byline Times*, 20 May 2022) https://bylinetimes.com/2022/05/23/doubts-cast-over-home-secretarys-claim-that-eu-has-resettled-refugees-in-rwanda/ accessed 12 April 2024
[121] 'Rwanda' (*UNHCR*) https://www.unhcr.org/countries/rwanda accessed 12 April 2024.

number does not reflect the actual conditions, safety, well-being, or fairness of the asylum processes. This issue is underscored by the tragic events of February 2018 at Rwanda's Kiziba refugee camp, where 12 Congolese refugees were killed during confrontations with the Rwandan police whilst protesting poor living conditions and reductions in food rations.[122] Therefore, it can be argued that the asylum system in Rwanda is not safe. By transferring individuals to a system that exhibits such discriminatory flaws, the UK could be complicit in exposing them to the very dangers the Refugee Convention seeks to prevent. The deal between Rwanda and the UK appears to be a strategy to deter refugees from seeking asylum in the UK, effectively outsourcing protection responsibilities to Rwanda, a practice like those adopted by other Western countries, as discussed in section 2.

B. The Rwanda Bill: A Tool for Political Leverage?

The Rwanda Safety Bill, ostensibly designed to regulate asylum procedures, seems to be primarily driven by political considerations rather than a genuine commitment to upholding international asylum standards. The timing of the bill's introduction particularly highlights this notion. Proposed initially as part of the UK and Rwanda Migration and Economic Development Partnership by the British government in 2022, this period coincided with notable political turmoil in the UK, evidenced by a severe cost-of-living crisis. By October 2022, the annual inflation rate had surged to 11.1%, the highest in 41 years, prompting the Bank of England to raise interest rates to 5.2%.[123] The economic situation continued to deteriorate; between April and September 2023, the Trussell Trust Food Bank charity distributed 1.5 million emergency food

[122] 'Rwanda: A Year on, No Justice for Refugee Killings' (*Human Rights Watch*, 28 October 2020) https://www.hrw.org/news/2019/02/23/rwanda-year-no-justice-refugee-killings#:~:text=Police%20sent%20to%20guard%20the,director%20at%20Human%20Rights%20Watch. accessed 12 April 2024.

[123] 'Rising Cost of Living in the UK - House of Commons Library' (*UK Parliament*, 23 April 2024) https://commonslibrary.parliament.uk/research-briefings/cbp-9428/ accessed 23 April 2024.

parcels, underscoring escalating hardship.[124] The healthcare system also faced considerable strain, with Referral to Treatment statistics from February 2024 showing that 7.54 million cases were on the waiting list, involving approximately 6.29 million individual patients awaiting treatment.[125] Additionally, a survey by the Office for National Statistics in March and April 2024 reported that 56% of adults in Great Britain experienced an increase in living costs over the previous month, further emphasising the economic strain.[126]

As of June 2023, the latest Ipsos poll revealed that eight in ten Britons were dissatisfied with how the government was managing the country, with an Ipsos poll suggesting that 47% of voters were considering supporting Labour in the next election.[127] Amidst this widespread dissatisfaction with the Conservative Party's performance, the Rwanda Safety Bill was strategically pushed by the Conservatives to divert public attention from pressing domestic issues. [128]Over the past couple of years, amidst these crises, the government has refocused public discourse on immigration issues. This shift particularly resonates with Conservative supporters, who exhibit a strong desire for reduced immigration. A poll conducted by Redfield & Wilton for UK in a Changing Europe supports this, revealing that 61% of Conservative voters consider immigration a crucial issue, viewing it as a solution to various national problems.[129] For a long time, the Conservative Party has promoted an anti-immigration stance, often

[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Gideon Skinner, 'Eight in Ten Britons Are Dissatisfied with How The Government Is Running The Country' (*Ipsos*, 23 June 2023) https://www.ipsos.com/en-uk/eight-ten-britons-are-dissatisfied-how-government-running-country accessed 19 April 2024.
[128] Polly Toynbee, 'Sunak is praying for the Lords to block the Rwanda bill – so he can blame the left' (*The Guardian*, 18 January 2024) https://www.theguardian.com/commentisfree/2024/jan/18/rishi-sunak-lords-block-rwanda-bill-blame-left-asylum-seekers accessed 23 April 2024.
[129] John Curtice, 'Is Immigration Costing the Conservatives Votes?' (*UK in a changing Europe*, 27 February 2024) https://ukandeu.ac.uk/is-immigration-costing-the-conservatives-votes/#:~:text=In%20the%20latest%20poll%20conducted,%25)%20feel%20the%20same%20way. accessed 21 April 2024.

blaming asylum seekers for the UK's domestic issues. This is evident from the Home Office statement, which states, "we cannot continue, year on year, with this inexorable rise in the number of illegal arrivals adding unacceptable pressures on our health, housing, educational, and welfare services."[130] Hence, it can be asserted that this strategic shift is an effort to secure voter support by manipulating public attention, especially with the general election approaching in January 2025.

On the other hand, the UK government has continued to defend the Rwanda bill, stating that it is essential for effective immigration management and safeguarding asylum processes.[131] Home Secretary James Cleverly, highlights that many asylum seekers making perilous journeys to the UK are driven not by the threat of persecution but by the pursuit of economic opportunities.[132] This misuse of the asylum system reportedly burdens British taxpayers with costs around £3 billion annually, according to the latest Home Office figures.[133] Such financial implications underline the urgent need for controlled immigration.[134] The Conservative Party argues that this legislation will streamline the deportation process, reduce illegal immigration, and discourage dangerous Channel crossings, as evidenced by a stark increase in arrivals by

[130] 'Illegal Migration Bill: Overarching Factsheet' (*GOV.UK*, 20 July 2023) https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/illegal-migration-bill-overarching-factsheet#:~:text=We%20cannot%20continue%2C%20year%20on,housing%2C%20educational%20and%20welfare%20services. accessed 22 April 2024.
[131] 'Safety of Rwanda (Asylum and Immigration) Bill' (*UK Parliament*) https://publications.parliament.uk/pa/jt5804/jtselect/jtrights/435/report.html accessed 17 April 2024.
[132] Peter William Walsh and Madeleine Sumption, 'UK Policies to Deter People from Claiming Asylum' (*Migration Observatory*, 4 April 2023) https://migrationobservatory.ox.ac.uk/resources/commentaries/uk-policies-to-deter-people-from-claiming-asylum/ accessed 21 April 2024.
[133] 'Illegal Migration Bill: Overarching Factsheet' (*GOV.UK*, 20 July 2023) https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/illegal-migration-bill-overarching-factsheet accessed 22 April 2024.
[134] Ibid.

small boats, from 5,049 in April 2023 to over 6,265 in April 2024, marking a 24% rise.[135]

Additionally, the UK government has justified choosing Rwanda as a partner in managing asylum processes, following a March 2022 UNHCR review which praised Rwanda for its adherence to the non-refoulement principle, confirming no violations in the previous year.[136] This endorsement establishes Rwanda as a reliable and safe destination for asylum seekers, in line with the 1951 Refugee Convention. Home Secretary Cleverly, in a Letter corresponding to Lord Goldsmith, pointed to Clause 3(a) of the Rwanda Bill.[137] This clause guarantees that individuals relocated to Rwanda who are unable to apply for asylum will have the option to return to the UK. This provision adds an extra layer of protection for asylum seekers, minimizing refoulement risks and aligning with Article 33(1) of the 1951 Refugee Convention. It aims to reinforce legal and procedural safeguards, ensuring safe asylum processing and protecting the rights of vulnerable refugees.

Conversely, in his correspondence with Lord Goldsmith, the Home Secretary overlooked a crucial legal inconsistency when discussing the Rwanda Bill's stipulation under Clause 3(a), which is that the provisions of the Illegal Migration Act 2003, prohibit the return of individuals who have been transferred to a safe third country. This oversight highlights a significant legal paradox, effectively trapping asylum seekers in a precarious limbo. Within this framework, asylum seekers find themselves unable to obtain refugee status in Rwanda, whilst also being legally precluded from returning to the UK. This contradiction not only complicates the legal landscape but also raises serious concerns about the humanitarian implications of these policies.

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[135] Ibid.

[136] *Country Information Note: Rwanda: Asylum System*, ver 2.1 (January 2024) 62.

[137] Home Office, Letter from the Home Secretary to Lord Goldsmith, 14 January 2024 https://committees.parliament.uk/publications/42871/documents/213213/default/ accessed 12 April 2024.

Additionally, the Home Office's reliance on the UNHCR's 2021 analysis of Rwanda's refoulement practices overlooks the unique context of that year, which was significantly impacted by severe COVID-19 lockdowns, particularly in Kigali, Rwanda's capital.[138] These restrictions likely altered typical migration and asylum-seeking patterns. Therefore, using data from this atypical period to affirm Rwanda's adherence to the non-refoulement principle in its refugee policies might be misleading. Instead, if the UK government truly intends to verify Rwanda's compliance with Article 33 of the Refugee Convention, it should closely examine Rwanda's arrangement with Israel, known as the 'voluntary departure' programme.[139] This initiative predominantly involved the transfer of African asylum seekers from Eritrea and Sudan, who had initially sought refuge in Israel, to Rwanda. Under this programme, detained asylum seekers were given a stark choice: indefinite detention or relocation to Rwanda. [140] In the case of *Tsegeta v MOI*, the Israeli District Court, echoing a stance like that of the UK Home Office, ruled that there was no substantial evidence to suggest that transferees would face danger in Rwanda, thereby declaring it a safe country. [141] However, a study by the UNHCR, which investigated the experiences of 80 Sudanese and Eritrean asylum seekers transferred to Rwanda between 2013 and 2018, uncovered that several individuals were secretly transported to Uganda, despite assurances of safety and protection in Rwanda. [142] This action calls into question Rwanda's reliability as a safe host for asylum seekers and indicates a breach of the fundamental principle of non-refoulement by indirectly transferring these individuals to Uganda. Additional testimonies from several hundred transferred individuals highlight their struggles with repeated arrests, securing

[138] (U.S. Embassy in Rwanda, 26 July 2021) https://rw.usembassy.gov/alert-additional-areas-of-rwanda-locked-down-from-july-28-august-10-2021/ accessed 20 April 2024.
[139] Shani Bar-Tuvia, 'Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the (Il)Legality and (Im)Morality of Western Externalization Policies' (2018) 30 International Journal of Refugee Law 474.
[140] Ibid.
[141] Ibid.
[142] Ilan Lior, 'Asylum Seekers Who Left for Rwanda: We Were Immediately Deported to Uganda' (Haaretz, 22 May 2015) http://www.haaretz.co.il/news/education/.premium-1.2642650 accessed 14 April 2024.

accommodation, and employment, together with barriers to securing asylum and maintaining a stable life in Rwanda.[143] Subsequently, many asylum seekers felt compelled to leave Rwanda due to inadequate protection, highlighting a significant discrepancy between Rwanda's declared commitments and their actual implementation.[144] This gap jeopardizes the safety and well-being of asylum seekers. Moreover, the 'voluntary departure' programme ultimately collapsed in January 2018, shortly after its announcement, underscoring the impracticality and potential risks associated with relying on Rwanda as a safe third country for asylum seekers. [145] Given Rwanda's track record of failing to uphold its commitments, as evidenced by systematic issues within its asylum system, it is reasonable to anticipate that the Rwanda Safety Bill might follow a similar trajectory to the previous agreements between Israel and Rwanda. If passed, the bill may be destined to fail within a few years, reflecting the ongoing challenges in ensuring reliable asylum practices.

Furthermore, the UK government's financial commitment to the Rwanda resettlement plan reveals deeper, politically driven motives. An investment of £240 million into the scheme, with estimated deportation costs soaring to £154,000 per individual, contrasts sharply with the plan to resettle only 300 refugees over three years. [146] This figure is strikingly inadequate against the backdrop of a global refugee crisis, making the impact on the UK's immigration statistics negligible. [147] Over a five-year period, the total estimated cost of £540 million underscores the economic inefficiency of the policy, which involves

[143] Ibid.
[144] Ibid.
[145] Shani Bar-Tuvia, 'Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the (Il)Legality and (Im)Morality of Western Externalization Policies' (2018) 30 International Journal of Refugee Law 474.
[146] Peter William Walsh, 'Q&A: The UK's Policy to Send Asylum Seekers to Rwanda' (*Migration Observatory*, 10 January 2024) https://migrationobservatory.ox.ac.uk/resources/commentaries/qa-the-uks-policy-to-send-asylum-seekers-to-rwanda/ accessed 11 April 2024.
[147] Simon McDonald, 'Peers Know the Rwanda Bill Is Flawed and Dangerous. We Must Use Every Power to Oppose It' (*The Guardian*, 14 April 2024) https://www.theguardian.com/commentisfree/2024/apr/14/rwanda-bill-peers-house-of-lords-amendments-commons-legislation accessed 17 April 2024.

exorbitant expenditures for relocating a relatively small number of asylum seekers.[148] Moreover, the low likelihood of actual deportation under this bill does little to deter new asylum seekers, who are often compelled to undertake perilous journeys by dire circumstances rather than choice.[149] Contrary to assertions by the Home Secretary that individuals are abusing the asylum system and not fleeing prosecution, research from the Migration Observatory at the University of Oxford presents a different reality.[150] The data indicates that many arriving by boat are escaping from countries such as Afghanistan, Iran, Eritrea, and Iraq, all of which are engulfed in considerable political turmoil.[151]

Additionally, international comparisons highlight the UK's relatively low intake of refugees. According to Professor David Cantor and data from the Pew Research Centre, illegal immigrants constitute less than 2% of the UK's total population, suggesting that the perceived immigration problem may be overstated by certain political narratives.[152] Tirana Hassan, Executive Director of Human Rights Watch, has criticised the motivations behind such policies as being more about garnering voter support than addressing the real needs of vulnerable populations.[153] These factors together paint a picture of a policy that is not only unsustainable but also likely driven more by political tactics than by

[148] Rajeev Syal, 'Rwanda Plan to Cost UK £1.8m for Each Asylum Seeker, Figures Show' (*The Guardian*, 1 March 2024) https://www.theguardian.com/uk-news/2024/mar/01/rwanda-plan-uk-asylum-seeker-cost-figures#:~:text=1%20month%20old-,Rwanda%20plan%20to%20cost%20UK%20%C2%A31.8,each%20asylum%20seeker%2C%20figures%20show&text=Rishi%20Sunak's%20flagship%20plan%20to,official%20spending%20watchdog%20has%20disclosed. accessed 22 April 2024.

[149] Ibid.

[150] 'Asylum and Refugee Resettlement in the UK' (*Migration Observatory*, 27 January 2023) https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/ accessed 20 April 2024.

[151] Ibid.

[152] David Cantor, 'Does the UK's Illegal Migration Bill Breach the Refugee Convention?' (*Refugee Law Initiative Blog*, 16 March 2023) https://rli.blogs.sas.ac.uk/2023/03/16/does-the-uks-illegal-migration-bill-breach-the-refugee-convention/ accessed 17 April 2024.

[153] Tova Tabacsko, Immigration as a Threat to the British State: A Policy Analysis of the United Kingdom and Rwanda Migration and Economic Development Partnership in the Broader Context of the UK's Stricter Immigration Policy (2023).

effective migration management or humanitarian concern. Such an approach not only threatens to undermine the integrity of the 1951 Refugee Convention but also calls into question the UK's commitment to its obligations under international law, raising serious ethical and fiscal concerns about the government's strategy.

In conclusion, it has been demonstrated that Rwanda does not offer a secure haven for transferred asylum seekers. A stark discrepancy exists between the policy rhetoric promoted by the UK Home Office and the Home Secretary in support of the Rwanda Bill, and the actual practices within Rwanda's asylum system. Despite assurances from the UK Home Office regarding Rwanda's safety and adherence to international norms, the prevailing evidence of systemic discrimination and a significant risk of refoulement casts serious doubts on the integrity and equity of the Rwandan asylum system. Moreover, the motivations underlying the Rwanda Bill seem to be primarily influenced by political considerations in the UK rather than by a sincere commitment to uphold the principles of the 1951 Convention. Thus, it is evident that the 1951 Convention is being repurposed to align with the UK government's narrative. This critical analysis emphasises the urgent need for the Convention to be revised to prevent Western countries from exploiting it as a tool for immigration control, ensuring it continues to uphold the fundamental principles of protecting refugees.

5. Conclusion

In conclusion, this research demonstrates that the 1951 Refugee Convention does not prevent Western countries from using it as a tool for immigration control. The paper delves into the complex interplay between the legal frameworks of the Convention and the contemporary practices of these countries in managing refugee and asylum policies. It uncovers a concerning and growing trend whereby the protective mandate of Articles 1 and 33 is often

compromised by restrictive interpretations that prioritise immigration control over humanitarian duties. Through detailed discussion, this paper illustrates that whilst the Convention is intended to provide sanctuary and rights to refugees, Western nations often manipulate these objectives to align with their national immigration strategies. This analysis not only highlights the discrepancies in application but also calls for a critical reassessment of how these laws are enacted in practice.

Initially, section one begins with a critical examination of Article 1 of the convention, delving into the complexities of defining 'refugee' status and the criteria for persecution. It reveals how Western nations, including the United States, Germany, Switzerland, Austria, France, Finland, New Zealand, and the UK, exploit the ambiguous and restrictive language of Article 1 to limit who qualifies as a refugee. These countries impose stringent interpretations of 'persecution,' thereby significantly narrowing the criteria for asylum. The discussion also critiques the five grounds of persecution defined by the convention as outdated, noting their inadequacy in addressing modern challenges such as displacement caused by environmental catastrophes, climate change, and gender-based violence, which do not conform to the 1951 criteria for refugee status. It argues convincingly that the antiquated and vague nature of Article 1's definition is manipulated by these Western states, transforming the convention from a protective framework for refugees into a regulatory mechanism for controlling immigration.

Following, from this Section two of the paper provides a critical analysis of the principle of non-refoulement under Article 33 of the 1951 Refugee Convention, which is essential for refugee protection. The discussion points out that Western countries, including the UK, USA, Canada, and Australia, often interpret Article 33 in a restrictive manner to circumvent their refugee protection obligations. These nations utilise the Safe Third Country Agreements to externalise their international responsibilities towards refugees. It is argued that these agreements often prioritise national interests over

international obligations and humanitarian considerations. It also examines various judicial decisions and policies, demonstrating a trend among Western nations to minimise their asylum responsibilities by exploiting legal loopholes and engaging in restrictive practices. Through this analysis, section 2 underscores the need for a more humane and legally consistent application of the Refugee Convention to ensure it serves its intended purpose of protecting refugees.

Finally, section three presents a case study on the Safety of Rwanda Bill to illustrate the practical implications of the issues explored in the initial discussions. This section provides a critical analysis of the UK's strategy to delegate asylum responsibilities to Rwanda. The findings indicate that despite claims from the UK government about Rwanda compliance with the Convention's standards, the actual implementation in Rwanda's asylum system is plagued with flaws and discriminatory practices. The discussion concludes that such legislative actions, which effectively repurpose the Refugee Convention, not only compromise the safety of refugees but also reflect a wider pattern among Western nations. These countries appear to utilise refugee protection laws more as mechanisms for managing immigration, rather than as means to safeguard the rights and well-being of refugees.

The findings highlight the critical need to reform international refugee policies beyond mere legal compliance, aiming instead, to fully embody the humanitarian principles central to the Refugee Convention. For the Convention to maintain its relevance and efficacy in the 21st century, it is imperative that countries collectively work to eliminate the loopholes that permit its misuse. Such reforms are essential for the Convention to uphold its role as a global benchmark for refugee protection, ensuring it acts as a safeguard against persecution rather than a tool for political manipulation.

This research contributes significantly to the expanding scholarly debate on the relevance of the 1951 Refugee Convention in today's world. It provides a

thorough critique of how Western countries increasingly interpret the Convention in restrictive ways, particularly focusing on Articles 1 and 33. The research demonstrates how legal interpretations, often influenced by political motives, can transform a framework intended for protection into a mechanism for immigration control. By examining legislative measures such as the Safety of Rwanda Bill and key case law, the research underscores major departures from the humanitarian ideals at the heart of the Convention. It shows the intricate forces shaping the current asylum landscape and underscores the critical need for re-evaluating and rejuvenating the Convention's fundamental humanitarian goals. Despite its valuable insights, the study encounters several limitations that impact its depth. The need to adhere to a restricted word count has influenced the selection of specific case studies and legislative instances, leaving out other potentially insightful contexts and analyses that could enrich the discussion. Furthermore, given that the Safety of Rwanda Bill is a recent development, there is limited academic research available on its practical effects, making its current assessment provisional.

Finally, it is recommended that future research conduct longitudinal studies on the Safety of Rwanda Bill and similar legislation to assess their long-term effects on refugee protection and rights. There is an urgent need for empirical research that includes interviews with refugees and asylum seekers. This approach will illuminate the human consequences of the policies under review, revealing practical challenges and lived experiences that are often overlooked in legal and policy analyses. These insights could inform the development of the Refugee Conventions. By delving into these areas, future research can build on the findings of this paper, enhancing understanding and contributing to the formulation of more effective and humane asylum policies globally that aligns with the Convention.

DISCRIMINATION BIAS IN AI: EXAMINING UK LEGISLATION AND POLICY TO COUNTER DISCRIMINATION WITHIN PREDICTIVE POLICING AI

Swati Krishnakumar

Abstract

Predictive policing (PP) is an algorithmic tool, whose purpose is twofold: police officers use PP to identify both potential offenders and victims. PP artificial intelligence (AI), particular, has rapidly progressed and vastly increased the police's capacity to process individuals' data. Despite aims of improving the accuracy and objectivity of decision-making, and police resource allocation, the adverse potential of PP to perpetuate discrimination has been largely overlooked by the government, who continue to encourage its usage. Therefore, this paper advocates for robust statutory measures to mitigate discrimination in PP decision-making. Actual implementation of such measures may seem unlikely, given the government's general reluctance to enact AI legislation. However, this paper presents a clear argument on how current PP tools lead to widespread discrimination, leaving little room for the government to disregard the dangerous effects of PP. By comparing the discriminatory effects of a now discontinued PP tool with those of another which is still employed, the inadequacies of current legislation and policy are identified and examined. Consequently, this paper advises that the UK can learn from recent EU AI legislation; the UK should use the EU's approach as a foundation for constructing its own more holistic legislation. Current literature largely assesses EU legislation as a whole, rather than identifying specific algorithmic issues affecting individuals. Therefore, this paper aims to bridge the literary gap, promoting the protection of individuals. This is important because the UK Government currently prioritises innovation and economic gain, over individuals' right to non-discriminatory police practices.

1. Introduction

Historically, crime detection has operated reactively - with law enforcement responding to crime as it occurs - rather than proactively through the use of data.[1] However, currently the advancement of artificial intelligence (AI) allows law enforcement to collect and analyse extensive information on people who have never even encountered the criminal justice system.[2] Thus, the ability of the police to access vast amounts of data, as well as the rapid growth of technology, has facilitated the shift towards proactive and predictive policing (PP).[3] AI is now used to forecast potential crime, grounded in the principle that "crime is not randomly distributed across people or places".[4]

The use of AI PP has substantial Government backing, who aim to "empower the police to use new technologies…in a way that maintains public trust".[5] However, as will be established within Section Two, AI's risks result in the discrimination of individuals subjected to such processing[6]. This has been of particular concern within the past year; in August 2023, the Government outlined their plan to leave AI largely unlegislated within their White Paper, 'A pro-innovation approach to AI regulation'.[7] In doing so, academics argue that the Government "misses a vital opportunity to … [safeguard] … fundamental rights".[8] The White Paper adopts a vastly different approach from that of the European Union, which legislated the EU Artificial Intelligence Act

[1] Sarah Brayne, 'Big Data Surveillance: The Case of Policing' (2017) 82(5) ASR 977, 978.

[2] Mirko Bagaric, Jennifer Svilar, Melissa Bull, Dan Hunter, and Nigel Stobbs, 'The Solution to the Pervasive Bias and Discrimination in the Criminal Justice System: Transparent and Fair Artificial Intelligence' (2021) 59(1) ACLR 95,112.

[3] Kia Rahnama, 'Science and Ethics of Algorithms in the Courtroom' [2019] JLTP 169, 173.

[4] Sarah Brayne and Angele Christin, 'Technologies of Crime Prediction: The Reception of Algorithms in Policing and Criminal Courts' [2020] SP 1,3.

[5] Home Office, *Written Evidence*, (NTL0055, 2021).

[6] Marion Oswald et al. 'Algorithmic risk assessment policing models: lessons from the Durham HART model and 'Experimental' proportionality' (2018) 27(2) ICTL 223, 228.

[7] Department for Science, Innovation and Technology, *A pro-innovation approach to AI regulation* (White Paper, CP 815, 2023).

[8] Public Law Project et al., 'Key principles for an alternative AI white paper' [2023] PLP 1,2

(EAIA) in March 2024.[9] As will be examined, the EAIA will demonstrate the necessity for legislative safeguards to protect individuals against AI discrimination.

This paper argues that the White Paper[10] and current anti-discrimination legislation are inadequate to protect individuals against PP AI discrimination, thus requiring robust legislation and safeguarding measures. Using 'conventional doctrinal research', the discussion will be conducted as follows. Section Two outlines the definitions pertinent to the issues within this paper. This includes the definitions of various algorithmic processes, the role of these processes within the tools 'Gangs Violence Matrix' (GVM)[11] and 'Harm Assessment Risk Tool' (HART)[12], and the definition of discrimination. Section Three argues that current use of PP results in discrimination by comparing the PP tools, GVM and HART. This is largely because PP incorporates unrepresentative data, is unevenly implemented, and inadequately transparent, thus hindering individuals in bringing recourse claims. The latter is particularly evident when considering the lack of case law, versus the highly discriminatory outcomes PP produces. Additionally, Section Three argues that current legislation, as well as the government's White Paper,[13] is inadequate for protecting individuals against PP discrimination.

Finally, Section Four advises statutory and abstract reforms the Government should consider to mitigate discrimination. There is minimal literature which compares the UK and EU's approach concerning the specific AI issues

[9] Department for Science, Innovation and Technology (n7); European Union Artificial Intelligence Act 2024.

[10] Department for Science, Innovation and Technology (n7).

[11] Metropolitan Police, 'Gangs Violence Matrix' (*met.police.uk, 2012*) <https://www.met.police.uk/police-forces/metropolitan-police/areas/about-us/about-the-met/gangs-violence-matrix/> accessed 12 January 2024.

[12] Centre for Public Impact, 'Durham Constabulary's AI decision aid for custody officers: A case study on the use of AI in government' [2018] CPI 2, 3.

[13] Department for Science, Innovation and Technology (n7).

discussed within this paper.[14] However, Schuett argues that the EAIA is likely to serve as a benchmark for future UK regulations.[15] Therefore, the EAIA is assessed when advising on specific measures for PP improvement. It must be noted that the UK signed a bi-lateral AI agreement with the US on 1st April 2024.[16] However, due to being extremely recent, it is yet to be seen whether the agreement addresses any of the issues highlighted within this paper. Therefore, this paper will provide a solid understanding of the issues to be overcome and suggests that later research uses this as a guide for assessing the adequacy of the agreement. It is likely that this suggested research will only be feasible after a substantial amount of case law emerges. As a result, the analysis and subsequent recommendations within this paper will exclusively assess the White Paper[17] and current UK legislation.

2. *Dissecting 'Gangs Violence Matrix', 'Harm Assessment Risk Tool', and Discrimination*

This section provides a theoretical understanding of the key concepts used within this paper. The discussion will begin by providing an understanding of both AI and 'algorithmic decision making' (ADM). Although ADM is not the main focus of the paper, it is included as part of the discussion due to its comparison with the AI tool analysed in Section Three. Following this, the discussion will provide an overview of two types of AI tools used within PP. Lastly, the Section will analyse the concept of 'discrimination', seeking to establish its definition in the context of the topic of the present discussion. This is essential to determine relevant legal safeguards and principles within Section Three.

[14] Jonas Schuett, 'Risk management in the Artificial Intelligence Act' [2022] CU 1,4.

[15] Ibid 2.

[16] Department for Science, Innovation and Technology, AI Safety Institutue, and The Rt Hon Michelle Donelan MP 'UK & United States announce partnership on science of AI safety' (*GOV.UK*, 2 April 2024) <https://www.gov.uk/government/news/uk-united-states-announce-partnership-on-science-of-ai-safety> accessed 7 April 2024.

[17] Department for Science, Innovation and Technology (n7).

A. Defining Algorithmic Decision Making and Artificial Intelligence

ADM refers to decisions based on data made by automated means without human involvement.[18] ADM works by analysing extensive datasets to infer correlations; these can additionally be used to inform AI PP tools.[19] However, AI is a more complex tool, defined by researching communities as a "methodology for using a non-human system to learn from experience and imitate human intelligent behaviour".[20] Additionally, data protection scholars define AI as "computer systems that…perform tasks that normally require human intelligence".[21] Thus, both definitions highlight AI's technological learning resembling human cognition. This is reflected in UK legislation, which defines AI as "technology enabling the programming or training of a device or software to…[i] interpret data using automated processing designed to approximate cognitive abilities and [ii] make recommendations, predictions or decisions".[22] As PP tools interpret data resembling human cognition to present risk prediction, both the academic and legal definitions adequately define PP AI tools for the purposes of this paper.

A brief overview of how these technologies work must be provided in order to illustrate the complexity of AI. 'Machine learning' is a type of AI technology used within PP, whereby vast amounts of data are used to train complex

[18] ICO, 'What Is Automated Individual Decision-Making and Profiling?' (*ico.org.uk*, 17 October 2022) <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/individual-rights/automated-decision-making-and-profiling/what-is-automated-individual-decision-making-and-profiling/#id2> accessed 6 October 2023; Metropolitan Police (n11).

[19] European Parliamentary Research Service, 'Understanding Algorithmic Decision-Making: Opportunities and Challenges' (2019) 1(2) EPRS 1.

[20] BCS The Chartered Institute for IT, 'BCS Essentials Certificate in Artificial Intelligence Syllabus' (2023) 1(2) BCS 1.

[21] Ida Joiner, *Emerging Library Technologies, It's Not Just for Geeks*, 1 (1st Edition, Chandos Publishing 2018) 11–22.

[22] National Security and Investment Act 2021, sch 3.

statistical models.[23] These models are then able to make predictions using new data.[24] The extensive data training results in models that draw conclusions in a non-linear manner.[25]

'Deep learning' is a more complex form of machine learning, integrating neural networks with multiple layers.[26] These layers consist of input nodes linked to 'hidden nodes' arranged in layers, finally connecting to output nodes.[27] Within the context of PP tools evaluated within Section Three, input nodes include data related to postcodes while output nodes represent the sought-after decisions, which may be the predictions of crime within specific areas for certain individuals.[28] Each connection is initially assigned random weightings, which are gradually adjusted by the AI to ensure accurate outputs for any input.[29] The technology used within PP involves a complex version of the deep learning process, raising concerns regarding the 'explainability' and transparency of AI systems.[30]

B. The Role of Artificial Intelligence and Algorithmic Decision Making within Policing

This paper examines AI and ADM tools designed for 'individual risk prediction'[31] which use software to predict the probability of a person

[23] Bagaric et al. (n2) 17.
[24] Ibid.
[25] Geoffrey Barnes and Jordan M. Hyatt , 'Classifying Adult Probationers by Forecasting Future Offending' [2012] NCJRS 4, 43.
[26] Gary Marcus, 'Deep Learning: A Critical Appraisal' [2018] ArXiv 1, 3.
[27] Ibid, 4.
[28] Ibid.
[29] Ibid.
[30] C3.ai, 'Explainable AI' (*C3 AI*, 2023) <https://c3.ai/glossary/machine-learning/explainability/> accessed 14 November 2023; See more details in Section 3.
[31] Miri Zilka, Holli Sargeant, and Adrian Weller, 'Transparency, Governance and Regulation of Algorithmic Tools Deployed in the Criminal Justice System: a UK Case Study' [2022] AIES 880, 881.

reoffending using datasets relating to prior offending and personal characteristics.[32]

For example, an ADM tool that was in use by the Metropolitan Police was the GVM.[33] This was a risk prediction dataset, identifying individuals affiliated with London-based gangs.[34] Unlike AI, GVM's algorithm was fixed and, therefore, did not continually change based on new data.[35] As a crime recording and investigative intelligence tool, GVM aimed to "reduce gang-related violence, safeguard those exploited by gangs, and prevent young lives from being lost".[36] Each individual was assigned a harm and victim score, indicating their likelihood of inflicting or experiencing harm respectively.[37] Due to its shortcomings, the GVM has now been discontinued.[38]

Contrarily, Durham Constabulary uses the HART AI tool to determine reasons behind an individual's offence, and recommend optimal interventions and services for aiding them in turning away from crime.[39] The algorithm integrates 34 different predictors,[40] including personal characteristics such as age, gender, and postcode.[41] These predictors are grouped into 509 separate prediction 'trees', which each generates a decision.[42] These 'trees' work by splitting data based on data points and creating a flowchart-like structure that ends in a

[32] Ibid; These characteristics are discussed in Section 2C.
[33] Metropolitan Police (n11).
[34] Ibid.
[35] European Parliamentary Research Service (n19).
[36] Metropolitan Police (n11).
[37] Ibid.
[38] Ibid; such shortcomings are discussed in Section Three.
[39] Michael Veale, 'Algorithms in the Criminal Justice System' [2019] TLS 4, 46.
[40] Ibid.
[41] Liberty Human Rights, 'Predictive Policing' (*L.iberty*,--) <https://www.libertyhumanrights.org.uk/fundamental/predictive-policing/> accessed 12 February 2024.
[42] Richard Berk, Susan Sorenson, and Geoffrey Barnes, 'Forecasting Domestic Violence: A Machine Learning Approach to Help Inform Arraignment Decisions' (2016) 13(1) JELS 94, 115.

prediction.[43] These are then combined to form the final output.[44] While HART can generate new neural patterns from past data, allowing it to identify complex, data-driven insights[45], this may lead to unintended discriminative outcomes if such data is biased.[46]

The academic literature in favour of PP argues that it contributes to the functioning of the police via three objectives. The first objective is that PP enables resources to be distributed more efficiently (hereinafter 'Objective One').[47] Secondly, PP facilitates accurate identification of individuals who may be involved in criminal acts - whether that be as a victim or offender (hereinafter 'Objective Two').[48] The final objective is that PP provides more objectivity to traditionally subjective decisions in law enforcement (hereinafter 'Objective Three').[49] These arguments stem from the notion that law enforcement should prioritise intelligence-led, rather than intuition-led policing.[50] GVM and HART will be compared and evaluated against these objectives throughout Section Three to determine the objectives' plausibility, and the extent to which the tools adhere to them.

[43] Ibid.

[44] Ibid.

[45] Veale (n39).

[46] This will be further analysed in Section 3.

[47] Jerry H. Ratcliffe, 'The Hotspot Matrix: A Framework for the Spatio-Temporal Targeting of Crime Reduction' (2004) 5(1) 5, 7; Albert Meijer and Martijn Wessels, 'Predictive Policing: Review of Benefits and Drawbacks' (2019) 42(12) 1031, 1033.

[48] Annette Vestby and Jonas Vestby, 'Machine Learning and the Police: Asking the Right Questions' (2021) 15(1) PJPP 44, 50; Wim Hardyns and Anneleen Rummens, 'Predictive Policing and a New Tool for Law Enforcement? Recent Developments and Challenges' (2017) 24 EJCPR 201, 204; Lorna Christie, 'AI in policing and security' (*UK Parliament POST*, 2021) <https://post.parliament.uk/ai-in-policing-and-security/> accessed 20 December 2023.

[49] Vestby (n48) 46; Hardyns and Rummens (n48) 211.

[50] Ajay Sandhu and Peter Fussey, 'The 'uberization of policing'? How Police Negotiate and Operationalise Predictive Policing Technology' (2021) 31(1) PS 66, 74; Ratcliffe (n47) 6; Robert Heaton, 'The Prospects for Intelligence-Led Policing: Some Historical and Quantitative Considerations' (2000) 9(4) PS 337,339; Mike Maguire 'Policing by Risks and Targets: Some Dimensions and Implications of Intelligence-Led Crime Control' (2000) 9(4) PS 315, 319.

C. Defining Discrimination

Clarifying the definition of discrimination empowers individuals who face mistreatment to seek redress.[51] To pursue legal justice, they must be able to clearly define and articulate their experiences—making precise definitions essential. Additionally, it enables the contextualisation for specific issues against the background of historical inequality.[52] This fosters a deeper understanding of actions, circumstances, and policies which harm individuals. As Bell and Hartmann express, the aim is to talk about issues such as race alongside its structural roots and consequences.[53] This approach properly guides legal scholars and policymakers in providing remedies for those who have experienced discrimination. Thus, this section analyses legal and academic definitions of discrimination to highlight key elements relevant to instances of discrimination resulting from PP. Notably, the history of discrimination will not be discussed. This omission is deliberate as prior legislation leading to current laws do not inform what legislation individuals may rely on when seeking redress in cases of PP discriminatory acts.

Discrimination is broadly understood as the act of 'distinguishing'.[54] Allport argues that 'discrimination' is different from 'prejudice', with the latter referring to an aversion towards particular social groups.[55] His conceptualisation of 'discrimination' instead aligns with Katz's definition, describing it as belligerent actions maintained by social norms that do not involve direct confrontation with individuals from the target group.[56] While

[51] William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…' (1980) 15(3) LSR 631, 654.
[52] Joyce Bell and Douglas Hartmann, 'Diversity in Everyday Discourse: The Cultural Ambiguities and Consequences of "Happy Talk"' (2007) 72(6) ASR 895, 906.
[53] Ibid 910.
[54] OED, 'Discrimination' (Oxford University Press, September 2023) <https://www.oed.com/dictionary/discrimination_n?tab=meaning_and_use#6527723> accessed 29 November 2023.
[55] Gordon Allport, *The Nature Of Prejudice* (1st Edition, Addison-Wesley Publishing Company 1954)
[56] Irwin Katz, 'Gordon Allport's *The Nature of Prejudice*' (1991) 12(1) ISPP 125, 147.

this definition correctly identifies that discrimination involves hostility towards specific groups, it overlooks the material effects of discrimination resulting from direct interactions. In the context of PP, AI using biased data may lead to police unjustly targeting individuals from specific groups due to inaccurate results.[57] Building on these definitions, Essed's concept of 'everyday discrimination' which refers to 'reoccurring indignities, hassles, and microaggressions that socially disadvantaged groups face daily', offers a more nuanced definition that captures the realities of PP discriminatory acts.[58]

Both Allport and Essed's definitions are reflected within UK legislation.[59] The Equality Act 2010 describes 'direct' discrimination as treating someone less favourably because of a 'protected characteristic'.[60] These include age, gender reassignment, marriage and civil partnership, pregnancy and maternity, disability, race, religion or belief, sex, and sexual orientation.[61] This offers a more detailed adoption of Allport's notion of a 'social group'.[62] However, the legislation infers that discrimination encompasses prejudice, as it involves both the 'actus rea' (the action) and the 'mens rea' (the aversion towards the group), therefore highlighting an inadequacy in Allport's explanation.

The Equality Act additionally outlines that discrimination can manifest via indirect means.[63] This occurs when 'A applies to B a provision, criterion, or practice that is discriminatory'.[64] It must result in individuals with the same characteristics as B being disadvantaged compared to those who do not share

[57] Brent Mittelstadt et al., 'The ethics of algorithms: Mapping the debate' (2016) 3(2) BDS 1, 4; Cathy O'Neil, *Weapons of math destruction: how big data increases inequality and threatens democracy* (1st Edition, New York: Broadway Books 2016).
[58] Philomena Essed, *Understanding Everyday Racism: An Interdisciplinary Theory*, (1st Edition, SAGE Publications 1991).
[59] Equality Act 2010, s 13.
[60] Ibid.
[61] Ibid, s 4.
[62] Allport (n55).
[63] GOV.UK, 'Discrimination: your rights' (*GOV.UK*, 2023) <https://www.gov.uk/discrimination-your-rights> accessed 4 November 2023.
[64] Equality Act 2010, s 19.

the characteristic.[65] Additionally, the act must not be a 'proportionate means of achieving a legitimate aim'.[66] For instance, in *Rainbow v Milton Keynes Council*, an advertisement specifying a teaching vacancy suitable for candidates in the first five years of their career was deemed to constitute indirect age discrimination to those over sixty, as there was no legitimate aim.[67] This aligns with Essed's definition, illustrating that individuals with protected characteristics undertaking necessary and daily activities, such as acquiring jobs, may be targets of indignities and microaggressions.[68] This highlights the importance of assessing AI systems for potential discrimination before deployment.[69]

Allport's concept of 'social group'[70] is additionally resonated in the UK General Data Protection Regulation (GDPR).[71] The 'protected characteristics' in the Equality Act[72] somewhat parallels with 'special category data' in the GDPR's Article 9[73]. The latter covers data related to race, religion or belief, sexual orientation, disability, pregnancy, and gender reassignment.[74] Therefore, for the purposes of the present analysis, Allport's term 'social group' will refer to data encompassing both 'special characteristics' and 'special category data'. The criterion of 'social group' data will be central to evaluating the discrimination arising from predictive policing, as it relates directly to the 'personal characteristics' employed by individual risk prediction tools.[75]

[65] Ibid, s 19 (2)(b).
[66] Ibid, s 19 (2)(d).
[67] *Rainbow v Milton Keynes Council* [2008] ET/1200104/07.
[68] Essed (n58).
[69] *R. (on the application of Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058, [2020] 1 W.L.R. 5037b.
[70] Allport (n55).
[71] UK General Data Protection Regulation 2018.
[72] Equality Act 2010, s 4.
[73] UK General Data Protection Regulation, art 9.
[74] Ibid.
[75] As discussed in Section 3A; Zilka et al. (n29).

For such evaluations, the discussed definitions and legislation still fail to recognise the institutional and systematic ways PP causes discrimination. Pager and Shepard highlight that institutions, organisations and policies discriminate by maintaining social inequalities.[76] For example, Kraemer argues that AI comprises of subjective judgements about what is considered 'valuable' for the outcome of the tool, thus giving "rise to the potential for unfair outcomes". Without a defined standard, Objective Three cannot be upheld, reinforcing bias and perpetuating social inequality for certain 'social groups'. This is, however, permitted by Part 3 of the Data Protection Act 2018 (DPA), whereby law enforcement agencies can process such data.[77] To narrow the scope of this paper, the processing compliance under the DPA will not be discussed. Instead, the lack of safeguards for individuals subjected to such processing will be analysed.

For the purposes of this paper, both legal and academic perspectives can be integrated in order to develop a working definition for discrimination. Therefore, discrimination can be characterised by the unjust treatment of individuals based on prejudicial decisions against those within specific 'social groups'. This spans individual instances and extends to systemic and systematic levels. This outlined definition will be used throughout Section Three to argue that the GVM and HART produces discrimination.

D. Concluding Remarks

This section aimed to provide a theoretical understanding of the tools and definitions to be used throughout this paper. The analysis started by clarifying the concepts of ADM and AI, with the intention of providing the theoretical lens necessary for both conducting a comprehensive criticism of PP systems

[76] Devah Pager and Hana Shepard, 'The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets' (2008) 34(1) ARS 181, 200.
[77] Data Protection Act 2018, Part 3.

and identifying the legislative frameworks relevant to these tools. Following these clarifications, a comprehensive definition of discrimination was provided to understand when it can occur, and what statutory measures are needed to prevent it. The definition will be used to argue that the use of both GVM and HART result in systemic and systematic discrimination towards those within particular 'social groups', failing to meet the three objectives of PP.

3. *The Shadow of Discrimination: Interrogating Algorithmic Tools alongside Legal and Policy Inadequacies*

Section Three will analyse the GVM and HART PP tools. The former was discontinued in February 2024 for upholding racial disproportionality.[78] Therefore, this section will argue that similar discrimination persists in HART. However, the Government's reluctance to enact AI legislation, as outlined in the White Paper,[79] provides inadequate safeguards to overcome discrimination. Firstly, Subsections 3A and 3B argue respectively that biased data (namely 'dirty' data)[80] and proxy data both contribute to discrimination. Next, Subsection 3C argues that PP is implemented unevenly due to the disparity between over- versus under-reliance on the tool by police officers. The final Subsection 3D will examine AI's lack of transparency, not present in ADM, which ultimately produces insufficient recourse measures for victims of discrimination. The section concludes by advocating for robust legal safeguards.

[78] Metropolitan Police (n11); Liberty, 'Liberty's Written Submission to a Pro-Innovation Approach to AI Regulation Consultation' [2023] LHR 1, 16.

[79] Department for Science, Innovation and Technology (n7).

[80] Rashida Richardson, Jason Schultz and Kate Crawford, ''dirty' Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice' [2019] NYULR 192, 195.

A. 'Dirty' Data

PP proponents celebrate the tool's potential to pinpoint high-risk members of criminal groups and potential future offenders.[81] Similarly, the Metropolitan Police argue that banning PP risks denying law enforcement crucial tools for public safety.[82] However, this argument overlooks the prevalence of biased data within PP, which results in discrimination.[83]

A study from 2018 found 78% of GVM subjects to be black, despite only forming 27% of serious youth violence perpetrators.[84] In accordance with this, although PP should be less biased than humans, Selbst argues that the presence of 'dirty' data causes discrimination to be inevitable.[85] Thus, Objective Three was not upheld within the GVM, entrenching systematic and systemic discrimination.[86]

Despite there being minimal case law which references PP,[87] *Bridges v South Wales Police* was significant in demanding that law enforcement agencies eliminate tool usage where it would have 'an unacceptable bias on the grounds of race or sex'.[88] Notably, this aligns with police's pre-existing public sector equality duties (PSED) to have due regard to the Equality Act; more specifically the need to eliminate discrimination.[89] To avoid discrimination, PP requires reliable training data, as inaccurate data undermines the tool's predictive

[81] Walter Perry et al., 'Predictive policing: The role of crime forecasting in law enforcement operations' [2013] RAND 1, 108; Evelien Pauw et al., 'Techological Led Policing' [2011] 3(1) JPS 7, 12.
[82] Metropolitan Police Service, *Metropolitan Police Service – Written Evidence* (NTL0031, 2021) 2.
[83] Mittelstadt et al. (n57).
[84] Amnesty International, 'Trapped In The Matrix: Secrecy, stigma, and bias in the Met's Gangs Database' [2018] AI 1, 2.
[85] Andrew Selbst, 'Disparate Impact in Big Data Policing' (2017) 52(1) GLR 109, 118; Richardson et al. (n69) 195.
[86] Pager and Shepard (n65).
[87] Centre for Data Ethics and Innovation, 'Review into Bias in Algorithmic Decision-Making' [2020] CDEI 4, 18.
[88] *R. (on the application of Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058 [199].
[89] Equality Act 2010, s 149.

accuracy.[90] Research demonstrates that crime detection via random patrolling (meaning, non-AI-usage) is less effective than PP for group prediction.[91] However, most PP research overlooks a common lack of precision when identifying risky individuals.[92] Individual predictions carry a margin of error, which is caused by the potential of interventions to prevent predicted crimes from occurring. [93] This is often overlooked in predictive accuracy reports, making PP difficult to assess.[94] The presence of 'dirty' data within the GVM[95], and the resulting discriminatory outcomes regarding racial disproportionality, alludes to the police having violated PSED[96] through continued use of the tool.[97]

Similarly to the now discontinued GVM, academics critique HART's use of biased data for its predictions.[98] While most predictor variables stem from suspects' offending history, it also processes age, gender, and two types of residential postcode.[99] This means that HART processes 'social group' data, which prompts the need for accuracy. Police targeting of high-risk postcodes disproportionately affects minorities,[100] who are statistically more likely to reside in deprived areas.[101] This results in the over-representation of particular

[90] Zilka et al. (n31) 886.

[91] Alexander Babuta and Marion Oswald, 'Briefing Paper: Data Analytics and Algorithmic Bias in Policing' [2019] RUSI 2, 5.

[92] Alan Sutherland et al. 'Sexual Violence Risk Assessment: An Investigation of the interrater Reliability of Professional Judgements Made Using the Risk for Sexual Violence Protocol' (2012) 11(2) IJFMH 119, 120.

[93] Ibid.

[94] Ibid.

[95] Richardson et al. (n69) 195.

[96] Equality Act 2010, s 149.

[97] Liberty (n78).

[98] Marion Oswald et al. (n6), 228.

[99] Ibid.

[100] Ibid.

[101] GOV.UK, 'People Living in Deprived Neighbourhoods' (*GOV.UK*, 16 June 2020) <https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/demographics/people-living-in-deprived-neighbourhoods/latest/> accessed 17 December 2023.

'social groups' in policing statistics.[102] This process, which creates biased data, is known as the 'social construction of crime', [103] and contravenes all three PP objectives. Predictive technologies' current inability to make objective decisions undermines both effective law enforcement allocation and accurate identification of potential offenders. Therefore, the data provided to PP mirrors 'the allocation of law enforcement resources and priorities' rather than actual occurrence of crime.[104] The similar inadequate data practices used by GVM and HART, as well as the former's discontinuation,[105] strongly indicates that HART's 'dirty' data prevents law enforcement from upholding PSED.[106]

However, there is minimal governmental incentive for companies who supply PP tools to eliminate 'dirty' data.[107] The White Paper highlights 'fairness' as a key principle, referring to AI which avoids discriminatory outcomes.[108] This aligns with Wong's view that fairness is a crucial concept in the creation of unbiased algorithms.[109] Similarly, Shin and Park argue that 'algorithmic fairness' broadly means that decisions made by algorithms should not produce discriminatory or disparate consequences.[110] While this collection of perspectives outlines the consequences of biased PP, they all face the challenge of the notion that the fairness of an algorithm can be questioned by scrutinising the fairness principles it is based on.[111] 'Fairness' is not explicitly defined within the White Paper, instead leaving it open for regulators to interpret.[112] Some

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[102] Chelsea Barabas, 'Beyond Bias: Re-Imagining the Terms of "EthicalAI" in Criminal Law' (2020) 12(83) GJLMCRP 83, 85 citing Delbert Elliott, *Lies, Damn Lies, and Arrest Statistics* (1st Edition, Center for the Study and Prevention of Violence University of Colorado 1995).

[103] Colin Sumner, *The social nature of crime and deviance* (1st Edition, Blackwell Publishing Ltd 2004) 13.

[104] Barabas (n102).

[105] Metropolitan Police (n11); Liberty (n78) 16.

[106] Richardson et al. (n69) 195; Equality Act 2010, s 149.

[107] Richardson et al. (n69) 195.

[108] Department for Science, Innovation and Technology (n7) 29.

[109] Pak-Hang Wong, 'Democratizing Algorithmic Fairness' (2020) 33(2) PT 225, 227.

[110] Donghee Shin and Yong Park, 'Role of Fairness, Accountability and Transparency in Algorithmic Affordance' (2019) 98(1) CHB 277,278.

[111] Wong (n109).

[112] Department for Science, Innovation and Technology (n7) 75.

academics raise concern that limited resources, capacity, and expertise amongst regulators will affect their ability to interpret White Paper principles.[113] Furthermore, the Government itself acknowledges regulators' concerns regarding their 'lack…[of]…statutory basis' to apply such principles.[114] This highlights the need for robust legislation to limit occurrence of 'dirty' data, which should facilitate police PSED compliance.[115]

B. Should 'Social Group' Data be Removed?

In adherence with the GDPR's data minimisation principle,[116] PP should only process data necessary to the decision at hand.[117] Therefore, to avoid claims of indirect discrimination, the data should constitute a 'proportionate means for achieving a legitimate aim'.[118]

Due to AI's potential for discrimination, the Avon and Somerset Police Department argue that excluding ethnicity data (a type of 'social group' data) promotes the potential to eliminate discrimination.[119] However, this method overlooks the effects of proxy data.[120] Proxies are indirect indicators of other factors which may be hidden from an AI's programming.[121] For instance, in the Avon and Somerset Police Department, ethnicity can be inferred from postcodes, making 'postcode' the proxy data.[122] These can be introduced into

[113] Liberty (n78) 19.

[114] Department for Science, Innovation and Technology (n7) 36.

[115] Richardson et al. (n69) 195; Equality Act 2010, s 149.

[116] UK General Data Protection Regulation, art 5(1)(c).

[117] Jennifer Cobbe, 'Administrative law and the machines of government: judicial review of automated public-sector decision-making' (2019) 39(4) LS 2, 27.

[118] Equality Act 2010 s 19(2)(d).

[119] Avon and Somerset Police, *Avon and Somerset Police – Written evidence* (NTL0031, NTL0052) 3.

[120] Privacy International, 'Data Is Power: Profiling and Automated Decision-Making in GDPR' [2017] PI 1, 8; Babuta and Oswald (n91) 13; Robin Allen and Dee Masters, 'Algorithms, Apps & Artificial Intelligence: The Next Frontier in Discrimination Law' (*Cloisters*, October 2018) <https://www.cloisters.com/insights/algorithms-apps-artificial-intelligence-the-next-frontier-in-discrimination-law> accessed 14 December 2023.

[121] Betsy Williams, Catherine Brooks and Yotam Shmargad, 'How Algorithms Discriminate Based on Data they Lack: Challenges, Solutions, and Policy Implications' (2018) 8 JOIP 78, 86.

[122] Avon and Somerset Police (n107).

PP to circumvent the legal obligations attached to 'protected characteristics' under the Equality Act, thus reducing the accountability of law enforcement officers.

Amnesty International's report revealed that GVM relied on speculative evidence, such as YouTube grime music videos, to link individuals to gangs and disadvantage them based on music-related stereotypes.[123] However, Barlett et al. support using social media for policing analysis, arguing that it aids in police investigations by exposing evidence previously unavailable to police.[124] This justification frames proxy data as providing a 'proportionate means of achieving a legitimate aim',[125] meaning it does not constitute indirect discrimination or contradict the data minimisation principle.

Nevertheless, racial stereotypes commonly link 'black' music culture to criminality, which often leads to portrayal of black rappers as gang members.[126] Fatsis argues that the small number of violent crimes at urban music events do not signify a causal link to criminality, thus black people are unjustifiably overrepresented in police GVM data.[127] Therefore, the inclusion of musical proxy data for inferring ethnicity failed to fulfil Objective Two. As individuals are overrepresented in the GVM, its accuracy is compromised and the police have failed to fulfil PSED.[128]

The GVM's proxy data issues are mirrored in HART. Big Brother Watch finds that HART incorporates 'social group' data – such as 'ethnicity-linked names'

[123] Amnesty International (n84) 12.

[124] Jamie Bartlett, Carl Miller, Jeremy Crump and Lynne Middleton, 'Policing In An Information Age' (2013) 1 D 5, 6.

[125] Equality Act 2010, s 19 (2)(d).

[126] Adam Dunbar and Charis Kubrin, 'Imagining Violent Criminals: an Experimental Investigation of Music Stereotypes and Character Judgments' (2018) 14(4) 507, 508.

[127] Lambros Fatsis, 'Grime: Criminal Subculture or Public Counterculture? A Critical Investigation into the Criminalization of Black Musical Subcultures in the UK' (2019) 15(3) CMC 1,9.

[128] Amnesty International (n84) 12; Beth Hall, Roxanne Khan and Mike Eslea, 'Criminalising Black Trauma: Grime and Drill Lyrics as a Form of Ethnographic Data to Understand "Gangs" and Serious Youth Violence' (2023) 7(2) 1, 2; Equality Act 2010, s 149.

and 'income support' - to categorise individuals.[129] Consequently, the use of this data has led to the creation of groups such as 'Asian Heritage' and 'Low Income Worker' groups respectively.[130] HART used such demographic characteristics to stereotype groups, with 'Low Income Workers' being unfairly described as 'heavy TV viewers' with 'few qualifications'.[131] Even HART's developers acknowledged the serious potential for postcode data to reinforce unfair stereotypes, resulting in discriminatory outcomes.[132] This evidences the significance of biased data in HART, reinforcing the common statistical phenomenon, 'garbage in, garbage out'.[133]

Allen and Masters argue that proxy data, such as postcodes, is often overlooked by those scrutinising PP due to not being classed as 'social group' data[134]. Therefore, officers can often evade indirect discrimination accusations, because such legal claims require proof of discrimination based on a protected characteristic, as per the Equality Act.[135] AI exacerbates this issue by creating its own proxies that developers are unaware of.[136] Therefore, AI's opaque nature[137] creates uncertainty regarding what information PP truly considers - an issue that will be exacerbated if HART is not subjected to regular checks.[138] This renders both the data minimisation principle and protections under the Equality Act inadequate. Given the discontinuation of GVM and the parallel challenges of proxy data in HART, it is evident that robust protection is essential to protect individuals against discrimination.[139]

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[129] Big Brother Watch, 'Big Brother Watch Briefing on Algorithmic Decision-Making in the Criminal Justice System' [2020] BBW 2, 8.
[130] Ibid.
[131] Ibid.
[132] Oswald et al. (n91) 6.
[133] Kristian Lum and William Isaac, 'To predict and serve?' (2016) 13(5) S 14, 19.
[134] Allen and Masters (n120).
[135] Equality Act 2010, s 4.
[136] Francis Pascoe, 'To What Extent is Legal Reform Needed to Overcome the Barriers To Proving Discrimination By Automated Decision Making?' [2022] PLR 45, 64.
[137] Examined in Section 3D.
[138] Barabas (n102) 96.
[139] Metropolitan Police (n11); Liberty (n78) 16.

The White Paper proposes a 'regulatory sandbox' for tackling technical risks, such as proxy data.[140] An AI regulatory sandbox is a controlled environment for developers to test AI tools before official deployment.[141] By mimicking real life factors, a sandbox presents an opportunity to test bias mitigation systems of a tool, without impacting real individuals.[142] Literature and the legislation of other jurisdictions commonly deem the primary aim of sandboxes as being risk mitigation.[143.] However, the White Paper's sandbox contradicts this consensus by prioritising innovation and pushing for the deployment of new technologies to the market.[144] Furthermore, the overarching focus on innovation appears to also be inconsistent with the White Paper's apparent aim of introducing a statutory duty to give due regard to the fairness principle.[145]

However, materialisation of this aim is unlikely. The Government acknowledges that industry prefers "non-statutory measures" for being less burdensome.[146] It follows that the sandbox's success will be evaluated against the Government's aim to promote innovation and AI's ability to boost the economy.[147] This weakens the likelihood of statutory measures being introduced and interferes with the validity of bias mitigation systems. Even in the unlikely case that statutory measures are introduced, a 'duty to have a regard' to the fairness principle is a weak apparatus to support non-discrimination. This argument is supported by reference to the PSED's 'due

[140] Department for Science, Innovation and Technology (n7) 60.

[141] Giulio Cornelli et al., 'Regulatory Sandboxes and Fintech Funding: Evidence from the UK' [2024] ROF 203, 204.

[142] Ibid 213.

[143] Further examined in Section 4; Jon Truby et al., 'A Sandbox Approach to Regulating High-Risk Artificial Intelligence Applications' (2022) 13(2) 270, 272; Tambiama Madiega and Anne Pol, 'Artificial Intelligence Act and Regulatory Sandboxes' [2022] EPRS 1, 2; Abhishek Raj and Anshul Pachouri , 'Regulating AI through sandbox: Roadmap for Developing and Under-Developed Countries' [2023] SDGS 1, 2; European Union Artificial Intelligence Act 2024, art 25.

[144] Department for Science, Innovation and Technology (n7) 2.

[145] Ibid 6.

[146] Ibid 36.

[147] Liberty (n78) 20.

regard' principles,[148] which the police often fail to adhere to despite its low threshold in the Equality Act.[149] PSED can be easily demonstrated via Equality Impact Assessments.[150] However, they are often "produced internally" (not subjected to external evaluation), "can lack evidence…and fail to consider intersectionality" when considering 'social group' data.[151] Thus, the Government's response is inadequate to address discrimination caused by proxy data in PP.

C. The Non-Uniform Implementation of Predictive Policing

The right not to be subject to solely automated decisions which have legal or similarly significant effects is one of the provisions under GDPR which applies in cases of PP.[152] Consequently, PP should serve as a supplementary tool rather than the sole determinant, necessitating 'meaningful human intervention'.[153] However, numerous scholars argue that current intervention within PP acts as a 'token gesture' due to automation bias, whereby humans over-trust computerised aids.[154]

While PP aims to process more information and create reliable results,[155] in compliance with Objective Two, it can lead to officers over-relying on AI tools and accepting implausible results.[156] These results were reinforced via feedback

[148] Equality Act 2010, s 149.

[149] Criminal Justice Alliance, 'Empowering Civil Society: Using the Public Sector Equality Duty to Tackle Race Disparity in the Criminal Justice System' [2023] CJA 1, 1.

[150] Ibid.

[151] Ibid.

[152] UK General Data Protection Regulation 2018, art 22.

[153] Margot Kaminski, 'The Right to an Explanation, Explained' (2019) 34(1) 189, 197; UK General Data Protection Regulation 2018, art 22.

[154] Ibid 201; Isak Mendoza and Lee Bygrave, 'The Right not to be Subject to Automated Decisions based on Profiling' [2017] EIL 1, 11; Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7(2) 76, 88; Data protection Working Party, 'Guidelines on Automated Individual Decision-Making and Profiling for the Purposes on Regulation 2016/679' [2017] DPWP 5, 21.

[155] Centre for Data Ethics and Innovation (n87) 6.

[156] Rita Gsenger and Toma Strle, 'Trust, Automation Bias and Aversion: Algorithmic Decision-Making in the Context of Credit Scoring' (2021) 19(4) IDCS 540, 544.

loops in GVM, perpetuating discriminatory practices.[157] Similarly in HART, when no skilled custody officer was on shift, the tool was too heavily relied on in supplementing decisions, thus evidencing automation bias.[158] Therefore, there is little 'meaningful human intervention'[159] for PP tools, adversely affecting individuals within certain 'social groups'.

Although automation bias is a well-documented phenomenon within literature[160], arguments often fail to consider that many officers recognise the limitations of PP due to bias, leading to sceptical attitudes and reluctance to use them.[161] Junior officers generally desire discretionary control over police work, emphasising the importance of experience and skill in its 'craft'.[162] One officer commented that "there will always be the need for a human being in that process…I would be really unhappy with following a line of inquiry that was purely [computer] based".[163] Many officers argued that without subjective police decisions, computer predictions fuelled by biased data would go unchecked.[164] However, sceptical officers address PP biases by re-empowering previously used discretionary decision-making, highlighted by officers actively opposing the computers' advice.[165] This nullifies the impact of Objective Two and reinstates intuition over intelligence-led policing.

Considering that existing law requires police to have "authority and competence to change the decision"[166] – thus obliging experts to analyse PP outputs - Kaminski argues that polices' 'meaningful human intervention'

[157] Amnesty International (n84) 12; Zilka (n31) 886.
[158] Dr Michael Veale (n39) 46.
[159] UK General Data Protection Regulation 2018, art 22.
[160] Gsenger and Strle (n156); Sandhu and Fussey (n50) 67.
[161] Sandhu and Fussey (n50) 67.
[162] James Willis, 'Improving Police: What's Craft Got To Do With It' [2013] 16(1) IIAP 1, 3.
[163] Sandhu and Fussey (n50) 76.
[164] Ibid.
[165] Ibid 77.
[166] Data protection Working Party (140) 21.

practices are adequate.[167] Nevertheless, some officers admit to ignoring or manipulating predictive technologies to maintain control over decisions.[168]

Studies of police discretion demonstrate its high susceptibility to human errors and biases, especially when working under short timeframes, even where PP 'social group' data has not been used.[169] For example, Chief Constable Michael Barton noted that custody officers often assessed offenders as higher risk than data justified in HART predictions, potentially due to human errors and biases.[170] Although this argument strays from holding discriminatory police accountable, it highlights the ease with which police can rely on predetermined cognitive processes when making decisions. Therefore, while some officers may not have automation bias, they impose their own biases, leading to subjective PP implementation.

Nonetheless, automation bias is still prevalent within senior officers, who argue for the use of PP due to its positive impact on resource allocation, in line with Objective One. Senior officers argue for PP's ability to "help position police officers near…projected criminal events…, reduce unneeded and costly travel during patrols, and allow officers to interrupt crime before … harms…[can]…be done".[171] In the same vein, one Chief Inspector even advocated for the 'uberisation' of police patrols, whereby "smartphones will act as portals to a mass database" that instructs officers.[172] The lack of uniformity in implementation by junior versus senior officers leads to a dichotomy based on personal opinions on PP tools: some rely too heavily on PP, while others reject it. This leaves the latter to inadvertently impose their own biases due to undertraining about 'meaningful human intervention',[173]

[167] Kaminski (n153) 201; UK General Data Protection Regulation 2018, art 22.
[168] Sandhu and Fussey (n50) 77.
[169] Katherine Spencer, Amanda Charbonneau and Jack Glaser, 'Implicit Bias and Policing' [2016] SPPC 50, 51.
[170] Veale (n39) 46.
[171] Sandhu and Fussey (n50) 73.
[172] Ibid.
[173] UK General Data Protection Regulation 2018, art 22.

thus disproving Kaminski's argument that police practices are adequate, thus often resulting in discrimination.[174] Therefore, Objective Three is not upheld; there has been a return to subjective policing, which necessitates objective implementation standards.

The White Paper overlooks the remits of automation bias, instead emphasising adherence to existing legislation.[175] Thus, Section Four will use academic literature to clarify this without reference to the White Paper. However, regarding junior officer's dissatisfaction with PP, the White Paper highlights the importance of building public trust, which it argues will be undermined unless "the potential for bias and discrimination are addressed".[176] Nevertheless, without outlining avenues for mitigating bias and education on PP implementation, these concerns remain unaddressed.[177] Furthermore, their primary motivation for enhancing public trust is to attract investment, rather than prioritising the mitigation of discrimination.[178] This demonstrates the governmental disregard for the diverse forms and consequences of discrimination at systemic and systematic levels.[179] Due to the non-uniform implementation of PP, an objective standard backed by education for police officers is pertinent to upholding non-discrimination.

D. Transparency and Recourse

Transparency within PP AI is necessary for two reasons. First, in order to implement 'meaningful human intervention'[180] of PP, police must understand

[174] Kaminski (n153) 201.
[175] Department for Science, Innovation and Technology (n7) 68.
[176] Ibid 5.
[177] Liberty (n78) 21.
[178] Department for Science, Innovation and Technology (n7) 5.
[179] Pager and Shepard (n65).
[180] UK General Data Protection Regulation 2018, art 22.

the tool's algorithmic functioning.[181] Second, in order to bring a discrimination claim under the Equality Act, individuals must understand the AI in order to prove a 'pattern of discrimination'.[182] Therefore, transparency is a prerequisite of both. These two reasons will be examined within this section.

Unlike human decision-making, HART provides no explanation for its outputs, which hinders transparency for officers and, as a result, their 'meaningful human intervention' and PSED adherence.[183] Cobbe refers to this weakness as 'algorithmic opacity', arising from intentional, illiterate and intrinsic reasons.[184] Intentional opacity aligns with Wachter's argument that companies may withhold an algorithms' code, data, or reasoning due to commercial secrecy.[185] This hinders scrutinisation and allows discrimination against individuals within certain 'social groups' to go unnoticed.[186] Consequently, the duty placed by DPA on the data controller to provide data subject access to data for law enforcement purposes becomes ineffective. [187] Furthermore Recital 63 of the GDPR reinforces both Cobbe and Wachter's arguments by permitting 'trade secret' exemptions from personal data transparency requirements.[188] This favours companies' interests and has the effect of hindering police adherence to PSED and 'meaningful human intervention'.[189]

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[181] Anupam Datta, Shayak Sen, and Yair Zick, 'Algorithmic transparency via quantitative input influence: Theory and experiments, with learning systems' [2016] IEEE 598, 599; Zilka (n31) 886; Veale (n39) 65.

[182] *Rihal v London Borough of Ealing* [2004] IRLR 642; Equality Act 2010, s 19; Joe Atkinson, 'Automated management, Digital Discrimination, and the Equality Act 2010' [2020] GELB 1352, 1355.

[183] Tal Zarsky, 'The Trouble with Algorithmic Decisions: An Analytic Road Map to Examine Efficiency and Fairness in Automated and Opaque Decision Making' (2016) 41(1) STHV 119, 127; Pascoe (n136) 55; UK General Data Protection Regulation 2018, art 22; Equality Act 2010, s 149.

[184] Cobbe (n117) 5.

[185] Wachter (n154) 6.

[186] Sandhu (n50) 68.

[187] UK General Data Protection Regulation 2018, art 44.

[188] Cobbe (n117) 5; Wachter (n154) 85; UK General Data Protection Regulation 2018, Recital 63.

[189] Equality Act 2010, s 149; UK General Data Protection Regulation 2018, art 22.

However, GDPR guidelines contradict Recital 63, explaining that companies cannot solely rely on 'trade secrets' as an excuse to refuse providing information.[190] Therefore, Kaminski argues that while the 'trade secret' exception is common, data protection authorities should be alert to identifying weak 'trade secret' claims.[191] While this might seem to permit a degree of transparency for law enforcement agencies, in practice, Kaminski's argument and the contradictory legislation both fail to provide clear guidelines for companies supplying AI to law enforcement, thus posing challenges to officers' PSED compliance.[192] This results in transparency issues between Government departments and public sectors.[193] A review by the Committee on Standards in Public Life found that even those working on governmental AI policy were unable to uncover which Government departments were using AI systems.[194] This underscores the need for transparency to be legislatively mandated to enable police PSED compliance and promote non-discrimination.[195]

Despite rightly recognising transparency as one of the five regulatory framework principles, the White Paper offers little incentive for transparency as it restricts transparency to what is 'appropriate', relative to the risk presented by an AI tool, deliberately avoiding statutory basis.[196] This parallels discussions around the 'Algorithmic Transparency Recording Standard' – a hub for standardised recording and sharing of information on the public sector's use of algorithmic tools.[197] Although the hub aids officers with PSED compliance[198] by demonstrating how they should disclose PP usage, it potentially requires

[190] Data protection Working Party (n140) 17.
[191] Kaminski (n153) 203.
[192] Mittelstadt (n57) 85; Equality Act 2010, s 149.
[193] Lord Evans of Weardale KCB DL, 'Artificial Intelligence and Public Standards: A Review by the Committee on Standards in Public Life' [2020] CSPL 6, 15.
[194] Ibid.
[195] Liberty (n78) 4; Equality Act 2010, s 149.
[196] Department for Science, Innovation and Technology (n7) 28; Liberty (n78) 3.
[197] GOV.UK 'Algorithmic Transparency Recording Standard Hub' (*GOV.UK,* 2023) <https://www.gov.uk/government/collections/algorithmic-transparency-recording-standard-hub> accessed 2 January 2024.
[198] Equality Act 2010, s 149.

company secrets to be exposed when explaining constructed algorithms. [199] Thus, it remains optional despite calls to the Government for statutory implementation.[200] This demonstrates that the Government's approach allows law enforcement and companies too much discretion over what information they disclose. Such discretion hinders PSED compliance and contradicts Objective Three.[201] With little plans to mandate transparency, the Government falls short of its own aim of making AI transparent.

Compounding on commercial secrecy, both Burrell and Cobbe argue that officers are hindered by 'illiterate opacity' when explaining decisions, whereby only those with technical expertise can understand complex algorithms such as HART.[202] However, their argument fails to consider the true complexity of AI. Unlike the simplicity of ADM tools (such as GVM), HART holds many hidden layers in its neural network when combining various prediction trees[203], making it difficult even for experts to comprehend what data is interpreted by the algorithm.[204] This 'black box'[205] nature of complex algorithms is described as 'intrinsic opacity' which refers to the extreme difficulty that almost everyone has in explaining algorithmic decisions.[206] Moses and Chan argue that 'intrinsic opacity' results in automation bias, as law enforcers may consider PP outcomes as sufficient due to a lack of understanding.[207] Consequently, it becomes challenging to assess an individuals' susceptibility to crime, thus contradicting

[199] Equality Act 2010, s 149.

[200] Liberty (n78) 5.

[201] Ibid; Equality Act 2010, s 149.

[202] Jenna Burrell, 'How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms' [2016] BDS 1, 4; Cobbe (n117) 5.

[203] Berk, Sorenson, and Barnes (n42).

[204] Pascoe (136) 56.

[205] Sandra Barbosa and Sara Felix, 'Algorithms and the GDPR: An analysis of Article 22' [2021] CEDIS 67, 79; Pragya Paudyal and BL Wong, 'Algorithmic Opacity: Making Algorithmic Processes Transparent through Abstraction Hierarchy' (2018) 62(1) 192, 192; Frederik Borgesius, 'Strengthening Legal Protection Against Discrimination by Algorithms and Artificial Intelligence' (2020) 24(10) IJHR 1572, 1577.

[206] Cobbe (n117) 6.

[207] Lyria Moses and Janet Chan, 'Algorithmic Predictions in Policing: Assumptions, Evaluation, and Accountability' (2018) 28(7) PS 806, 817.

Objective Two.[208] This hampers compliance with PSED[209] and 'meaningful human intervention'[210] obligations, requiring statutory basis for transparency and education regarding AI.[211]

Vestby similarly argues that transparency is essential for individuals to challenge algorithmic tools.[212] To contest PP, individuals must demonstrate a 'pattern of discrimination', requiring comprehension of the tool's outputs.[213] However, individuals may struggle with this due to intentional and intrinsic opacity.[214]

Malgieri and Comandé argue that individuals already have sufficient existing protections, such as the 'right to an explanation' of automated decisions under Recital 71.[215] However, this argument fails to consider that Recitals are not legally binding, thus hindering adequate and uniform enforcement.[216] For example, *R v Higher Education Funding Council* implies that public bodies can avoid providing reasoning for decisions if it causes an unreasonably high administrative burden.[217] This defence is a convenient excuse for officers accused of failing to adequately justify their decision, who may rely on explanations such as commercial secrecy or hindering investigations.[218] Therefore, without an adequate 'right to an explanation', victims have insufficient recourse.[219]

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[208] Ibid 818.
[209] Equality Act 2010, s 149.
[210] UK General Data Protection Regulation 2018, art 22.
[211] Liberty (n78) 4.
[212] Vestby (n48) 45.
[213] *Rihal v London Borough of Ealing* [2004] IRLR 642; Equality Act 2010, s 19; Atkinson (n182) 1355; Datta (n181) 599.
[214] Cobbe (n117) 5.
[215] Gianclaudio Malgieri and Giovanni Comande´, 'Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation' (2017) 7(4) IDPL 243, 244; UK General Data Protection Regulation, Recital 71.
[216] Wachter (n154) 78.
[217] *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651, [665]– [666]; Pascoe (n136) 62.
[218] Ibid.
[219] Malgieri and Comande´(n215) 244.

There are no signs of this issue being resolved, as the White Paper expressed that new rights or routes to redress will not be introduced.[220] Instead, the only guidance provided for explaining AI-supplemented decisions comes from the Information Commissioner's Office and the Alan Turing Institute.[221] While the paper suggests for explanations to be provided in comprehendible language, its implementation remains undefined in relation to intrinsic opacity which still hinders the fulfilment of PSED by public bodies . Therefore, the absence of statutory remedies and transparency obligations limits the ability of predictive policing discrimination victims to challenge decisions, thereby reinforcing both systemic and systematic discrimination within policing practices.

E. Concluding Remarks

This section demonstrated how HART fails to uphold the three objectives outlined in Section Two and, as a result, gives rise to discriminatory outcomes. Similar to GVM, HART inputs both 'dirty' and proxy data, leading to inaccuracies and misallocation of police resources.[222] Consequently, HART is not currently a 'proportionate means of achieving a legitimate aim', thus constituting indirect discrimination towards particular 'social groups'.[223] Additionally, Section 3D argued that subjective standards for 'meaningful human intervention'[224] lead to uneven implementation of PP and resultant biases being prevalent in officers and AI alike. Given GVM's discontinuation caused by issues similar to those found in HART, statutory measures are necessary in order to improve AI PP tools currently available. Finally, AI's specific lack of transparency poses challenges to both officers' PSED adherence

[220] Department for Science, Innovation and Technology (n7) 36.

[221] ICO 'Explaining Decisions Made with AI' (*ico.org.uk*, 2023) <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/artificial-intelligence/explaining-decisions-made-with-artificial-intelligence/> accessed 24 March 2024.

[222] Oswald (n91) 228; Richardson et al. (n69) 195.

[223] Equality Act 2010, s 19(2)(d).

[224] UK General Data Protection Regulation 2018, art 22.

and victims in seeking recourse.[225] The Government's White Paper fails to adequately address these issues, underscoring the need for strict statutory measures in order to safeguard individuals from discriminatory practices in PP.[226]

4. Reimagining Predictive Policing: Leveraging the EU AI Act for Reform

Section Three established that current legislation is inadequate to enforce non-discriminatory AI PP. Therefore, this section argues that a combination of robust legislation and government-supported abstract measures would better protect individuals and uphold the three objectives of PP[227]. This argument is supported by Koops' 'multi-level legislation' approach, which strikes a justified balance of legislative certainty for individuals and officers with a level of flexibility that enables future PP developers to uphold the Government's aims of innovation.[228]

Section 4A proposes legislative and technical reforms in conjunction with a variety of fairness principles, aimed at addressing both 'dirty' and proxy data.[229] Section 4B supports the introduction of more adequate training and education for implementing an objective standard of 'meaningful human intervention' in practice.[230] Such training requires codified transparency measures in order to overcome intentional and intrinsic opacity, as well as to provide victims with recourse. It will become clear that both 'meaningful human intervention'[231] and transparency issues can be tackled via similar

[225] Equality Act 2010, s 149.
[226] Liberty (n78) 4.
[227] Section 2B.
[228] Bert-Jaap Koops, 'Should ICT Regulation Be Technology-Neutral?' (2006) 9(1) LTS 77, 104.
[229] Richardson et al. (n69) 195.
[230] UK General Data Protection Regulation 2018, art 22.
[231] UK General Data Protection Regulation 2018, art 22.

reforms. Additionally, Schuett argues that the EAIA's risk-based approach is likely to serve as a benchmark for future UK regulations.[232] Therefore, while extensive EAIA critique is beyond the scope of this paper, its approach will be woven throughout the analysis in order to demonstrate that the UK's goal of promoting innovation does not prevent safeguarding individuals' rights.[233] The EAIA aims to achieve both objectives, though it is not without its own limitations.

A. 'Dirty' And Proxy Data

Similar strategies can address the bias issues in both 'dirty' and proxy data.[234] This section argues that identification and mitigation methods should be mandated, alongside software tools with informal standards for law enforcement and companies.[235] This has the potential to produce non-discriminatory AI rules while preserving innovation in PP tools. Furthermore, this ensures fulfilment of all three PP objectives; employing an objective standard to mitigate bias via legislation facilitates accurate identification of victims and perpetrators, thus, enabling appropriate deployment of police resources. Additionally, although the White Paper itself fails to adequately define 'fairness', literature surrounding development of non-discriminatory AI argues 'fairness' as a key element.[236] Therefore, various fairness definitions will be examined in order to advise the Government on legislation and implementing bias mitigation techniques.

[232] Schuett (n14) 4.

[233] European Union Artificial Intelligence Act 2024; Liberty (n78) 2.

[234] Richardson et al. (n69) 195.

[235] Centre for Data Ethics and Innovation (n87) 29.

[236] Christopher Starke, et al., 'Fairness Perceptions of Algorithmic Decision-Making: A Systematic Review of the Empirical Literature' (2022) 9(2) BDS 1, 1; Ben Hutchinson and Margaret Mitchell, '50 Years of Test (Un)fairness: Lessons for Machine Learning' [2019] FAT 49, 54.

Mathematical Approaches to Fairness

Data scientists and scholars propose mathematical techniques, which address bias in alignment with mathematical approaches to fairness.[237] Article 9(7) EAIA supports this notion, mandating risk-management systems with pre-defined metrics.[238] O'Neil et al. argue that such measures prevent AI from adopting discriminatory practices during training, underscoring the need for legislation to ensure compliance.[239]

However, the EAIA still lacks specificity for mathematical fairness techniques. If this approach is implemented in the UK, companies and law enforcement would be left to devise their own solutions, despite governmental concerns of imposing additional administrative burdens on such bodies.[240] Due to a potential lack of expertise and financial constraints, mathematical fairness techniques may not be thoroughly tested.[241] This may lead to inadequate bias mitigation, particularly given the White Paper's focus on rapid AI deployment.[242]

Much literature advocates for testing bias mitigation techniques within a regulatory sandbox.[243] While the White Paper's sandbox may seem effective, its primary purpose is to promote innovation and accelerate AI's entry into the market.[244] Accordingly, rapid deployment can interfere with the conduction of

[237] Centre for Data Ethics and Innovation (n87) 29; Bart Custers, 'Data Dilemmas in the Information Society Introduction and Overview' (2013) 3(1) S 3, 7; Faisal Kamiran and Toon Calders, 'Data Pre-Processing Techniques for Classification without Discrimination' (2012) 33(1) KIS 1, 3; Pratik Gajane and Mykola Pechenizkiy, 'On Formalizing Fairness in Prediction with Machine Learning' [2017] ArXiv 1, 2; Sahil Verma and Julia Rubin, 'Fairness Definitions Explained' [2018] IEEE 1,3.

[238] European Union Artificial Intelligence Act 2024, art 9(7).

[239] Cathy O'Neil, Brian d'Alessandro, and Tom LaGatta, 'Conscientious Classification: A Data Scientist's Guide to Discrimination-Aware Classification' (2019) 5(2) BD 120, 141.

[240] Department for Science, Innovation and Technology (n7) 36.

[241] Liberty (n78) 19; Dodd (n257).

[242] Department for Science, Innovation and Technology (n7) 7.

[243] Truby et al. (n143) 272; Madiega and Pol (n143) 2; Raj and Pachouri (n143) 2.

[244] Department for Science, Innovation and Technology (n7) 7.

precise bias assessments. Alternatively, the EAIA legislates a sandbox which prioritises threat detection, alongside innovation.[245] This balanced approach is supported by academics[246], arguing that it aids in both protecting individuals and fostering innovation by creating a 'safe space' for experimentation without liability.[247]

However, literature regarding sandboxes overlooks the specific techniques companies and law enforcement bodies may use when testing their products. Therefore, the burden lands on such bodies to generate bias mitigation methods, who may be constrained due to a lack of expertise.[248] Accordingly, O'Neil et al. argue that pre-processing models, which mitigate 'dirty' data before deployment, [249] may be enforced to modify the weighting of 'social group' training data.[250] Consequently, such data may not directly indicate an individuals' likelihood of being a criminal, thus reducing over-policing of individuals within certain 'social groups'. Such an approach may be useful to reduce administrative burdens by offering companies and law enforcement agencies ready-to-use platforms with specific techniques to test bias within their products.[251]

However, O'Neil et al.'s proposal would fail to fully mitigate the burden on companies. Although they offer specific techniques for bias to be mitigated, law enforcement bodies developing AI tools (such as the Durham Constabulary in the case of HART) are not experts in manipulating data to produce fair outcomes.[252] This is exacerbated by the presence of intrinsic opacity.[253]

[245] European Union Artificial Intelligence Act 2024, art 25.
[246] Cornelli et al., (n127) 207.
[247] Ibid.
[248] Liberty (n78) 19.
[249] Richardson et al. (n69) 195.
[250] O'Neil (n239) 127.
[251] Cornelli et al. (n141) 207; O'Neil (n239) 127.
[252] Cobbe (n117) 5; Burrell (n202) 4.
[253] Ibid; Intrinsic opacity is examined in Section 3D.

Therefore, law enforcement bodies may struggle to implement bias mitigation techniques within testing.

Consequently, while opacity issues will be examined in Section 4B, the EAIA's Article 15(1a) and various scholars emphasise the importance of involving individuals from diverse disciplines to develop and oversee risk management techniques.[254] For example, computer science publications regarding discrimination-aware data analysis offer companies and law enforcement bodies expertise to mitigate bias.[255] The implementation of such measures within the EAIA demonstrates the necessity for codified bias mitigation techniques aided by experts to ensure non-discrimination. Scholars widely argue that AI possesses various risks, necessitating its accurate identification in high-risk situations, such as policing, thus requiring robust legislation.[256] Therefore, employing a regulatory sandbox with mathematical bias mitigation techniques, developed by individuals from diverse disciplines, reduces discrimination risks and enhances accuracy and objectivity, aligning with Objectives Two and Three.

Nevertheless, the overlooked limitation of this technique is the lack of consideration for financial constraints faced by law enforcement bodies.[257] Consequently, regulatory sandboxes aided by bias mitigation experts may not be universally implementable due to funding shortages. Additionally, despite the need for statutory footing, there are little objective standards to measure bias mitigation methods against.[258] However, this can be mitigated with the aid

[254] European Union Artificial Intelligence Act 2024, art 15(1a); Frederik Borgesius, 'Discrimination, Artificial Intelligence, and Algorithmic Decision Making' [2018] DGD 7, 51; Dillon Reisman et al., 'Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability' [2018] ANI 3, 20.

[255] Kamiran and Calders (n237) 3; Gajane and Pechenizkiy (n237) 2; Verma and Rubin (n237) 3.

[256] Schuett (n14) 2; Oswald et al. (n91) 6; Mittelstadt et al. (n57) 4; Barabas (n102) 85.

[257] Vikram Dodd, 'Thousands of UK Police Working Away from Frontline Crime amid Funding Crisis' (*The Guardian*, 5 January 2024) <https://www.theguardian.com/uk-news/2024/jan/05/police-still-suffering-damage-uk-government-cuts-funding-crisis> accessed 15 February 2024.

[258] Centre for Data Ethics and Innovation (n87) 29.

of tools such as the 'AI Fairness 360 Open Source Toolkit', which provides tests and algorithms to assess and mitigate bias in AI tools.[259] Such tools could serve as a benchmark, alleviating Governmental concern regarding administrative burdens.[260] While the toolkit may be constrained by its limited understanding of wider discrimination concepts, it still provides an objective standard for mathematical bias mitigation.[261] Therefore, by providing clear standards for law enforcement to uphold, innovative practices can be maintained within legal objectives. As a result, establishing standards and ensuring individuals are adequately protected by excluding 'dirty' data in PP could still be realised without trading off the aim to save time and money.[262]

Broader Contextual and Managerial 'Best Practice' Approaches to Fairness

To use mathematical fairness techniques alone is limited for two reasons. Firstly, Lepri et al. argue that algorithmic fairness must also consider the social context of discrimination to adequately protect particular 'social groups'.[263] Therefore, legislation promoting fairness tools should address the various representations of bias, such as stereotypes that lead to proxy data.[264] Mathematical techniques have a narrow focus, merely detecting directly discriminatory 'protected characteristics', thus failing to identify proxies.[265] As discussed within Section 2A, this results in over-policing of individuals within certain 'social groups', reinforcing the 'social construction of crime', as well as systemic and systematic discrimination.[266] Additionally, solely relying on mathematical techniques fails to consider that AI tools establish their own

[259] IBM, 'AI Fairness 360' (*aif360.res.ibm.com*, --) <https://aif360.res.ibm.com> accessed 12 March 2024.

[260] Department for Science, Innovation and Technology (n7) 2.

[261] Bruno Lepri et al., 'Fair, Transparent, and Accountable Algorithmic Decision-making Processes: The Premise, the Proposed Solutions, and the Open Challenges', (2018) 31(1) 611, 617.

[262] Richardson et al. (n69) 195.

[263] Lepri et al. (n261) 617.

[264] Babuta and Oswald (n91) 12.

[265] Ibid.

[266] Pager and Shepard (n65); Sumner (n103).

algorithms post-deployment; thus solely relying on pre-processing models is inadequate.[267] Academics argue that long-term risk-assessments are commonly overlooked when PP is too rapidly adopted.[268] As such, Barabas suggests that fairness lies in developing managerial 'best practices', such as continued risk assessments.[269]

Article 9 EAIA incorporates mathematical fairness techniques through the mandate of periodic review of risk management systems against defined metrics and thresholds.[270] Rieke et al. suggest bias mitigation through "simple observation of…inputs and outputs" to identify discriminatory data, implying that effective scrutiny need not be complex.[271] However, this suggestion is limited for failing to identify proxy data.[272]

While outputs may be classified as discriminatory – due to unrepresentative 'social group' data - postcode proxies for ethnicity in HART may remain unidentified due to falling outside the 'social group' data class.[273] While Equality Impact Assessments may seem suitable for identifying proxy data using discrimination checks, no specific assessments exist for AI; as discussed in Section 3B this poses unique harms compared to ADM.[274] Furthermore, these assessments often lack external stakeholder involvement, contrary to the EAIA's approach where expert involvement in bias mitigation methods is mandated for effective scrutiny.[275]

[267] Aaron Rieke, Miranda Bogen, David Robinson, 'Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods' [2018] ON 5, 20.
[268] Babuta and Oswald (n91) 11.
[269] Barabas (n102) 96.
[270] European Union Artificial Intelligence Act 2024, art 9.
[271] Rieke (n267) 8, 5.
[272] Babuta and Oswald (n91) 12.
[273] Big Brother Watch (n117) 8.
[274] Criminal Justice Alliance (n149) 1.
[275] Ibid; European Union Artificial Intelligence Act 2024, art 15(1a).

While the White Paper proposes regulatory oversight, it lacks specific requirements for implementation.[276] Contrarily, the EAIA tasks market surveillance authorities with conducting checks and overseeing the implementation of PP, thus detecting bias and, if adopted, would ensure compliance with the Equality Act.[277] Furthermore, market authorities must receive all necessary information and documentation to demonstrate high-risk AI (PP) conformance in an easily understandable language on request.[278] Although the EAIA fails to specify the information to be provided, Microsoft and Google's 'datasheets for datasets' provides a template and can assist authorities in assessing tools and requesting specific information for compliance.[279] Additionally, the tool aids in identifying proxies by deciding "how appropriate the corresponding dataset is for a task, what its strengths and limitations are, and how it fits into the broader ecosystem".[280] This approach aids mitigation by encouraging law enforcement and companies to consider broader contexts of discrimination in line with Lepri's approach;[281] namely, how structural injustices against minorities are produced and reinforced via stereotypes.[282] Consequently, the tool helps recognise proxies as 'protected characteristic' data, facilitating claims under the Equality Act.[283] Though this approach is limited due to intentional opacity,[284] continued assessment that considers wider contexts of discrimination must be mandated to ensure PP avoids discriminatory outcomes over time. Intentional opacity concerns will be addressed in detail in the following sections.

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[276] Department for Science, Innovation and Technology (n6) 36.

[277] European Union Artificial Intelligence Act 2024, art 130; Equality Act 2010.

[278] European Union Artificial Intelligence Act 2024, art 131.

[279] Timnit Gebru et al., 'Datasheets for Datasets' (2021) 64(12) 86, 88.

[280] Ibid.

[281] Lepri et al. (n261) 617.

[282] Nicol Lee, Paul Resnick and Genie Barton, 'Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms' (*Brookings*, 22 May 2019) <https://www.brookings.edu/articles/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/> accessed 14 February 2024.

[283] Equality Act 2010, s 4.

[284] Cobbe (n117) 5.

Overall, this section highlighted that each approach to fairness provides inadequate safeguards when used alone. In combination, however, it produces regulatory sandboxes[285] for companies and law enforcement bodies to test specified pre-processing[286] mathematical bias mitigation techniques,[287] alongside providing examples of optimal standards to achieve.[288] This results in bias mitigation in the early stages of PP development.[289] Furthermore, by allowing wider contexts of discrimination to be considered and upholding managerial documentation standards,[290] bias can continually be mitigated post-deployment. Consequently, this ensures individuals within specific 'social groups' are adequately protected against 'dirty'[291] and proxy data. This enhances the three objectives of PP; by mitigating bias, PP becomes more accurate and therefore objective, thus allowing policing resources to be effectively distributed.

B. 'Meaningful Human Intervention', Transparency, and Recourse

Regarding the legislative omittance of explaining 'meaningful human intervention',[292] Liberty argues that the distinction between sole versus partial automated processing should be eliminated due to automation bias risks.[293] This extends protection to cover individuals subjected to PP in general.[294] However, Liberty overlooks the significant implications of such a reform. Removing the word 'solely' from Article 22 would completely eliminate individuals undergoing decisions based on automated processing, which

[285] Truby et al. (n143) 272; Madiega and Pol (n143) 2; Raj and Pachouri (n143) 2.
[286] O'Neil (n239) 127.
[287] Gajane and Pechenizkiy (n237) 2; Verma and Rubin (n237) 3.
[288] IBM (n259).
[289] O'Neil (n239) 127.
[290] Lepri et al. (n261) 617; European Union Artificial Intelligence Act 2024, art 131.
[291] Richardson et al. (n69) 195.
[292] UK General Data Protection Regulation 2018, art 22.
[293] Liberty (n78) 11; UK General Data Protection Regulation, art 22.
[294] Ibid.

overlooks PPs' effectiveness in resource allocation.[295] Eliminating predictive policing AI would shift decision-making back to intuition rather than intelligence-led policing, reintroducing cognitive biases and perpetuating the very forms of discrimination that such AI was designed to address. Additionally, though most literature narrowly focuses on automation bias, this is not the only PP implementation issue given that both overuse and underuse of PP give rise to various kinds of risks[296]. This is caused by limited understanding of how AI functions due to algorithmic opacity.[297]

Nevertheless, Liberty's approach correctly supports extending protections to challenge misconception that partial is safer than sole automation due to human involvement.[298] Mandating educational programmes for guiding PP implementation via 'meaningful human intervention'[299] is essential for equipping officers with objective application standards,[300] fostering responsible, consistent, and fair decision-making. These programs should inform officers about the technical functionalities of algorithmic tools such as HART, whilst also emphasising the importance of critical engagement, ethical reflection, and legal accountability, thus also aiming to overcome intrinsic opacity.[301] Furthermore, if law enforcement bodies understand how PP works, this information will be better relayed to individuals seeking recourse.[302] Therefore, 'meaningful human intervention',[303] transparency and recourse issues can largely be resolved via the outlined similar methods. This approach

[295] UK General Data Protection Regulation 2018, art 22.
[296] As discussed in Section 3C.
[297] Cobbe (n117) 5.
[298] Liberty (n78) 11.
[299] UK General Data Protection Regulation 2018, art 22.
[300] Centre for Data Ethics and Innovation (n87); Andrew Ferguson, 'Policing Predictive Policing' (2017) 94(5) WULR 1109, 1152.
[301] Cobbe (n117) 5; Borgesius (n254) 64; Liberty (n78) 3.
[302] Zilka et al. (n31) 885.
[303] UK General Data Protection Regulation 2018, art 22.

results in the reinforcement of intelligence-led policing,[304] preventing systemic and systematic policing discrimination in line with Objective Three.[305]

The Information Commissioner's Office - the UK's data protection supervisory authority- and European Data Protection Board attempt to solve the above issues by emphasising the importance of officers considering all relevant information and external factors.[306] Additionally, they recommend for training to focus on AI system comprehension, identifying potential errors, and grasping external factors overlooked by AI.[307] Accordingly, Kaminski argues current legislation and guidance is sufficient as it requires companies and law enforcement to implement "suitable measures to safeguard…[individuals']…rights".[308]

While Kaminski correctly identifies officers' need for training, the argument is limited for two reasons. Firstly, it fails to advise overcoming intentional opacity; conducting training and understanding of AI systems requires revealing commercial trade secrets.[309] Secondly, it lacks guidance for explaining 'meaningful human intervention'[310] or AI system functioning to officers in a manner that overcomes intrinsic opacity.[311] Therefore, there are inadequate safeguards for individuals, and ineffective training for officers overcoming transparency and implementing PP[312].

[304] Heaton (n50) 339; Maguire (n50) 319.
[305] Pager and Shepard (n65).
[306] Pippa Scotcher, 'AI and Article 22: The Need for Meaningful Human Review' (*Outsourced Data Protection Officers GDPR and Data Protection Compliance,* 19 April 2022) <https://www.dpocentre.com/ai-and-article-22-the-need-for-meaningful-human-review/> accessed 2 April 2024.
[307] Ibid.
[308] Kaminski (n153) 198.
[309] Cobbe (n117) 5.
[310] UK General Data Protection Regulation 2018, art 22.
[311] Cobbe (n117) 5.
[312] As is be discussed in Section 4B.

Intentional Opacity

Ensuring transparency is essential for scrutinising and implementing PP, and providing clear definitions of 'meaningful human intervention'.[313] Borgesius suggests publicly releasing AI information to facilitate academic examination of the code.[314] However, this argument fails to recognise that algorithms – developed and owned by companies deploying tools to the police - are private property and, thus, capable of being protected under trade secrets rights within the GDPR's Recital 63.[315] Additionally, disclosing information may risk leaking personal data, creating privacy concerns for processed individuals.[316] Informational fairness scholars argue that, in order to be fair, AI must be transparent and provide explanations for decisions.[317] Therefore, to uphold the White Paper's transparency principles, clear legislative rules are needed for information publication when private companies supply AI to public bodies.[318]

To address trade secret constraints, Eechoud et al. suggest that transparency can be achieved within secure environments, where researchers access data under defined conditions, enabling authorities to scrutinise predictive policing systems without risking data leaks or exposing trade secrets to competitors..[319] This also enhances police investigatory powers; if criminals become aware (before a decision has been made) of an ongoing investigation due to system data being too transparent, they may alter their behaviour or destroy evidence.[320] By overseeing specific decision-making processes, authorities can

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[313] UK General Data Protection Regulation 2018, art 22; Joel Walmsley, 'Artificial intelligence and the Value of Transparency' (2021) 36(1) AIS 585, 592.

[314] Borgesius (n254) 54.

[315] Gianclaudio Malgieri, 'Trade Secrets v Personal Data: A Possible Solution for Balancing Rights' (2018) 6(2) IDPL 102, 104; UK General Data Protection Regulation 2018, recital 63; further discussed in Section 2D.

[316] Datta (n181).

[317] Starke et al. (n236) 6.

[318] Fair Trials, 'Automating Injustice: The Use of Artificial Intelligence and Automated Decision-Making Systems in Criminal Justice in Europe' [2021] FT 4, 5.

[319] Mireille Eechoud, Frederik Borgesius, Jonathan Gray, 'Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework' (2015) 30(3) BTLJ 2073, 2095.

[320] Information Commissioner's Office, 'The Right to Be Informed' (*ico.org.uk,* 27 July 2023) <https://ico.org.uk/for-organisations/law-enforcement/guide-to-le-processing/individual-rights/the-right-to-be-informed/> accessed 17 January 2024.

help prevent discrimination by ensuring that the processing represents a 'proportionate means of achieving a legitimate aim'.[321] This approach parallels the 'regulatory sandbox'[322] offering secure environments for regulators to assess discrimination risks. Therefore, this approach requires amendment of the GDPR's Recital 63 to allow 'trade secrets' to be securely disclosed.[323] By overcoming intentional opacity through mandating regulatory sandboxes, individuals are more adequately shielded from discrimination. Therefore, regulation should aim to balance public interest in transparency with commercial, privacy and opacity concerns.[324]

Intrinsic Opacity and 'Meaningful Human Intervention'

In line with Article 15(1a) of the EAIA ,[325] scholars argue that including crime analysts into police forces serves as built-in trainers.[326] This statutory approach ensures that initially sceptical junior officers receive adequate education on PP implementation as well as its benefits, as outlined in the three objectives[327]. Therefore, officers are incentivised to use PP and reap its benefits. However, this argument fails to recognise that crime analysts are also susceptible to intrinsic opacity, leaving them unable to provide adequate training.[328] Solely using this approach means 'meaningful human intervention'[329] definitions cannot be explained within training, as officers cannot understand the AI.[330] Additionally, this is hindered by an absence of legislation; law enforcement themselves are not required to provide reasoning for decisions made by AI, as

[321] Equality Act 2010, s 19(2)(d).
[322] Discussed within Section 3.
[323] UK General Data Protection Regulation 2018, Recital 63; Liberty (n78) 3.
[324] Borgesius (n254) 65.
[325] European Union Artificial Intelligence Act 2024, art 15(1a)
[326] Ferguson (n300) 1153; David Kelley and Sharon McCarthy, 'The Report of the Crime Reporting Review Committee to Commissioner Raymond W. Kelly Concerning Compstat Auditing' [2013] NYCG 1, 54.
[327] As discussed in Section 2B.
[328] Cobbe (n117) 5.
[329] UK General Data Protection Regulation 2018, art 22.
[330] Cobbe (n117) 6.

it would be too administratively burdensome.[331] Therefore, the Government must recommend clear measures of transparency and tools for crime analysts and officers to understand 'meaningful human intervention',[332] thus complying with PSED.[333]

For example, the Government can implement 'Local Interpretable Model-agnostic Explanations' (LIME) for individual predictions.[334] The model works for any AI, and thus enables data analysts conducting officer training to explain decisions comprehensibly, thereby mitigating intrinsic opacity.[335] 'Shapley Additive exPlanations' (SHAP) is another tool which interprets features, such as HART's postcodes, and quantifies its importance.[336] Using both tools creates a holistic method to increase transparency and provide decision explanations to officers; LIME focuses on specific explanations, while SHAP provides insights into features more generally. Consequently, urgent police work is not hindered by the time taken to interpret decisions; the accuracy and importance of specific variables is already quantified.[337] Therefore, implementing 'meaningful human intervention'[338] techniques for enhancing transparency can mitigate systemic and systematic discrimination.[339]

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[331] *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651, [665]– [666].

[332] UK General Data Protection Regulation 2018, art 22; Liberty (n78) 3.

[333] Fair Trials (n297) 5; Equality Act 2010, s 149.

[334] Krystian Safjan, 'Explaining AI - the Key Differences between LIME and SHAP Methods' (*Krystian Safjan's Blog,* 14 April 2023) <https://safjan.com/explaining-ai-the-key-differences-between-lime-and-shap-methods/> accessed 16 March 2024; Afaf Athar, 'SHAP (SHapley Additive ExPlanations) and LIME (Local Interpretable Model-Agnostic Explanations)…' (*Analytics Vidhya,* 8 October 2020) <https://medium.com/analytics-vidhya/shap-shapley-additive-explanations-and-lime-local-interpretable-model-agnostic-explanations-8c0aa33e91f> accessed 3 April 2024.

[335] Cobbe (n117) 5.

[336] Safjan (n334); Athar (n310).

[337] Spencer et al. (n154).

[338] UK General Data Protection Regulation 2018, art 22.

[339] Pager and Shepard (n65).

Furthermore, such tools may provide explanations to individuals seeking recourse.[340] By providing individuals with 'right to an explanation', they can prove a 'pattern of discrimination' when seeking a remedy - as required under the Equality Act.[341] Such provisions can be seen in the EAIA's 'right to an explanation' and DPA's 'right of access'.[342] The DPA gives individuals the right to request access to information that law enforcement bodies hold about them, while the EAIA allows individuals the right to request explanation of the role AI played in a decision.[343] Therefore, Mazzi et al. argue that individuals are adequately protected as individuals can already check the lawfulness and reasoning behind processing.[344]

However, neither legislation specifies what exact information individuals should receive. Thus, by using LIME and SHAP, individuals may receive specific explanations regarding their exact processing, alongside how the tool works in general.[345] This allows individuals to gain a holistic view of whether their 'social group' data is being processed fairly by PP. Therefore, transparency does not mean that every detail of an AI system is presented,[346] thus allowing companies to withhold certain trade secrets from the public.[347] Instead, transparency provides intelligible information to officers, as well as to individuals bringing discrimination claims.

Although such tools assist explaining specific decisions, they do not fully allow 'meaningful human intervention'[348] as they may not adequately highlight

[340] Zilka et al. (n31) 885.
[341] *Rihal v London Borough of Ealing* [2004] IRLR 642; Equality Act 2010, s 19; Atkinson (n182) 1355.
[342] European Union Artificial Intelligence Act 2024, art 68; Data Protection Act 2018, s45.
[343] Ibid.
[344] Francesca Mazzi et al., 'The UK Reform of Data Protection: Key Changes and their Ethical, Social and Legal Implications' (2022) 30(3) IJLIT 270, 273.
[345] Safjan (n334); Athar (n310).
[346] Liberty (n78) 3.
[347] UK General Data Protection Regulation 2018, recital 63; Malgieri (n315).
[348] UK General Data Protection Regulation 2018, art 22.

system biases.[349] Pager and Shepard's definition of discrimination[350] highlights that training must include the limitations, biases, and ethical implications of AI.[351] Therefore, the 'Fairness Toolkit' and 'Digital Decision Tool' can be used as abstract methods for considering societal impacts of PP.[352] The former uses awareness cards, providing examples of bias and unfairness in algorithmic systems.[353] The latter is an interactive flowchart, raising concerns about bias, fairness, and ethical PP issues.[354] Embedding education on wider implications of systemic discrimination incentivises officers sceptical of AI to use the tools by formalising an objective process.

However, literature supporting police training programmes overlooks financial constraints on the police force, which make training unfeasible.[355] Thus, Ferguson suggests that the companies supplying PP have incentives to fund training programs.[356] As the police generate crime data that fuels predictive technology development, it is imperative that companies ensure officers collect such data accurately.[357] This works alongside bias mitigation techniques to ensure accurate and objective data, thus upholding Objectives Two and Three. Furthermore, this approach ensures that officers follow objective standards when interpreting PP outputs, instead of imposing their own biases.[358]

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[349] Truby et al. (n143) 272.

[350] Examined in Section 2B.

[351] Pager and Shepard (n65); Nick Evans, 'Artificial Intelligence and Policing: It's a Matter of Trust' (*Policing Insight,* 1 September 2022) <https://policinginsight.com/feature/opinion/artificial-intelligence-and-policing-its-a-matter-of-trust/> accessed 30 December 2023.

[352] UnBias, 'Fairness Toolkit' (*UnBias,* 4 July 2018) <https://unbias.wp.horizon.ac.uk/fairness-toolkit/> accessed 2 April 2024; Natasha Duarte, 'Digital Decisions Tool' (*Center for Democracy and Technology,* 8 August 2017) <https://cdt.org/insights/digital-decisions-tool/> accessed 7 April 2024; Michael Rovatsos, Brent Mittelstadt and Ansgar Koene, 'Landscape Summary:Bias in Algorithmic Decision-Making' [2019] CDEI 2, 30.

[353] Ibid.

[354] Ibid.

[355] Dodd (n257).

[356] Ferguson (n300) 1153.

[357] Ibid.

[358] Sandhu and Fussey (n50) 77.

Effective Implementation

However, many academics who favour education overlook implementation guidance. This issue remains unresolved by the EAIA given that law enforcement is exempt from Article 14(5)[359] which mandates verification of decisions by two competent and trained individuals.[360] While the need for streamlined decision-making from officers in time-sensitive situations may override two-person verification, speed should not compromise decision quality or individual rights and public safety.[361] Jiang et al. argue that incorporating multiple individuals fosters a balanced perspective and reduces the occurrence of automation bias.[362]

However, due to the high potential for PP to perpetuate discrimination, Jiang's 'two-person verification' solution is too simplistic if used alone.[363] Having two people review a decision is ineffective without a standard against which their biases can be assessed. Without doing so, this solution poses the risk of reinforcing the same biases PP aimed to eliminate. Therefore, effective documentation[364] is also required for holding officers accountable and assessing the trainings' effectiveness.[365] Statutory implementation of rules for documenting detailed, case-specific, written decisions – including involvement of PP – is essential.[366] This ensures transparency obligations have the intended

[359] European Union Artificial Intelligence Act 2024, s 14(5).
[360] Ibid, art 14(5).
[361] Owen Pyle, 'Fast Decision-Making in Policing and Perception of Risk' (*College of Policing*, 5 June 2022) <https://www.college.police.uk/article/fast-decision-making-policing-and-perception-risk> accessed 3 February 2024.
[362] Luyuan Jiang et al., 'Who should be first? How and When AI- Human Order Influences Procedural Justice in a Multistage Decision-Making Process' (2023) 18(7) PLS 1, 4.
[363] Big Brother Watch (n117).
[364] Examined in Section 4A.
[365] Barabas (n102) 96.
[366] Fair Trials (n297) 5.

impact of ensuring officers provide adequate decision-reasoning to comply with PSED[367] and 'meaningful human intervention'[368] obligations.[369]

Overall, to mandate an objective standard of 'meaningful human intervention',[370] training led by analysts from PP suppliers is essential.[371] This would reduce automation bias and incentivise officers to use PP, rather than imposing their own biases.[372] This requires legislatively mandated transparency for overcoming intentional and intrinsic opacity.[373] Furthermore, to ensure effective implementation, PP should be interpreted at least within pairs,[374] alongside 'best practice' documentation standards.[375]

C. Concluding Remarks

This section proposed a combination of legislation and enforceable abstract measures to mitigate PP discrimination. The integration of the EAIA illustrates the importance of statutory measures in safeguarding individuals' rights, whilst also fostering innovation.[376] Various fairness definitions informed legislation and tools for combatting discrimination caused by 'dirty'[377] and proxy data.[378] Suggestions included testing mathematical bias techniques in regulatory sandboxes to mitigate bias pre-deployment, while proposing pre-made abstract tools to measure methods against.[379] Post-deployment, broader contexts of discrimination and standardised managerial documentation can

[367] Equality Act 2010, s 149.
[368] UK General Data Protection Regulation 2018, art 22.
[369] Datta (n181) 599; Zilka (n31) 886; Veale (n39) 65.
[370] UK General Data Protection Regulation 2018, art 22.
[371] Ferguson (n300) 1153; Kelley and McCarthy (n326) 54; Evans (n351).
[372] Mendoza and Bygrave (n154) 11; Sandhu and Fussey (n50) 77.
[373] Liberty (n78) 4; Cobbe (n117) 5.
[374] European Union Artificial Intelligence Act 2024, art 14(5).
[375] Barabas (n102) 96; Section 4A.
[376] European Union Artificial Intelligence Act 2024; Schuett (n14) 4.
[377] Richardson et al. (n69) 195.
[378] Starke (n236) 1; Hutchinson and Mitchell (n236) 54.
[379] Centre for Data Ethics and Innovation (n87) 29; Truby et al. (n143) 272; UnBias (n352).

further mitigate bias and identify proxy data.[380] This upholds Objectives One and Two: by mitigating bias to ensure accurate PP, police resources can be effectively distributed. Regarding 'meaningful human intervention',[381] companies supplying PP should provide training by experts to ensure proper implementation, without allowing automation or officer bias.[382] This upholds Objective Three: officer training enables objective PP application. Training facilitates clear explanation of decisions to individuals seeking recourse, thus promoting PP as an unbiased tool, reliant on intelligence-led policing rather than intuition-led approaches.[383]

5. Conclusion

This paper established that it is possible to eliminate discrimination and to uphold the three PP objectives[384]. However, the Government's efforts thus far have been inadequate, prompting the need for reform. The paper first examined definitions of ADM and AI to explain how GVM and HART work.[385] Additionally several definitions of discrimination were synthesised to establish a comprehensive framework for use in the following sections.

The paper argued that HART causes discrimination and compared its inadequacies with those of the now discontinued GVM. GVM was found discriminatory under UK law, and due to its similarities with HART, stronger legislation is needed to protect individuals from similar harms. Legislation would also prompt law enforcement and companies to develop tools that comply.

[380] Lepri et al. (n261) 617; Barabas (n102) 96; Further discussion in Section 3.
[381] UK General Data Protection Regulation 2018, art 22.
[382] Ferguson (n300) 1153.
[383] Sandhu and Fussey (n50) 74; Ratcliffe (n47) 6; Heaton (n50) 339; Maguire (n50) 319.
[384] Section 2B.
[385] Sections 2A and 2B.

HART was found to be discriminatory in several key ways. Primarily, HART relies on 'dirty' data[386] that misrepresents certain social groups, leading to biased outcomes—exacerbated by the White Paper's lack of adequate safeguards.[387] Proxy data results in similar discrimination which is harder to regulate as it falls outside the Equality Act, and the White Paper's hyperfocus on innovation weakens proxy data mitigation efforts[388]. Although bias mitigation and innovation can coexist,[389] the government prioritises economic and commercial interests over fairness.

The absence of a clear standard for 'meaningful human intervention'[390] also causes inconsistent use of HART—some officers overly trust it, others reject it—both leading to discrimination.[391] This issue remains largely unaddressed by the White Paper. Officers must understand how HART functions to apply it fairly, yet opacity—both intentional and intrinsic—prevents this.[392] This also undermines individuals' ability to seek legal recourse, as they must prove a pattern of discrimination, which requires access to explanations that are currently unavailable.[393] Without stronger transparency, both fair implementation and accountability are compromised.

Drawing on the EAIA and academic insight,[394] the government can implement legislative reform and currently abstract methods to address bias. Consequently, 'dirty'[395] and proxy data can be identified and mitigated through regulation, both before and after deployment, while accounting for

[386] Richardson et al. (n69) 195.
[387] Section 3A.
[388] Section 3B.
[389] As argued in Section 3.
[390] UK General Data Protection Regulation 2018, art 22.
[391] Section 3C.
[392] Cobbe (n105) 5.
[393] *Rihal v London Borough of Ealing* [2004] IRLR 642; Equality Act 2010, s 19; Atkinson (n167) 1355.
[394] European Union Artificial Intelligence Act 2024.
[395] Richardson et al. (n69) 195.

broader contexts of discrimination.[396] This enhances the three objectives of PP; by mitigating bias, PP becomes more accurate and therefore objective, thus allowing policing resources to be effectively distributed. Mandated training is also needed to overcome opacity and establish an objective standard for 'meaningful human intervention';[397] this hinges on the implementation of transparency legislation.[398] To ensure this approach is effective, 'best practice' documentation standards are also required. This helps officers understand the AI, reducing both automation bias and the imposition of personal bias. Overall, the combination of the outlined methods upholds the three PP objectives, and significantly reduces the likelihood of PP discrimination.

It is crucial to highlight that the infancy of both the EAIA, and the suggested tools and technologies means that its implementation is yet to be seen. Further research on the tools' effectiveness, impacts on various 'social groups', whether it upholds the three PP objectives, and its implementation must be conducted. This should be guided by and respond to developments in EU case law, incorporating legal analysis, empirical impact studies, and regulatory audits.[399] However, this paper contributes to paving the way for fulfilment of the three PP objectives. It may additionally serve as a basis for determining the areas to be addressed by the US-UK agreement[400], as well as a framework for evaluating its effectiveness. Consequently, over time, discriminatory PP can be eradicated, whilst ensuring that the public is sufficiently shielded from genuinely threatening individuals.

[396] Section 4C.

[397] UK General Data Protection Regulation 2018, art 22.

[398] Section 4B.

[399] Section 2B.

[400] Department for Science, Innovation and Technology, AI Safety Institutue, and The Rt Hon Michelle Donelan MP (n16).

Autonomy and capacity in Healthcare: What do they mean and to what extent are interpretative limitations failing those who lack them?

JOSEPH NICOLLE

Abstract

In 2005, the law regarding mental capacity was established. It pledged to protect and restore power to individuals found to lack the capacity to make decisions for themselves. It stated that all adults should receive the support to make their own decisions where possible and provided a framework to aid those who could not. This paper examines whether the law has complied with these promises or whether it has fallen disastrously short. This will be achieved firstly through consideration of the principles of autonomy and capacity and their association. Secondly, analysis of relevant statute and case law will demonstrate its interpretive shortcomings and evidence how the law may be reformed to align with modern understandings and interpretations. It will be argued that the current law on capacity is distorted and provides a disjointed understanding for autonomy. Subsequently, it will be argued that these contorted interpretations of the law fails those it vows to protect. Furthermore, such skewed interpretations highlight blemishes in the current safeguards for depriving incapacitated individuals of their liberty, resulting in a 'theoretical gap,' which has resulted in very real consequences. Finally, it will be proposed that there are two central adjustments to be made of the law, one of which takes inspiration from international interpretations.

1. Introduction

The legal regulation of healthcare has long been a field of discord. Arguably, from a legal and healthcare perspective, there are no more salient issues than those limiting the powers of the autonomous individual. Whilst legal concerns cease to be at the forefront of human consideration when making healthcare

decisions, the law plays a pivotal role in the decision-making process. Firstly, it dictates when individuals are capable to make their own decisions and when they are deemed incapable to the extent their decisions require intervention.[1] Secondly, it provides a framework to determine what happens when these rights are withdrawn.[2]

The recognition of individual autonomy and the right of the individual to make independent decisions rests on whether they obtain the required mental capacity to do so.[3] This involves an in-depth analysis and assessment of whether the individual's decisions are not clouded by mental defect. Therefore, whilst the law recognises individual autonomy, whether this principle manifests in practice, is contingent on whether the standard for capacity is met. This standard is enshrined in the Mental Capacity Act 2005 (MCA).[4] With this in mind, it is necessary to consider the significance and theoretical underpinnings of autonomy and capacity, how they work together, and whether the law interprets and applies them correctly. Failing this, it is essential to evaluate the solutions that seek to provide remedy.

To achieve this, both academic literature as well as legal and medical principles will be analysed. Section one will consider theoretical understandings of autonomy and capacity, and their application in healthcare. This will provide a broad understanding of both concepts to allow the second chapter to deconstruct the MCA and how its theoretical and interpretive limitations prevent it from fulfilling its intended purposes. Following this, discussion will consider the most appropriate solutions. It will be argued, that a combination of theoretical and interpretative improvements should be made, together with, a transformation of existing perceptions and understandings. Despite this, this paper recognises the laws limited ability to provide complete reform and

[1] See Mental Capacity Act 2005, s.3.
[2] See Mental Capacity Act 2005, s.4
[3] Mental Capacity Act 2005, s.1(1).
[4] Mental Capacity Act 2005.

acknowledges there are areas where the law may cease to assist due to potential rigidity.

2. *Understandings of autonomy and capacity*

To fulfil the intentions of this paper, it is firstly essential to gain an understanding of what autonomy and capacity mean intrinsically. This chapter will provide an understanding of both concepts, their relationship, and their legal and medical relevance. This will be followed by a discussion of the case law to demonstrate various inconsistencies concerning how both concepts interrelate.

A. Conceptions of Autonomy

Autonomy, in and of itself, has little to do with healthcare. Originating from Ancient Greece, it is merely the idea of self-governance and one's ability to make their own decisions according to their own plan. [5] A contentious topic amongst philosophers, there remains differing interpretations on how autonomy should be understood and exercised.[6] It is not the intention of this paper to reach a complete and faultless interpretation of how autonomy should be interpreted and applied. This would be impossible and discourteous of all the innovative contributions made by various thinkers throughout the centuries. To land on an absolute understanding would be unachievable, as Gerald Dworkin noted, the only two undisputed aspects of autonomy are that 'it is an element of all persons,' and that it is a 'desirable quality to have'.[7]

[5] John Saunders 'Autonomy, consent and the law' (2011) 11(1) Clinical Medicine 94
[6] Viv Ashley, 'Philosophical Models of Personal Autonomy' (2012) *Green Paper Technical Report: Philosophical Models of Autonomy*. Essex Autonomy Project available < https://autonomy.essex.ac.uk/wp-content/uploads/2016/11/Essex-Autonomy-Project-Philosophical-Models-of-Autonomy-October-2012.pdf> accessed 29 September 2025
[7] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988)

However, it is important to gain a sufficient understanding of its components to provide context to the present topic.

Whilst there is somewhat consensus on what autonomy is, enabled by stripping it of its philosophical interpretations and reverting it back to its Ancient Greek, *auto* meaning 'self' and *nomos* meaning 'law'[8], its philosophical underpinnings provide insight into how it should be applied in practice which prove useful for this essay. Two central contributors to contemporary interpretations of autonomy and its application are Kant and Mill. Kant referred to rationality when he spoke of individual autonomy.[9] According to Kant, this was achieved by following objective principles such as the universalizability principle, which states one's actions should be permissible for others to imitate.[10]

On the other hand, using the utilitarian approach advanced by Bentham, Mill introduced the harm principle.[11] This maintains that one's autonomous actions should only be restricted if they cause harm to others.[12] Mill's interpretation is functional for this paper as it emphasises the limits that should be placed on autonomy based on the consequences one's actions may produce. Furthermore, an issue arises when the harm principle is applied to the individual themselves. It is rational to argue that one's autonomy should be limited to prevent harm to others. However, the question remains as to what happens in cases where one's actions cause harm to themselves and they do not possess capacity to perceive these harms.

For example, a Jehovah Witness' refusal to undergo a blood transfusion may be detrimental to themselves but does not directly affect anyone else, other than perhaps loved ones.[13] This begs the question on where the line will be drawn

[8] 'Autonomy' available <https://www.vocabulary.com/dictionary/autonomy> Accessed April 2024.
[9] Immanuel Kant, *Groundwork on the Metaphysics of Morals* (first published 1785, J.W. Ellington trans, Hackett Publishing 1993).
[10] Ibid.
[11] John Stuart Mill, *On Liberty and Other Essays* (first published 1859, J. Grey ed, OUP 1991.)
[12] Ibid.
[13] See J. Pugh, *Autonomy, Rationality and Contemporary Bioethics* (OUP 2020)

when a capable individual openly puts themselves at risk through their actions. Is forcing upon individuals what is objectively right for them ethical? There is certainly an argument to say that it is, and blood transfusions provide a good example.

However, less sinister examples provide argument to the contrary. Gillon's use of unhealthy food provides an useful illustration[14]. The choice to eat healthy food is in the long-term interests of all individuals yet many succumb to unhealthy food with the full knowledge it is not in their long-term interests. Therefore, should individuals be prevented from eating unhealthy foods just because it is better for them? To take it upon oneself to restrict the food choices of others in advocacy of their long-term benefit seems excessive. Poor food choices may be detrimental in the long term but it is not going to be fatal at the present time. As a result, it is crucial to allow others to live the lifestyle they wish so long as their decision is not detrimental to their current state of wellbeing. Consequently, whether it is permissible to limit one's autonomous choices is dependent on the effects of the decision being made, and so there must be a line where something becomes potentially too disastrous to allow the individual act on. However, finding the balance between allowing one to rule their own life despite making consequential decisions and limiting their individual autonomy to promote what others believe is in their best interests is proving to be a difficult equilibrium.

Which of these interpretations is ethically 'correct' merits boundless discussion, but for the purposes of this paper, it is Mills interpretation that is the most practical interpretation to adopt, as opposed to using autonomy in a Kantian sense.

[14] Raanan Gillon, 'Ethics need principles – four can encompass the rest – and respect for autonomy should be "first among equals"' (2003) 29 Journal of Medical Ethics 307, 310.

B. In Bioethics

Developments in individual autonomy have inevitably translated into other areas and are not exclusive to philosophical discussion. It has gained increasing recognition in healthcare, with the paternalism previously inherent in the medical profession yielding to patient autonomy.

The previous ethical and legal models of healthcare focussed on prevention of physician malpractice and their obligation to provide appropriate treatment. However, the current autonomy model ensures medical professions are more attentive to the patient's wishes. There has been a shift from the physician being responsible for determining what is objectively best for the individual, to the physician's responsibility to fulfil the patient's wishes.[15] Autonomy holds a contentious place in healthcare due to its conflict with other principles of medical ethics. The healthcare industry is founded on the assumption that those with medical expertise are best placed to decide solutions for how to improve one's health.[16] However, in recent times the conclusions drawn by physicians have been abdicated in support of individual autonomy.

For example, *Airedale NHS Trust v Bland*[17] highlighted the right of the autonomous patient to decline medical intervention even if resulting in their death. Moreover, Lord Goff explicitly stated that the sanctity of life has surrendered to the autonomy principle.[18] More recently, *Montgomery v Lanarkshire Health Board*[19] presented a clash between patient autonomy and medical expertise in which the former reigned supreme.

[15] Charles W. Lidz, Lynn Fischer, Robert M. Arnold, The Meaning of Autonomy in Long Term Care, *The Erosion of Autonomy in Long-Term Care* (OUP, 1992)
[16] Dylan Mirek Popowicz, '"Doctor Knows Best": On the Epistemic Authority of the Medical Practitioner' (2021) 2(2) Philosophy of Medicine 1.
[17] *Airedale NHS Trust v Bland* [1993] AC 789.
[18] *Ibid*,867.
[19] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

The increased recognition of patient autonomy is fundamentally constructive and commendable as it demonstrates the increased centrality of the individual in healthcare decision-making in line with modern human rights standards. However, whether it should override auxiliary medical principles is disputable.

The previous model of physicians making patient decisions has been compared to the paternalism seen in a 'condescending gentleman'[20] and subsequently obtains authoritarian elements, particularly true at its inception in the eighteenth century. Whilst a move towards a more inclusive decision-making process was needed due to the paternalistic nature of the medical profession, it may be argued that the increase in patient autonomy has come at the expense of another medical principle - the principle of beneficence. This places a duty on physicians to act to the benefit of the patient. Yet, how this is to be interpreted is contentious, but it stands to reason that in healthcare it means to improve the patient's health or reduce the harm or pain suffered. Consequently, this can sometimes conflict with what the patient wishes as considered above. Whilst they will almost certainly want to reduce their pain or suffering, the viable methods to do so may differ between patient and physician. Beneficence is a cornerstone of medical ethics and has been described as a moral obligation of physicians[21] and so, acknowledgement of this is important to the issue of limiting patient autonomy.

C. Where does capacity fit in?

A plausible prerequisite to exercise one's autonomy is the need to obtain the capacity to do so. Capacity has different definitions dependent on context, however, the relevant definition for the purposes of this paper is 'the ability to

[20]Edmund D. Pellegrino & David C. Thomasma, 'The Conflict between Autonomy and Beneficence in Medical Ethics: Proposal for a Resolution' (1987) 3 J Contemp Health L & Pol'y 23, 25.
[21] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (OUP, 2001).

understand or to do something'.[22] Much like autonomy, there is no absolute definition, understanding, or interpretation, but it is accurate to state that it is often synonymous with ability. The differing interpretations surrounding capacity are beyond the realms of this paper, as the primary concern here is to provide knowledge of how it can be broadly understood and its legal relation to autonomy. The declaration by George Box that 'all models are wrong, but some are useful,'[23] has never been more accurate when dealing with capacity. This said, there are different interpretations that prove useful.

A distinction must firstly be made between mental and legal capacity. Legal capacity refers to the formal ability to hold and exercise legal rights and duties.[24] Therefore, theoretically, and according to human right principles, everyone has, or should have, legal capacity. This right is inferred by legislation such as the Human Rights Act[25] and conventions such as the European Convention on Human Rights (ECHR).[26] Legal capacity becomes contentious when those with mental impairments try to make decisions but find these decisions blocked and their legal rights compromised due to their mental impairment.

On the other hand, mental capacity, which is specifically relevant to this discussion, considers one's decision-making skills. The substantive law on mental capacity will be analysed in the next chapter, but at this stage, it can be understood as one's ability to understand information and form decisions. The test for legal capacity is, as demonstrated above, objective and applies to all. However, the test for mental capacity is subjective as it is one persons ability to make a particular decision in a particular time. One's mental capacity is subject to enhanced scrutiny which is evident in the series of questions that must be

[22]Alex Ruck Keene, Nuala B. Kane, Scott Y.H. Kim, Gareth S. Owen, 'Mental capacity – why look for a paradigm shift' (2023) 31(3) Medical Law Review 340.
[23] George E.P. Box, 'Science and Statistics' (1986) 71 Journal of the American Statistical Association 791
[24] Alex Ruck Keene, Nuala B. Kane, Scott Y.H. Kim, Gareth S. Owen, 'Mental capacity – why look for a paradigm shift' (2023) 31(3) Medical Law Review 340
[25] Human Rights Act 1998.
[26] European Convention on Human Rights 1950.

satisfied in order to prove ones mental capacity – such as can the individual understand the information relevant to the decision, can they retain this information, can they then use or weigh the information to reach a decision, can they communicate this decision. Consequently, mental capacity ranges from person-to-person for reasons such as mental impairment, age or brain injury.

It is also important to consider the legal relationship between mental capacity and autonomy. Paul Skowron posits three contradictory accounts in the case law regarding this.[27] The first to consider is capacity as autonomy's gatekeeper. This is the most dominant interpretation. This account maintains that, if an individual has the mental capacity to make decisions, then their autonomy to do so should be respected and exempt from state interference. . On the other hand, it affirms that where individuals do not have the mental capacity, they are deemed to lack autonomy and therefore, state interference is permitted. However, this account does recognise that those who lack capacity still have an ability to self-govern. *Re C*[28] provides a good example of the gatekeeper account, with Thorpe J confirming that if an individual's capacity to decide is not impaired then autonomy will hold more weight.[29] However, the case also explicitly stated that 'the further capacity is reduced, the lighter autonomy weighs'.[30] Subsequently, capacity acts as a gatekeeper since this is the tool one can use to embrace their autonomy in a legal sense.

The second account is the insufficiency account. Like the gatekeeper narrative , it acknowledges that incapacitated individuals do not obtain an overriding right to respect for autonomy. However, the insufficiency account fails to recognise that those with mental capacity do necessarily obtain this right. For instance, there is additional criteria to satisfy for those deemed capable to gain

[27] Paul Skowron, 'The Relationship between Autonomy and Adult Mental Capacity in the Law of England and Wales' (2019) 27(1) Medical Law Review 32, 58.
[28] *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290 Fam.
[29] *Ibid* [292] (Thorpe J).
[30] *Ibid*.

respect for their autonomy. Consequently, having mental capacity does not equate to autonomous recognition. In *R v Cooper,* Lady Hale maintained that autonomy includes the 'freedom and the capacity to make a choice.'[31]Therefore, capacity is only one element of autonomy. The other is 'freedom'. This freedom can be understood as freedom from external forces. In *Re T,* Lord Donaldson held that it was not only necessary for doctors to consider a patient's capacity, but also whether they were under significant influence from others.[32] If this 'undue influence'[33] is present, even for capable individuals, the court considers this to 'destroy her volition,'[34]and so, will cease to recognise their autonomy.

Finally, Skowron notes the survival account.[35] This contends that respect for an incapable individual's autonomy can still withstand state intervention. In *WvM,* Mr Justice Baker confirmed that 'person autonomy survives the onset of incapacity'.[36] Whilst this seems certain, as Skowron highlights, the position this takes up is not straightforward. This account of the relationship between autonomy and capacity falls somewhere between the following extremes. At one end, is the notion that all individuals, capable or not, should be free from state intervention –rationalised on the premise that their very status as humans, is suggestive of their autonomy.

However, at the opposing end, is the argument that incapable individuals, whilst retaining some capacity to self-determine, should not be recognised as autonomous. The survival account maintains that the autonomy right can still be upheld despite incapacity, yet, it does not have to. For instance, Mr Justice Baker further contended that a court decision that sufficiently regards the patient's autonomy and wishes of them and their family and withholds treatment in the patient's best interests,[37] does not breach autonomy under

[31] *R v Cooper* [2009] UKHL 42, [2010] Crim LR [75].
[32] *Re T (An Adult: Refusal of Treatment)* [1992] EWCA Civ 18, [1993] Fam 95 [37].
[33] *Ibid* [41] (Butler-Sloss LJ).
[34] *Ibid.*
[35] Paul Skowron, 'The Relationship between Autonomy and Adult Mental Capacity in the Law of England and Wales' (2019) 27(1) Medical Law Review 32, 58
[36] *W v M* [2011] EWCOP 2443, [2012] 1 WLR 1653 [95].
[37] *Ibid* [95].

Article 8.[38] Therefore, this is suggestive that respect for autonomy can still be maintained despite incapacity. Put differently, respect for autonomy can limit decisions made on behalf of incapable individuals.

It can be summarised that these interpretations provide differing considerations of how the legal relationship between autonomy and capacity should be understood. Though, this is often a matter of judicial interpretation. Therefore, the influence of capacity on autonomy is only as prevalent as the judiciary allow it to be. The following section will consider the current law on capacity, beginning with its provisions, principles, and assessment. Subsequently, its limitations will be illustrated focusing specifically on the laws interpretative and theoretical misapprehensions, as opposed to its practical limitations.

3. *A Justifiable Infringement or Unfit For Purpose?*

A comprehensive understanding of both autonomy and capacity allows for analysis of the current law. Assessments of capacity are consequential to an individual's ability to self-govern. The MCA was contended to be a 'visionary piece of legislation,'[39] and a triumphant achievement for autonomy. However, this rhetoric has proved far from accurate. Its inadequacy has been demonstrated by a plethora of academics, legal experts, and physicians. The purpose of this section is not to present an exhaustive list of the many deficiencies of the act as these are widely recorded by government departments[40], academics[41] and legal specialists.[42]Rather, this section is more

[38] Article 8 European Convention on Human Rights [1950].
[39] Select Committeeon the Mental Capacity Act 2005, '*Mental Capacity Act 2005: Post-Legislative Scrutiny*' (2014HL, 139.)
[40] *Ibid.*
[41] Sam Wilson, 'Mental Capacity Legislation in the UK: Systemic Review of the Experiences of Adults Lacking Capacity and Their Carers' (2017) 41 5 BJPSych Bulletin 260,266.
[42] Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372.)

concerned with the ways in which the MCA has a narrow and limited interpretation of autonomy, a misguided and archaic perspective on capacity, and lastly, how its current framework for liberty deprivation is broken.

A. Historical Context

Roots of the MCA are found in *F v West Berkshire HA*.[43] Here, the House of Lords concluded a sterilisation operation could be performed on an impaired adult woman without her consent if it was in her best interests. *Berkshire* is notorious for the attention it gave to patient's best interests. This defence of acting in the patient's best interests is now enshrined in Section 5 of the MCA.[44]Following *Berkshire,* the Law Commission concluded[45] that the Mental Health Act[46] - responsible for capacity matters - was unsystematic and heedless of modern values. Consequently, reform necessitated consideration of wider legal and social issues than previously addressed.

B. Provisions and Principles

The MCA provided a legal framework by which to determine one's mental capabilities. It additionally provides those responsible for care with the right to make decisions on their behalf. The principles of the MCA can be found in Section 1.[47]The first, maintains the assumption of capacity unless there is well-founded evidence to the contrary.[48] Secondly, everything must be done to enhance the decision-making capabilities of the individual.[49] Subsequently, a mere irrational decision is not indicative of incapacity.[50] The fourth and fifth

[43] *F v West Berkshire Health Authority* [1990] 2 AC 1.
[44] Mental Capacity Act 2005, S5.
[45] Law Commission, *Mental Incapacity,* (Law Com No 231, 1995.).
[46] Mental Health Act 1983.
[47] Mental Capacity Act 2005.
[48] Ibid., s.1(2)
[49] Ibid., s.1(3)
[50] Ibid.,s.1(4)

principles assure the best interests of the individual are met and that the least restrictive treatment option is used.[51]

It is a subjective, situation-specific framework. Matthew Hotopf demonstrates this with the example of dementia patients.[52]The Act does not render all dementia patient's incapable.[53] Rather, the Act assumes their capacity unless demonstrated that their dementia restricts their capabilities.[54] Additionally, incapacity on one decision does not mean incapacity on *all* decisions.[55] The capacity assessment itself is two-fold.[56] The first element requires impairment of mind, usually mental illness but also encompasses mind-altering drugs.[57] Secondly, the impairment must *cause* the individual to be incapable of making decisions when required.[58] This speaks to the fluctuation often present with capacity. Patients often lack capacity on one decision but not others and it is certainly possible for one to regain capacity.[59]

C. Operating on a Cliff-Edge: A Narrow Interpretation of Autonomy

One persuasive argument presented is the MCA's cliff-edge approach to capacity.[60] Those found capable obtain the legal privileges that accompany this. Their consent must be given before treatment, and they may reject life-saving treatment if they wish.[61]Consequently, should a capable individual have a treatment forced upon them without consent, there may be legal repercussions.

[51] Ibid., s.1(5) and (6)
[52] Matthew Hotopf, 'The Assessment of Mental Capacity' (2005) 5(6) Clinical Medicine 580.
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] Cressida Auckland, 'The Cusp of Capacity: Empowering and Protecting People in Decisions About Treatment and Care'(DPhil thesis, University of Oxford 2019)
[61] *Ibid.*

For instance, physicians may be guilty of battery due to unlawful force,[62] or in breach of Article 8 concerning the right to private and family life - which now encompasses physical and mental integrity - [63] as illustrated in *X and Y v Netherlands*.[64]Further, if treatment is considered 'degrading,' it may also amount to a breach of Article 3.[65]

However, those found incapable are not afforded the same legal protection. For instance, given that their decisions are not viewed as holding authority or validity, decisions must be made in their best interests.[66] However, there is a lack of clarity on what constitutes 'best interests.' Therefore, this concept is discretionary and left in the hands of the decision-maker. Yet, there are various guidelines to assist with decision making such as, the likelihood of the individual regaining their capacity and encouraging their participation.[67] It is also necessary for decision-makers to consider any wishes or beliefs that would likely have impacted their decision were the individual was capable, and any advance directive provided when they had capacity.[68]However, there is not one factor that takes priority. Ultimately, it is down to the decision-maker how much weight is given to each, and so it is not uncommon for the patient's wishes to be overlooked and sacrificed by external forces.

The law operates on a cliff-edge because too much emphasis is afforded to the capacity threshold when determining the extent of one's autonomous capabilities. As Auckland accurately alludes to, this means is that those safely on the cliff are afforded the legal prerogative but those who find themselves over the cliff (not meeting the capacity threshold) find themselves without legal validity.[69] This has promoted the belief that the law adopts a narrow

[62] *R v Afolabi* [2017] EWHC 2960.
[63] Auckland (n 60), 28.
[64] *X and Y v Netherlands* [1986] 8 EHRR 235 [22].
[65] Article 3 European Convention on Human Rights 1950.
[66] Mental Capacity Act 2005, s.1(5).
[67] *Ibid.,* s.4(7).
[68] *Ibid.,*s.4 (6).
[69] Auckland (n 60)

interpretation of autonomy.[70] John Coggon's three-dimensional classification of autonomy proves useful in demonstrating this.[71]

Coggon's first classification is *ideal desire* autonomy. By applying objective and universally accepted values, this reflects what a person *should* want. Secondly, there is *best desire* autonomy. This reflects the individuals' underlying beliefs and values, even where conflicting with their immediate wants. Finally, is *current desire* autonomy, reflecting a decision based on immediate inclinations.[72] It appears the MCA adopts this third interpretation. Section 3 stresses the importance of the patient's decision-making process and ability to retain information to draw conclusions. Little consideration is given to whether the decision reflects the individual's values or beliefs. This has led to what Coggon and Miola term 'value-agnosticism.'[73] The law discounts the beliefs and values of an incapacitated individual as these cannot be certain due to their incapacitation and instead purely focuses on the individuals rational decision making. There is a circularity to this argument and whilst this presents the law as value-neutral, scrutiny of a patient's underlying beliefs is necessary to prevent them acting on ill-founded, harmful beliefs.

NHS Trust v Mrs T[74] provides a noteworthy example. Mrs T suffered borderline personality disorder and had self-harmed to such an extent that her haemoglobin levels were so low that she needed a blood transfusion. Mrs T was astutely aware that without treatment she would die, yet remained uncooperative. Her reasoning was founded on her belief that her blood was evil and was transporting evil around her body. Whilst she believed blood used in transfusions was "clean," she contended that once mixed with her own, this would lead to contamination resulting in the performance of evil acts. . The

[70] *Ibid.*, 58.
[71] John Coggon, 'Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?' (2007) 15 Healthcare Analysis 235,240.
[72] *Ibid.*
[73] John Coggon and Jose Miola, 'Autonomy, Liberty and Medical Decision-Making' (2011) 70 3 Cambridge Law Journal 523-,528.
[74] *NHS Trust v T* [2004] EWHC 1279 Fam.

issue here was not Mrs T decision-making process, nor was it her ability to reach reasoned conclusions. Mrs T not only understood the consequences but also provided thorough reasoning as to why she had reached such conclusions The problem was her starting point that her blood was evil. If her belief was correct, then her reasoning was not only legitimate but courageous. Consequently, an interpretation of autonomy concentrated on the decision-making process only accounts for the effect of mental illness on that process, not the effect mental illness has on underlying beliefs. Therefore, there is a need to put underlying beliefs under scrutiny and the risk of losing value-agnosticism is a price worth paying to prevent harmful actions based on them.

D. A Misinterpretation of Incapacity?

Adding to this narrow interpretation of autonomy is a misconstrued interpretation of capacity. Capacity was previously noted to encompass those who could understand and retain information. Therefore, incapacity must include those incapable of this. However, this should not be assumed to be a complete understanding. Understandings in the way humans engage in decision-making has evolved and continues to do so. One looks to the emergence of emotions[75] and cognitive biases[76] and their increased recognition in decision-making. If decision-making is dependent on the ability to demonstrate capacity, why is this assessment founded on a criterion that does not reflect the multifaceted decision-making process all individuals engage with?

Prior to the MCA, to have had capacity one must have 'believed' the information given to them.[77]This was arguably translated into the MCA

[75] Antonio Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (Random House 2008.)
[76] Martie G. Haselton, Daniel Nettle and Paul W. Andrews, 'The Evolution of Cognitive Bias' in D.M. Buss (eds), *The Handbook of Evolutionary Psychology Interfaces with Traditional Psychology Disciplines* (John Wiley and Sons 2015)
[77] *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290.

although not explicitly. However, the requirement to understand 'the reasonably foreseeable consequences of deciding one way or another' bares resemblance.[78] Following the MCA, the courts again adopted this necessity of belief.[79] This is unsurprising since the starting point of court proceedings is to establish the facts which stalls if the individual does not agree on such facts.

What it means to 'believe' is contentious. For instance, Bartlett uses the example of a clinician changing a diagnosis to demonstrate the insufficiency of this interpretation. If a patient considers a previous diagnosis more persuasive, whilst they may be factually incorrect but surely this cannot be indication of their incapacity.[80] Moreover, what about incorrect beliefs held by a significant amount of people? If one rejects a Covid-19 vaccination because it does not exist, do they lack capacity even though there are a wide-range of people that would agree with them? The answer is of course, no. Therefore, 'belief' being a requirement for capacity does not provide a sufficient interpretation of what capacity is.

The courts answer to this is causation. If a false belief is the direct result of impairment, then the patient lacks capacity.[81]However, as Bartlett rightly analyses this creates problems of its own. The first is, whilst theoretically convenient, how to determine whether a false belief is a product of disorder is ambiguous.[82] There is almost always various factors that play into an incorrect belief and so the question of how much of an influence does disorder have to contribute and how can this be measured arises. Secondly, there is inconsistency in how different unjustifiable reasons for a belief are considered. For instance, mental disorder is considered an indefensible reason to obtain a specific belief, yet gaining one's belief from the internet, although not a sufficient reason to have such a belief, does not render one incapable. This

[78] Mental Capacity Act 2005, s.3 (4).
[79] *A Local Authority v MM* [2007] EWHC 2003.
[80] Peter Bartlett 'Re-thinking the Mental Capacity Act 2005: Towards the Next Generation of Law' (2022) 86 Modern Law Review 659, 686.
[81] *PC v City of York Council* [2013] EWCA Civ 478.
[82]Ibid (n 59) 686. .

fixation on belief and weight given to it has led to what Williams terms the 'concertina effect'. [83] This states that the capacity assessment is fundamentally dependent on the assessor's view of the outcome of the decision being made. Namely, instead of allowing an unwise decision to unravel, assessors consider a poor decision to be a symptom of disorder and therefore evidence of incapacity,[84]a direct infringement on the central principles of the MCA.[85] The Act makes clear that unwise decisions outside of dominant social norms are not evidence of incapacity - as autonomy requires that individuals can draw conclusions that the rest of society deem irrational.[86] One group to consider here is anorexic patients. *A Local Authority v E*[87] demonstrated that the decision of anorexic patient's not to eat is often considered evidence of incapacity to make decisions. . Consequently, people with anorexia are deemed to be incapable of making decisions regarding medical treatment including force-feeding procedures, even if these decisions rests on other views they may have. Thus, the MCA must adopt more contemporary understandings of factors that influence decision-making and resist the temptation to consider disorder to be an absolute hinderance to drawing reasonable conclusions.

D. The Deprivation of Liberty Safeguards

The misinterpretations of autonomy and capacity negate the purpose of the liberty deprivation framework. Whilst both concepts are intended to deprive incapable individuals of liberty in the interests of safety , the flawed understanding of capacity means some are wrongly deemed incapable and deprived of their autonomy. Consequently, it is important to analyse how these

[83] Val Williams, Geraldine Boyle, Marcus Jepson, Paul Swift, Toby Williamson and Pauline Heslop, 'Best Interests Decisions: Professional Practices in Health and Social Care' (2013) 22 1 Health & Social Care in the Community 78,86.
[84] *Ibid,* 82.
[85] Mental Capacity Act 2005, s.1(4).
[86] *Ibid.*
[87] *A Local Authority v E* [2012] EWHC 1639 COP.

skewed interpretations have led to the violation of fundamental rights in the liberty deprivation safeguards.

The Mental Health Act 2007[88] incorporated the Deprivation of Liberty Safeguards (DoLS) into the MCA. These safeguards permit the restriction of individuals in a hospital or care home, where it is in the patient's best interests. The safeguards provide a legal framework through which individuals may be deprived of their liberty on the grounds of necessity and best interest. The DoLS were required following the final decision in *Bournewood*[89] in which, after a series of judgements, the ECtHR held that an autistic man had been unlawfully deprived of his liberty and his rights violated under Articles 5 (1) and 5 (4) ECHR.[90] As a result, UK Parliament was required to introduce domestic legislation compatible with international human rights law.

The DoLS advocate a six-step assessment to determine whether an individual can legally be deprived of their liberty. The first, is the requirement that the individual is at least eighteen years old. The second requires disability of the mind subject to the Mental Health Acts. Thirdly, the individual must be incapable. Next, it must be in the individual's best interests to be deprived of their liberty and the he individual must be eligible to be deprived of their liberty under the DoLS, completed by a mental health practitioner to determine whether the individual is under the jurisdiction of Mental Health Acts, or if other legislation is more suitable. Finally, liberty deprivation of the individual must not conflict with a justifiable refusal of the individual to object to any proposed treatment.[91]

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[88] Mental Health Act 2007.

[89] *R v Bournewood Community and Mental Health NHS Trust* [1997] EWCA Civ 2879. *R v Bournewood Community and Mental Health NHS Trust* [1998] UKHL 24. – which one is it?

[90] *HL v. UK* App no 45508/99 (ECtHR, 2004)

[91] Mental Capacity, 'The Six Key Assessments for DoLS', (*Mental Capacity in practice*, 4 December 2023)<https://mental-capacity.co.uk/six-assessments-dols-application/> accessed March 2024.

E. Destined to Fail?

The potential severity of the DoLS warrants a cautious and clear framework in which legal and medical professionals can operate. Yet, due to the lack of definition of what deprivation of liberty consists of - not only in the legislation but also the code of practice - means this has not come to pass.[92] Similarly, the lack of clarity on the difference between mere restriction and liberty deprivation. The only interpretation to this regard is paragraph 2.3 of the Code of Practice, which states the difference is one of 'degree and intensity'.[93] Yet, this wording is abstract and offers no guidance on determining both 'degree and intensity.' Current case law indicates that a deprivation of liberty exists where there is 'complete and effective control' over the individual,[94] yet lack of clarification has produced differing interpretations and inconsistencies. The safeguards are often not used when required leaving individuals legally exposed and without protection.[95] Consequently, it is estimated that some 50,000 people are unlawfully deprived of their liberty in care homes.[96] Therefore, a 'lost population,'[97] has emerged encompassing those who do not fall under the legal remit of either legislation.

There is an array of case law highlighting the interpretative inconsistencies. For instance, *JE v DE*[98] provides an important starting point. This case concerned a man required to live in a care home contrary to his and his wife's wishes. Munby J contended the issue was not whether the man's liberty was restricted in the institutional setting. Rather, the issue was whether the individual was restricted of his freedom to leave.[99] David Hewitt, posits that lack of freedom

[92] Ministry of Justice. The Mental Capacity Act 2005. Deprivation of Liberty Safeguards. Code of Practice to supplement the Main Mental Capacity Act 2005 Code of Practice [2022]. – clarify? What is this?
[93] *Ibid.*
[94] *JE v DE and Surrey County Council* [2006] EWHC 3459 (Fam).
[95] Select Committee, *The Mental Capacity Act: Report of Session* (HL 2013-14) para 32.
[96] Ajit Shah and Chris Heginbotham, 'Newly Introduced Deprivation of Liberty Safeguards: Anomalies and Concerns' (2010) 34 6 The Psychiatrist243,245.
[97] *Ibid.*
[98] *JE v DE and Surrey County Council* [2006] EWHC 3459 (Fam).
[99] *Ibid* [115].

to leave is only one of a combination of factors amounting to a liberty deprivation.[100] Therefore, it was necessary for Munby J to consider other elements, yet his judgement focussed solely on the lack of freedom to leave.

Additional cases demonstrate this 'freedom to leave' approach. *Dorset County Council v EH*[101] focused on an individual's lack of freedom to leave their care home, whilst *City of Sunderland v PS,*[102] maintained that the only necessary restriction was security to ensure a patient could not leave the premises. However, other cases offer different interpretations. McFarlane J in *LLBC v TG* [103] was reluctant to recognise a deprivation of liberty as 'it was an ordinary care home where ordinary restrictions of liberty applied.' The DoLS maintain that consideration is afforded to the individual's specific condition. Yet McFarlane J, opted for a generalised interpretation of what was considered 'ordinary' in that setting. Additionally, in *LBH v GP and MP,*[104] Coleridge J concluded there was not a deprivation of liberty in a care home for two reasons. Firstly, the local authority did not consider themselves authorised to keep the patient at the care home and would apply to the Court of Protection if the patient was determined to leave. Secondly, there was evidence of the individuals' wishes to remain. However, the latter reason is troublesome, as it is not clear how it relates to liberty deprivation since the patient lacked capacity.

These examples show the differing judicial interpretations of liberty deprivation and so it is unsurprising that many find themselves illegally deprived of their liberty with judges clearly working with different understandings of the concept.

[100] David Hewitt, 'Re-Considering the Mental Health Bill: The View of the Parliamentary Human Rights Committee' (2007) J Mental Health L 57.
[101] *Dorset County Council v EH* [2009] EWHC 784 Fam.
[102] *City of Sunderland v PS* [2007] EWHC 623 Fam.
[103] *LLBC v TG* [2007] EWHC 2640 Fam.
[104] *LBH v GP and MP* [2009] FD08P01058.

4. *The way forward*

The second section demonstrated how the current framework for assessing mental capacity is narrow and simplistic. Furthermore, case law illustrates inconsistencies in application. It was subsequently argued that the law unjustifiably infringes upon what should be autonomous individuals, assesses their capacity in a facile fashion and ceases to encompass those it should protect. Therefore, the logical conclusion to derive is that there must be considerable reform. This section will address the two most appropriate antidotes. The first being reformation of the DoLS framework and the second being amelioration of the 'best interest' principle with a look towards a more expansive international framework. It will subsequently be concluded these areas remain the most important in restoring power and dignity back to incapable individuals as well as ensuring more contemporary understandings and interpretations of autonomy and capacity are adopted.

A. Reforming the Liberty Deprivation Safeguards

The Mental Capacity (Amendment) Act[105] sought to replace the DoLS with the Liberty Protection Safeguards (LPS), though their implementation has been extensively delayed, and are now due to be introduced in Autumn 2024. The safeguards intend to provide several refinements. Firstly, to control the backlog of DoLS applications, which as of March 2020 stood at 129,780.[106] This is consequence of the surge in applications following the decision in *Cheshire West,*[107]following which it has become evident that there are far more people illegally deprived of their liberty than originally thought. Steven Neary, for example, was deprived of his liberty for three months by being held at a

[105] Mental Capacity (Amendment) Act 2019.
[106] NHS Digital, 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards England, 2018-19' (NHS Digital 2020) <https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/england-2018-19> accessed March 2024.
[107] *Cheshire West and Chester Council v P* [2014] UKSC 19.

support unit without any DoLS authorisation. [108] Secondly, the LPS will broaden the settings in which a liberty deprivation order can be authorised by extending to private domestic settings and alternative supported accommodation,[109]whilst also lowering the age a deprivation of liberty can be sanctioned to encompass anyone aged sixteen and above.[110]

However, lack of judicial interpretation means it is only possible to speculate whether the LPS will be 'good law.'[111] Consequently, it is necessary to engage with conceptual frameworks to measure this. The natural law perspective, for instance, considers the moral basis of laws to determine their goodness.[112] Contrastingly, a positivist approach centred on measurement and quantifiable observation,[113] disregards morality and instead deploys the recognition rule to determine validity. This perspective, adopted by Hart, contends that since the Act achieved royal assent, it is, by definition, good law. [114] Certainly, the issue with this approach is that it may uphold the most heinous legislation, on the premise that it was passed through the necessary mechanisms. Thus, a more suitable framework is the eight sub-rules of law[115] developed by Lord Bingham.[116] The aim of this is not to provide a complete measurement which can determine how effective the safeguards will be. Rather, this framework performs an inquisitorial role by asking important questions of the legislation.

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[108] *London Borough of Hillingdon v Neary* [2011] EWHC 1377.
[109] 'What are Liberty Protection Safeguards?' (Social Care Institute of Excellence, October 2022) < https://www.scie.org.uk/mca/lps/latest/#:~:text=LPS%20will%20be%20about%20safeguarding,those%20arrangements%20for%20their%20care > accessed 12 April 2024.
[110] *Ibid.*
[111] Rosie Harding, 'Safeguarding Freedom? Liberty Protection Safeguards, Social Justice and the Rule of Law', (2021) 74 Current Legal Problems 329,339.
[112] Lon. L Fuller, *The Morality of Law: Revised Edition* (Yale University Press, 1969)
[113] University of Nottingham, 'Understanding Pragmatic Research: Two Traditional Research Paradigms,https://www.nottingham.ac.uk/helmopen/rlos/research-evidence-based-practice/designing-research/types-of-study/understanding-pragmatic-research/section02.html#:~:text=Positivism%20is%20a%20paradigm%20that,cannot%20be%20known%20for%20certain. Accessed April 2024 – perhaps find an alternative source on this point.
[114] H.L.A Hart, *The Concept of Law* (OUP , 2012).
[115] *Ibid* (n89) 341.
[116] Tom Bingham, *The Rule of Law* (Penguin, 2011).

B. Clarity and Predictability

Bingham's first principle ensures the law is accessible and comprehensible.[117] Individuals warrant awareness of the law that governs them, and it is necessary to ensure knowledge of their rights under law. Schedule 1 Paragraph 14 obliges public bodies to publish information regarding the LPS including its process and effects, as well as enforcing a duty to provide information that is understandable and accessible. [118] Whilst this appears satisfactory, the reality of whether this is achieved will be determined by the Code of Practice. In 2022, the government published its proposed changes to the Code of Practice.[119] The changes included clarity on "best interests,"[120]and discussion of how the safeguards will apply to sixteen and seventeen-year-olds.[121] Therefore, it appears likely the safeguards will satisfy Bingham's first principle of increasing accessibility and clarity.

C. Application of the Law

The second principle maintains that legal disputes are resolved by application of the law, rather than arbitrary discretion to ensure consistency and predictability. Fortunately, the LPS makes it explicit when it is legal to deprive one of their liberty in its 'authorisation conditions.'[122] These include incapacity to consent, a mental impairment and that the deprivation is necessary and 'proportionate in relation to the likelihood and seriousness of harm to the

[117] *Ibid.*
[118] Mental Capacity (Amendment) Act 2019 Schedule 1 Paragraph 14.
[119] HM Government, '*Consultation on proposed changes to the Mental Capacity Act 2005 Code of Practice and implementation of the Liberty Protection Safeguards: Including the Liberty Protection Safeguards secondary legislation* [2022]<https://assets.publishing.service.gov.uk/media/62b096338fa8f5357549faad/changes-to-the-MCA-code-and-implementation-of-the-LPS-consultation-document-extension.pdf> accessed?
[120] *Ibid*,20.
[121] *Ibid,* 31.
[122] *Ibid* (n 89) 344.

cared-for person'.[123] Any deprivation of liberty will be illegal under the LPS unless it satisfies these requirements. Nevertheless, certain factors remain in need of additional clarification. For instance, contention surrounds what it means to suffer from mental disorder. Presumably it would be those pursuant to the Mental Health Acts,[124] and not merely an individual of unsound mind as in the ECHR, although this is uncertain.[125] Therefore, it appears as though there will be adequate application of the law and abstinence from arbitrary and inconsistent decisions so long as there is further elucidation as to what it means to suffer from mental illness.

D. Equality Before the Law and International Obligations

The third and eighth principle are somewhat interconnected and therefore it is necessary to consider them in unison as they are the central limitations of the incoming safeguards. The third guarantees equality before the law, something the LPS will almost certainly not achieve. The LPS is founded on the right to liberty and security, enshrined in Article 5 ECHR which permits the liberty deprivation of individuals of unsound mind. Contrarily, Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD)[126] maintains the mere presence of disability does not vindicate a deprivation of liberty. The UK has ratified, and is therefore bound by, both conventions. It is certainly possible that the European Court of Human Rights (ECtHR) will absorb the principles of the CRPD, however until this there will be a looming conflict between the two. The LPS can therefore not fulfil both commitments unless both adopt the same understanding and interpretation of disability and impairment. This permits recognition of Bingham's eighth principle that domestic law fulfils international obligations.[127] The conflict between the two conventions means

[123] *Ibid.*
[124] Mental Health Act 1983 and Mental Health Act 2007.
[125] European Convention on Human Rights 1950, Article 5 (1)(e).
[126] Article 14 United Nations Convention on the Rights of Persons of Disabilities 2006.
[127] Ibid (n 89) 346.

that to satisfy one is to violate the other. . The Human Rights Act,[128]incorporates ECHR principles into domestic law and it appears the ECtHR affords greater legal authority to this treaty than its contemporaries. Consequently, not only will the LPS struggle to maintain equality but it will suffice to satisfy its international obligations unless the two international treaties move closer to the same ideal.

E. Acting in Good Faith and Protecting Fundamental Rights

The fourth principle ensures those responsible for implementation act in good faith and do not abuse their powers. This is relatively unproblematic for the LPS. Those responsible for implementation, healthcare providers, local authorities or patient representatives will be sufficiently aware of acting within their powers to avert legal condemnation.

The fifth rule requires the promotion and protection of fundamental rights. It is a principle of the LPS to do this, though how this will be done practically will determine success. The LPS intends to reduce the costs of the DoLS which will be achieved by addressing authorisation renewals. The authorisations under the LPS may be renewed up to three months succeeding an initial renewal period of one year with no set time limit for frequent reviews. Renewals will additionally not require formal assessments of one's capacity. The review and renewal process is crucial for upholding fundamental rights as it determines when one can reclaim liberty.[129]Further, whilst costs will be reduced, the potential for the renewal of the authorisation of a deprivation of liberty to live up to three years is troublesome and it stands to reason the costs are justified in order to uphold the patient's right to frequently question their deprivation. The need for frequent reviews has been supported by ECtHR caselaw such as

[128] Human Rights Act 1998.
[129] Ibid (n 89) 345.

Kadusic v Switzerland[130] and *Herz v Allemagne,*[131] which demonstrated that psychiatric reports exceeding eighteen months were not considered recent enough to justify a deprivation of liberty.[132]Therefore, it seems reasonable to conclude those responsible for implementation will operate within their power boundaries and accordingly be held accountable. However, the safeguards must ensure that in their aspiration to practically reduce costs they do not infringe upon a patient's right to undergo regular reviews of their conditions.

F. Dispute Resolution and a Fair Trail

Bingham's sixth principle ensures the means are provided for individuals to solve civil disputes that cannot be resolved without incurring significant cost. This maintains the principle of equal access to justice and legal remedies. As Harding refers to,[133]the fact public bodies are obliged to publish information regarding the rights to request a review suggests compliance with Bingham's sixth principle. Similarly, the duty on Approved Mental Capacity Professionals to carry out pre-authorisation reviews where it is thought the cared-for person objects to their care and treatment, provides encouragement.

Lastly, the seventh principle warrants the impartiality of the judicial system to permit a fair and equal trial. The Court of Protection will govern disputes on the LPS and will ensure impartiality whilst a 'non-means tested legal aid'[134] will be afforded to challengers of an LPS authorisation. However, the consistency of how this aid is distributed will stand the test of time. One may, for instance, face obstacles if they are to challenge a deprivation of liberty order that does not come under the jurisdiction of the LPS but a separate element of the MCA.

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130 *Kadusic v Switzerland,* application no.43977/13 at [44].
131 *Herz v Allemagne,* application no 44672/98 at [50].
132 Rosie Harding, 'The 'Adjusted' Liberty Protection Safeguards: Some (*Legal Capacity Research,* 13 July 2018) <https://legalcapacity.org.uk/everyday-decisions/the-adjusted-liberty-protection-safeguards-some-concerns/#_ftn2 > accessed March 2024.
133 Ibid (n 89) 346.
134 *Ibid.*

With the above elements considered, there is reason to be optimistic that the LPS will be successful. However, whilst the definition of 'success' is subjective and a matter of interpretation, it is credible to attest that the LPS will almost certainly provide vital improvements, including greater clarity, accessibility, and inclusion. Nevertheless, whether it can counter the significant backlog of DoLS orders is questionable. If not, arguably, this leaves intact ongoing issues identified above.

G. A New Direction for Best Interests

The primary issue with the 'best interests' principle is the discretion left to decision-makers. Consequently, the wishes and values of individuals are often not afforded equal consideration in comparison to other elements.[135] The case law demonstrates a balancing act. Benefits and consequences are balanced and only when an account is "in significant credit,"[136] can a decision be deemed in ones' best interests.[137]Lack of hierarchy between factors means some become "magnetic"[138] and swing decisions a certain way. Paradoxically, the courts appear to want to give considerable weight to patient's wishes evidenced in *Aintree*[139] where the Supreme Court stressed a focus on individual preferences. The Law Commission later confirmed its support for this. Yet, failure to do this has meant the MCA trails behind international developments.

[135] Mental Capacity Act 2005 Section 4.
[136] Law Commission, *Mental Capacity and Deprivation of Liberty*(Law Com No 372, 2017) 157
[137] *Re A* [2000] 1 FCR 193, 206.
[138] *Ibid* (n 114) 157.
[139] *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67.

H. Domestic Law trailing behind?

The Convention on the Rights of Persons with Disabilities[140] (CRPD) signifies a major paradigm shift in the rights of impaired individuals.[141] Article 1 places those with disabilities on an equal standing as their abled counterparts. As opposed to treating disabled individuals as burdensome,[142] the CRPD adopts a social model framework holding that disability is symptom of an individuals' engagement with their environment.[143] Therefore, it is not a duty of individuals to abide by society's constructed norms and attitudes, rather it is the inadequacy of society in failing to accommodate individuals that require acknowledgment.[144]Further, it recognises the detriment that social and environmental forces inflict on one's decision-making and ensures their legal capacity is maintained as a mechanism through which they can exercise their rights. Obtaining legal capacity allows their participation in the decision-making process, through which they are supported, as opposed to delegating to a substituted decision-maker.

Devi at al. posit this increased participation[145]produces the most appropriate decisions, since it upholds self-government by placing individuals at the centre of decisions. [146] However, 'appropriate' decisions do not equal 'right 'decisions, nor does this address the potential for incapacitated individuals to regret their decision should they regain their capacity. For instance, an individual may

[140] Convention on the Rights of Persons with Disabilities [2006].
[141] Renu Barton-Hanson, 'Reforming Best Interests: The Road Towards Supported Decision-Making', [2018] 40 3.
[142] Genevra Richardson, 'Mental Disabilities and the Law: From Substitute to Supported Decision-Making?' (2012) 65 Current Legal Problems ,333, 351.
[143] Robert D. Dinerstein, 'Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making' (2012) 19(2)Human Rights Brief 8, 9.
[144] Michael Bach and Lana Kerzner, 'A New Paradigm For Protecting Autonomy And The Right To Legal Capacity,' (Law Commission of Ontario, 2010)
[145] Nandini Devi, Jerome Bickenbach and Gerold Stucki, 'Moving Towards Substituted Decision-Making? Article 12 of the Convention on the Rights of Persons with Disabilities,'[2011] 5 4 Alter 249, 264.
[146] Gavin Davidson, Berni Kelly, Geraldine Macdonald, 'Supported Decision Making: A Review of the International Literature', (2015) 38 International Journal of Law and Psychiatry 61,67.

reacquire their capacity and wish they had received more assistance when incapacitated, specifically if they regret the decisions made before regaining capacity.

The case of Chloe Cole in the US highlights the consequences of not adequately assisting an individual in their decision-making when not of full capacity.[147]Aged thirteen, Cole was prescribed the puberty blocker Lupron and received testosterone injections to transition to a male. From this, aged fifteen, Cole underwent a double mastectomy to remove her breasts. However, two years later, Cole realised her desire to breastfeed and wished to detransition. As a result, she subsequently sought treatment to reverse the effects of the hormones and received breast reconstruction surgery. Now, Cole advocates against the prescription of such treatment for those of a young age – on the basis that younger individuals are less able to comprehend the long-term impacts of such treatment should they change their mind. Thus, Cole contends that her age impacted her ability to fully understand the potential consequences of such treatment, and equally, that she was also not adequately informed of such effects by doctors.

Discussion of this case is not to suggest that obtaining transition treatment is evidence of one's incapacity. Rather, this case highlights the importance of assisting individuals without full capacity in making decisions in their long-term interests. Similarly, it highlights the importance of considering the impact of individual decisions, given that choices may be regretted where full capacity is acquired. Cole's case does not indicate incapacity due to disorder, however, it does demonstrate incapacity due to age and whilst age is not necessarily indicative of *incapacity* neither is it of *full capacity*. This is proven by the fact there is an abundance of legislation that exists to protect young people from

[147]Albert Eisenerg, ''The Plight Of the Detransitioners: Listen to their marginalized voices,'(2023) 75 10 National Review 35. ,https://go.gale.com/ps/i.do?id=GALE%7CA748991721&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=00280038&p=AONE&sw=w&userGroupName=anon%7E1a7c12a1&aty=open-web-entry> accessed 1 April 2024.

their lack of full capacity. Accordingly, it is necessary to provide those who may be mentally incapable for whatever reason, age, or disorder, with the support and guidance required to prevent individuals making decisions they may, once fully capable, regret.

Therefore, a balance must be struck. Whilst there is a moral obligation to act to the best interests of others, there is an inevitability about this duty that conflicts with one's ability to self-govern. Yet, this is a price worth paying. Arguably, it is easy to be deluded by one's own wants. . Desires are fickle and inconsistent, no more so than when one is incapacitated. However, based on Kantian ethics, there is a moral duty to aide the understanding of others.[148] There must be a middle-ground between enabling individual autonomy but also having a duty to others. It is not only wrong to allow people to make harmful decisions, but there is an ethical duty to prevent it. The moral status of omissions is contentious, yet it can reasonably be declared that they are morally accountable when there is a norm or standard attached that requires one to act.[149] Surely, it is a reasonable standard to hold that individuals retain a level of responsibility to act in the best interests of each other. 'Best interests' is contentious, yet it cannot mean to simply yield to the individuals will and preferences otherwise it would cease to exist. Instead, it must refer to an objective standard operating independent of one's subjective sense of right and wrong.

Consequently, this paper contends that whilst the wishes and preferences paradigm should carry more weight, entirely discarding the best interest's principle is not advantageous. Rather it may be more appropriate to provide a set of guiding principles as well as altering the terminology.[150]It is undisputable that the objective understanding of 'best interests' is lost in the MCA, however, the solution to this is not to adopt a 'wills and preferences' paradigm. Instead,

[148] Immanuel Kant, *Groundwork on the Metaphysics of Morals* (first published 1785, J.W. Ellington trans, Hackett Publishing 1993).
[149] Randolph Clarke, 'Omissions, Abilities, and Freedom', *Omissions: Agency, Metaphysics, and Responsibility* (OUP 2014) 87,104.
[150] Mary Donnelly, 'Best Interests in the Mental Capacity Act: Time to say Goodbye' (2016) 24 3 Medical Law Review 318,332.

it would be more prudent to replace the term 'best interests' with a set of guiding principles that reflect the multifaceted nature and complexity of decision-making.[151] The Assisted Decision-Making (Capacity) Act in Ireland, for instance, adopts eleven guiding principles for interveners to consider.[152] Whilst adopting some of the principles in the MCA, such guidelines go further by providing guiding instructions for interveners to follow, therefore demonstrating a more focussed and transparent criteria – as opposed to enforcing a general expectation on interveners to merely act in the patients 'best interests'. Yet, such instructions may not provide convenient use as they lack shorthand expression and have occasionally had to refer to the use of the term 'benefit' when instructing interveners on how to act with regards to the patient.[153] Therefore, these guiding principles may be more instructive and considerate of other factors, but they would also require a shorthand expression. Additionally, it may be more appropriate to refer to a terminology of rights, which would require any action to respect the rights of the individual.[154] This would perhaps be as unclear and abstract as the 'best interest' principle, although it would, at least, ensure that significant consideration is given to the will and preference of the individual.

5. Conclusion

In conclusion, it has been made evident through the examination of legal and medical principles as well as analysis of the current legislation on capacity that the misinterpretations of autonomy and capacity means the law is falling disastrously short.

Firstly, section two discussed varying interpretations of autonomy and capacity and their relationship, enabled by placing both concepts in their medical and legal context where their significance was further maintained. It

[151] *Ibid.*
[152] Assisted Decision-Making (Capacity) Act 2015 (Ireland) s8.
[153] *Ibid.,* s.8 (7)(e).
[154] Ibid (n 127)

was concluded that it would be unjust to deduce a definitive explanation of both concepts due to their contested interpretations. Yet, for the purposes of this paper, autonomy can be understood as self-government, and capacity as a tool one uses to access this. These understandings provided a sufficient basis to scrutinise the law on capacity the contorted interpretations of both concepts and the deficient liberty deprivation framework.

Following this, section three examined the shortcomings of the Mental Capacity Act and demonstrated its narrow interpretations of autonomy and incapacity. This preceded an analysis of the liberty deprivation framework for incapacitated individuals and how this is prevented from fulfilling its obligation to uphold fundamental rights. It was established that since the legislation's passing, there have been developments in understandings of both autonomy and capacity and growth concerning the role of both concepts in decision making, yet it was held that the law has simply failed to evolve with them.

Thirdly, section four analysed two central areas of reform and considered if they would fulfil the intended objectives. The incoming Liberty Protection Safeguards were analysed through use of Bingham's eight principles of 'good law,' through which it was concluded that there remains reason to be optimistic that the incoming safeguards will be effective. However, much of this depends on how the safeguards are put into practice and whether they provides greater clarity for those responsible for its implementation. Whilst this framework posed functional questions of the safeguards, it is by no means a complete model through which to assess the effectiveness of law that is not yet in practice. Surely, law can only be deemed 'good' if it delivers its desired purpose, which, of course, is not yet certain. Secondly, the 'best interest' principle was analysed and compared with international conventions and understandings. Accordingly, it was concluded that the principle, as it currently stands, affords too much discretion to the decision-maker, limiting the value of individual patient's wishes. Consequently, it lags behind

international advances such as the CRPD. Thus, it was ultimately inferred that whilst more value should be placed on individual preferences, abandonment of the 'best interest principle' is wholly undesirable and unrealistic, rather, amendments are more appropriate.

It is concluded that autonomy is the cornerstone of individuality, and capacity is the tool one uses to access it. Given that autonomy upholds the integrity of the individual, it is suggested that infringements must therefore be necessary. This said, there must also be adequate intervention to assist those who require aide in their decision-making without accusations of paternalism. Ultimately, it can be said that there has been considerable ground gained in understandings of how individuals engage in decision-making processes, but we are still far from achieving a fully balanced system.

Family Vlogging in England and Wales: How are the Rights of Privacy and Welfare of Children who work online protected, and are the rights of Parents Prioritised

Eva Wainwright

Abstract

With the rise of YouTube, family vlogging has become a popular. This is a new source of income in which personal experiences are broadcast to large audiences. Thus, with children gaining visibility through platforms such as this, it becomes crucial to consider the implications of such exposure and implement appropriate safeguards. This paper seeks to understand how the law in England and Wales navigates the relationship between children's rights and interests and parents' rights in the context of family vlogging. Findings from this research revealed that the merging of public and private spheres online significantly compromises children's safety, often due to the legal system's emphasis on parental rights and its reactive approach to privacy breaches and exploitation. Through analysis of the misuse of private information tort and judicial approaches, this research demonstrated that existing laws are inadequate in the face of technological advancements, detailing how this is influenced by freedom from state intervention. Furthermore, the analysis of child labour and economic exploitation regulations highlighted that licensing provisions could be adapted to protect children from exploitation and ensure their well-being, like that of current traditional entertainment industries.

Ultimately, this paper asserts that the absence of the development of safeguards leaves children engaged in online labour susceptible to exploitation and privacy violations and advocates for the implementation of comprehensive measures to protect their well-being and rights.

1. Introduction

Family vlogging (short for video logging) involves sharing intimate and personal information about family members, particularly children, through showcasing their lives.[1] Family vlogging was first established and monetised on YouTube, a video-sharing platform, so it is significant to focus the research on examining privacy, labour, and the protection of children's welfare in online spaces.

This inevitably has raised concerns regarding the privacy and well-being of the children involved. Riggio identifies that family vlogs are distinctive from home videos in that they can reach large audiences and, crucially, generate income from those views.[2] Consequently, there is a potential to earn a substantial amount of money,[3] thus highlighting the labour that is imposed on children as a result. Furthermore, the 2020 House of Commons Committee Report 'Influencer culture: Lights, camera, inaction?' recognised the risks of exploitation and harm from family vlogging.[4] Yet, no specific laws that safeguard the privacy, welfare, and exploitation of these children have been implemented. This is important as YouTube families are entirely ungoverned, so reliance falls heavily on the law to protect the children in these families' privacy, welfare and exploitation from labour.[5] While there are existing laws in England and Wales that target the privacy, welfare and exploitation of children, these were not drafted with children working online in mind.

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[1] Amanda G Riggio, 'The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws Comment' (2020) 44 Seattle University Law Review 493 <https://heinonline.org/HOL/P?h=hein.journals/sealr44&i=497> accessed 14 April 2024.
[2] Amanda G Riggio, 'The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws Comment' (2020) 44 Seattle University Law Review 493 <https://heinonline.org/HOL/P?h=hein.journals/sealr44&i=497> accessed 14 April 2024.
[3] Carolina Carrêlo, '*YouTube Family Vlogging as a Promoter of Digital Child Labour: A Case Study on "The Bucket List Family"*' (Masters Dissertation, Malmo Unerversitit (undated)).
[4] Digital, Culture, Media and Sport Committee, 'Influencer Culture: Lights, Camera, Inaction?' (2022) House of Commons Committee report 12.
[5] Emma Nottingham, '"Dad! Cut That Part out!": Children's Rights to Privacy in the Age of "Generation Tagged": Sharenting, Digital Kidnapping and the Child Micro-Celebrity', The Routledge International Handbook of Young Children's Rights (Routledge 2019).

A "child" is defined as a person below the age of 18 under the United Nations Convention on the Rights of the Child.[6] Given this definition, the term "children who work online" specifically refers to children who are featured in family vlogs, positioning them at the intersection of evolving digital phenomena and longstanding legal protections.

This paper aims to examine the effectiveness of existing legal frameworks and policies in safeguarding children online, with the purpose of identifying legislative gaps in existing frameworks. Specifically, this paper aims to investigate how parental actions infringe upon a child's privacy and impose laborious expectations on the child, highlighting the dangers of a lack of safeguarding for children who work online.

In order to answer the research question, the overall structure is split into three sections. Section 2 begins by focusing on the theoretical background of childhood to understand the tensions between parental rights and child rights. Section three then analyses the legal frameworks of privacy and the consequences of a lack of framework, focusing on the tort of misuse of private information. In a similar way, section four will analyse the legal frameworks of child labour and the consequences of a lack of protection, with a focus on licenses and economic exploitation.

2. Establishing Children as Legal Rights Bearers

A. Introduction

[6] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577

This section analyses the theoretical background of childhood and its influences in establishing children as legal rights bearers. By examining these changes through the lens of family vlogging, this part will highlight how historical legal frameworks continue to influence and shape current debates and policies surrounding safeguards for children in the digital era. This analysis devotes particular attention to the role of state intervention in upholding children's rights, its significance in shaping familial dynamics, and the varying societal attitudes towards this governmental action. It is then analysed whether these societal attitudes affect the position of children as rights bearers and parental authority. This is examined chronologically in four subsections. Throughout the discussion, these past frameworks and understandings are compared to how this could have implications for the children of family vloggers.

B. Drawing the Lines Between Childhood and Adulthood

Throughout history, scholars have identified that the concept of childhood has evolved in response to changing societal norms, laws and regulations.[7] Essentially, childhood is not considered an inherent biological state but a socially constructed phenomenon.[8] To have a modern conception of childhood, Archard determines that it must be recognised that children differ from adults and that there are differences and distinguishing characteristics.[9] There has been an evident historical shift towards seeing children as an individual group that merits particular protections, differentiating them from adults.[10]

Ariès identifies that before the 15th century, the focus on children's growth and welfare was comparatively lesser than in later centuries, with children treated

[7] David Archard, *Children: Rights and Childhood* (Routledge 2014).
[8] Diana Gittins, 'The Historical Construction of Childhood', Introduction to Childhood Studies (McGraw-Hill Education (UK) 2015).
[9] David Archard, *Children: Rights and Childhood* (Routledge 2014).
[10] Diana Gittins, 'The Historical Construction of Childhood', Introduction to Childhood Studies (McGraw-Hill Education (UK) 2015).

more akin to miniature adults.[11] Ariès argues that this attitude towards children was exemplified in early family portraits, which show children being dressed in smaller versions of adult clothes so that they ended up resembling adults.[12] The lack of recognition of childhood is significant as it left children at the mercy of their parents. Thus, without specific rights or legislation, children - particularly of the lower classes - were subjected to harsh treatment, and many died because of this.[13]

Even though family vlogging cannot be compared to the historical issues that young people experienced at this time, this still demonstrates how a lack of special recognition and protection afforded to children ultimately ignores their vulnerabilities. Accordingly, it is important that children's rights online are given special consideration. This is because the modern concept of childhood emphasises a child's differing characteristics from an adult, in that they are more vulnerable.

Ariès argues that in later family portraits in the 17th century, the children received greater attention as they became the focus of attention and had much more defining characteristics.[14] Despite portraits only serving as an example for middle and upper-class children,[15] this illustrates how the concept of childhood can shift. In the current digital era, Lee has identified that technological advances have resulted in an erosion of boundaries between adulthood and childhood.[16] This is a limitation of the modern concept of childhood as it demonstrates a partial return to the pre-17th century view of childhood as not distinct from adulthood. Consequently, this return to a lack of distinction provides a barrier to safeguarding modern children online.

[11] Philippe Aries, *Centuries of Childhood* (R Baldick tr, First Edition, Jonathan Cape Ltd 1962).
[12] Philippe Aries, *Centuries of Childhood* (R Baldick tr, First Edition, Jonathan Cape Ltd 1962).
[13] Gretchen Kerr, 'A Brief History of Childhood: What It Means to Be a Child', *Gender-Based Violence in Children's Sport* (1st edition, Routledge 2022).
[14] Michael Wyness, *Childhood and Society* (Bloomsbury Publishing Plc 2019) accessed 2 March 2024.
[15] David Archard, *Children: Rights and Childhood* (Routledge 2014).
[16] Nick Lee, *Childhood and Society: Growing up in an Age of Uncertainty* (Open University Press 2001).

As the notion of childhood evolved, so did the recognition of the need to provide distinct safeguards for children to ensure that they were no longer being treated with indifference.[17] The Industrial Revolution of the 18th to 19th centuries brought the discussions surrounding the need for safeguards for children to the forefront of societal consciousness.[18] This was highlighted in literature such as Emilie by Rousseau,[19] where Rousseau emphasises the value of there being a separate, distinct phase of life that the modern concept of childhood represents.[20] Before the revolution, few people voiced opposition to child labour. This resulted in children working in unsafe and unethical conditions, primarily within factories, as the work was considered economically necessary.[21] The Industrial Revolution catalysed social activists to emphasize the innocence and vulnerability of children, sparking a paradigm shift towards perceiving childhood as a distinctive phase deserving of special protection.[22] This ideological development translated into tangible legal measures such as the Factory Act 1833 which prohibited the employment of children under 9 in factories and regulated the working hours of those aged between 9 and 18.[23] This development is important as it distinguishes children from adults especially with regard to employment.

[17] Allison James and Alan Prout, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Routledge 2003).
[18] Caroline Sawyer, 'The Child Is Not a Person: Family Law and Other Legal Cultures' (2006) 28 Journal of Social Welfare and Family Law 1 <https://doi.org/10.1080/09649060600762274> accessed 2 December 2023.
[19] Jean-Jacques Rousseau and Michael Wu, *Emile: Or On Education* (First Edition, Basic Books 1979).
[20] David Archard, *Children: Rights and Childhood* (Routledge 2014).
[21] Caroline Sawyer, 'The Child Is Not a Person: Family Law and Other Legal Cultures' (2006) 28 Journal of Social Welfare and Family Law 1 <https://doi.org/10.1080/09649060600762274> accessed 2 December 2023.
[22] Allison James and Alan Prout, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Routledge 2003).
[23] Factory Act 1833

C. The public/private divide

The pervading attitude in England and Wales during and before the 19th century was that family life was private.[24] The laissez-faire economic doctrine in the 19th century opposed any state intervention in business affairs.[25] In turn, this developed the concept of free market and was pivotal in defining the divide between public and private actions within the law.[26]

The public/private dichotomy distinguishes areas subject to the state's legal jurisdiction from those considered outside of it (private). [27] This is significant as this public/private dichotomy continues to be reflected in current law, such as in Article 8 (right to private family life) of the United Nations Convention on the Rights of the Child (UNCRC).[28] Olsen identifies the parallels in the arguments from the 19th century advocating for non-intervention in both the market and the family.[29] At the time, it was argued that families should be free to live as they liked in their own houses without intervention from the government or other parties. This was exemplified by the decision of Semayne, where it was stated that people were free to do as they liked in their own homes.[30] This decision was upheld for over 250 years, thus reinforcing the status of parental authority within the home. [31]

Olson suggests that while free market and private family arguments shared common ground, state neutrality towards families presents more challenges,

[24] Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 Harvard Law Review 1497, 1498, 1505.
[25] Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 Harvard Law Review 1497, 1498, 1505.
[26] David Archard, *Children: Rights and Childhood* (Routledge 2014).
[27] Alan Brown, 'What Is The Family of the Law The Influence of the Nuclear Family Model' (University of Strathclyde 2016).
[28] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[29] Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 Harvard Law Review 1497, 1498, 1505.
[30] *Semayne v Gresham* [1604] Yelverton 29
[31] Alan Brown, 'What Is The Family of the Law The Influence of the Nuclear Family Model' (University of Strathclyde 2016).

for example, in the same way as children forced to work in factories.[32] This is because, in the family context, state neutrality implies the upholding of the existing social roles within the family. [33] In the context of family vlogging, reinforcing traditional social roles through a lack of state intervention has implications where children are left vulnerable to exploitation by parents. Therefore, the state needs to take an active role in safeguarding children from their parental exploitation.

Wyness identified that, with children's growing economic dependency on their parents, the separation and segregation of children from adult society through education and work illustrated the increasing societal conception of children as being innocent and powerless.[34] However, a large proportion of this growth only applied to white middle-class boys because girls were primarily removed from school and treated more like "miniature women"[35] and poorer families could not afford the fee for school until the Elementary Education Act 1880 was implemented.[36] In 1891, this law mandated compulsory education for children aged five to ten and eliminated school fees. By making school attendance a legal requirement, the law transitioned children from the home environment to the public sphere, placing their education under the responsibility of a state institution rather than leaving it to the discretion of private families.[37] As a result, the parent's authority inherently decreased while the state's and its agents' power grew correspondingly.

[32] Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 University of Michigan Journal of Law Reform 835, 835.
[33] Andrew Norman Gilbert, *British Conservatism and the Legal Regulation of Intimate Adult Relationships*, 1983-2013 (UCL (University College London) 2016).
[34] Michael Wyness, *Childhood and Society* (Bloomsbury Publishing Plc 2019) accessed 2 March 2024.
[35] Diana Gittins, *The Child in Question* (Palgrave Macmillan 1998).
[36] Elementary Act 1880 43 & 44 Vict. c. 23
[37] Stephen Cretney, 'Privatizing the Family: The Reform of Child Law' (2012) 4 The Denning Law Journal 15
<https://www.proquest.com/docview/2661710529/citation/1EC36B7880484AADPQ/1> accessed 4 March 2024.

However, the dependence on parents due to education was extended even further in the current digital era through the Education and Skills Act 2008, which increased mandatory education requirements so that children must stay in education or training until the age of 18.[38] Therefore, many children cannot afford to leave their parent's homes until they are much older than this.[39] This extended reliance, as Lee identified, weakens the distinctions between adulthood and childhood,[40] resulting in fewer clear stages of development.[41] Therefore, this is a limitation to the modern conception of childhood as it becomes more difficult to identify and protect vulnerable groups, such as children working online. This has practical implications for implementing safeguarding measures. While this does not necessarily increase parental authority nor irradicate childhood, it does minimise the state's ability to protect children, consequently privatising much of their welfare.

D. Children as Legal Actors

Creating a space reserved for only children throughout the 19th century altered the public/private divide and created an environment where there was a greater emphasis on safeguarding children. This is evident with the implementation of the Children's Charter 1889, which altered the public/private divide regarding children's welfare rights regarding ill-treatment and neglect.[42] The act act extended children's welfare rights beyond the private realm,[43] opening the potential for more state involvement through establishing crimes (such as the ability for parents and guardians to be charged

[38] Education and Skills Act 2008 c. 25
[39] Mary Jane Kehily, *An Introduction to Childhood Studies* (Mary Jane Kehily ed, Open University Press 2008) <http://www.mcgraw-hill.co.uk/html/0335228704.html> accessed 23 April 2024.
[40] Nick Lee, *Childhood and Society: Growing up in an Age of Uncertainty* (Open University Press 2001).
[41] Mary Jane Kehily, *An Introduction to Childhood Studies* (Mary Jane Kehily ed, Open University Press 2008) <http://www.mcgraw-hill.co.uk/html/0335228704.html> accessed 23 April 2024.
[42] Prevention of Cruelty to, and Protection of, Children Act 1889 c. 44
[43] Harry Hendrick, *Child Welfare: Historical Dimensions, Contemporary Debate* (Policy Press 2003).

with cruelty and neglect)[44] and measures for intervening to enforce these rights (such as the power of search).[45] Nevertheless, at this point in time, the state's participation in a child's welfare depended on the cruelty and neglect of the child, having left the private home.[46] The significance of implementing the Children's Charter[47] was the recognition of the specific protection that children need, and the implementation of this Charter marked a pivotal moment in acknowledging and addressing the vulnerabilities of children within society.[48]

Following the reforms of the Charter in 1904[49] and 1908,[50] the Children Act 1948 following established a more professional child support structure,[51] which encouraged governmental action and provided new safeguards to improve parenting to preserve family life.[52] This was significant as the state now took on an increasingly important role in policing families, stepping in when issues arose and paying little attention to whether doing so violated parental rights.[53] State intervention was encouraged following these acts, shifting the perception of private family life established from Seymane.[54] For example, the case of Maria Colwell's death in 1973 saw the condemnation of the state and welfare organisations for their under-intervention and professional negligence.[55] The British media, in Maria Colwell's case, and those that followed, such as Tyra Henry and Jasmine Beckford in 1984 and Kimberley Carlile in 1986, portrayed social workers and their agencies as inept.[56] This is important as the increasing support for state intervention ultimately impacted home life, becoming less private and enforcing safeguards for the welfare of children.

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[44] Prevention of Cruelty to, and Protection of, Children Act 1889 c. 44 s1
[45] Prevention of Cruelty to, and Protection of, Children Act 1889 c. 44 s6
[46] David Archard, *Children: Rights and Childhood* (Routledge 2014).
[47] Prevention of Cruelty to, and Protection of, Children Act 1889 c. 44
[48] Prevention of Cruelty to, and Protection of, Children Act 1889 c. 44
[49] Prevention of Cruelty to Children Act 1904 c. 15
[50] Children Act 1908 c. 67
[51] Children Act 1948 c. 43
[52] Harry Hendrick, *Child Welfare: Historical Dimensions, Contemporary Debate* (Policy Press 2003).
[53] Michael Wyness, *Childhood and Society* (3rd edn, Red Globe Press 2019).
[54] *Semayne v Gresham* [1604] Yelverton 29
[55] Michael Wyness, *Childhood and Society* (3rd edn, Red Globe Press 2019).
[56] Jane Pilcher and Stephen Wagg, *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (Falmer Press 1996).

The liberal interventionist state that existed for much of the 20th century was later criticised for threatening the family structure and, by extension, the country's moral and financial stability. [57] This New Right rhetoric, as it was termed, was an ideology influenced by Margret Thatcher that emerged in the 1960s and 1970s and resulted in significant policy changes after Thatcher became Prime Minister in 1979. [58] This ideology advocated decreased taxation, a reduced welfare state system, deregulation, and privatisation.[59] This was a partial return towards the 19th-century privatisation of the family due to the growing reluctance of intervention into the private family home. This return ultimately highlights a departure from the new prioritisation of children's rights to the prioritisation of private family, demonstrating the implications the return to restricted state intervention has had on the modern-day rights of children online.

Thatcher's government saw significant support following the Cleveland Report in 1988.[60] The Cleveland report raised concerns about the steep increase in the alleged sexual abuse diagnoses of children, many of which were ultimately found to be false.[61] This infuriated many, including a Member of Parliament Stuart Bell, who depicted the parents as victims of needless government interference and asserted that social work had been taken over by "anti-family" forces.[62] The prevailing opinion then was that social workers, medical organisations and other local agencies had excessive authority to unjustly

[57] Jane Pilcher and Stephen Wagg, *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (Falmer Press 1996).
[58] Ben Williams, '*The "New Right" and Its Legacy for British Conservatism*' (2021) 29 Journal of Political Ideologies 121 <https://doi.org/10.1080/13569317.2021.1979139> accessed 14 February 2024.
[59] Ben Williams, '*The "New Right" and Its Legacy for British Conservatism*' (2021) 29 Journal of Political Ideologies 121 <https://doi.org/10.1080/13569317.2021.1979139> accessed 14 February 2024.
[60] Elizabeth Butler-Sloss, *Report of the Inquiry Into Child Abuse in Cleveland 1987* (HM Stationery Office 1988).
[61] Jane Pilcher and Stephen Wagg, *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (Falmer Press 1996).
[62] Bob Franklin and Nigel Parton (eds), *Social Work, the Media and Public Relations* (Routledge 2014).

separate families.[63] This illustrates the complex relationship between state intervention, societal perceptions, and the balance between protecting children and respecting family privacy.

The Children Act 1989 (CA 1989) was implemented following the Cleveland Report.[64] The act sought to place a strong emphasis on parents' rights to maintain the family's autonomy via the introduction of "parental responsibility".[65] Essentially, with the introduction of this concept, children's rights were limited to freedom from governmental interference and the right to remain within their families and develop freely.[66] While the act prioritises family autonomy, it's essential to recognise the potential drawbacks when families enter the public sphere, as is often the case with family vlogging. Despite the act's intent to shield families from intrusion, it does not safeguard children from the pressures and risks of public exposure.

The concept of parental responsibility is upheld by the traditional thinking that children develop best in their families and homes. To ensure that these children can stay in the care of their parents, social agencies provided a range of supporting services so that wherever possible.[67] This approach has certain drawbacks, such as restricting the state's ability to step in when the traditional family structure may not be able to ensure the child's best interests, or the labelling of a family as "dysfunctional" if it deviates from the stereotype of a white middle-class nuclear family. Consequently, while the state holds the parent responsible, it does not prioritise the broader social and economic factors that can significantly impact a child's well-being and development.

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[63] Peter Newell, 'Children's Rights after Cleveland' (1988) 2 Children & Society 199
[64] Children Act 1989 c. 41
[65] Caroline Sawyer, 'The Child Is Not a Person: Family Law and Other Legal Cultures' (2006) 28 Journal of Social Welfare and Family Law 1 <https://doi.org/10.1080/09649060600762274> accessed 2 December 2023.
[66] Harry Hendrick, *Child Welfare: Historical Dimensions, Contemporary Debate* (Policy Press 2003).
[67] Jane Pilcher and Stephen Wagg, *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (Falmer Press 1996).

The CA 1989 compels judges and the state to prioritise a child's well-being when making choices about their development.[68] However, the child's wishes are only one of numerous considerations to examine when developing such understandings.[69] No legal duty exists for authorities or parents to consider children's wishes.[70] This is because parental rights give parents the authority to safeguard their child's interests in whatever way they see suitable, regardless of the child's personal views.[71] Therefore, parental rights are likely to be prioritised over a child's agency and well-being, particularly in cases where traditional family structures or cultural norms conflict with a child's autonomy and needs. This is a limitation of child protection for family vlogging as family vlogging blurs the lines between public and private within the family home, further complicating this relationship and balance.

E. Specific Rights of the Child

The United Kingdom ratified the UNCRC in 1991,[72] committing to be held accountable to the UN for guaranteeing the implementation of children's rights in the UK.[73] The UNCRC is the most extensive and modern legally enforceable document on the care of children, and it views children's wellbeing as a matter of law instead of compassion.[74] The convention portrays children and

[68] Children Act 1989 c. 41 s1(3)
[69] Children Act 1989 c. 41 s1(3)
[70] Adrian L James, 'Children, the UNCRC, and Family Law in England and Wales' (2008) 46 Family Court Review 53 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-1617.2007.00183.x> accessed 20 April 2024.
[71] Imelda Coyne, 'Research with Children and Young People: The Issue of Parental (Proxy) Consent' (2010) 24 Children & Society 227 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1099-0860.2009.00216.x> accessed 2 March 2024.
[72] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[73] Marc Cornock and Heather Montgomery, 'Children's Rights Since Margaret Thatcher', Thatcher's grandchildren?: politics and childhood in the twenty-first century (Palgrave Macmillan 2014).
[74] Gretchen Kerr, 'A Brief History of Childhood: What It Means to Be a Child', Gender-Based Violence in Children's Sport (1st edition, Routledge 2022).

adolescents as contributing participants with rights, through articles such as Article 12 and Article 4.[75]

The UNCRC focuses on the family as the primary and essential environment in which children grow.[76] Article 8 of the UNCRC preserves family life, including a wide range of parental rights and obligations for the care and raising of children, as well as the preservation of parental authority within the family unit.[77] This compels the state to protect family privacy, including parental authority, unless there are compelling reasons to interfere. However, the UNCRC still encourages a childhood centred on independence and distinctiveness.[78] For example, Article 12 puts considerable weight on children's own views.[79] This is significant as, under Article 4, states are required to implement the rights in this convention.[80] Consequently, this establishes a framework that provides children with special protection measures that are distinct from their parents, affording them a degree of independence and a voice in their own lives.

Later legislation in the 21st century has been implemented with children in mind following the ratification of the UNCRC, such as the Children Act 2004[81] and the Equality Act 2010.[82] Much of which expanded on this established legislation to give greater importance to children's rights and but has not lessened parental rights and responsibility. For example, the 2004 act expanded

[75] Marc Cornock and Heather Montgomery, 'Children's Rights Since Margaret Thatcher', Thatcher's grandchildren?: politics and childhood in the twenty-first century (Palgrave Macmillan 2014) accessed 20 April 2024. | Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[76] Rachel E Taylor, *Fortin's Children's Rights and the Developing Law* (University of Oxford 2024)
[77] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[78] Marc Cornock and Heather Montgomery, 'Children's Rights Since Margaret Thatcher', Thatcher's grandchildren?: politics and childhood in the twenty-first century (Palgrave Macmillan 2014) accessed 20 April 2024.
[79] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[80] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[81] Children Act 2004 c. 31
[82] Equality Act 2010 c. 15

on the 1989 Act[83] and established a Children's Commissioner to champion their interests.[84] By ratifying the UNCRC, the UK has signalled its recognition of children as active participants in society with inherent rights that must be protected.

Despite the ratification and the creation of new laws to reflect international development, the UNCRC has never been fully implemented into domestic legislation. [85] Therefore, those wanting to protect children's rights must rely mainly on the adult-focused Human Rights Act 1998 (HRA)[86] and the CA 1989. The HRA can be applied to children through Article 14, which requires all rights in the act to be applied to everyone without discrimination.[87] This is further supported by the Equality Act 2010, which prohibits discrimination because of age under section 5.[88] The European Convention on Human Rights,[89] on which the HRA is based, was not drafted with children in mind, and it does not address many of the challenges in delivering relevant and effective rights to children.[90] This raises concerns regarding how much the UK government prioritises the preservation and promotion of children's rights in decision-making and policy procedures. As a result, the UNCRC's potential influence and usefulness in protecting children's rights is restricted due to a lack of direct adoption into domestic legislation.

One example in this sense comes from the fact that the UNCRC does not establish a hierarchy of rights. Article 3 establishes that the child's best interests

[83] Children Act 1989 c. 41
[84] Children Act 2004 c. 31 Part 1
[85] Rosemary Sheehan, Nicky Stanley and Helen Rhoades, *Vulnerable Children and the Law: International Evidence for Improving Child Welfare, Child Protection and Children's Rights* (Jessica Kingsley Publishers 2012).
[86] Human Rights Act 1998 c. 42
[87] Human Rights Act 1998 c. 42
[88] Equality Act 2010 c. 15
[89] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)
[90] Rachel E Taylor, *Fortin's Children's Rights and the Developing Law* (University of Oxford 2024).

are the primary consideration,[91] not the foremost important one. As a result, a child's interests may not always outweigh all other conditions, such as the parent's own rights.[92] This means that the significance of this convention does not erase the notion of parental rights and responsibility from the CA 1989, even if it hinders the child's own wishes. This has implications for children who are faced with new ways of being endangered and exploited, like children of family vloggers.

F. Conclusion

This section has considered the historical development of childhood. It has been concluded that society and the law have developed a separateness regarding childhood and adulthood, with a notable change in the recognition of children as a separate group that is entitled to certain safeguards. However, when it comes to protecting children as a unique group, the development of technology has made this separation more challenging to maintain. Furthermore, an understanding of the relationship between state involvement, parental rights, and children's well-being was understood by the contrasting viewpoints of the liberal interventionist state of the 20th century and the 19th-century concept of family privacy. This constantly shifting viewpoint highlights the conflict between parental rights and the best interests of the children. While legislation like the CA 1989 strongly focuses on family autonomy and parental responsibility, the ratification of the UNCRC underlines children's rights to participate actively in society. Nevertheless, the lack of complete domestic implementation of these rights creates a gap in safeguarding children's wellbeing, with adult-focused law filling the void.

[91] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[92] David Archard, *Children: Rights and Childhood* (Routledge 2014).

3. *Analysis of the Current Law and Consequences for Breach of Privacy*

A. Introduction

This section provides an analysis of parental online privacy breaches. This is important as it establishes that a lack of regulation can and has caused a hindrance to children's rights online. This section will discuss the consequences of sharing private information in this format, as this contextualises this type of breach of privacy. Understanding how this breach of privacy undermines children's rights is essential to the argument that there is a lack of safeguarding for children in this regard. This is particularly emphasised and articulated through examples of Family Vlogger's specific activities on YouTube. Additionally, the discussion will look into the current law of privacy is applied to the circumstances of family vlogging to illustrate the potential harms inflicted on children already. The law is focused on the tort of misuse of private information (MoPI), as it is the most relevant current law that applies in this context. The Data Protection Act 2018 will not be discussed as it primarily governs the processing and protection of personal data,[93] whereas the MoPI tort focuses on the protection of individuals' privacy rights, serving as a more suitable legal lens to analyse and address parental online privacy breaches. Throughout the discussion, particular attention will be paid to the prioritisation of parental rights and authority to articulate how historical conceptions and views of parental responsibility and privatisation have influenced a lack of child safeguarding online like in the examples of the SacconneJolys, the Shaytards and the LaBrant family.

[93] Data Protection Act 2018 c. 12

B. Breach of Privacy

Under UNCRC, 'no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence'.[94] This is expanded upon in the HRA 1998, where the right to 'private life' under Article 8 broadly covers protecting personal information and identity.[95]

However, parents who establish an internet presence for their children prevent these children from having a choice of no online identity at all.[96] For example, the SacconeJolys filmed their four children before they were even born, chronicling their growth regularly (and sometimes even daily).[97] Blum-Ross and Livingstone argue that the he sharing of intimate family information and moments - such as the birth of a person's children[98] - has been shown to increase viewer interaction with videos and help vloggers like the SacconeJolys develop an online persona, which comes across as more authentic than that of a brand or a traditional celebrity.[99]

Even if it appears that the child consented through participation in these videos, a consenting child may not fully comprehend the longer-term impacts of what they are consenting to. This has increased implications because followers of family channels keep and re-upload information.[100] Once a child's life is brought out of the private domain, it is difficult to control how much of

[94] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577, Art. 16
[95] Human Rights Act 1998 c. 42
[96] Alana Harrison, 'Protecting and Promoting the Rights of Child Influencers in the Digital Age' (Masters, Victoria University of Wellington 2020).
[97] 'SacconeJolys' (YouTube Channel) <https://www.youtube.com/channel/UCxJrnvfqSSvly5hiq2Fe68g> accessed 20 February 2024.
[98] 'SacconeJolys', LIVES CHANGED FOREVER! (2012) <https://www.youtube.com/watch?v=uLrNulUx7xc>.
[99] Alicia Blum-Ross and Sonia Livingstone, '"Sharenting," Parent Blogging, and the Boundaries of the Digital Self' (2017) 15 Popular Communication 110 <https://doi.org/10.1080/15405702.2016.1223300> accessed 9 April 2024.
[100] Crystal Abidin, 'Micro-microcelebrity: Branding Babies on the Internet' (2015) 18 M/C Journal <https://journal.media-culture.org.au/index.php/mcjournal/article/view/1022> accessed 16 October 2023.

their life is publicised. Thus, a breach of privacy in this way through the publication of private information undermines a child's right under both Article 16 of the UNCRC and Article 8 of the HRA.

A parent may not be aware that they are breaching their child's privacy and putting their welfare at risk by disclosing personal information online. Nevertheless, the ease at which this information can be accessed online by strangers underscores the importance of parents safeguarding their children's privacy online. People carrying out identity theft and digital kidnapping - the act of impersonating someone else by resharing their photos and other information - particularly target children and teenagers.[101] In addition, there have been cases when paedophiles have taken children's photos from their parents' account for use on pornographic websites.[102] Indeed, it was reported by the eSafety Commissioner in Australia that over 50% of the images uploaded on websites dedicated to paedophilia were sourced from social media platforms.[103] Critically, parents may facilitate such activities by disclosing on YouTube personal details such as their child's name and birthday to earn income.[104] Thus, this underscores the necessity for legal protections to safeguard children from potential risks, as the deliberate monetization of children's privacy within family vlogs constitutes a parental choice with significant implications for children's well-being and future.

Parents are actively contributing to developing their children's digital footprints by including them in the content they create for money. According

[101] Keltie Haley, 'Sharenting and the (Potential) Right to Be Forgotten' (2020) 95 95 Indiana Law Journal 1005 (2020) <https://www.repository.law.indiana.edu/ilj/vol95/iss3/9>. accessed 8 April 2024.
[102] Richard Wortley and Stephen Smallbone, 'Child Pornography on the Internet' (2012) Center for Problem-Oriented Policing 41 <https://popcenter.asu.edu/sites/default/files/child_pornography_on_the_internet.pdf>. accessed 6 April 2024.
[103] Victoria Richards, 'Paedophile Websites Steal Half Their Photos from Social Media Sites like Facebook | The Independent' *The Independent* (30 September 2015) <https://www.independent.co.uk/news/world/australasia/paedophile-websites-steal-half-their-photos-from-social-media-sites-like-facebook-a6673191.html> accessed 19 April 2024.
[104] Keltie Haley, 'Sharenting and the (Potential) Right to Be Forgotten' (2020) 95 95 Indiana Law Journal 1005 (2020) <https://www.repository.law.indiana.edu/ilj/vol95/iss3/9>. accessed 8 April 2024.

to Weaver and Gahegan, a digital footprint records a person's online existence.[105] As a result, Steinberg argues that parents restrict their children's freedom to create their own digital footprints.[106] The digital footprints left by using the internet may impact a person's future opportunities. As Buchanan points out, stories in the media of people being rejected from universities or losing their jobs because of something they said on social media are becoming more common.[107] This is further impacted by the fact that this information shared can exist forever, so there is no control over this information. Therefore, it is significant that concerns should be raised over parent vloggers publishing substantial amounts of private information about their children on YouTube, as it impacts their futures and undermines their autonomy and vulnerabilities.

The academic debate around the concept of consent is beyond the scope of the present analysis. However, it is essential to highlight that parents in England and Wales have the right to consent on behalf of children under the age of sixteen, as it is assumed that they lack the capacity to do so.[108] A child under sixteen can be seen as 'Gillick-competent' and can consent to their own medical treatment without the need for parental permission or knowledge, provided they are deemed to have sufficient maturity and understanding to appreciate what is involved in their decision.[109] However, consent may still be signalled by children not considered Gillick competent. Harrison has identified that there is an increasing amount of research indicating that young toddlers may use nonverbal clues to communicate long before they can use vocal ones, for instance, a child who objects to being recorded or photographed could become

[105]Stephen Weaver and Mark Gahegan, 'Constructing, Visualizing, and Analyzing a Digital Footprint', The Geographical Review, vol 97 (2007).
[106] Stacey Steinberg, 'Sharenting: Children's Privacy in the Age of Social Media' (2017) 66 Emory Law Journal 839 <https://scholarlycommons.law.emory.edu/elj/vol66/iss4/2> assessed 17 April 2024.
[107] Rachel Buchanan and others, 'Post No Photos, Leave No Trace: Children's Digital Footprint Management Strategies' (2017) 14 E-Learning and Digital Media 275 <https://doi.org/10.1177/2042753017751711> accessed 11 April 2024.
[108] Alana Harrison, 'Protecting and Promoting the Rights of Child Influencers in the Digital Age' (Masters, Victoria University of Wellington 2020).
[109] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112

silent or withdraw inside themselves.[110] This is significant when you consider the content of these videos on the internet.

For example, The Shaytards[111] published a video in which their young daughter repeatedly pleads, "Dad! Cut that part out!" after telling her dad about a boy she has a crush on.[112] Not only was the child clearly humiliated by the sharing of this information online, but the child's privacy was also blatantly disregarded through the deprivation of choice. This reflects a worrying trend in which children's privacy and boundaries are ignored in favour of entertainment value, creating a dangerous precedent for internet content involving children.

C. The Consequences of the Commercialisation of Privacy

Family vlogging may affect a child's ability to build their sense of self, their sense of autonomy and their trust of others, all of which would be detrimental to their development.[113] This is supported by Leaver and Highfield who identify that family vlogging normalises a culture of surveillance and disrupts a child's ability to create their own online identity.[114] Furthermore, Jorge et al.'s study highlighted that the children of celebrities' online identities typically reflect the preferences of their famous parent (or parents) and their audience rather than who they really were.[115] Similarly, a focus group study conducted

[110] Alana Harrison, 'Protecting and Promoting the Rights of Child Influencers in the Digital Age' (Masters, Victoria University of Wellington 2020).
[111] 'Shaytards' (YouTube Channel) <https://www.youtube.com/SHAYTARDS> accessed 21 February 2024.
[112] Emma Nottingham, '"Dad! Cut That Part out!": Children's Rights to Privacy in the Age of "Generation Tagged": Sharenting, Digital Kidnapping and the Child Micro-Celebrity', *The Routledge International Handbook of Young Children's Rights* (Routledge 2019).
[113] Keltie Haley, 'Sharenting and the (Potential) Right to Be Forgotten' (2020) 95 95 Indiana Law Journal 1005 (2020) <https://www.repository.law.indiana.edu/ilj/vol95/iss3/9>.a
[114] Tama Leaver and Tim Highfield, 'Visualising the Ends of Identity: Pre-Birth and Post-Death on Instagram' (2018) 21 Information, Communication & Society 30 <https://doi.org/10.1080/1369118X.2016.1259343> accessed 21 January 2024.
[115] Ana Jorge, Lidia Marôpo and Filipa Neto, '"When You Realise Your Dad Is Cristiano Ronaldo": Celebrity Sharenting and Children's Digital Identities' (2022) 25 Information Communication and Society 516 <http://www.scopus.com/inward/record.url?scp=85126102528&partnerID=8YFLogxK> accessed 3 April 2024.

by Ouvrein and Verswijvel reveals a discrepancy between the identity parents create online for their children and that created by the adolescents themselves.[116] Therefore, this demonstrates the importance of a child's ability to develop their identity on their own terms, which family vlogging does not allow.

Additionally, the ongoing filming of children by parent vloggers has raised concerns about the possible long-term impacts of constant surveillance and documentation on their development and sense of identity.[117] As noted by Udenze and Bode, children's understanding of privacy may deteriorate more quickly if they are raised in a culture where the disclosure of private information online is accepted as the norm.[118] This normalisation of constant surveillance and public sharing from a young age can contribute to a blurring of the lines between public and private spaces, potentially impairing children's ability to navigate their personal and digital identities as they grow into adults.

Moreover, the freedom for children to make mistakes and develop from them in private is compromised by the parent vloggers' need to maintain a certain image for an audience.[119] Research indicates that children who have an online presence frequently engage in self-comparison with others, potentially leading to detrimental effects on their physical and psychological well-being.[120] Furthermore, some parents decide to post their children's mistakes online,

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[116] Gaëlle Ouvrein and Karen Verswijvel, 'Sharenting: Parental Adoration or Public Humiliation? A Focus Group Study on Adolescents' Experiences with Sharenting against the Background of Their Own Impression Management' (2019) 99 Children and Youth Services Review 319 <https://www.sciencedirect.com/science/article/pii/S0190740918309952> accessed 2 February 2024.
[117] Silas Udenze and O Bode, *Sharenting in Digital Age: A Netnographic Investigation* (2020). <https://doi.org/10.13140/RG.2.2.14790.29761> assessed 21 January 2024.
[118] Silas Udenze and O Bode, *Sharenting in Digital Age: A Netnographic Investigation* (2020). <https://doi.org/10.13140/RG.2.2.14790.29761> assessed 21 January 2024.
[119] Reedha Ali and Jennifer Coronado, 'Unsubscribing from the YouTube Family: An Analysis of the Developmental Hindrances in Children Video-Casted from the Home' (2023) <https://soar.suny.edu/handle/20.500.12648/10357> accessed 21 February 2024.
[120] Yewande F Oluwajobi, Oluwatosin Olanrewaju-Elufowoju and Emmanuel Fatimehin, 'The Legal Aspect of Digitalization of Privacy of Children Online' (2024) 4 Redeemer's University Journal of Jurisprudence and International Law <https://runlawjournals.com/index.php/runjjil/article/view/63> accessed 6 April 2024.

which may have a negative impact on the child's feelings of value and dignityespecially since videos featuring children in distress are viewed in particularly high numbers on family vlogger YouTube channels. [121] For example, the LaBrant family published a video to their 8.7 million subscribers,[122] which featured their 6-year-old daughter crying in distress due to a 'prank' where they told their daughter that they were giving her dog away.[123] This illustrates the distress these children can be placed under to for all to see online. This undermines the children's welfare and ability to develop a positive sense of self, therefore, violating their privacy and autonomy.

In addition, when the children later see videos of their childhood experiences posted online for others, especially their peers, to see, it could lead to embarrassment and potentially expose them to bullying. In this sense, Verswijvel highlights that adolescents largely disapprove of their parents sharing details about them on social media and consider it embarrassing and purposeless.[124] Therefore, this illustrates the value of privacy in this respect and underscores the need for parents to be mindful of their children's boundaries and consent before sharing personal information or images online..

D. The Laws Enforcing Breach of Privacy

Following the 2022 House of Commons Committee Report, the current domestic law surrounding privacy still has no specific regulations, instances of

[121] Reedha Ali and Jennifer Coronado, 'Unsubscribing from the YouTube Family: An Analysis of the Developmental Hindrances in Children Video-Casted from the Home' (2023) <https://soar.suny.edu/handle/20.500.12648/10357> accessed 21 February 2024.
[122] 'The LaBrant Fam' (YouTube Channel) <https://www.youtube.com/@ColeAndSav> accessed 22 April 2024.
[123] Julia Carrie Wong, '"It's Not Play If You're Making Money": How Instagram and YouTube Disrupted Child Labor Laws' The Guardian (24 April 2019) <https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws> accessed 22 April 2024.
[124] Karen Verswijvel and others, 'Sharenting, Is It a Good or a Bad Thing? Understanding How Adolescents Think and Feel about Sharenting on Social Network Sites' (2019) 104 Children and Youth Services Review 104401 <https://www.sciencedirect.com/science/article/pii/S0190740919303482> accessed 9 April 2024.

state intervention, or common law cases regarding child influencers and the privacy breaches they experience.[125] This suggests that, in accordance with Schedule 1 Article 8 of the HRA,[126] the State continues to considers children's internet behaviour to be a private affair in which it would be wrong to interfere.[127] Thus, it can be seen that a breach of privacy in this regard would interfere with a parent or a child's right to a private life.

As established in section 2, parental responsibility means that parents are the primary decision-makers with regard to the well-being of their children and grants them the right to participate in and make decisions regarding their upbringing.[128] Parents may contend that they have the right under Schedule 1 Article 10 of the HRA to "impart" private information about their family in whatever way they see fit as part of their right to freedom of expression,[129] especially since the law does not view parents as possible sources for damaging disclosure.[130]

The law concerning privacy does not recognise the broad right to privacy as a basic right in all respects.[131] Instead, it relies on common law concepts such as defamation, trespass, breach of confidence, and misuse of private information.[132] For this research, the common law concepts of defamation and

[125] Digital, Culture, Media and Sport Committee, 'Influencer Culture: Lights, Camera, Inaction?' (2022) House of Commons Committee report 12.
[126] Human Rights Act 1998 c. 42
[127] Alana Harrison, 'Protecting and Promoting the Rights of Child Influencers in the Digital Age' (Masters, Victoria University of Wellington 2020).
[128] Claire Bessant, 'Parental Views about the Importance of Family Privacy and Its Protection in English Law' (thesis, University of Leicester 2021) <https://figshare.le.ac.uk/articles/thesis/Parental_views_about_the_importance_of_family_privacy_and_its_protection_in_English_law/16810372/1> accessed 16 April 2024.
[129] Human Rights Act 1998 c. 42
[130] Stacey Steinberg, 'Sharenting: Children's Privacy in the Age of Social Media' (2017) 66 Emory Law Journal 839 <https://scholarlycommons.law.emory.edu/elj/vol66/iss4/2> accessed 4 April 2024.
[131] Marion Oswald, Helen James and Emma Nottingham, 'The Not-so-Secret Life of Five-Year-Olds: Legal and Ethical Issues Relating to Disclosure of Information and the Depiction of Children on Broadcast and Social Media' (2016) 8 Journal of Media Law 198 <https://doi.org/10.1080/17577632.2016.1239942> accessed 8 April 2024.
[132] Soumia Landi, 'Misuse of Private Information: A Legal Analysis of Privacy Precedent in Connection to Media Abuses in England and Wales' (2023) 13 King's Student Law Review 1 <https://heinonline.org/HOL/P?h=hein.journals/kinstul13&i=69> accessed 8 April 2024.

trespass is not relevant and will instead focus on breach of confidence and misuse of private information. To establish a successful breach of confidence claim, the information must satisfy the required level of security and not be publicly accessible. Under case law, children's private activities that are taken outside the family home may be classified as public or shared events when seen by many other people.[133] Therefore, publishing information regarding such actions does not violate the obligation of confidentiality. Even if a child proves their parent owes them a duty of confidence, their parents could claim public interest or publicly available facts to justify disclosure.[134] Moreham and Warby argue that breach of confidence does not cover general private information which has been put into the public domain.[135] Therefore, laws relating to breach of confidence does not safeguard the children of family vloggers.

E. Misuse of Private Information

The most effective means of promoting fundamental rights to privacy in England and Wales is the tort of misuse of private information, which has its roots in breach of confidence and the HRA.[136] As established by Campbell,[137] the tort of misuse of private information highlights the tension between Article 8 (the right to privacy) and Article 10 (the freedom of expression).[138] To succeed with a misuse of private information claim, it must initially be demonstrated that the child has a legitimate expectation of privacy regarding information their parents disclosed. Then it must be shown that that the child's right to privacy outweighs that of their parent's.[139] However, currently, most common

[133] *Woodward v Hutchins* [1977] 2 All ER 751
[134] Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 Communications Law 7.
[135] Nicole Moreham and others (eds), *Tugendhat and Christie: The Law of Privacy and The Media* (Third Edition, Third Edition, Oxford University Press 2016).
[136] Soumia Landi, 'Misuse of Private Information: A Legal Analysis of Privacy Precedent in Connection to Media Abuses in England and Wales' (2023) 13 King's Student Law Review 1 <https://heinonline.org/HOL/P?h=hein.journals/kinstul13&i=69> accessed 8 April 2024.
[137] *Campbell v Mirror Group Newspapers* [2004] UKHL 22
[138] Human Rights Act 1998 c. 42
[139] Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 Communications Law 7.

law judgements concerning the conflict between Articles 8 and 10 frequently address press freedom.[140] Despite this focus, the application of this case demonstrates a consistent consideration for parental wishes and actions over and above children's, reflecting the nuanced approach taken by the legal system towards privacy in the context of family life.

The principle of a reasonable expectation of privacy, particularly concerning children, has been underscored in the pivotal case Campbell,[141] and further in Murray[142] and Weller.[143] It has been established that individuals, including children, do not inherently possess an automatic expectation of privacy.[144] Instead, the court assesses whether a reasonable person would perceive the situation as invasive if they faced the same publicity.[145] Considering the UNCRC, it is evident that children's interests are of paramount importance and, [146] as per Weller, 'considerable weight' is put on the harm that children might face or have faced. [147] However, this does not mean their rights always precede other considerations.[148]

This is important in a family vlogging context, as the courts may weigh the children's rights to privacy against the parents' freedom of expression,[149] the parents' right to private life,[150] or the public's right to information.[151] Furthermore, in Weller , Lord Dyson brought attention to the vulnerability of children when considering harm, emphasising their inability to consent

[140] Human Rights Act 1998 c. 42
[141] *Campbell v Mirror Group Newspapers* [2004] UKHL 22
[142] *Murray v Express Newspapers plc and another* [2008] EWCA Civ 446
[143] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)
[144] Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 Communications Law 7.
[145] Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 Communications Law 7.
[146] *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554
[147] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)
[148] *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554
[149] Human Rights Act 1998 c. 42
[150] Human Rights Act 1998 c. 42
[151] Human Rights Act 1998 c. 42

intentionally or unintentionally to be photographed.[152] He highlighted the potential damage that even seemingly innocent images could inflict upon children, including the risk of embarrassment and a risk to their safety.[153] Therefore, the harm and that children face and their unique position are being recognised in more recent times by the courts in determining their best interests. Family vlogging serves as a relevant example within this context, as regularly documenting and sharing a child's daily experiences can unintentionally expose them to various risks.

Where parental rights to a family life conflict with the best interests of the children, the UNCRC puts greater weight on the rights of the child.[154] However, the courts have yet to face the question of whether it would be in the best interests of a child to order their parents to stop documenting their life online.[155] It is doubtful, though, that the courts would find it in their best interests. This is because, on the surface level, there is not any visible harm or risk of harm, only interference with controlling the child's information.[156] This highlights how important it is for courts to acknowledge and safeguard this unique position, considering the potential harm that excessive publicity can cause for these children.

Nevertheless, the common law decisions detailed above demonstrate that the court relies on the parents' prior efforts to protect their child's privacy and their

[152] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)| Jelena Gligorijević, 'Children's Privacy: The Role of Parental Control and Consent' (2019) 19 Human Rights Law Review 201 <https://doi.org/10.1093/hrlr/ngz004> accessed 24 November 2023.
[153] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)| Marion Oswald, Helen James & Emma Nottingham 'The not-so secret life of five-year-olds: legal and ethical issues relating to disclosure of information and the depiction of children on broadcast and social media' (2016)
[154] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[155] Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 Communications Law 7.
[156] Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 Communications Law 7.

advocacy on their behalf.[157] The case of AAA serves as an example since the Court of Appeal refused to keep confidential the information that the claimant's child was the illegitimate child of a well-known politician.[158] According to the court's reasoning, the mother's voluntary disclosure of this fact demonstrated a parental decision to share this information publicly.[159] Therefore, this puts the parent's agency ahead of the child's reasonable expectation to privacy and highlights the potential consequences of having a parent in the public eye.

Lord Dyson's ruling in Weller serves as another illustration of the judiciary's recognition of parents' right to control when it comes to their children's information.[160] In delivering his opinion, Lord Dyson emphasised the importance of considering the broader context of a child's family life when assessing their privacy rights.[161]

> If parents choose to bring a young child onto the red carpet at a premiere or awards night, it would be difficult to see how the child would have a reasonable expectation of privacy or article 8 would be engaged…A child's reasonable expectation of privacy must be seen in the light of the way in which his family life is conducted.[162]

Lord Dyson highlights the close relationship between a child's reasonable expectation of privacy and how their family lives.[163] Regarding family vlogging, parents have ultimate control over how their children present themselves online. Based on the precedent in Weller,[164] because of the public nature of activity these parents partake in, children should not have a

[157] Jelena Gligorijević, 'Children's Privacy: The Role of Parental Control and Consent' (2019) 19 Human Rights Law Review 201 <https://doi.org/10.1093/hrlr/ngz004> accessed 24 November 2023.
[158] *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554
[159] *AAA v Associated Newspapers* Ltd [2013] EWCA Civ 554
[160] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)
[161] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)
[162] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)
[163] Soumia Landi, 'Misuse of Private Information: A Legal Analysis of Privacy Precedent in Connection to Media Abuses in England and Wales' (2023) 13 King's Student Law Review 1
[164] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)

reasonable expectation of privacy.[165] Therefore, sharing children's lives online is not merely a reflection of current lifestyle choices but a decision that could have lasting impacts on a child's right to privacy.

Furthermore, 'norms' regulate new behaviours and laws. These 'norms' take time to develop to accommodate new technologies.[166] Steijn points out that a court would struggle to determine what is practical to do since family vlogging is still a relatively new phenomenon.[167] This increases the likelihood of applying the precedent in Weller,[168] where children of family vloggers should reasonably expect their information to be broadcasted. The reason is that this exposure is the lifestyle they are conditioned to expect from their parents. However, the Supreme Court has acknowledged that in enforcing the law to protect a child's welfare, the courts should consider the possibility that a parent's actions may not be in the best interests of the child.[169] Nevertheless, as discussed in the first chapter, the state is reluctant to get involved when a parent's authority to handle the affairs of their family comes into question.[170] Hughes contends that this undercuts more general privacy protection principles when courts are hesitant to consider children's privacy rights in situations where damage may not be immediately evident.[171]

F. Conclusion

[165] Jelena Gligorijević, 'Children's Privacy: The Role of Parental Control and Consent' (2019) 19 Human Rights Law Review 201 <https://doi.org/10.1093/hrlr/ngz004> accessed 24 November 2023.
[166] Wouter Steijn, 'The Role of Informational Norms on Social Network Sites', Youth 2.0: Social Media and Adolescence (2016)
[167] Wouter Steijn, 'The Role of Informational Norms on Social Network Sites', Youth 2.0: Social Media and Adolescence (2016).
[168] *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB)
[169] Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 Communications Law 7.
[170] Imelda Coyne, 'Research with Children and Young People: The Issue of Parental (Proxy) Consent' (2010) 24 Children & Society 227 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1099-0860.2009.00216.x> accessed 2 March 2024.
[171] Kirsty Hughes, 'The Child's Right to Privacy and Article 8 European Convention on Human Rights' in Michael Freeman (ed), Law and Childhood Studies: Current Legal Issues Volume 14 (Oxford University Press 2012) <https://doi.org/10.1093/acprof:oso/9780199652501.003.0026> accessed 9 April 2024.

It is concluded that the commercialisation of privacy diminishes a child's agency in creating their own digital identities and fails to sufficiently protect children's autonomy. It was established that there is a lack of explicit laws or case law specifically addressing the privacy concerns of children working online. Effectively protecting children's privacy rights is challenging due to the judiciary's regard for parental autonomy and unwillingness to intervene in family matters. This further highlighted the conflict between parental rights and the best interests of the child. Thus, the development of technology has made the separation of children's rights from parents more challenging to maintain.

Consequently, a child's right to privacy is restricted to situations where they are at visible risk or if their parents advocated on their behalf, not because it is essential to their autonomy and dignity. This sets a dangerous precedent for content involving children on the internet, reflecting a worrying trend in which children's privacy and boundaries are disregarded in favour of entertainment value. This is significant because it highlights the need for a thorough reassessment of legal frameworks and societal norms to protect children's rights in the digital age, particularly regarding privacy and welfare in the context of family vlogging. Accordingly, the following part will investigate whether the rights and safeguards for child labour in the entertainment industry currently in place prioritise children's rights when those rights are being violated by their parents.

4. *Analysis of the Current Law and Consequences for Child Labour in Entertainment*

A. Introduction

This section analyses child labour within the entertainment industry. By examining this area of labour through the lens of family vlogging, this part highlights the blurred boundaries between work and leisure, as well as the potential exploitation of children in pursuit of online fame and financial gain. First, it is relevant to discuss how labour is facilitated on YouTube, as this contextualises the type of harm that may be inflicted on children who work online. Understanding how this type of employment undermines children's rights is essential to the argument that there is a lack of safeguarding for children in this regard. This is particularly emphasised and articulated through examples of Family Vlogger's specific activities on YouTube. The current law on child labour in entertainment is applied to the circumstances of family vlogging to illustrate the potential harm inflicted on children already. Particular attention is devoted to the prioritisation of parental rights and authority to articulate how historical conceptions and views have influenced a lack of child safeguarding online.

B. Child Labour on YouTube

YouTube videos are monetised primarily through the advertisements that run on the uploaded material.[172] It is approximated that a video makes £2-£5 per 1000 views.[173] As of June 2019, before deleting a number of videos, YouTube

[172] Amanda G Riggio, 'The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws Comment' (2020) 44 Seattle University Law Review 493 <https://heinonline.org/HOL/P?h=hein.journals/sealr44&i=497> accessed 14 April 2024.
[173] Samantha Leathers, 'Meet the YouTube Kids Earning More than £190,000 per Video' *Express* (8 September 2021) <https://www.express.co.uk/finance/personalfinance/1488297/youtube-child-influencers-make-millions-money> accessed 15 April 2024.

family vloggers the SacconeJolys had 842,987,044 views on their channel.[174] This means that if the approximation is accurate, the SacconeJolys made between £1,685,974-£4,214,935 across the 10 years since starting their channel in 2009. Therefore, the children in these videos contributed significantly to the sums that were earned from the channel.

Since YouTube forbids users under the age of thirteen from having their own accounts,[175] the accounts on which the content is posted are owned and managed strictly by the parents.[176] This is significant as it means that the choice to reserve these earnings for their child rests with the parents. Therefore, the parents are the exclusive arbiters of the child's employment schedule, conditions, and compensation, in addition to being the legal beneficiaries of the child's labour.[177]

Paid-brand sponsorships represent a further revenue stream for family vloggers. Most family vloggers feature their children in sponsored advertisements within their vlogs. In most cases, a business is less likely to approach parent influencers for a sponsorship deal if the child is not included in the content.[178] Contracts cannot be enforced against children, so when businesses collaborate with a family channel on YouTube to promote their products or services, they do so by engaging the parents.[179] Therefore, children

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[174] 'Leflooftv Monthly YouTube Statistics - Socialblade.Com' (6 June 2019) <https://web.archive.org/web/20190606145112/https://socialblade.com/youtube/user/leflooftv/monthly> accessed 15 April 2024.

[175] YouTube, 'Terms of Service' <https://www.youtube.com/static?gl=GB&template=terms> accessed 15 January 2025.

[176] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 The George Washington International Law Review 127 <https://www.proquest.com/docview/2755619906/abstract/8B59E75C1558420DPQ/1> accessed 28 April 2024.

[177] Alana Harrison, 'Protecting And Promoting The Rights Of Child Influencers In The Digital Age' <https://digitalnz.org/records/52547374> accessed 11 April 2024.

[178] Amanda G Riggio, 'The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws Comment' (2020) 44 Seattle University Law Review 493 <https://heinonline.org/HOL/P?h=hein.journals/sealr44&i=497> accessed 14 April 2024.

[179] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 George Washington International Law Review 127 <https://heinonline.org/HOL/P?h=hein.journals/gwilr54&i=143> accessed 14 April 2024.

of family vloggers might not have much to show financially for all the possible harm they have experienced during their upbringing and education because parents are not obligated to set aside their children's wages.

The lack of external oversight and the inherently intimate and unregulated nature of the home environment present challenges in ensuring the well-being and rights of the children involved.[180] We do not know anything about what happens behind the scenes of family vlogs beyond what the parents choose to disclose. This is ultimately a hindrance to children's rights as it facilitates an environment where children can be forced to work within the private sphere.[181] For example, the parent vlogger from the 'Fantastic Adventures' channel, Machelle Hobson, was charged with abusing seven of her children.[182] This YouTube account - which was created in 2012 and ultimately terminated in 2019 after Machelle was arrested - featured videos of Machelle's children acting out pre-scripted scenes. [183] The children were "disciplined" in different horrifying ways, including, by withholding food and water, being pepper sprayed from head to toe and being locked in a closet.[184] One of the children stated that they were disciplined in these manners 'if they do not recall their lines or do not participate (in the videos) as they are directed to'.[185] While these

[180] Emma Nottingham, '"Dad! Cut That Part out!": Children's Rights to Privacy in the Age of "Generation Tagged": Sharenting, Digital Kidnapping and the Child Micro-Celebrity', The Routledge International Handbook of Young Children's Rights (Routledge 2019).
[181] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 George Washington International Law Review 127 <https://heinonline.org/HOL/P?h=hein.journals/gwilr54&i=143> accessed 14 April 2024.
[182] Eric Levenson and Alonso Mel, 'A Mom on a Popular YouTube Show Is Accused of Pepper-Spraying Her Kids When They Flubbed Their Lines' (CNN, 20 March 2019) <https://www.cnn.com/2019/03/20/us/youtube-fantastic-adventures-mom-arrest-trnd/index.html> accessed 22 April 2024.
[183] Katie Mettler, 'This "YouTube Mom" Was Accused of Torturing the Show's Stars — Her Own Kids. She Died before Standing Trial.' Washington Post (14 November 2019) <https://www.washingtonpost.com/crime-law/2019/11/13/popular-youtube-mom-who-was-charged-with-child-abuse-has-died/> accessed 22 April 2024.
[184] Katie Mettler, 'This "YouTube Mom" Was Accused of Torturing the Show's Stars — Her Own Kids. She Died before Standing Trial.' Washington Post (14 November 2019) <https://www.washingtonpost.com/crime-law/2019/11/13/popular-youtube-mom-who-was-charged-with-child-abuse-has-died/> accessed 22 April 2024.
[185] Eric Levenson and Alonso Mel, 'A Mom on a Popular YouTube Show Is Accused of Pepper-Spraying Her Kids When They Flubbed Their Lines' (CNN, 20 March 2019)

videos were not specifically 'family vlogs' due to being scripted, this case demonstrates how children can be forced to work and participate in videos uploaded onto YouTube, therefore putting their welfare at risk.

Early exposure to influencer work and the marketing of products and services may cause children to normalise commercialisation and exploitative practices.[186] Family vloggers with high incomes who exemplify a consumer lifestyle, for example, through product placement may cause their child to develop unhealthy materialism, impacting their life expectations in adulthood.[187] The Communications Act 2003 prevents viewers, mainly young viewers, of online content from being exposed to advertising lacking sufficient disclosure.[188] The potential harm of advertising highlighted in this legislation is significant, particularly because the Act does not protect child influencers from such exposure.[189] Therefore, this demonstrates the potential long-term impacts of content creation for this relatively new, vulnerable group of children.

Family vloggers who subject their children to constant filming might not have the discipline to create a structured and healthy filming schedule.[190] The making of these vlogs has the potential to take up most of the day, and some vloggers film every day. Furthermore, children's education can still suffer even if they attend school full-time. Parents may encourage their children to devote more of their after-school time to creating content rather than completing

<https://www.cnn.com/2019/03/20/us/youtube-fantastic-adventures-mom-arrest-trnd/index.html> accessed 22 April 2024.

[186] Simone Van der Hof, Valerie Verdoodt and Mark Leiser, 'Child Labour and Online Protection in a World of Influencers' [2019] SSRN Electronic Journal.

[187] Suzanna Opree and others, 'Children's Advertising Exposure, Advertised Product Desire, and Materialism: A Longitudinal Study' [2013] Communication Research.

[188] The Communications Act 2003 c. 21

[189] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 The George Washington International Law Review 127 <https://www.proquest.com/docview/2755619906/abstract/8B59E75C1558420DPQ/1> accessed 28 April 2024.

[190] Amanda G Riggio, 'The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws Comment' (2020) 44 Seattle University Law Review 493 <https://heinonline.org/HOL/P?h=hein.journals/sealr44&i=497> accessed 14 April 2024.

homework, interacting with peers, or participating in extracurricular activities.[191] This is significant as the extent of what goes on behind the scenes is not immediately quantifiable since many elements of the lives and schedules of family vloggers stay concealed.[192]

C. Child Employment Laws for the Entertainment Industry

The Children (Protection at Work) Regulations 1998 revised the Children and Young Persons Act (CYPA) 1933,[193] to allow the youngest child to be employed at the age of fourteen. [194] Under the revised law, children as early as thirteen may engage in "light work" as long as it is not likely to be harmful to the safety and development of the child, including their attendance at school. [195] The interpretation and implementation of this clause in the context of family vlogging raises concerns given the blurred borders between work, play, and personal life and the numerous possible harms inflicted on children by this type of work, as detailed above. Therefore, family vlogging can not be considered "light work".

There are limitations on the kind of employment (part-time) that 14-year-olds can perform and the number of hours they can work throughout the academic year and during school breaks.[196] Once a child reaches the "minimum school leaving age," (fifteen) they can pursue full-time employment.[197] However, the use of the word "employment" leaves children who work online in the dark. Family vloggers primarily generate money without formal employment

[191] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 George Washington International Law Review 127 <https://heinonline.org/HOL/P?h=hein.journals/gwilr54&i=143> accessed 14 April 2024.
[192] Amanda G Riggio, 'The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws Comment' (2020) 44 Seattle University Law Review 493 <https://heinonline.org/HOL/P?h=hein.journals/sealr44&i=497> accessed 14 April 2024.
[193] Children and Young Persons Act 1933 c.12
[194] Children (Protection at Work) Regulations 1998 No. 276
[195] Children (Protection at Work) Regulations 1998 No. 276, section 2
[196] Children (Protection at Work) Regulations 1998 No. 276
[197] Children (Protection at Work) Regulations 1998 No. 276

contracts being enforced. Hence, they are not considered "employed" under the relevant legislation.[198] Furthermore, even with corporate sponsorship, child influencers may still not be considered "employees," which would afford them few legal protections.[199] Therefore, there are no legal restrictions on the age at which a parent may start their child's online 'work'.

The CYPA 1963 place restrictions on the involvement of children in certain public activities. [200] A local authority has to issue a licence to a child under the age of sixteen before they may participate in public performances.[201] Additionally, CYPA 1963 Act makes it a crime for a parent to enable a child to participate in specific forms of performance without a licence, or for anybody to induce or acquire a child to do so.[202] Therefore, parents are responsible for putting protective measures in place. The CYPA 1963 provides extensive safeguards for child performers aged fourteen to sixteen through these licences,[203] with the Children and Families Act 2014[204] providing an extension of licensing of child performance to those under 14.[205]

Despite this revision of the CYPA 1963 through the Children and Families Act 2014, the Department for Education notes that licences have not been extended to "user-generated content".[206] This is because licences are needed only when a child participates in an event that is either paid for by an audience or occurs

[198] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 George Washington International Law Review 127 <https://heinonline.org/HOL/P?h=hein.journals/gwilr54&i=143> accessed 14 April 2024.
[199] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 George Washington International Law Review 127 <https://heinonline.org/HOL/P?h=hein.journals/gwilr54&i=143> accessed 14 April 2024.
[200] Children and Young Persons Act 1963 c. 37
[201] Children and Young Persons Act 1963 c. 37
[202] Children and Young Persons Act 1963 c. 37
[203] Children and Young Persons Act 1963 c. 37
[204] Children and Families Act 2014 c. 6
[205] Children and Young Persons Act 1963 c. 37
[206] Department for Education, 'Child Performance and Activities Legislation in England Advice for Local Authorities and Individuals Working with Children in All Types of Professional or Amateur Performances, Paid Sport and Paid Modelling' (February 2015).

on property that has a premises licence. [207] Once again, it seems that there is a loophole for family vloggers for this licencing requirement since a lot of influencer content might seem natural or spontaneous, parents of influencers can claim that their child does not rehearse before the filming of the content.[208] This is especially the case since much of this content is filmed within the confines of their home.

In addition, a lengthy document that crucially identifies the child through their birth certificate and a picture of the child is needed for a licence application for these performances.[209] This gives the government access to sufficient data to perhaps monitor the wellbeing of the child and ensure the protection of their rights.[210] Since "user-generated content" is exempt from licencing, the government does not have the ability to identify or potentially monitor the children on family channels.

D. Protecting Children from Economic Exploitation

When producing influencer content, children may be exposed to work conditions that would be illegal in other industries. Thus, they may be vulnerable to economic exploitation as, as previously said, they do not have the legal right to the revenue they make or the ability to demand safe working conditions.

A child's right to be protected from economic exploitation can offer some defence against influencer employment. The UNCRC addresses the protection

[207] Licensing Act 2003 c.17
[208] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 George Washington International Law Review 127
<https://heinonline.org/HOL/P?h=hein.journals/gwilr54&i=143> accessed 14 April 2024.
[209] Children and Young Persons Act 1963 c. 37
[210] Rachel Fishbein, 'Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom' (2022) 54 George Washington International Law Review 127
<https://heinonline.org/HOL/P?h=hein.journals/gwilr54&i=143> accessed 14 April 2024.

of minors against child employment, especially dangerous or harmful jobs.[211] Influencer actions are often not considered "hazardous" due to the absence of any immediate or bodily danger.[212] However, such employment must also not be detrimental to a child's physical or social development, nor may it impede their ability to get an education, according to UNCRC.[213] The harms established in section 3 such as distress and embarrassment, as well as the privacy implications, would be considered detrimental to a child's development.

Furthermore, these pursuits should not be unduly time-consuming, physically, or emotionally taxing, or else they would not allow children to develop into productive adults. An influencer would need to consistently post vlogs, images, and other content on social media sites to maintain their popularity. Producing engaging material on a regular basis takes a lot of work.[214] There will be pressure to keep performing, particularly if the family vloggers are rising or falling in popularity. Thus, would be time-consuming for the child and could interrupt their education as a parent may encourage their children to devote their after-school time to filming. Furthermore, this type of pressure on the child would be emotionally taxing as for a lot of family channels this is their main source of income. Therefore, a child may be able to claim that their right under UNCRC to be free from economic exploitation is violated in cases of family vlogging.[215]

However, as established in both section 3 and the current section, a lot of the harm that the children may experience is 'invisible' and long-term. This means

[211] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[212] Amanda G Riggio, 'The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws Comment' (2020) 44 Seattle University Law Review 493 <https://heinonline.org/HOL/P?h=hein.journals/sealr44&i=497> accessed 14 April 2024.
[213] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577, Art. 32
[214] Amanda G Riggio, 'The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws Comment' (2020) 44 Seattle University Law Review 493 <https://heinonline.org/HOL/P?h=hein.journals/sealr44&i=497> accessed 14 April 2024.
[215] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577

that much of it cannot be proven nor established as detrimental. Furthermore, as detailed above, the UNCRC is unenforceable alone which underscores the importance of domestic legislation to protect children in this regard.

E. Current YouTube Guidelines

Although it has been identified that there are limited legal safeguards afforded to children who currently work online, YouTube has a set of rules called 'Community Guidelines' that outline what type of content is not permitted on the platform.[216] By uploading content to this website, parents agree to abide by the code of conduct and YouTube has the right to terminate the account if they breach this agreement.[217] While this is not a typical contract of employment, it does have elements of one.[218]

YouTube's Community Guidelines oppose any kind of abuse, including emotional, sexual, or physical abuse, as well as any content that may be interpreted as simulating such crimes.[219] It is also forbidden for creators to produce videos that can make children feel distressed, such as ones that mimic parental abuse or coercion.[220] Content that humiliates or divulges personal information about children is prohibited under the guidelines.[221] However, as

[216] YouTube Help, 'YouTube Community Guidelines and Policies - How YouTube Works' (YouTube Community Guidelines and policies - How YouTube Works) <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/> accessed 28 April 2024.
[217] YouTube, 'Terms of Service' <https://www.youtube.com/static?gl=GB&template=terms> accessed 15 January 2025.
[218] YouTube Help, 'YouTube Community Guidelines and Policies - How YouTube Works' (YouTube Community Guidelines and policies - How YouTube Works) <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/> accessed 28 April 2024.
[219] YouTube Help, 'YouTube Community Guidelines and Policies - How YouTube Works' (YouTube Community Guidelines and policies - How YouTube Works) <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/> accessed 28 April 2024.
[220] YouTube Help, 'Child Safety Policy' <https://support.google.com/youtube/answer/2801999?hl=en&ref_topic=9282679#zippy=%2Ccontent-featuring-minors> accessed 28 April 2024.
[221] YouTube Help, 'Child Safety Policy' <https://support.google.com/youtube/answer/2801999?hl=en&ref_topic=9282679#zippy=%2Ccontent-featuring-minors> accessed 28 April 2024.

it was discussed in the previous chapter, content like this has existed on the platform. For example, the parents of the channel 'DaddyOFive' often carried out "pranks" on their children, such as in the video titled '8-year-old gets waterboarded' which very evidently caused the children much distress.[222] Yet the channel did not get removed for two years.[223] This demonstrates how these guidelines are not strictly enforced, illustrating the need for specific legal regulation of this entertainment platform.

Additionally, the guidelines recommend that creators adhere to local regulations pertaining to the employment of children, such as licences and working hours.[224] Significantly, this guidance would allow for the enforceability of local laws on the platform. However, as it was previously established, there is a lack of regulation in England and Wales for this specific area of employment.

F. Conclusion

This section established a significant gap in legal frameworks and enforcement regarding safeguarding children who work online. YouTube's monetisation mechanisms allow for considerable financial gain from family vlogging, which blurs the lines between leisure and labour and exposes children to economic exploitation. Despite generating substantial income, these children often have no legal claim to the profits they help accrue and are subject to work conditions that could harm their overall development.

[222] Andrew Griffin, 'DaddyOFive: Why Dad's "Prank" Videos Became Some of the Most Controversial on YouTube | The Independent' The Independent (2 May 2017) <https://www.independent.co.uk/news/daddyofive-dad-prank-videos-youtube-controversial-child-custody-battle-a7713651.html> accessed 27 April 2024.
[223] Andrew Griffin, 'DaddyOFive: Why Dad's "Prank" Videos Became Some of the Most Controversial on YouTube | The Independent' The Independent (2 May 2017) <https://www.independent.co.uk/news/daddyofive-dad-prank-videos-youtube-controversial-child-custody-battle-a7713651.html> accessed 27 April 2024.
[224] YouTube Help, 'Best Practices for Content with Children' <https://support.google.com/youtube/answer/9229229?> accessed 28 April 2024.

What differs from privacy is the established licence framework, which children who work online could easily benefit from with alterations, and the YouTube guidelines to enforce this. Nevertheless, it has been established that there is a lack of safeguards for these children's online labour, which prioritises the parents' intent to gain financial gain.

5. *Conclusion and Recommendation*

From the details covered in this paper, it is evident that the rights to privacy and welfare of children who work online are not prioritised over the rights of their parents, leaving the children vulnerable and largely unprotected. There are legislative gaps in the existing legal protection frameworks for privacy and labour regarding children working online.

The application of children of family vloggers to the misuse of private information tort highlighted the current conflict between parental rights and a child's reasonable expectation of privacy. The discussion underscores the significant challenges introduced by technological advancements and demonstrates that online spaces blur traditional boundaries between public and private life. Due to this blurring of boundaries, the legal protections that are currently in place are not comprehensive enough to safeguard children in the online space. This gap is further exacerbated by the judicial reluctance to interfere with parental rights unless there is a visible risk to the child. This has created a precarious situation where children's rights are only defended reactively rather than actively protected, with the rights of the parent generally prioritised. Thus, the detailed harms of such work, like the interference with a child's development of identity due to parental control over the dissemination of their personal information, highlight the urgent need for proactive legal measures to safeguard children's privacy in the digital realm.

This paper puts a spotlight on the necessity for legislative reforms rather than relying on the development of case law to adequately safeguard and address the gap in privacy rights resulting from technology development. Despite recognising the dangers posed by online activities through the House of Commons Committee Report 2020,[225] current legislation still fails to adequately address the role of parents as potential sources of privacy breaches for children, particularly in the context of family vlogging. Therefore, such reforms should not only address the specific challenges posed by family vlogging but also lay the groundwork for a broader framework that prioritises children's rights across all online activities. These reforms could be as simple as fully implementing the United Nation Convention of the Rights of the Child into domestic legislation.[226] This would extend a child's right to privacy through child-centred legislation instead of enforced rights under the Human Rights Act 1988.[227]

Family vlogging, as a form of online labour involving children, presents unique challenges that were not envisaged when the Children and Young Person Act 1933, 1963 and 1998 was enacted.[228] The introduction of licensing regulation for this user-generated content as an extension of the current Children and Young People Act 1998 would provide an almost immediate legislative safeguard to protect children online from exploitative work. This research for labour, therefore, did not need to discuss as many nuances as an existing framework could be adapted for children who work online.

However, it is essential that safeguards are introduced to ensure that children who work online are paid. As identified, parents are not legally obligated to financially compensate their children for their participation in the family

[225] Digital, Culture, Media and Sport Committee, 'Influencer Culture: Lights, Camera, Inaction?' (2022) House of Commons Committee report 12.
[226] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) United Nations Treaty Series, 1577
[227] The Human Rights Act 1998 c. 42
[228] Children and Young Persons Act 1933 c.12; Children and Young Persons Act 1963 c. 37; Children (Protection at Work) Regulations 1998 No. 276

vlogging activities. This could be similar to French law no. 2020-1266 of October 2020,[229] where 'child influencers' now enjoy the same protection under the Employment Code as children in the modelling, entertainment and advertising industries. So, parents must request an individual licence or approval from the authorities, have a new financial obligation and must now deposit some of the income earned by their child.

However, more research needs to be carried out in this area. Due to YouTube only being created in 2005,[230] most research surrounding this phenomenon is relatively new and does not directly compare: which is an unavoidable limitation. This means that much of the cases and research had to be implied from similar but not identical circumstances, such as child actors and press freedom. Additionally, the evolving nature of technology and online platforms presents challenges in capturing the full scope of the issue as regulations and societal attitudes develop more slowly than technological advancements.

As a result, the significance of the paper is that it highlights the boundaries separating public and private, which have become less distinct due to the quick spread of digital platforms and the monetisation of children's online activities. Through this content analysis, the discussion has established that the privacy and welfare of children who work online are not protected through the current legislation and common law decisions. This is significant as it calls for a review of the current legal system to ensure parents' rights are not put ahead of their children's.

[229] Loi 2020-1266 du 19 octobre 2020 visant à encadrer l'exploitation commerciale de l'image d'enfants de moins de seize ans sur les plateformes en ligne [Law 2020-1266 of October 19, 2020 Aimed at Regulating the Commercial Exploitation of the Image of Children Under the Age of Sixteen on Online Platforms]

[230] Xu Cheng, Cameron Dale and Jiangchuan Liu, 'Statistics and Social Network of YouTube Videos', 2008 16th Interntional Workshop on Quality of Service (2008) <https://ieeexplore.ieee.org/abstract/document/4539688> accessed 7 April 2024

UNDERSTANDING EXPERIENCES OF DOMESTIC AND PAID WORK FOR POLICEWOMEN IN THEIR ATTEMPTS TO RECONCILE DEMANDS

Caroline Bjørnstad

Abstract

This article explores the existence and prevalence of gender norms for policewomen in domestic work and masculine norms in policing to determine their experiences of reconciling domestic and paid work. Women are expected to perform housework due to the sexual division of labour in the household. This appears to apply to all women, even those in professions with masculine norms. The police have also been found to reflect these expectations in their treatment of women in labour policies. This was either through denying women being put on flexible schedules that accommodated their work-life balance or shaming them for working these patterns. However, the underlying gender roles and attitudes of expectations of domestic work, particularly in England and Wales, have not been previously explored in the literature. To evaluate policewomen's experiences of domestic and paid work, this article conducted 10 interviews with policewomen. This uncovered the existence of gender roles in the division of labour and masculine attitudes in policing, which prevented policewomen from accessing help to reconcile their domestic and policing demands. They also identified experiences with stress and conflict in the family, all of which worsened their ability to balance work and life. The article concludes that further research into strategies and necessity of rigid organisational demands is required for improving their lived realities. A recommendation for more research is made, so police can improve their role in aiding work-life balance for policewomen.

1. Introduction

A. Context

At the end of World War II, women were expected to be housewives and perform domestic labour in a household. According to English common law from this time: *"The husband is legally entitled to unpaid domestic service from his wife, and this is a right that courts of law uphold"* (Oakley, 2018, p.129). Looking at this statement in 2025 may seem like a far-fetched, long-outgrown social norm, as more women have been introduced to paid work since then. Even in masculine professions, such as the police, women have been breaking down gender barriers to create more opportunities and gender equality between women and men (Caroly, 2011). However, the idea that women should perform domestic work still persists even when women are in paid employment and work full-time. As such, women are expected to perform a 'double shift' (Balbo, 1978), meaning they work paid shifts before coming home and dealing with chores and often children (Gächter et al., 2011).

Domestic work includes tasks done in the household that are necessary for the running of the household, such as cleaning, cooking, and laundry (Friedan, 1963). A study done by Agocs et al. (2015) showed that on average, women work 10 more hours than men a week, in the form of domestic labour. This implies the time allocated to relaxing and switching off from work is instead spent doing unpaid, domestic labour. Due to this, many women struggle with burnout, which can affect well-being and family conflict (Thompson et al., 2005).

For most women, the persistence of gender norms in domestic work has been addressed well in the literature, but not in professions that do not work regular and set hours (Oakley, 2018). An example is the police, where women are employed into a male-dominated environment with unpredictable and

irregular shift patterns (Agocs et al., 2015). Even though they work in a role where their presence alone actively defies masculine norms, they were still subjected to police culture norms (Silvestri, 2017). These include stigma around seeking help, the impersonal nature of policing and the ideal worker expectation, which is the assumption that a professional will be available for work constantly. This affected their attempts to reconcile domestic and paid work. As such, attitudes on labour policies implemented to help policewomen instead ensure these are underutilised and ineffective in addressing their specific problems in establishing a work-life balance (Caroly, 2011). Thus, policewomen often ended up leaving the force or experiencing burn-out (Gächter et al., 2011).

As acknowledged in the research, policewomen are invaluable for victim support, de-escalating violence, and community policing (Cowan and Bochantin, 2009). Thus, addressing their experiences of gendered expectations in domestic work as a reason for leaving the force is vital for improving their realities. However, most of the existing research that covers the policewomen's experiences is done in other countries with different social and political contexts, that do not always coincide with England and Wales (Tena, 2013 on Mexican policewomen; Caroly, 2011 on French policewomen). This then places the research within the realm of domestic work for women in nontraditional, male-dominated occupations. Due to the lack of research on this topic in general, issues of gender norms, such as emotional labour, which is the associated mental load of handling domestic work and the limited extent of men's involvement in housework are not well developed (Agocs et al., 2015). More importantly, none of the previously identified gender norms have been determined in relation to policewomen in England and Wales and their experiences. To help develop labour policies and challenge police culture's attitudes on gender roles, some foundation in this topic of domestic and paid work for policewomen in England must be provided.

B. Aim

As such, this article aims to develop an overview of how policewomen in England experience gender roles in the domestic sphere. This is done to determine how they reconcile domestic work with the demands of policing, and what impacts this have on them in choices they make regarding staying in the police. Then, the complexities of their lived experiences of masculine norms in the police are evaluated to determine how these attitudes prevents them from accessing help (Silvestri, 2017). Due to the lack of research conducted on domestic work and policies that help address this in the police, such as flexi- and agile-working, the article outlines these policies. Then, the effectiveness of said policies are discussed and issues identified help inform recommendations to the force. The importance of this research is that it develops literature in an area not explored in the English context, to provide a foundation upon which further research into the academia on domestic work for women in nontraditional jobs can draw from. All of which is done to improve women's lived experiences of reconciling domestic and paid work.

C. Hypothesis

The hypothesis is that policewomen experience expectations to perform domestic labour and police culture norms make it difficult to aid the reconciliation of domestic and paid work. To help evidence this, this article conducts interviews with policewomen, covering topics of relevance and thematically analysing the data produced to answer the research questions. Due to the multi-faceted aims of the research, multiple aspects of policewomen's experiences must be considered to understand the full complexity of their lived realities. These are explored using the research question: *How do cis, hetero, non-civilian policewomen in a Northern-English police force experience gender norms in domestic work?*

D. Structure

This article is structured into five chapters. The first has now introduced the topic and necessity for research. The following chapter explores the existing literature on domestic work, police culture and mental health to situate the research in the larger academic context. The third chapter discusses the methodology utilised by justifying the approach and explaining the process used. Chapter four presents the themes that emerged from the data analysis, where findings are discussed and the implications of these are viewed in relation to existing literature. Lastly, the fifth chapter concludes on the findings and offers recommendations and possibilities for future research.

2. Literature Review

A. Domestic work

The concept of 'housework', or domestic work, was first identified by Friedan in her book '*The Feminine Mystique*' (1963). Friedan addressed the prevalence of the housewife identity after World War II and domestic work, explained as sexual division of labour in domestic tasks, for example, cooking, cleaning, childcare and scheduling (Agocs et al., 2015). Here, women were expected to perform domestic tasks in the household due to the existence of gender roles and a sexual division of labour. Similarly, Oakley's 1974/2018 research on women showed how they had internalised gender expectations of domestic labour being their responsibility, even in cases where there were egalitarian attitudes in the household. Although this research was published years ago, recent literature has identified the continued expectation that women should perform domestic labour (Gächter et al., 2011; Dick and Cassell, 2004; Agocs et al., 2015; Caroly, 2011):

> "*Modern marriage* may *be characterized by an equality of status and 'mutuality' between husband and wife, but inequality on the domestic task level is not automatically banished"* (Oakley, 2018, p.139)

This reflects the consensus in the literature that men's role is to help with housework, not perform domestic labour. Similarly, as identified by Tena (2013), men usually recognised themselves as co-responsible for domestic work. This study was done in Mexico, so the context is different, but the findings are replicated in Dick and Cassell's (2004) discourse analysis on policewomen. Both found differences in how men interpret domestic work, how many hours they dedicate to it and what tasks they perform. They often focused on tasks they found more dignified, such as cooking, and less on tasks related to childcare. The studies even stated women misinterpret men's participation as co-responsibility in household chores, meaning women may perceive men as doing more housework than they perform (Dick and Cassell, 2004; Tena, 2013). This is a finding where the gendered reasoning behind how women misidentify men's role in the house has not been explored in depth.

Double shift/presence

The second concept addressed is the double shift, or the double presence, where both terms are used inextricably. Double presence was conceptualised by Balbo in 1978 and encapsulates the need to simultaneously respond to demands of paid and domestic work. This concept helps explain how women delegate time and space for each labour demand, as it contextualises how women perform domestic labour upon returning from paid work (Tena, 2013). Some did this by collaborating with their partner to manage domestic responsibilities, whereas others felt they were solely responsible for it (Agocs et al., 2015). However, there is an identified gap in the literature, as Caroly (2011) claims experiences of double shift have not been well developed in the literature, because it is viewed as a private matter, especially for women in male-dominated, nonstandard employment. Providing more research here helps to emphasise policewomen's experiences as different to other women,

due to their irregular and longer hours making it particularly difficult to perform the second shift (Agocs et al., 2015).

Triple shift/presence

Literature has found policewomen to be less likely to be married or have children, as these are seen as additional factors of stress (Gächter et al., 2011). They often cite the inflexibility of the job as the main source of conflict and accept they cannot have it all (Dick and Cassell, 2004; Gächter et al., 2011). The incompatibility of cohabitation is usually explained by the triple shift, where:

> "[…] *most women reported living without a partner, in strong contrast with men. This led us to deepen its meaning, and we found what we have called a possible "triple presence", which adds another duty in the case of women who live as couples, which implies meeting the demands of time and space expected by their partners, and a greater amount of domestic work derived from the fact of sharing the same living space but not sharing the responsibility for the work associated with it"* (Tena, 2013, p.90)

Other studies have also included the concept of the triple shift/presence by including the demand for emotional labour (Agocs et al., 2015). However, Agocs et al. (2015) study focused on emotional labour in childcare, meaning domestic work beyond childcare was not addressed, resulting in a research gap. When all these expectations of gender roles in the household clash, it leads to a double absence due to expected double presence, which relates to the next concept of the ideal worker and ideal wife/mother paradox (Caroly, 2011).

Ideal worker and ideal mother/wife paradox

The ideal worker is someone who works 40 hours a week all year, is constantly on call and 100% dedicated to their profession (Cowan and Bochantin, 2009). This is an expectation that features heavily in police work (Charlesworth and Robertson, 2012). Conversely, the ideal mother/wife is available to perform gender duties and follow up on their children's activities constantly (Cowan

and Bochantin, 2009). For policewomen, it is hard to reconcile the societal expectations of being a good mother/wife with the work expectations of being an ideal worker (Agocs et al., 2015). This leads to clashed senses of self, as addressed by Agocs et al.'s in their Canadian study:

> *"They feel torn between the demands of work and home, they are responsible for the majority of domestic labor, and they experience guilt because their paid employment detracts from the time that they would like to spend with their children, thereby frustrating their attempts to live up to the "good mother" ideal"* (2015, p.267).

Further research suggests that policewomen have found it difficult to separate work and life, where *"their home lives are, at times, interrupted by the demands of their occupation, and their work lives are, at times, interrupted by the needs of their family"* (Agocs et al., 2015, p.274). This lack of work-life balance was particularly difficult for policewomen as the nature of their job entails emotional labour and nontraditional hours (Thompson et al., 2005; Cowan and Bochantin, 2009). Due to this, they are unable to be 100% mentally and physically at home with children, further worsening burnout and stress (Agocs et al., 2015).

B. Police culture

Values

Police culture is the norms shared by the police, usually reinforced, and passed on as something fundamental and structurally integrated into the profession (Chan, 2011). Characteristics and cultural norms of police culture include machismo and tough masculinity (Silvestri, 2017). This seeks to justify a view of women as being unable to perform tasks to the same standard as men (Caroly, 2011). The prevalence of this concept helps guide understanding of police behaviour and systematic discrimination against women. However, some articles claim there is resistance from policewomen to admit the role of

police culture in discrimination and instead align their views with their male colleagues. Dick and Cassell (2004) claim this is consenting to their oppression; due to the fact they do not confront or change masculine police norms. This is a potential limitation and disagreement that is maintained in the research.

Labour policies

The police profession is considered nonstandard employment, meaning duties and responsibilities deviate from 'usual' work, evidenced by their shift work and unusual schedules (Agocs et al., 2015). The literature has identified that the breadwinner ideas persist in police labour policies, and this is used to justify masculine organisational demands and operational policing (Charlesworth and Robertson, 2012; Thompson et al., 2006). For example, in England and Wales, police discipline regulations allow seniors to keep officers on duty if something unexpected happens (Dick and Cassell, 2004). Combined with overtime expectations and unpredictable shift patterns, this is exceptionally harder for women due to their domestic expectations (Gächter et al., 2011). The importance of looking into labour policies was that those with greater help found it easier to balance work and life, evidenced by those who found changing work schedules helped reconciling demands (Thompson et al., 2005). However, the ability and effectiveness of being put on a type of labour policy depended on the leniency of supervisor, which made for different experiences of help offered in the police (Cowan and Bochantin, 2009). Caroly (2011) also addressed this in her article by stating that work-life balance is affected by operational solutions and help offered to reconcile unpredictable work schedules. Even though this study was conducted in France with focus on male nurses and policewomen, a similar study by Dick and Cassell (2004) reflect this model. The prevalence of this in England is considered in later findings' interpretations.

Masculine norms in policies

Dick and Cassell (2004) have heavily criticised this necessity of the ideal worker and instead identified it as an assertion of masculinity. They claim policing is socially constructed and that:

> *"If, as Waddington (1999) suggests, it* [operational policing] *is actually 'mundane and boring', why must it be enacted as a reactive, fire-fighting activity that requires every officer to work a harsh, rotating five-week shift system and the preparedness to either stay behind at work or return to work at short notice, should this be deemed necessary?"* (p.54)

This perspective is important as it proves a systemic marginalisation of women as justified by policing norms and values. Dick and Cassell (2004) also state policewomen are hesitant to use homelife as a reason for difficulty in working shifts, as this will be seen by fellow officers as their unsuitability for employment. This lack of suitable labour policies places the burden of reconciliation on women, where they must prioritise their career or housework, making it more difficult to reconcile home and work life (Tena, 2013; Caroly, 2011). The literature disagrees on how to improve this, where Tena (2013) highlights the need to use affirmative language to acknowledge women's right to co-responsibility. Caroly (2011), on the other hand, claims any changes in labour policies do not influence cultural movement or rethink gender roles, but are instead used to deny women work and further marginalise them. This discourse is considered and addressed in the research.

C. Well-being

Stress

Developed by key author Thompson, there is a substantial body of research published on how policewomen and policemen react differently to stress. Women are found to report more stress than male colleagues, and although

there are different reasons for this disparity, certain stress models show women to be disproportionately affected (Thompson et al., 2005). The specific factors affecting women are interpersonal stressors, such as gender discrimination, and management or organisational stressors, such as workload and time pressures (Thompson et al., 2006). Further, as established in research, higher workloads make someone more likely to suffer from physical and mental problems, which would be the case for policewomen working paid and domestic work (Gächter et al., 2011). Looking at stress in the context of domestic labour and role expectations, a pattern of difficulties in work-life balance can be established and exacerbated by gender norms and the refusal of police culture to accommodate policewomen's specific needs (Agocs et al., 2015).

Burnout and family conflicts

The effects of prolonged and enhanced stress have grave consequences for policewomen. Thompson et al. (2005) have identified a vicious cycle where family conflict is a result of burnout, and burnout leads to more family conflict. Also, emotional exhaustion has been identified as particularly likely in professions that deal with people and their problems, where consequences are withdrawal and negative self-attitude (Thompson et al., 2005). This applies to policewomen, who work jobs with high levels of emotional labour. In addition, the difficulty of accessing support due to the police culture's masculine norms makes it harder to address and improve policewomen's situation (Thompson et al., 2005; Silvestri, 2017). Instead, they end up sacrificing their well-being and sleep to reconcile expectations, further burning them out and forcing them to choose between the home or work sphere (Agocs et al., 2015). All of which show how the literature and concepts reveals the ways policewomen experience domestic and paid work and research gaps which will be addressed in this article.

3. *Methodology*

A. Research Approach

This chapter outlines the methodological approach, data collection and analysis utilised to help answer the research question. Ethical considerations, issues of access and limitations are also evaluated to ensure criticality and integrity of research. Firstly, the research uses an interpretivist epistemology, where the aim is to determine individuals' feelings and experiences of the topic first-hand (Bachman and Schutt, 2019). This is chosen as the benefits of qualitative research are how participants provide:

> *"unique perspectives* [which] *are represented in such a way as to protect the integrity of their views while acknowledging the varied viewpoints of the participants who share in the same experiences or phenomenon"* (Billups, 2021, p.4).

Using this approach also allows for a broad exploration of the topic and provides insights to fully encapsulate the experiences policewomen have, more so than quantitative data. Although a quantitative approach can provide generalised statistical analysis of the distribution of domestic work or the extent to which policies are used by the police, the research question prompts an understanding best provided by in-depth qualitative data.

Secondly, qualitative research can convey the subjective nature of social sciences through academic concepts (Matthews and Ross, 2010). This is important as the research addresses social concepts, such as police culture. Here, using a constructivist ontology aids the researcher as it explains how knowledge and meanings are continuously created by social actors and maintained through social interaction (Clark et al., 2021). This is useful for the understanding of police's attitudes in their approach to domestic work and

why certain aspects of domestic work are create specific experiences for policewomen.

Thus, this research uses an inductive approach, due to the research's focus on developing theory from observations, where the flexibility and adaptability of social concepts help convey policewomen's experiences (Clark et al., 2021). Although certain existing theories, as outlined in the literature review, guide the emerging topics, other concepts not previously explored in depth in relation to policewomen are identified, such as emotional labour. This shows the importance of concepts' adaptability to other situations and experiences and considering data independently of established literature (Clark et al., 2021). Out of the potential methods, semi-structured interviews are preferred over ethnography, as it is the least time-consuming and invasive of the two approaches (Clark et al., 2021).

B. Data collection

Sampling

The chosen sampling pool was policewomen in a northern-English police force (anonymised), due to ease of access and geographical closeness, justifying the non-probability sampling method, convenience sampling (Matthews and Ross, 2010). Interviewing policewomen was chosen because they possessed the desired understandings of the topic of interest, namely experiences of reconciling domestic and paid police work. Unlike police representatives, policewomen would provide the best insight for answering the research question.

The research aimed for 10 participants, for reasons of time and effort needed for qualitative data analysis. Recognising the gatekeeping nature of policing, the access to these participants through probability sample methods was difficult (Clark et al., 2021). As a protected public institution, privacy of their

staff is highly important, and because of that, their contact information is not readily available. Although this limited the sample pool, this was warranted by the nature of policing. Thus, snowballing sampling, a purposive method commonly utilised in research on gatekeeping institutions, was used (Morash and Haarr, 2012). The process of this method is the researcher makes initial contact with people relevant to the topic and utilise this connection to get in touch with other potential participants (Clark et al., 2021). In this research, this was executed through an existing contact in the police distributing the interview invitation by email, attached with the consent form and information sheet, to all prospective policewomen, on behalf of the researcher. Reaching all potential interviewees was important to address issues of non-response or retracting consent (Clark et al., 2021). Further, using a contact helped reach everyone who fit the criteria, but still ensured the anonymity of those who did not participate in the research, as the researcher did not receive their contact information.

Semi-structured interviews

After initial contact, prospective participants who responded and returned their consent forms were scheduled for an interview. In total, 10 semi-structured interviews were conducted, lasting between 45-60 minutes. Some consistency was ensured amongst participants due to prepared open- and closed-ended questions. This eased the later process of data collection where responses to the same question could be compared to each other. More importantly, semi-structured interviews also allowed for flexibility and tailored questions to provide more in-depth, personal responses to appreciate participant's individual experiences.

The interviews were conducted one-on-one through Microsoft Teams. Although recognising the benefits of face-to-face interviewing, online interviewing was preferred as policing demands had some participants cancel last minute. It also provided them with the freedom to partake in the interview in a quiet and comfortable place of their own choosing (Morash and Haarr,

2012). Some decided to do the interview from home, whereas others did it in conference rooms at work during their shifts. Both locations remained largely undisturbed during the interview.

After agreeing to start audio recording, participants were reminded of the purpose of the interview and their right to not answer or withdraw consent. No participants made use of this during the interview. Using the prepared interview guide, questions were asked, which aimed to best understand policewomen's experiences of reconciling domestic and paid work. These were developed based on the literature review and previous findings, but also amended throughout the process as more information and observations arose. During the interview, rapport was established through relating to participants and actively listening to their statements. The importance of a good listener is to ensure themes are unveiled and followed up in interview, to allow for the best possible data to be collected (Kvale, 1996). Due to time and limited sample issues, no pilot interviews were conducted. Instead, the first interviews were used to help improve research guide to include the issues of most importance and are still included in the final data produced (Clark et al., 2021; Agocs et al., 2015).

In the interview, the video feature was not recorded (Wincup, 2017). Although the benefits of using video were considered, such as reading their body language and establishing better rapport, the potential anonymity issues associated with videoed responses outweighed these benefits (Clark et al., 2021). Audio responses were recorded using the researcher's phone, which was decided to address limitations of memories and reflexivity in interpretations of statements (Wincup, 2017). Further, it helped the interviewer divert all its attention to the interviewee, making the researcher more likely to appreciate important themes and follow-up with questions (Clark et al., 2021).

C. Data analysis

Upon the completion of an interview, 10 minutes were used to jot down initial impressions and interpretations of participants' responses (Clark et al., 2021). Once finalised, the audio was transcribed as permitted by participants. All transcriptions were verbatim, and quotes used in the discussion chapter are the original statement, where as much context as possible is provided (Morash and Haarr, 2012). Next, the transcriptions were coded using Nvivo software, a qualitative data programme. Alongside the notes made, the most frequent codes were identified for the thematic analysis (Matthews and Ross, 2010; Agocs et al., 2015).

A thematic analysis is *"a process of segmentation, categorisation and relinking of aspects of the data prior to final interpretation"* (Grbich, 2007, p.16). Utilising this process helped with finding common topics and examples for arguments. These topics were then categorised into themes and sub-themes, for example, gender roles, and sub-themes of division of labour and men's roles (Matthews and Ross, 2010). To ensure the integrity of the research, any cases contradicting the hypothesis were flagged and addressed in the findings and discussion chapter (Clark et al., 2021).

D. Ethical considerations

As this research used interviews, the ethical considerations associated with qualitative data had to be addressed. The importance of ethics is to ensure researchers maintain morality and integrity at all stages in their research (Matthew and Ross, 2010). This was expressed through good-natured conduct with respect to the subjects throughout the process (Clark et al., 2021). General principles of conducting research under the ethical guidelines of the British Sociological Association, Social Research Association and Leeds's own ethics committee were also adhered to. This was ensured through the consent form,

information sheet, and approved ethical application submitted for this research. Looking at principles of avoidance of harm, confidentiality, anonymity and informed consent, the ethical considerations in this research are recognised.

Avoidance of harm

Avoidance of any harm is the first principle of ethics (Matthews and Ross, 2010). In the context of this research, physical harm for any parties was unlikely as the researcher and interviewee were not in each other's presence. However, the research topic can be one of conflict and stress when pointed out, which can trigger emotions from participants. This was addressed by reminding interviewees of the right to stop or to not answer certain questions without any repercussions if they felt uneasy.

Anonymity

Issues of breach in confidentiality were considered throughout the research, and this sustained focus was reflected in measures made to ensure anonymity (Clark et al., 2021). An example is how subjects were anonymised by assigning numbers and referring to them as such throughout the findings and discussion chapter. Also, any identifying traits, such as force, age, rank, and race, were excluded to prevent breaches of anonymity. Lastly, participants were made aware of any issues of identification, such as the small sample pool, in the consent form to ensure their understanding and full consent, which links to the next principle (Matthew and Ross, 2010).

Informed consent

Informed consent is vital for any social research. This was ensured throughout the process, but perhaps most prominently in the initial sampling. All potential participants were provided with a comprehensive information sheet and consent form, which were all returned before the interview was conducted (Clark et al., 2021). During the interview process, the information and consent

documents were reiterated to guarantee thorough and full comprehension of research. They were also reminded of their right to withdraw or refuse to answer without repercussions, all of which emphasised confidence in research and informed decision-making (Matthew and Ross, 2010). When interviews were finished, the audio was uploaded to a secure, password-protected location, before being deleted from the audio recorder (Clark et al., 2021). Upon finalising the interviews, all interviewees had their transcriptions returned to them, so they could scrutinise any points of identification to ensure further protection of anonymity (Morash and Haarr, 2012). They were also informed of their right to withdraw consent up until 7 days after receiving the transcript, where all data was deleted if no longer consenting. No participants made use of this.

E. Reflexivity

Although all efforts were made to remain impartial, personal biases are acknowledged to guarantee the integrity of research. The role of the social researcher and its reflexivity was examined throughout the process by reflecting on the researcher's presumptions and expectations at all stages. The importance of recognising reflexivity is to ensure the credibility of the research by addressing bias in questions and interpretation of data, as a potential influence on the themes deduced in the analysis (Bachman and Schutt, 2019; Wincup, 2017). As the researcher is an unmarried, childless woman who has never worked in policing, she did not have any first-hand experiences of issues addressed in this article. Thus, certain experiences of policing treatment or childcare issues may be lost on the interviewer as they have not lived it themselves but also proves how any insights are largely reflective of the interviewees' understandings. However, because this research was conducted based on feminist discourse, known to focus on empowered women and equality in housework, the interviewee may have felt the researcher subscribed to these views (Dick and Cassell, 2004). Social desirability bias can thus lead to participants providing answers that they perceive the interviewer as wanting

to hear (Clark et al., 2021). This might result in socially biased responses to, for example, have their relationships appear more progressive. However, the variety of responses from 'partners being useless' to 'even split in household' limited the over-reporting of certain behaviours.

F. Limitations

The use of purposive and convenience sampling and the small and geographically restricted sample size, preclude generalisation beyond participants. As such, findings cannot be claimed applicable to other policewomen or forces, apart from those in the sample. Further, the lack of variety in certain characteristics of sample, such as race and sexuality, meant no generalisation are made to other traits or intersectionality either. There were some technological problems, where one interview was cut short due to an issue with Microsoft Teams and other interviews had poor connections which affected the flow of conversation and created difficulties with transcription. Further, as there was no video, there were issues with the conversation getting interrupted by either party and talking over each other. However, the identified advantages outweighed the disadvantages. All of which show justify the methodological approach for data collection and analysis utilised in this research.

4. Findings and Discussion

A. Gender norms

This chapter covers the themes extracted from the data analysis of the interviews, where findings from the data help illustrate women's experiences of domestic and policework. The implications of each finding are discussed in relation to previous literature to help answer the research questions. Firstly, the division of physical tasks and men's role in domestic tasks is explored to show

the experience policewomen have of gender roles in their reconciliation of unpaid, domestic tasks and paid work. Here, domestic work is defined as needs-based tasks done in the household and are split between physical tasks, such as cleaning and cooking and emotional tasks, such as childcare and scheduling.

Division of labour

The existing literature suggests policewomen, like other women, are subjected to gender roles in domestic work (Caroly, 2011). Some policewomen were able to identify this gender norm:

> *"P10: It's just- it's just the expected norm, I suppose. Uhm, I- I don't- I can't say that it's specifically come from anywhere. I just think it's the normal way things run, really.*
> *Interviewer: So you could say it's part of like a gender norm, is that what you feel like?*
> *P10: Yeah, that's what, yeah. That's probably a better way of saying it,* […] *I'm not necessarily saying it's right, but it's* […] *what is expected"*

The prevalence of this norm in policewomen's experience of domestic work was clearly reflected in the research, where most of them were responsible for the overall running of the household, although some of their partners did certain jobs:

> *"Interviewer:* […] *how do you guys distribute the domestic tasks in your family at the moment?*
> *P10:* […] *I'd say that everything would be largely mine* […] *But that's not to say that he* [her partner] *wouldn't do it if asked"*

> *"I think me and* [name of partner] *probably think it's quite balanced and it feels fairly balanced, but I think if you actually were to look at, I think I'll probably do a fair bit more. It's probably like 70-30"* (P8)

The 70/30 split identified in the last statement was reflected by all policewomen when asked how many hours they spent on domestic work compared to their partners. These findings demonstrate that women are still largely responsible for housework, but men are somewhat involved. Interestingly, policewomen who were married to policemen still did most of the domestic work. This indicates that the gendered expectation that women do domestic work is not justified through men having higher work demands (Agocs et al., 2015).

On the other hand, some households disclosed an even division of physical labour as partners were used to doing domestic labour:

> *"I'm lucky enough that my partner is a very, incredibly modern man and he is happy to help out, uhm, and so we share the tasks"* (P1)

Although this was only identified by one participant, this finding calls into question previous research on the rigidness of domestic work, by showing it was possible to have an equal division in tasks, if men were brought up doing domestic work (Cislaghi and Heise, 2020).

Men's role

The role men played in domestic work varied between participants and thus, affected their experiences of reconciling domestic and paid work. For those who had split tasks with partners, the partner mostly contributed through cleaning or childcare. This contradicted previous findings where men would normally do the cooking and be uninvolved in childcare (Tena, 2013). More importantly, this research found another domestic task that men did not do, which had not been previously addressed: laundry. All policewomen identified themselves as mainly responsible for doing the laundry. Their partners' disinvolvement was normally excused by stating they were unable to separate between white and black clothing:

> *"If the washing is sorted into piles, he will put the washing through it. He doesn't know the difference between white- white and black, so he- he will not separate them"* (P7)

> *"I do most of it* [the laundry]. *Uhm, just because I'm better at it, because otherwise all our clothes end up weird colours"* (P8)

These statements reflect the expectation that women do domestic work, as the man did not have to learn the ways of this needs-based task, because their claimed ineptitude forced the woman to do it instead (Burkeman, 2008). This reflects aspects of weaponised incompetence, a concept that has been under researched in academia. However, the lack of studies conducted on this makes it difficult to infer the implications of this, beyond recognising its existence, making it a topic for future research (Dick and Cassell, 2004).

Similarly to Tena (2013)'s finding, some policewomen misidentified their partner's involvement; by claiming they did practical tasks:

> *"I probably end up doing a lot more sort of like domestic chores, like cleaning, tidying, washing, laundry. But then* [name of husband] *will be outside, like building a decking in the garden* […] *he is contributing in a different way"* (P8)

What is important to note is that these tasks are not necessary for the day-to-day running of the household, and as such, they are not considered housework. The importance of this finding is that policewomen in England also had difficulties recognising the role men played in housework, similarly to the Mexican policewomen in Tena's (2013) study. Implications of this have shown to preclude addressing the gender expectations behind these behaviours and instead, ensure the continued existence of policewomen doing domestic work (Cislaghi and Heise, 2020).

B. Emotional labour

Previous research has neglected to consider how the emotional labour of domestic tasks beyond childcare is experienced by policewomen (Agocs et al., 2015). In cases where it had been considered, it was understood as a triple presence, where partners introduced additional labour (Tena, 2013). This section introduces more research on the topic and discusses the reality of the triple presence.

Scheduling

In all households, the woman was responsible for the emotional tasks, even when there was an equal split in the physical domestic work. Some women were able to recognise the emotional labour associated with domestic tasks unprompted:

> *"Oh, the presents, yeah, it's always women that do that, isn't it? Like- they call it emotional work"* (P1)

> *"I always say that* [scheduling] *it's the mental load, isn't it?* (P6)

The role of scheduling, which is the pre-planning and forward-thinking associated with domestic tasks, was particularly addressed by most policewomen in the sample, seen as they were solely responsible for this labour. Their partners were also found to assume they would perform this labour, evidenced by them not worrying about planning or taking initiative to do housework as the woman sorted this out:

> *"*[…] *if I ask him to do it, he would* […] *He just wouldn't volunteer is probably the best way of putting it"* (P4)

When needing to ask for help in domestic tasks, the woman still performed the emotional labour of a task, even without performing the actual task. This demonstrates how the strenuous process of constantly thinking about the performance of multiple tasks and having to schedule the process of doing it are left to the woman (Agocs et al., 2015). In turn, this caused an uneven distribution of mental task, which made partners unequal in their domestic work, even when the physical tasks are equally split. The importance of this is that it portrays how policewomen are responsible for the mental load of housework, which causes negative experiences of domestic labour.

Well-being

The impact emotional labour had on policewomen was emphasised in the interviews through feelings of stress and burnout:

> *"For me it's more the stress of pre-planning, the childcare and the mental load and things like that. The logistics of life, really. That's the thing that I find difficult to manage. So if we're both expected to be in work at 7:00 am, I'm thinking: right, we need to wake* [name of child] *up at 6:00 am. She needs to be dropped off at my mum's at 6:20. Is my mum available? It's that kind of stuff that I struggle with more than the chores"* (P6)

> *"Interviewee:* […] *how did you then manage doing your own domestic tasks and then your caring responsibilities as well?*
> *P2: Oh, it nearly broke me"*

This showed the negative influences emotional labour had on women, as the scheduling associated with reconciling domestic and policing demands was identified by policewomen as a reason for stress and burnout. The importance of understanding mental loads and how they are experienced by policewomen was addressed as a reason for participants going on stress leave. These findings reinforce previous literature done by Agocs et al. (2015) on the impact of mental loads of childcare.

More importantly, due to policing demands of overtime, Thompson et al. (2005) found that role overload, where work demands cannot be done in the allotted time, resulted in more stress and burnout for policewomen. Linked with how policewomen's role normally involves a high level of emotional labour, the experiences policewomen had of reconciling domestic and policework were worsened (Thompson et al., 2005). All of which showed how the well-being impacts were aggravated by professional demands and emotional labour.

Conflict

The impacts of stress and burnout on family conflict was difficult for policewomen to identify:

> "[…] *you might not recognise it at the time, but* […] [it is] *the easiest person to take it out on, isn't it?"* (P10)

For those who were able to, reasons for conflicts differed from housework not being done to general feelings of resentment as the woman was doing everything:

> *"But I do think there's an expectation that I do stuff, and we have had conversations before where I've said to* [name of partner]*, I'm like I don't think you realise how much I do like when you're not here. You come home and the house is tidy, but it's not just- it doesn't just become tidy for no reason. It's because I go around every morning* […] *and make sure it's tidy* […] *I don't mind doing it* […] *I just want a little like clap, like little well done"* (P8)

As they were expected to do the emotional labour and normally experienced a lack of recognition, this then resulted in more family conflicts, which worsened policewomen's experiences of reconciling domestic and paid work. Similarly to findings by Thompson et al. (2005), frustration was particularly expressed

when tasks were left unfinished, and the policewomen had to complete them after a shift:

> *"You think, am I the only person that sees it? Am I the only person that's doing it?"* (P5)

On the other hand, in single-women households or those with split tasks, the lack of gendered expectations for them to do domestic work reduced conflicts:

> *"I know I'm the only adult in the house and I've just got to do it, so there's no one to arguing with, but I also know that because I'm the only adult it will get done"* (P9)

> *"*[…] *there's no expectation* [to do housework] […] *he'll wash and vacuum both the cars without asking* […] [so] *they've never been an issue in our household"* (P6)

These reflects similar findings as done by Gächter et al. (2011) on how the presence of a partner caused more conflicts due to the expectation of emotional labour. However, this finding calls into question how partners induced emotional labour, evidenced by how some households had partners, but split tasks, which diminished the negative consequences of emotional labour. Thus, this shows that it is the lack of expectations, not of a partner, that decreases conflicts from emotional labour. More importantly, it presents the possibility of reducing stress caused by emotional labour through having both partners equally involved in domestic demands (Thompson et al., 2005). As such, this theme provided an example of how policewomen experience gender norm expectations to do emotional labour, and the relevant impacts on their well-being. The section that follows considers how these expectations can be reflected in police attitudes and culture surrounding domestic labour and women's responsibility.

C.Police culture

Another theme that influences policewomen's experience and ability to reconcile domestic and paid work is police culture and the associated masculine norms. As explored by Silvestri (2017), these machismo values included ideal worker expectations, stigma around seeking help and the impersonal nature of policing. The experiences policewomen have of being subjected to these attitudes is explored to understand the difficulties of accessing help offered in the force.

Ideal worker expectations

Most policewomen in this research experienced and were subjected to masculine norms in the police, which worsened their experience of performing domestic work. One example is the expectations of being at work 24/7, which has also been recognised by Cowan and Bochantin (2009):

> "[…] *the expectations of you being at work 24/7* […] [w]*ere very high"* (P2)

> "[…] *you're kind of expect it to work as though you're not a mum* […] *But then at home you've got to be a parent like you haven't got a full-time job"* (P9)

Even though they claimed this has improved slightly, the masculine worker expectations in the police were identified as creating difficulties for policewomen, particularly if unable to separate the two:

> *"I'm not enjoying home and I'm not enjoying work because I'm always worried about the other one"* (P4)

> *"I suppose it's a knock-on effect* […] *you can't fully commit to either can you?"* (P10)

These findings support the previous research by Agocs et al. (2015), on how policewomen feel guilty if they were at work and tasks at home were not completed and vice versa. When they were unable to respond to both demands, participants disclosed feelings of inadequacy as both women and police officers:

> *"You've got to be on your ball at work, in our role, really switched on. And then I sometimes think, maybe that does take a lot of my energy and brain power, so that when I am at home, I'm not quite there, because I'm- I'm tired and from being at work"* (P5)

This was particularly evident for 'policemums' and higher-ranked officers who had teams depending on them. Compared to male colleagues, P4 recognised how it was easier for them to separate work and life as they had more of a one-track mind, showing the gendered nature of these issues (Burkeman, 2008).

Stigma around help

The way most policewomen reconciled a work-life balance was by not bringing private life into work and discussing their personal issues:

> "[…] *once you're in work, you do kind of switch out of mum mode and just get your professional head on"* (P6)

This was also evidenced by P2 as she did not want her domestic situation known to her colleagues, to avoid them thinking differently of her. The reasons behind this were explained as both resulting from police culture, but also her personal preference of not discussing her private life. This reflected the role of masculinity in stigmatising help and leading policewomen to not make use of policies, by not introducing personal issues into work, as also identified by Dick and Cassell (2004) and Thompson et al. (2005).

This was particularly impactful for the effectiveness of line managers. They were frequently mentioned as important for policewomen's experiences with the force, due to their role in helping policewomen by accommodating shifts and managing workloads:

> *"It's- it's a disciplined organisation, so you're not always going to get, uhm, what you need or what you want* […] [but] *you can deal with that if you've at least got some understanding from your line manager"* (P2)

However, due to the stigma around seeking help, policewomen experienced reluctance in making use of them. This impact of police norms on utilising line managers was an aspect not previously explored in the literature. Thus, the importance of this finding is that it may aid explanations on how internalised gender norms in police culture, such as stigma around help, cause difficulties with introducing or limiting the effectiveness of policies (Olson and Wasilewski, 2016).

Impersonal nature of policing

Further, policewomen identified the impersonal nature of policing as creating obstacles for help. The experience of lack of help was worsened by how police did not recognise differences between their workers:

> "[…] *they just expect you to get on with it in the end of the day, like there's- there's no difference to how I'm treated as to how, you know, a 20-year-old male that still lives at home is treated"* (P1)

> "[…] *you turn up for work and you do your job, and you get on, I don't think they're interested in what's going on"* (P5)

This finding clearly demonstrates the issues of the impersonal nature of policing, where not recognising differences between their workers erase experiences of those who do not conform to the male standards of policing

(Dick and Cassell, 2004). Hence, this supports the literature that worker expectations were found to be irreconcilable with policewomen's realities and the understanding that private life is independent of work, prevented any potential help. The effectiveness of the available help is considered in the next section.

D. Police policies

There were different solutions offered by police to help policewomen reconcile domestic and paid work. Caroly (2011) emphasised how the lack of suitable labour policies cause women to prioritise either home or work sphere. Hence, the effectiveness of policies introduced specifically for reconciling work and life, such as flexi-working and agile-working is important. As these have not been explored previously, they are outlined, and then, experiences of their use are discussed.

Benefits of agile-/flexi-working

Most women preferred flexi-working as they could work full-time, whilst retaining some flexibility in shifts to aid with housework demands. Similarly, they preferred the options offered under agile working, so officers could work from home. Policewomen in roles with clerical tasks recognised benefits of working from home one day a week:

> "[…] *if I was at work, realistically, you sit down for an hour, then you'd probably go chatting or go for a coffee or whatever. If I'm at home, I can get my jobs done, sit down and do my work. When I want, I can stretch my legs, and do washing machine, do you know. You can fit it* [domestic work] *in* […] *and amongst your working"* (P4)

> *"if I didn't get to work from home, I probably would have to go* […] *part-time"* (P9)

The freedom offered under agile working was emphasised as helpful for reconciling their domestic work and policework, as they could do domestic tasks during their breaks. As such, these findings confirm previous literature on how women's decision to work pattern is a result of institutional and structural conditions, to reconcile domestic and paid work (Crompton and Lyonette, 2010).

On the other hand,

> *"I find working from home during COVID, obviously there were times we have to, but I find working from home very difficult. I like to be at work to do work* […] *And home's home and bringing work into the home sometimes isn't, uhm always that easy"* (P7)

This shows similar issues as identified under separating work and life. However, P7 also disclosed that being at home helped with domestic work. Thus, the benefits of agile-working were found to outweigh the disadvantages for policewomen in their decisions to work this schedule.

Police's approach

In terms of the police's approach to agile- and flexi-working, there were contradictory experiences and thus, perceptions of willingness to help. In terms of flexibility, P7 identified the potential help available:

> *"They're* [the force] *giving a bit more flexibility to shift patterns,* […] *not just part-time shift patterns, but like you can probably start your shifts a little bit later or a little bit early, so I think they're doing a lot more than they used to do"*

However, the most common response was police rejecting or delaying putting policewomen on these shift patterns, although it contributed massively for them to respond to domestic and policework demands:

> "[…] *when I was getting really overwhelmed and stressed* […] *I was just like, I can't do everything.* […] *maybe if I could just like work one day from home or something* […] *But that was like rejected"* (P8)

> *"I put in what's called flexible working pattern, and I had, uhm, a battle, should we say, to get my flexible working pattern approved* […] *it went through quite a lot of senior management, quite a lot of discussions* […] *eventually my shift pattern was approved. But before that I had a lot of conversations, telephone calls, sort of trying to dissuade me to- from getting promoted, saying conversations that was: don't really think this role is for you, because I couldn't work the full shift pattern"* (P9)

This shows the importance of working patterns that are compatible and accommodating for domestic work, due to the fact policewomen make choices regarding their work as influenced by their ability to reconcile unpredictable work schedules (Caroly, 2011). Those who had good experiences often worked in understaffed departments where the demands for officers were high, guaranteeing them to stay in the same job:

> *"Interviewer:* […] *How was that process trying to get that* [work schedule] *through with your supervisor?*
> […]
> *P4: They were really accommodating because I work in safeguarding and it's not a very popular- it's not a very popular department right now to work in, so* […] *they said, well, we- we want you, we'll make it work. And they- they did it straight away"*

These differences in experiences were explained by P4 and P5 as resulting from there not being a standard in approaches to these patterns across line managers and departments. Similarly to Thompson et al. (2005), the importance of a good line manager that is lenient in work schedules for policewomen's experience of domestic and paid work is emphasised. This also reflected how women with help in labour policies had it easier when balancing work and life (Caroly, 2011). Lastly, the findings portrayed a common theme in the literature of how policewomen are marginalised by labour policies, as police expects them to be available at work, which is incompatible with their lived realities of reconciling paid and unpaid work (Gächter et al., 2011).

Male officers' attitudes

Most policewomen emphasised the importance of working these schedules for accommodating for home demands, whilst being financially viable. Thus, the misconception male officers held about why women did flexi-working was an obstacle to accessing these policies (Cowan and Bochantin, 2009). Most men assumed they changed their work schedules to get time off work, when they were simply trying to reconcile being a mother and a police officer:

> *"*[…] *it is the attitude in the police that's wrong, because all the male officers think that you're trying to get time off work and you're not* […] *You're just trying to be a mum and a police officer"* (P4)

Even though some policewomen were off work one day each week, they would work longer on other days to weigh up for it with the same workload as those in full-time roles, which was not recognised by male colleagues. This lack of understanding for the reasons behind working flexi- or part-time was identified as resulting from masculine norms and worker expectations in the police (Dick and Cassell, 2004). Like Caroly (2011), these views may be held to justify policewomen's unsuitability for policework.

Domestic work expectations

Police attitudes regarding housework and gender expectations can also be seen in how an officer mentioned there is less shift flexibility offered to male officers. When one participant's partner tried to move his shifts, this was made difficult compared to when she moved her shifts to accommodate his work. These influenced experiences of reconciling domestic work:

> *"I just adapt mine* [shifts] *around his, so it's not so much that one of us will be at home, when the other is at work. It's just me moving my hours to just make sure that I can drop her off at childcare and pick her up again"* (P6)

> *"I think the organisation expects the male partner* […] *just carry on as if he hasn't got a family* […] *and expects the female officer just to kind of handle it and sort of your rota and deal with the domestic stuff"* (P3)

Here, women worked shifts around their partners, so they could accommodate childcare in the household. Although some of this can be explained as the partners of these policewomen working in other, demanding sector, it is still problematic as Tena (2013) identified, because this shows an expectation that women will perform this domestic labour. Also it shows how the police does not facilitate co-responsibility in the household. Further, this showed a different reality of off-shifting, than what was identified by Cowan and Bochantin (2009). Instead of working opposing shifts to each other, so one parent could be at home with the children, the woman was expected to change her work hours to reconcile domestic and paid work. One higher-ranking participant did state the police attempted to sometimes put officers on the same shift pattern, so they could see each other in the evenings:

> *"There are policies in place if both partners are in the police and* […] [assessment are made so] *somebody isn't posted to an opposing shift to what their partner is* […] *that may well be what their- they request to do to*

> *help with childcare or something like that, but you also need some crossover, otherwise you'd just be ships that pass in the night so"* (P2)

However, those who worked off-shifting patterns did not reflect this. As such, the expectations of women doing domestic work was portrayed through police's attitude in policies offered. Collectively, this evidenced Caroly (2011)'s view that changes in labour policies do not alter the police culture or gender expectations in housework, but rejects her claim in that it marginalises them, due to policies' potential effectiveness if addressing the underlying masculine norms.

Organisational demands

Lastly, issues surrounding lack of help were justified by policewomen as necessitated by the rigid organisational demands of policing triumphing over any personal issues:

> "[…] *there's also an understanding that, uhm, because of the very nature of the job that sometimes the job can't- can't meet your needs in the same as any other profession* […] *there is a balance between organisational needs and what the organisation can do to help meet your individual, personal needs* […] *ultimately, organisational need will always come first, because the organisational need is in serving the public"* (P2)

Collectively, this supports evidence in the literature about the way police can justify their masculine labour policies by blaming organisational demands (Charlesworth and Robertson, 2012; Thompson et al., 2006). The prevalence of this was aided by how most policewomen had not reflected on what police could introduce to help. Some policewomen reflected on the paradoxical nature of police and policies:

> "[…] *on the one hand, we have policies that say we've got flexibility, but then we have operating procedures which are not"* (P1)

The importance of this finding is that it contradicts the statement by Dick and Cassell (2004) that policewomen do not recognise discrimination and thus, consent to their oppression. Instead, throughout the interviews, most policewomen identified the role of masculine norms and how their experiences with them caused difficulties in reconciling domestic and paid work. This was seen in how they all emphasised the importance of looking into the necessity of current demands:

> *"I know we've got a demand for an organisation, but* [facilitate] *your demand to look after your people which, you know, that's 8% of the workforce"* (P9)

Even though all policewomen recognised how difficult it is to change the norm in the police, the finding is important as it necessitates further research into this topic to help improve policewomen's experiences of reconciling domestic and paid work. This was reflected by Dick and Cassell (2004), who investigated organisational demands' role in systemic marginalisation of policewomen. The importance of this is themes were able to provide a framework upon which further research can be based. This informs the recommendations in the next chapter, the conclusion, and brings together the impacts of all these findings for the lived experiences of policewomen.

5. Conclusion

A. Conclusion

This article aimed to improve the understanding of policewomen's experiences in reconciling domestic and paid work, as affected by gender roles and police culture norms with specific reference to England and Wales. This was done by interviewing policewomen on their understandings and perceptions of

domestic work in their daily lives as influenced by the police and gender norms. Then, findings from these interviews were divided into themes and sub-themes to ensure a clear narrative that responded to the research questions. Lastly, these findings were outlined and discussed in terms of the implications they had for policewomen's experiences and ability to reconcile domestic and paid work. All of these were situated in the existing literature, whilst still making conclusions based on the statements put forward.

The article also outlined existing policies in an English police force to evaluate their effectiveness in aiding policewomen's work-life balance. This was done to help understand the role police played in their experiences and conceptualisation of reconciling domestic and paid work. The importance of this was revealed in the literature review, due to a gap in research done on policewomen and domestic work in England and Wales. To address this gap, findings of gender roles and police culture from interviews with policewomen were evaluated to understand their impact on women's well-being and use of policies. All of these addressed the objectives of conceptualising how policewomen responded to both policing and domestic demands, the influence on their well-being and how policies aided them in this reconciliation.

To conclude, the combined effects of these themes showed policewomen experience gender norms' expectations from both police and partners, which worsened their well-being and ability to reconcile these two demands. As such, the hypothesis outlined in the introduction of how gender expectations in domestic work and the police worsened the balance of these two demands was confirmed. Key contributions made under each theme can be outlined in terms of what arguments were put forward:

Under gender norms, policewomen were found to experience difficulties with performing domestic work, similar to other research done on women and housework (Caroly, 2011). In particular, the article found men's limited involvement in domestic tasks influenced the extent to which policewomen

had to perform this labour (Tena, 2013). In turn, this affected the women's experience of domestic work, where evenly divided households that did not conform to gender roles experienced less gender expectations compared to other uneven households. More importantly, the role of emotional labour in scheduling and how performing this labour affected policewomen disproportionately, due to their job demands, was addressed in-depth (Agocs et al., 2015). These findings identified the large influence the mental load of domestic work had on their experiences and enjoyment of domestic work, reflected through the identified impacts on their well-being and family conflicts.

Secondly, police norms, such as ideal worker expectations, the stigma around help and the impersonal nature of policing were found to either limit the effectiveness of policies introduced or prevent the introduction of help altogether (Silvestri, 2017). As they worked nontraditional hours, the issue of policing demands and masculine norms were evidenced and discussed. These worsened policewomen's experiences of policework and domestic work, as these norms did not coincide with their lived realities, and instead, limited the help offered. Rather than questioning the problematic aspects of these norms to improve the lived realities of their workers, police instead used them to excuse policewomen's unsuitability for policing (Cowan and Bochantin, 2009). This restricted the effectiveness of policies for policewomen, making it more difficult for them to reconcile domestic and paid work.

Lastly, the policies addressed, which were flexi-working and agile-working, were important tools for policewomen in their attempts to reconcile domestic and paid work. However, police's hesitation towards approving these schedules, attitudes subjected to by male officers and expectations that policewomen were responsible for domestic work, worsened their experience of reconciliation and made them largely ineffective. Even when utilising policies, issues of masculine norms prevailed to prevent policewomen from

accessing these. All of which were found to be justified by organisational demands.

B. Recommendations

Recommendations can be drawn from these findings, where the three most prominent were looking into the necessity of rigid organisational demands, having more open conversations with employees, and introducing more policewomen into higher-ranked roles. As discussed previously in the literature and flagged by policewomen, they found it important for police to investigate whether the demanding labour was entirely necessary (Dick and Cassell, 2004). Due to some police roles with large numbers of policewomen, such as child protection units, being more accommodating to their workers, the implications of this were identified by participants as potentially being possible in other departments. This must be researched further.

The second recommendation made by policewomen was to have more understanding and open dialogue with their workers. Simply recognising the difficulties policewomen have in balancing the demands of policework and domestic work was said to help with their experiences of this reconciliation. Also, more information about work patterns and support for being put on these shifts would greatly aid their domestic work demands. Further, in relation to masculine norms and attitudes in police, this can be improved by educating all officers on the reasons women go on certain accommodating work patterns.

Lastly, policewomen recommended introducing more women in higher ranks. This was because women thought differently from men, and their femininity could help influence the introduction of strategic policies and organisational structures of forces. Specifically, female line managers were important as they could empathise with their situations and help them, especially if they have children themselves, which would, in turn, address the previous recommendation of more understanding in the force. This importance of

representation for policewomen was also identified as motivating other women to move up the ranks: *"It's kind of like if you see it, you could be it"* (P9). All of which can be introduced into policing to further help with improving policewomen's experiences of domestic work and policework.

C. Limitations

An obstacle the research faced in making judgements and drawing conclusions from previous research was the lack of literature on the topic. Even though the importance of the research was to contribute more literature and findings on the topic, the underdevelopment of relevant, identified themes, such as weaponised incompetence, prevented developments on these concepts. This also hampered the deductions that could be made from the data without having any research to emphasise the arguments made.

What would have been done differently, if given the chance was to narrow the focus down to either domestic work in the home or domestic work expectations by police at work. In doing so, the research could have focused on strategies policewomen used in either sphere to reconcile domestic and paid work, by using help from other women or the choice of roles that accommodated their expectations better. However, this decision was justified by the lack of research on both aspects of their experiences of domestic work, which was needed to contextualise any identified findings.

Secondly, the geographical limitations precluded discussing policies or experiences beyond the force and the policewomen in the sample but can provide a basis for what themes could be explored in a larger data set.

D. Future research

Findings that go beyond the scope of this article have the potential for future research. As this research provided evidence of experiences policewomen have

and a possible explanation for why policewomen left the force, this could be the foundation for further studies. Specifically, research into strategies policewomen utilise to aid with reconciling domestic work and policework was identified as important to further emphasise women's complex realities. Also, lived experiences of intersectional women of other races or sexualities than the ones in this article should be researched to understand imbalances beyond white, heterosexual relationships.

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