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FOREWARD

It gives me immense joy to introduce the sixth volume of *the Leeds Student Law and Criminal Justice Review*. As an alumnus of the school and a former Managing Editor of the Review, it is a privilege and an honour to return in this capacity and reflect on the phenomenal emerging scholarship of undergraduate students and the enduring role the journal plays in showcasing it.

The articles in this volume are testament to the enthusiastic, rigorous, and impactful research undergraduate students undertake in the School of Law. They highlight that meaningful legal scholarship is not just the purview of postgraduates and established academics, but rather emerges wherever curiosity is nurtured, critical thinking is encouraged, and students are empowered to engage deeply in law and criminal justice discussions and their wider contexts.

This issue includes contributions from a striking range of subjects: labour exploitation, criminal justice reform, intellectual property in virtual worlds and the challenges generative AI poses to creative rights. These contributions have moved beyond doctrinal description and engage critically with the social, political, and technological challenges facing our world today.

In his article, Daffa Budiman shifts the lens from individual wrongdoers to the systemic conditions that make labour trafficking possible. Using crime script analysis and situational crime prevention, Budiman evaluates the United Kingdom's prevention practice in the face of multidimensional logics that cover the recruitment, transportation, reception, and exploitation of labour. Olivia Timperley's article makes a compelling case for trauma-informed frameworks to disrupt youth offending pathways. Employing qualitative and interpretative methodology Timperley finds systematic barriers that consistently undermine trauma-informed practice including limits to professional understanding, multi-agency disconnection, resource constrains and entrenched punitive cultures. Imogen Rail's paper follows this thread of criminal justice reform in the exploration of holistic approaches to female offending. This article critiques traditional punitive frameworks and advocates for context specific, trauma

informed care, gender responsive intervention and community-based supports as holistic alternatives to imprisonment which consider vulnerabilities rather than exacerbating them.

Alexander Lane-Durand's article examines the use of non-disclosure agreements and defamation claims to silence victims of sexual misconduct in England and Wales. Using a feminist theoretical framework that skilfully integrates MacKinnon's dominance theory, Fineman's vulnerability theory and Fricker's conceptualisation of epistemic injustice, Lane-Durand makes a powerful case for reform to address power asymmetries and hold perpetrators accountable. Ioan Bush's critical analysis of football banning orders (FBOs) interrogates the existential tension between public order and induvial rights. Bush assesses the current legitimacy of FBO legislation and its civil libertarian implications finding them to be punitive and ineffective without the institution of reform.

Moving onto to the technological developments in our world, Alissia Briggs questions how trade mark law is adapting to metaverse fashion. She explores whether trade mark protections and traditional intellectual property law can rise to meet the technological emergence of virtual reality and the complexities of the metaverse. Finally, Rory Lyttle explores the impact of generative AI in the entertainment industry with a particular focus on artists' autonomy, reputation, and economic interest. Lyttle asks whether the US publicity rights model is fit for purpose in the UK in today's digital age.

Congratulations to all authors featured in this issue. Your contributions to this review are not merely exemplary undergraduate dissertations, but well-developed provocations to ongoing legal debates on justice, rights, inequality, and technology. Your insights have and will, continue to shape the future of these areas. Whether you go on to careers in legal practice, policy, academia and beyond, the critical analysis, intellectual independence, and commitment to understanding legal contexts demonstrated in this issue will remain invaluable skills.

The strength of this publication is also a reflection of the collaborative labour that sustains it. The review is led by Postgraduate Researchers whose commitment to

editorial excellence, mentorship and academic citizenship has seen the journal turn into what it is today.

With this in mind, I would like to thank Sat Kartar Kaur Chandan, Shihao Xu and Hannah Shackleton for their commitment to the editorial process and the review itself. Special mention to this Issues managing editor, Oluwabunmi Adaramola whose leadership and dedication has steered the authors and the editorial towards the completion and successful publication of this issue.

The Leeds Student Law and Criminal Justice Review remain a vital platform for emerging scholarship in law and criminal justice. It is a powerful reminder of what can be achieved when students are given the space and support to think critically, write boldly and contribute meaningfully to the academic home that is the School of Law at the University of Leeds.

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INTRODUCTION TO THE SIXTH ISSUE.

It is a pleasure to introduce the 6th edition of the Leeds Student Law and Criminal Justice Review. A continuation of the brainchild of Dr Colin Mackie in 2020, this journal continues to develop and nurture research from the University of Leeds School of Law by teams of Postgraduate Researchers in the school.

The Review exists to showcase the intellectual ambition and academic curiosity of students within the School of Law at the University of Leeds. Each year, a small selection of outstanding undergraduate and postgraduate dissertations are developed into publishable articles through a collaborative editorial process between student authors and the Review's editorial board.

This year's edition brings together seven articles: six papers by our undergraduate students and one paper by a taught postgraduate student. These papers have been selected due to the breadth of legal inquiry undertaken by our students and the engagement with a diverse range of legal questions, and reflective of the various research centres that exist within the school of law. These works were selected through the collaborative effort of the academic overseeing the review (Dr Clare James) and this year's editorial board, whose careful engagement with each paper ensured the quality and integrity of the final articles.

We would therefore like to thank Dr Clare James, the academic staff overseeing this year's Review process, for her assistance and guidance throughout the process. We would also like to extend our sincere gratitude to the student authors, whose dedication and openness to the editorial process made this publication possible. Special thanks are also due to Dr Damarie Kalonzo, our foreword author, whose reflections help situate this year's Review within broader legal and professional discussions. Finally, we would like to acknowledge the support of the Management Support Staff in the School of Law at the University of Leeds for their assistance with the entirety of the administrative process.

We hope that this edition of the Leeds Student Law and Criminal Justice Review contributes meaningfully to ongoing legal debates and serves as a testament to the intellectual energy of our student community.

The Editorial Board, 2025/26
Leeds Student Law and Criminal Justice Review

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Breaking Chains: How Trauma-Informed Justice Can Disrupt Cycles of Crime Across Generations.

OLIVIA TIMPERLEY*

Abstract

This article critically examines how trauma, particularly early-life and intergenerational trauma, shapes youth offending pathways and how trauma-informed frameworks can transform justice responses in England and Wales. Drawing on theoretical perspectives from developmental psychology, attachment theory, social learning theory, and youth desistance research, it explores how Adverse Childhood Experiences (ACEs), systemic inequalities, and social disadvantage increase criminogenic risks. While traditional justice systems emphasise individual culpability, a growing body of research argues that addressing trauma as both a developmental and structural issue is essential for effective, ethical crime prevention. The study employs a qualitative, interpretive methodology, using semi-structured interviews with seven professionals across youth justice, policing, social care, and legal services. The findings reveal systemic barriers undermining trauma-informed practice, including inconsistent professional understanding, multi- agency disconnection, resource constraints, and entrenched punitive cultures. Findings revealed a clear mismatch between reactive enforcement priorities and the preventative, relational interventions needed to break cycles of harm. The article offers a critical review of key trauma-informed frameworks, including the Trauma-Informed Wales Framework, the Youth Justice Blueprint, the Child First model, and England's National Protocol on Looked-After Children. While these frameworks reflect promising shifts towards resilience-based, rights-centred, and developmentally appropriate interventions, their impact is limited by fragmented implementation and structural gaps. Overall, the article argues that embedding trauma-informed principles across all levels of youth justice practice requires national leadership, cross-sector collaboration, sustained investment,

and a shift from punitive to rehabilitative models. It calls for system-wide transformation to support vulnerable young people and break intergenerational cycles of disadvantage and criminalisation.

1. Introduction

Across England and Wales, thousands of young people enter the Criminal Justice System (CJS) each year carrying invisible burdens: the psychological and emotional scars of trauma. Behind youth offending statistics lie stories of childhood adversity, broken relationships, systemic disadvantage, and unmet needs (McManus et al., 2018; Craig et al., 2021). Recent research across criminology, psychology, and social policy shows that trauma, particularly cumulative and intergenerational, plays a central role in shaping pathways into and out of criminal behaviour (Halsey, 2018; Case and Haines, 2020; Keels, 2022). While legal systems have historically prioritised individual responsibility, a growing body of evidence argues that meaningful crime prevention requires understanding of not just what people do but also questions what has happened to them and how these past harms shape future risks.

This article investigates the role of trauma in youth offending and evaluates how trauma-informed frameworks can transform justice responses in England and Wales. It draws on theory, empirical research, and practitioner insights to examine how childhood adversity, adverse environments, and systemic inequalities disrupt emotional development, amplify criminogenic risks, and trap young people in cycles of harm and punishment (Leshem and Weisburd, 2019; Holmes and Farnfield, 2014; Bandura, 1977). Without addressing trauma as both a personal and structural issue, youth justice systems remain reactive, fragmented, and ineffective.

The five sections build this argument. Section 2 defines key terms including Adverse Childhood Experiences, trauma, intergenerational harm, developmental psychology, and trauma-informed practice (Halsey, 2018; Craig et al., 2021; McManus et al.,

2018), explaining why addressing early adversity is essential for ethical interventions. Section 3 reviews empirical and theoretical research on how trauma shapes risk, social learning, and offending. It critiques emerging frameworks like the Youth Justice Blueprint for Wales (Welsh Government, 2019a) and the National Protocol for Looked-After Children (Department for Education, 2018). It also identifies gaps, notably the lack of longitudinal and intersectional research (Sabnis et al., 2021; Quigg et al., 2024). Section 4 describes the qualitative methodology, designed to capture practitioners' perspectives across youth justice, policing, social care, and legal services (Palacios and Miller, 2017; Ikeyi, 2021). Section 5 presents findings around four key challenges: inconsistent professional understanding, systemic barriers, reactive strategies, and tensions between culpability and vulnerability (Brierley-Sollis, 2023; Silvester, 2022). Section 6 critically analyses frameworks like the Trauma-Informed Wales Framework (ACE Hub Wales and Traumatic Stress Wales, 2022), the Child First model (Youth Justice Board, 2022), and Portsmouth Youth Justice Service's practice framework (Portsmouth Youth Justice Service, 2025), assessing their alignment with developmental theory, innovations, and implementation gaps.

Overall, this article argues that breaking cycles of harm and reducing reoffending requires embedding trauma-informed principles system-wide, supported by national leadership, structural reform, and sustained investment (Bradley, 2021; Nicholls, 2024), advancing ethical, preventative, and developmentally informed youth justice.

2. Background

A. Introduction

Understanding the developmental roots of criminal behaviour requires an examination of trauma, especially generational trauma, and its impact on individuals' life trajectories. This Section defines and contextualises key concepts underpinning

the article, including Adverse Childhood Experiences (ACEs), trauma, intergenerational trauma, developmental psychology, youth desistance theories, attachment theory, social learning theory, and trauma-informed practice principles. Clarifying these foundational elements sets up a framework for understanding how early exposure to adversity influences the routes into and out of criminal behaviour.

B. Defining Key Concepts

Adverse Childhood Experiences (ACEs)

ACEs refer to a range of traumatic events occurring during childhood, including abuse, neglect, and household dysfunction, such as parental substance misuse or incarceration (McManus et al., 2018). Research has shown that the combined effects of ACEs significantly increase the chances of facing negative outcomes, such as mental health issues, substance abuse, and criminal activity (Craig et al., 2021). Individuals exposed to four or more ACEs are reported to be substantially more likely to become involved in violence, both as victims and perpetrators (McManus et al., 2018). Recognising the significant influence of ACEs is essential for grasping the developmental factors that can lead to criminal behaviour and the necessity for trauma-informed approaches.

Trauma

Trauma is generally defined in the scope of criminology and psychology as any distressing experience that induces considerable fear, helplessness, dissociation, confusion, or other disruptive emotions potent enough to exert a lasting adverse impact on an individual's attitudes, behaviour, and functioning (American Psychological Association, 2018). Traditionally, traumatic events include those caused by human actions (such as rape, war, or violence) or by nature (such as natural disasters), often challenging an individual's perception of the world as a safe and predictable place. The definition of trauma is still up for debate, though Gradus and Galea (2022) emphasise that although diagnostic frameworks such as the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) offer formal criteria, they frequently do not capture the complete spectrum of

experiences that may lead to trauma-like psychological effects. Their work points out that events such as racial discrimination, financial hardship (e.g., eviction), and environmental challenges linked to climate change can also trigger profound psychological distress, even though they fall outside standard trauma criteria (Gradusa and Galeaa, 2022).

This evolving understanding reflects a broader shift in recognising that trauma does not always arise from traditionally defined catastrophic events but can also emerge from chronic social and economic stressors, especially for marginalised populations. Despite these definitional complexities, there is broad agreement that in the context of criminal behaviour, trauma frequently manifests through emotional dysregulation, heightened impulsivity, and maladaptive coping mechanisms such as aggression or substance abuse (Keels, 2022). Prolonged exposure to trauma throughout essential developmental periods affects neurological and social functioning, consequently heightening the probability of future criminal behaviour (Craig et al., 2021).

Generational, Intergenerational, and Transgenerational Trauma

Throughout this article, the terms generational trauma, intergenerational trauma, and transgenerational trauma will be used interchangeably. These terms describe the phenomenon whereby trauma is transmitted from one generation to the next, influencing emotional responses, behaviours, and socio-economic outcomes (McManus et al., 2018). Generational trauma may arise from both direct experiences, such as abuse or neglect, and indirect pathways, including socio-economic deprivation and systemic discrimination (Craig et al., 2021). Unresolved trauma within families often perpetuates cycles of violence, criminality, and disadvantage (Halsey, 2018). Halsey's (2018) case studies illustrate how trauma can lead to cycles of violence, wherein individuals who have been victimised express their pain through hostility towards others, a pattern underscored by statistics showing the high prevalence of trauma and ACEs among detained populations, highlighting the necessity for a sophisticated understanding of the psychological foundations of criminal activity. Many interviewees in the study

reported histories of severe trauma, reinforcing the argument that individuals with traumatic backgrounds are disproportionately overrepresented in prisons and youth detention centres (Halsey, 2018). Importantly, Halsey's work emphasises the role of intergenerational incarceration and its profound effects on family dynamics, illustrating how each generation may inherit the psychological scars of the previous one, leading to a perpetuation of criminal behaviour across familial lines (Halsey, 2018).

C. Theoretical Perspectives

Developmental Psychology

Developmental psychology provides critical insights into how early experiences shape emotional, cognitive, and behavioural development. Research indicates that traumatic experiences during formative years disrupt attachment formation, emotional regulation, and executive functioning (Holmes & Farnfield, 2014). These disruptions increase vulnerability to risk-taking, impulsiveness, and antisocial behaviour, particularly during adolescence (Leshem & Weisburd, 2019). Studies in developmental psychopathology further suggest that trauma exposure can lead to maladaptive internal working models of relationships, impacting future interactions with authority figures, peers, and society at large (Craig et al., 2021).

Attachment Theory

Attachment theory, initially developed by Bowlby (1979), posits that early caregiver relationships form the foundation for emotional security and social functioning. Traumatic disruptions to attachment processes, such as those caused by neglect, abuse, or parental incarceration, can lead to insecure attachment styles, including disorganised attachment. These attachment difficulties are strongly associated with higher risks of externalising behaviours, delinquency, and difficulty forming prosocial relationships (Craig et al., 2021). Within criminal justice populations, histories of disrupted attachment are prevalent, highlighting the importance of relational interventions.

Social Learning Theory

Social Learning Theory (Bandura, 1977) offers another explanatory framework, suggesting that individuals learn behaviours through observing and imitating others, particularly within their immediate social environment. In trauma-exposed contexts, aggressive or antisocial behaviours may be normalised through repeated exposure to violence, criminality, or maladaptive coping strategies (Keels, 2022). When combined with diminished prosocial modelling, learned patterns of aggression and mistrust contribute to entrenching offending behaviours across generations.

Youth Justice Desistance Theories

Desistance theories within youth justice explore the processes through which individuals cease offending. Research suggests that positive social bonds, stable employment, education, and prosocial identity development are crucial for desistance (Case & Haines, 2020). However, for trauma-exposed youth, barriers such as emotional dysregulation, stigma, and systemic disadvantage complicate desistance pathways (McManus, 2018). Trauma-informed approaches within youth justice seek to address these barriers by fostering trust, enhancing emotional literacy, and creating opportunities for restorative social integration.

Trauma-Informed Practice Principles

Trauma-informed practice is grounded in the understanding that many individuals engaging with criminal justice, education, or social care systems have histories of trauma. It operates on key principles, including safety, trustworthiness, collaboration, empowerment, and cultural sensitivity (Crosby, 2016). Implementing trauma-informed approaches involves recognising the signs of trauma, avoiding re-traumatisation, and embedding practices that promote healing and resilience (Bradley, 2021). Within justice settings, trauma-informed practice shifts the focus from "What is wrong with you?" to "What has happened to you?" fundamentally altering intervention strategies (Quigg et al., 2023).

D. Conclusion

This section has outlined the foundational concepts necessary to understand the developmental, psychological, and systemic factors underpinning trauma and criminal behaviour. Definitions of ACEs, trauma, and intergenerational trauma establish the significance of early adversity. At the same time, developmental psychology, attachment theory, social learning theory, and desistance theories offer explanatory models for how trauma impacts behavioural trajectories. Finally, trauma-informed practice principles highlight the need for systemic change in addressing the root causes of criminality. This conceptual groundwork sets the stage for the forthcoming literature review, which will critically evaluate existing research and examine the role of trauma-informed approaches within crime prevention and youth justice.

3. Literature Review

A. Introduction

Although crime is often understood through legal and sociological perspectives, an increasing amount of research highlights the significant influence of trauma, especially generational trauma, on the development of criminal behaviour (McManus et al., 2021; Craig et al., 2021). Individuals with ACEs are over-represented in the CJS. However, traditional punitive justice models frequently fail to address these underlying issues (Quigg et al., 2024). This section critically examines the empirical and theoretical literature on the relationship between trauma and criminal behaviour, evaluates the effectiveness of trauma-informed approaches in justice settings, and explores practitioner perspectives on implementing trauma-responsive frameworks.

Importantly, exposure to trauma does not inevitably result in offending behaviour. Many individuals demonstrate resilience, particularly where protective factors are present. Recognising these protective influences is essential to avoid overly

deterministic interpretations of trauma-crime relationships.

B. Generational Trauma and Criminal Behaviour

Generational trauma describes how trauma experienced by one generation can profoundly impact the following, shaping behaviours, emotional responses, and social outcomes (McManus et al., 2018). Within criminological research, intergenerational trauma is linked to increased risks of offending, particularly when compounded by socio-economic disadvantages and systemic marginalisation (Craig et al., 2021). Halsey (2017) highlights that addressing unresolved trauma is crucial, as it can break cycles of violence and criminal behaviour, with emotional dysregulation and maladaptive coping, like aggression and substance abuse, playing key roles. Craig et al. (2021) further demonstrates that exposure to adverse familial and community environments normalises criminal behaviour, reinforcing intergenerational cycles of trauma, aligning with Social Learning Theory (Bandura, 1977; Tadayon Nabavi and Bijandi, 2012), which posits that behaviours, including violence, are learned through observation and imitation within social environments.

Childhood trauma alters neurological and social development, affecting emotional regulation, impulse control, and risk perception (Leshem and Weisburd, 2019; Keels, 2022). Maladaptive internal working models formed through trauma-exposed environments make individuals more susceptible to antisocial peer groups and criminal pathways. Attachment theory supports the idea that disrupted early relationships often result in poor emotional regulation and insecure relational patterns (Fritzon et al., 2020; Malvaso et al., 2021). Attachment theory supports the idea that disrupted early relationships often result in poor emotional regulation and insecure relational patterns (Fritzon et al., 2020; Malvaso et al., 2021). Quigg et al. (2024) further emphasise that trauma and social exclusion often go hand in hand, leading to a cumulative sense of disadvantage. Individuals living in disadvantaged neighbourhoods are particularly vulnerable, facing higher levels of violence, dysfunctional family dynamics, and neglect from institutions; these factors only deepen the impact of personal trauma (Eichelsheim and Van de Weijer, 2018). The Youth Justice Blueprint for Wales (Welsh Government, 2019a) echoes this

by calling for the justice system to actively recognise and respond to the effects of ACEs, embedding trauma-informed thinking across all youth justice interventions.

C. Mechanisms Linking Trauma to Offending

Empirical studies consistently document the mechanisms by which trauma increases criminogenic risk factors. Early and repeated exposure to adversity disrupts emotional regulation, fosters aggression as a learned coping strategy, and increases impulsivity and hypervigilance, which together elevate the risk of criminal involvement (McManus et al., 2021; Craig et al., 2021; Keels, 2022). Individuals from trauma-exposed backgrounds often develop defensive, survival-oriented behaviours that may be maladaptive within social and legal contexts.

McManus et al. (2021) found that individuals who had experienced four or more ACEs were significantly more likely to engage in violent crime. Similarly, Craig et al. (2021) reports that early exposure to violence and instability disrupts emotional regulation and encourages aggression as a learned coping strategy. Keels (2022) highlights the role of chronic exposure to violence in normalising aggression and shaping defensive, survival-driven behaviours among adolescents. Together, these findings show how some individuals from trauma-exposed backgrounds often develop hypervigilance and impulsivity, increasing their criminogenic risk. The Risk-Need-Responsivity (RNR) model conceptualises trauma as both a risk and treatment-need factor, emphasising the necessity for trauma-responsive rehabilitation (Fritzon et al., 2020).

Furthermore, societal hurdles such as poverty, racial prejudice, and restricted access to supportive services contribute to trauma transmission between generations. These systemic inequities amplify the effects of trauma, increasing the risk of criminal justice involvement. Strain Theory (Merton, 1938) offers an important lens for understanding how trauma-related social pressures contribute to criminal behaviour, arguing that individuals who experience blocked opportunities to achieve socially accepted goals (such as stability or success) may turn to crime as an alternative means of coping.

Watts and McNulty (2013) present evidence demonstrating that experiences of childhood abuse are significantly correlated with a heightened probability of engaging in violent crime in adulthood. However, reliance on ACE scores as predictive tools warrants caution. Such measures can oversimplify complex lived experiences and often fail to account for context, severity, timing or the presence of protective factors. Therefore, ACE frameworks are most useful when applied as indicative rather than determinative measures of risk.

D. Trauma-Informed Crime Prevention and Justice Responses

The limitations of traditional punitive justice frameworks in dealing with people exposed to trauma prompted the development of trauma-informed approaches, as these strategies aim to shift the justice system from punishment to rehabilitation, acknowledging the widespread effects of trauma on behaviour (Crosby, 2016; Case and Haines, 2020). Initiatives such as the **Children First model** advocate for diversionary and supportive interventions that promote well-being and resilience among youth offenders (Case and Haines, 2020). Similarly, restorative justice approaches, emphasising dialogue and emotional healing, have gained traction in addressing the relational and psychological harm caused by offending (Randall and Haskell, 2013; Banwell-Moore, 2024).

Empirical evaluations have demonstrated notably promising outcomes in recent intervention programs. For example, the Merseyside Violence Reduction Partnership's trauma-informed police training has significantly improved officers' ability to engage empathetically and effectively with vulnerable populations, including victims of domestic violence, at-risk youth, and people with mental health issues (Wilson et al., 2023). This training has not only improved immediate interactions but also contributed to building trust between law enforcement and marginalised communities. Similarly, the Aston Project is a strong example of a successful community-based diversion initiative, providing structured activities, mentorship, and personalised support for people at risk of offending, reducing their likelihood of entering the CJS (Hobson et al., 2021). Collectively, these initiatives underscore the potential of targeted, evidence-based approaches in promoting safer

communities and strengthening constructive relationships between authorities and the public.

Nevertheless, implementation remains inconsistent. The Youth Justice Blueprint Implementation Plan (Welsh Government, 2019b) acknowledges the deficiency of coordinated trauma-informed practices across agencies. Systemic barriers hinder widespread adoption, including resource limitations, inconsistent regulatory frameworks, and resistance to moving from punitive traditions (Bradley, 2021; Nicholls, 2024). Wrexham University (2023) further highlights that despite firm commitments on paper, the practical delivery of trauma-informed approaches within Welsh youth justice services is frequently undermined by limited inter- agency coordination, gaps in practitioner training, and insufficient structural support. Their evaluation underscores that sustained implementation requires policy alignment and meaningful investment in workforce development, cross- sector collaboration, and long-term cultural change within justice organisations.

E. Perspectives on Trauma-Informed Practice

Insights from criminal justice professionals are essential for evaluating the practical implementation of trauma-informed approaches. Research increasingly demonstrates that practitioners recognise the substantial impact of trauma on the emergence of criminal behaviour (Crosby, 2016; Newbury et al., 2021). Children in the criminal system frequently exhibit developmental delays, emotional dysregulation, and trauma-related behavioural issues, requiring therapies that emphasise emotional support, relationship-building, and trust rather than punitive actions (Newbury et al., 2021). For example, the Enhanced Case Management (ECM) pilots in Wales illustrate the value of embedding trauma- responsive practices at all stages of youth justice intervention (Wrexham University, 2023). Complementing this, the Welsh Government (2019a) identifies the Constructive Resettlement approach as a promising strategy to develop individualised, coordinated, and trauma-sensitive support for justice-involved youth, aiming to reduce reoffending and promote positive identity

transformation.

Nonetheless, the Welsh Government's Youth Justice Blueprint Implementation Plan (2019b) identifies substantial obstacles, including persistent disparities in policy consistency, institutional lack of progress, poor inter-agency collaboration, and insufficient training infrastructure. Restorative justice practitioners further emphasise that healing-focused approaches addressing the needs of both victims and offenders are key to effective trauma-informed practice (Banwell-Moore, 2024). Booth (2022) underscores that organisational buy-in, adequate resourcing, and cross-sector collaboration are prerequisites for success, yet such structural and financial support are often lacking. Nicholls (2024) also highlights that many frontline workers operate within systems that fail to provide the necessary institutional backing, leaving practitioners under-resourced and overburdened, which ultimately constrains the widespread adoption and sustainability of trauma-informed interventions.

F. Future Directions and Research Gaps

Despite increasing recognition of trauma-informed practice, significant gaps remain in research and policy. Longitudinal research is urgently needed to track the long-term impact of trauma-responsive interventions on key outcomes such as recidivism rates, psychological health, and social reintegration (Quigg et al., 2024). While the Youth Justice Blueprint for Wales offers a rare example of an evolving trauma-informed framework with sustained policy commitment over time (Welsh Government, 2019a), it also underscores the challenges of ensuring continuity across political and institutional cycles. This initiative provides valuable insights into how policy frameworks can be designed to support long-term, trauma- focused changes within justice systems.

Further research should also explore the intersectionality of trauma with race, gender, and social class, recognising that marginalised populations often face compounded adversities that amplify the psychological and behavioural impacts of trauma (Keels, 2022). Without taking this into consideration, interventions risk disregarding the most vulnerable groups and failing to address the systemic causes of trauma

exposure. Furthermore, standardised evaluation tools are required to enable meaningful comparisons of trauma-informed therapies across regional and national contexts (Wilson et al., 2023). Without such tools, assessing which programmes are most effective and under what conditions they thrive is difficult.

As Petrillo (2021) argues, embedding practitioner perspectives directly into the design of policies and interventions is critical to ensure that trauma-informed frameworks are theoretically robust and practically implementable. Insights from practitioners provide key knowledge regarding implementation issues, ethical dilemmas, and the practical limitations of frontline work, facilitating the alignment of policy ambitions with operational realities. At the same time, ethical risks must be carefully managed, including the potential for pathologising young people or reinforcing stigmatising labels that frame individuals primarily through a problem-oriented lens.

G. Conclusion

Generational trauma significantly shapes criminal trajectories, creating cycles of adversity that traditional justice responses often fail to address. Trauma-informed crime prevention and justice approaches offer a promising alternative, focusing on rehabilitation, resilience-building, and systemic change. However, much of the existing evidence base remains correlational rather than causal, highlighting the need for caution when interpreting trauma as a direct determinant of offending behaviour. Challenges in implementation, resourcing, and systemic buy-in remain. Future research should prioritise longitudinal and intersectional analyses to strengthen the evidence base and guide the development of more effective, equitable justice strategies. Establishing the theoretical and empirical foundations surrounding trauma-informed justice sets the stage for the following section, which will outline the methodological approach employed to explore how criminal justice professionals in England and Wales understand and apply these principles in practice.

4. Methodology

A. Introduction

This section outlines the methodological approach used to investigate how criminal justice professionals understand trauma and generational trauma and how this understanding informs crime prevention strategies in England and Wales. A qualitative approach was adopted, as it is particularly suited for exploring subjective experiences and complex, nuanced perspectives (Palacios and Miller, 2017). Qualitative research allows for the rich, in-depth exploration of meanings that participants assign to their professional encounters with trauma, an area not easily captured through quantitative methods. An interpretive epistemology underpinned the study, seeking to understand participants' views within their specific social and professional contexts rather than to produce generalisable results.

It is vital to emphasise at the outset that the findings of this study are descriptive rather than causative. In keeping with the interpretive method used here, the study aims to investigate how professionals comprehend and conceptualise trauma, rather than establish concrete cause and effect correlations between trauma-informed practice and crime prevention outcomes. This is consistent with the methodology employed in the literature review, which synthesised previous research descriptively rather than making causal conclusions.

B. Participant Recruitment and Sampling

Participants were recruited through purposive and snowball sampling techniques (Parker, 2019). Initially, seven professionals who worked across various sectors within the CJS and associated services, including social care, police services, the courts, youth offending teams, and therapeutic services, were contacted. Purposive sampling ensured that individuals selected had direct knowledge or experience with trauma-informed initiatives or the broader justice system.

Professionals from differing sectors were included to capture diverse insights, ranging from frontline practitioners to legal professionals. Snowball sampling was employed to secure the final participants, whereby participants recommended other suitable colleagues. Given the interpretive foundation of this study, it is recognised that the small sample size does not aim to offer statistical generalisability. Instead, it seeks to provide rich, contextualised understandings that reflect individual experiences, not the entirety of any profession.

C. Ethical Considerations and Consent Process

Ethical considerations were observed throughout, based upon the detailed procedures outlined in the participant consent form. These included clear information about the purpose of the research, voluntary participation, confidentiality, and participants' rights. Participants were made aware they could withdraw from the study at any time without explanation, and a specific withdrawal deadline was communicated. Informed consent was sought for the use of direct quotes, the option to remain anonymous, and the recording of interviews, where applicable. Job roles were anonymised where needed, quotes were only used with explicit consent, and any identifiable details were removed. Ethics approval was granted in advance by the University of Leeds, and participants were fully informed of their rights, including voluntary participation, refusal to answer specific questions, and the secure, academic-only use of the data collected. They could opt to remain anonymous, including the omission of specific job titles, and choose whether to permit direct quotations or audio recordings, with email interviews offered for additional flexibility. In line with Rahman and Deuchar's (2024) emphasis on transparency and ethical responsibility, clear documentation of methods, data protection measures, and participant choices ensured the integrity and trustworthiness of the research.

D. Data Collection Method

Data was collected through semi-structured interviews, chosen for their capacity to elicit rich, authentic insights through open-ended questions (Ikeyi, 2021). This

method offered the necessary flexibility to explore emerging issues while maintaining focus on the research aims, enabling deeper probing where clarification or elaboration was needed. Semi-structured interviews are well-suited for investigating sensitive topics surrounding trauma and exploring professional experiences, fostering trust and candid self-disclosure between interviewer and participant (Ikeyi, 2021). Additionally, they align with interpretive paradigms, supporting the study's aim to capture contextualised understandings within participants' natural professional settings.

Depending on participant preference, interviews were conducted via Zoom or email, ensuring accessibility and comfort. Zoom interviews typically lasted 30 to 45 minutes, while email responses were collected within agreed-upon timeframes. A conversational, informal style was adopted to build rapport, encourage open communication, and mitigate power imbalances. However, consistent with Ikeyi (2021), limitations such as potential biases, variability in depth across interviews, and risks to confidentiality were acknowledged. Ethical safeguards, including clear consent processes and flexible response options, were implemented to address these concerns to protect participant anonymity and well-being.

As noted in Section 6, the potential for social desirability bias, where participants may present themselves or their organisations as more trauma-informed in principle than in everyday practice, is discussed within the broader analysis and interpretation of findings rather than here in the methodological design.

E. Interview Design and Structure

Open-ended interview questions were tailored to each participant's specific roles and experiences. Each interviewee received between six and eight role-specific questions, ensuring relevance to their area of professional practice. In addition, a comparative question was asked across all participants: "*What policy changes would you like to see implemented to improve trauma-informed interventions in the UK?*" This strategy allowed for individualised exploration while creating a basis for comparative thematic

analysis across sectors. Tailoring questions helped preserve the authenticity and depth of participant responses, while the standardised comparative question facilitated the identification of broader patterns across the dataset.

F. Reflexivity and Limitations

Ethical and methodological reflexivity was integral to the research design. Reflexivity, understood as critically examining how knowledge is co-produced between researchers and participants (Lumsden & Winter, 2014), shaped each stage from access and data collection to interpretation. A key challenge was balancing the richness of contextual information with the ethical duty to protect participant anonymity; broader descriptors were used when job titles risked identification. Additionally, two modes of interviewing, Zoom and email, introduced variations in spontaneity and depth, reflecting how researchers' positionality and methodological choices can shape the research process (Lumsden & Winter, 2014). Nonetheless, maintaining flexibility was vital for fostering trust, ensuring participant comfort, and supporting ethical engagement with a diverse professional group.

Researcher bias was another key consideration. As a researcher interested in trauma-informed justice, steps were taken to maintain objectivity by engaging in deliberate reflexive practices, seeking peer feedback, consulting supervisory guidance, and triangulating interpretations against existing academic literature. Consistent with Schaffer's (2015) observation that interpretivists must acknowledge their active role in constructing meaning rather than assuming a position of neutrality, this reflexivity was central to maintaining methodological integrity. Additionally, informed consent procedures and offering participants the opportunity to review their interview summaries further helped mitigate the risk of misrepresentation.

G. Data Analysis Overview

Data analysis combined narrative and thematic approaches to maximise depth and pattern recognition. Narrative analysis was initially used to preserve the temporal, emotional, and meaning-making aspects of participants' experiences, allowing

each personal and professional story to be understood in full context (McAllum et al., 2019). This method, rooted in the narrative tradition, recognises that storytelling structures how individuals make sense of the social world, capturing contingent, sequential processes that structure participants' accounts.

Following narrative exploration, a thematic analysis followed Braun and Clarke's (2022) six-phase framework. Thematic analysis enabled the systematic identification of patterns across the dataset while maintaining transparency about coding decisions, an important step in demonstrating rigour (McAllum et al., 2019). McAllum et al. (2019) also note that while thematic analysis efficiently identifies patterns, narrative analysis uniquely preserves the sequential and role-based complexity of individual experiences. The combination of both approaches thus provided a multidimensional, interpretive understanding of how trauma is conceptualised within justice settings, balancing cross-case patterning with individual depth.

The stages involved were:

1. **Familiarisation with Data**: Interviews were reviewed several times, with detailed notes taken when transcription was unavailable.
2. **Generating Initial Codes**: Open coding identified both semantic and latent meanings, with codes such as "lack of training," "multi-agency barriers," and "institutional distrust" frequently emerging.
3. **Searching for Themes**: Related codes were clustered into broader thematic patterns around systemic and practitioner-level issues.
4. **Reviewing Themes**: Themes were refined to ensure internal coherence and distinction from one another.
5. **Defining and Naming Themes**: Final themes were clearly articulated to reflect their analytic scope.
6. **Producing the Report**: The final thematic findings were illustrated with participant quotations (where consent was allowed), linking insights to the research questions.

Final themes included:

- Inconsistent Professional Understanding of Trauma
- Systemic Barriers and Multi-Agency Disconnection
- Reactive vs. Preventative Approaches
- Perceptions of Criminal Responsibility and Youth Vulnerability

It is important to acknowledge that coding and theme generation are inherently interpretive processes. The identification of patterns, the grouping of codes, and the naming of themes reflect the researcher's analytical judgement and theoretical positioning. However, such subjectivity is not viewed as a weakness but as an expected and recognised feature of qualitative research, particularly within interpretivist frameworks.

H. Conclusion

This section outlines the methodological framework underpinning the study, detailing the interpretive approach, participant recruitment, ethical safeguards, data collection, and analytic strategies employed. By combining narrative and thematic analyses, the study sought to capture the depth of individual experiences and the broader patterns across professional understandings of trauma within the CJS. The next section presents the key findings of the research, exploring how participants conceptualise trauma, the systemic barriers they encounter, and the implications for trauma-informed crime prevention strategies in England and Wales.

5. Findings and Discussion

A. Introduction

This section presents empirical research findings exploring the role of generational trauma in criminal behaviour and how trauma-informed approaches are understood and implemented by professionals within youth justice, social care

and policing contexts in England and Wales. The research specifically sought to give insight into the following questions:

- How do professionals interpret and implement trauma-informed approaches?
- What are the barriers to implementing trauma-informed strategies effectively within the youth criminal justice system?

This section is organised into four sub-sections: individual interviewee analyses, the thematic analysis process, a cross-interview comparison, and the broader contribution of findings. The section concludes by reflecting on methodological challenges.

B. Individual Interviewee Analyses

Interviewee 1: Therapeutic Life Story Worker

This interviewee works directly with trauma-affected children, primarily those in care, through the Therapeutic Life Story Work (TLSW) model. Their role focuses on helping children understand and process early experiences by constructing coherent personal narratives using psychological and emotional tools. This approach is designed to help children gain control over their emotions and behaviours by understanding how trauma has shaped them (Rose, 2012).

The interviewee observed consistent patterns of transgenerational trauma among young people who later entered the CJS particularly linked to domestic abuse,

substance misuse, and neglect. She explained that without timely support, children often develop poor emotional regulation, increasing their risk of offending in adolescence or adulthood, a pattern also highlighted by Wilmott (2022), who argues that unaddressed early trauma disrupts emotional development and heightens vulnerability to criminality. TLSW aims to interrupt these patterns by fostering self-awareness and reflection. The participant stressed the importance of helping young people understand brain development and neuroscience, noting that while many initially resist, these insights eventually help them make sense of their feelings and behaviours, reducing the likelihood of repeating harmful cycles.

A significant barrier identified was the chronic under-resourcing of children's services, which the interviewee linked directly to the damaging effects of austerity and funding cuts across England, a concern echoed in wider literature (Webb et al., 2022). Staff shortages mean many children remain in harmful family environments longer than necessary, and social workers often lack time to review complete family histories, including intergenerational criminal behaviour or ACEs, leading to reactive rather than preventative interventions. She also highlighted the need for stronger inter-agency information sharing, as police, schools, and social care often work in isolation, producing fragmented responses. For example, she reflected on how school interventions tend to be "reactionary," focusing on isolated incidents instead of addressing root causes.

The interviewee referenced Richard Rose, founder of TLSW, who is now exploring its application in youth offending institutions (Rose, 2012). She endorsed this expansion and argued that the model should extend to families known to social services, even if the children are not currently in care. She concluded that wider integration of TLSW, backed by genuine funding and awareness, could help break cycles of trauma and significantly reduce reoffending.

Interviewee 2: Former Social Worker (Youth Offending Team)

Interviewee 2, a retired social worker, offered a reflective perspective on youth justice practice during the early 2000s, a period of significant policy change in England and Wales. Working closely with a Youth Offending Team (YOT), they prepared pre-sentence reports (PSRs) for juvenile courts and coordinated inter-agency interventions assessing family background, offending history, and support needs. This era followed the Crime and Disorder Act 1998, which introduced the modern Youth Justice System (YJS) and required local authorities to establish YOTs promoting early intervention, collaboration, and accountability (Ministry of Justice, 2013).

The interviewee's account also highlighted tensions within youth justice shaped by the political climate of the early 2000s. Under New Labour's "tough on crime, tough on the causes of crime" approach, policy combined punitive measures with

preventative aims, often contradictory (Drakeford and Butler, 2001). Youth justice professionals operated under pressure to control perceived antisocial behaviour, particularly after high-profile cases like the murder of James Bulger, which intensified public demand for tougher responses and reinforced punitive policies (Cummins, 2021).

Despite these pressures, the interviewee's work reflected the value placed on early support and family assessments, principles that align closely with modern trauma-informed approaches. They recalled how community-based social work and policing were more prominent and engaged, with agencies maintaining regular contact with families and young people in local neighbourhoods. Some scholars argue that this close-knit, supportive model has eroded in recent years due to resource cuts and increasing managerialism (Cummins, 2021).

While acknowledging that youth offending appears more complex today, the interviewee suggested that current practitioners could benefit from lessons drawn from past community-centred, supportive practices. Their reflections underscored the importance of balancing accountability with meaningful early intervention, an approach that continues to resonate in trauma-informed youth justice frameworks today.

Interviewee 3: Criminal Justice Practitioner (Court-Based Experience) Interviewee 3, with over four decades of experience in the CJS, provided a long- term perspective on how courts have evolved in handling youth offending and considering trauma in legal processes. Their experience across youth and adult court proceedings offered insights into sentencing, pre-sentence reports (PSRs), and how trauma-related factors are addressed. The interviewee observed that while the Code for Crown Prosecutors provides clear procedural steps, requiring both the Evidential and Public Interest Tests, there remains no structured legal guidance on assessing childhood trauma in these decisions. In practice, trauma is more likely to be considered if flagged early through PSRs or multi-agency reports. Factors like family history, psychological assessments, and social worker input often shape evaluations, but the process depends on timely, high-quality

information-sharing, which remains inconsistent across jurisdictions.

They noted that trauma-informed elements have become more common over time, particularly for children and young people. Courts increasingly use special measures to support vulnerable witnesses or defendants, such as allowing video evidence or removing wigs to create less intimidating environments. However, this progress is uneven, as trauma's importance is still variably interpreted by professionals, an issue highlighted by Brierley-Sollis (2023), who warns that inconsistent interpretations across sectors can undermine equitable youth justice outcomes.

Crucially, the interviewee pointed out that age heavily influences how trauma is weighed. Younger defendants are more often viewed through developmental and psychological lenses, whereas adults with prior convictions rarely have their trauma histories factored into legal decisions. This reflects the broader divide between the rehabilitative ideals of youth justice and the more punitive focus in adult systems. Early cross-agency collaboration is crucial, particularly in cases involving youth. They recognised enhancements in interagency communication but highlighted that system fragmentation obstructs effective practice. When agencies operate in isolation or under time constraints, critical elements of a child's background may be overlooked in court. In summary, this interview highlighted the need for greater consistency, enhanced training for legal professionals, and the establishment of formal trauma-informed protocols to ensure young and vulnerable individuals receive fair and informed treatment within the criminal justice process.

Interviewee 4: Police Sergeant (Experience in Frontline and Strategic Policing)
Interviewee 4, a frontline sergeant, sheds light on how routine policing and criminal justice solutions disregard trauma. Their observations revealed operational realities and structural issues in crime prevention and juvenile intervention. They placed policing in a trauma-informed perspective by participating in community policing and multi-agency projects. The lack of established trauma-informed infrastructure in police forces was a significant issue. Despite efforts to avoid criminalising vulnerable youth, particularly those exploited by organised drug networks, the respondent noted that this strategy is

inconsistent and discretionary. For example, when handling a 13-year-old involved in Class A drug activity, they explained: "We arrested all the main dealers, but with the kids, they've tried to work around them, not to get them charged." However, this discretion depends heavily on external agency support and is not embedded in policy.

They spoke positively about Operation Connect, a multi-agency initiative combining social services, housing, youth workers, and employment support to divert at-risk youth. "Try to get them jobs, courses they wouldn't be able to get onto," they explained. However, they warned that the programme is under-resourced: "A lot of the time when people are referred to Connect, it is a long wait or a no because of the workload they have."

A striking point concerned unrealistic expectations placed on newly released individuals; the interviewee cited cases of people released from prison in the morning and expected to attend rehabilitation meetings the same afternoon, often across the city. "They won't be interested in going across town to a meeting," they noted, not due to lack of motivation but because of the impracticality of navigating complex services post-release, as documented in re-entry research (Lewis et al., 2007). Such structural oversights are particularly harmful for trauma-affected individuals, who often struggle with trust and regulation, increasing their risk of reoffending (Willmot, 2022).

They were clear on training: "There is no training like that at the moment." Materials exist from the College of Policing but are rarely accessed, and formal sessions have largely been cut due to staffing pressures, creating knowledge gaps, particularly in recognising trauma-related behaviours.

Finally, the interviewee sharply criticised stop-and-search practices, linking them to trauma and community harm. Describing cases where a youth was stopped four times in one night, they argued that such tactics erode trust and re-traumatise already marginalised individuals (Scrase, 2020; Cogan et al., 2025). Overall, their reflections reinforce the urgent need to embed trauma awareness systematically across policing to enable effective, preventative interventions.

Interviewee 5: Police Constable (Frontline Experience with Youth and Vulnerable Communities)

Interviewee 5, a frontline police constable, described the daily difficulty of working with trauma-affected people. Their thoughts highlighted the emotional strains of working with vulnerable people, notably children and families, and frontline policing trauma knowledge gaps. The constable's community response experience revealed how systemic inadequacies affect police decision-making and offender outcomes. A key theme was the pervasiveness of trauma in everyday policing. Much of their work, they explained, involves responding to "corrosive backgrounds", domestic abuse, neglect, and substance misuse, which leave profound behavioural impacts on children. Despite this, they noted a lack of formal trauma-informed training for operational officers: "There's no training like that at the moment... most response cops don't talk to offenders." They strongly advocated for practical, empathy-driven education, arguing, "The more you understand, the more you can help." While praising domestic violence training, they emphasised the need for trauma-specific content to help officers identify learned behaviours, de-escalate sensitively, and reduce re-traumatisation, particularly when working with youth.

The constable also reflected on repeat offending within families, describing "vicious cycles" of generational trauma. They recounted returning to the same homes years later, finding the children of prior offenders now ensnared in similar patterns, a frustrating and disheartening reality that punitive approaches alone cannot fix. They added that some offenders even viewed prison as easier than life outside, "I know criminals that say life in prison is far easier than the streets." Burnout and officer fatigue were flagged as significant barriers. Overworked professionals, especially in youth justice and social care, can less apply proactive, trauma-informed strategies, increasing the risk that vulnerable individuals are overlooked, a concern supported by research on staff fatigue and service outcomes (Davies et al., 2023).

The interviewee concluded that inconsistent databases, training, and procedures between police agencies hamper collaboration, emphasising national consistency. They said everyone must be "singing from the same hymn sheet" for trauma-

informed practices to flourish nationally. This interview strongly emphasises the necessity for trauma-sensitive training and highlights how ignoring trauma damages communities and policing.

Interviewee 6: Employed Barrister (Legal Practitioner with Youth Justice Experience)

Interviewee 6 offered a legal perspective on trauma-informed prosecution and judicial proceedings. With considerable experience working with vulnerable groups, particularly youths and looked-after children, their perspectives emphasised the difficulty legal practitioners have in balancing trauma with prosecutorial duties. They also addressed how the Code for Crown Prosecutors and the National Protocol on Reducing Unnecessary Criminalisation of Looked-After Children promote sympathetic, preventive justice. The interviewee reaffirmed the enduring importance of the two-stage test, the Evidential and Public Interest Tests, in prosecution decisions. Notably, they stressed that public interest considerations apply only once the evidential test is met but that factors like youth vulnerability and trauma now feature more prominently than in previous decades. While the Code has remained stable since 1986, recent amendments reflect "greater legal and societal awareness of trauma and vulnerability." They noted a "significant drop in prosecutions involving children in care" due to the National Protocol's role in inter-agency cooperation. Despite not being a formal trauma-informed legal framework, the procedure has helped prosecutors consider trauma when making decisions about vulnerable groups. The interviewee said a young person's history is "virtually always of paramount consideration" in sentencing. Youth courts increasingly prioritise personalised interventions, rehabilitation, and diversion over punishment, coinciding with legislative initiatives to consider children's welfare, trauma history, and cognitive development.

Information exchange remained difficult. According to the interviewee, all prosecuting authorities must get relevant information for trauma-informed outcomes. They said that specialist youth prosecutors are a crucial "army" of

trained professionals navigating complex cases. The interview closed with a request for youth justice appeals policy clarity. The existing procedure of handwritten appeals may be too informal for trauma and victim effect assessments. The interview showed that while trauma-informed legal frameworks are still developing, prosecutorial procedures are increasingly recognising trauma. Preventing the wrongful criminalisation of young people with adverse life experiences requires additional training, supervision, and inter-agency communication.

Interviewee 7: Detective Chief Inspector (Strategic Policing Perspective) Interviewee 7 presented a senior-level viewpoint on how policing may better detect and address generational trauma. They discussed systemic issues and operational changes, highlighting culture change, early intervention, and cross-agency collaboration. They highlighted the expanding application of trauma-informed principles in youth-focused police decision-making after years of managing multi-agency strategies. Institutional culture was one of the biggest obstacles to trauma-awareness. Shifting from "traditional routes of the criminal justice system" to holistic, needs-based responses requires police to unlearn outdated practices and recognise trauma. The interviewee acknowledged police-community relations' historical failings and highlighted that open communication and transparency are necessary to end generational trauma-sustaining cycles of damage and distrust.

A key aspect of their response was the Child-Centred Policing Plan, adopted across operational departments and connected with the National Police Chiefs' Council (NPCC) strategy for children and youth. Performance frameworks assess progress on reducing reoffending, increasing outcomes for vulnerable children, and enhancing officer-child connections. This effort prioritises preventative and customised treatments. The interviewee explained how daily risk meetings and co-located safeguarding teams help identify at-risk individuals and provide targeted support like social work referrals and educational interventions.

They also highlighted community policing as the "central pillar" for addressing

generational trauma. Building long-term, trust-based relationships allows officers to challenge community distrust and identify risks before crises arise. Community teams play a key role in multi-agency partnerships, bringing together health, education, and social care services to deliver comprehensive responses.

They supported a nationwide trauma-informed policy framework developed by the College of Police. They cautioned against using trauma as a defence or mitigating factor without clarity and precision in establishing relevance. They advised formal inspections and evaluations to document and audit trauma- informed approaches. Although progress has been made, sustained transformation requires consistency, national leadership, and regular evaluation, according to the interview. Trauma-informed policing offers effective crime prevention and humane practice based on evidence and cross-sector collaboration.

C. Thematic Analysis Findings

Theme 1: Inconsistent Professional Understanding of Trauma

A central theme across the interviews was the inconsistency in professionals' understanding and application of trauma-informed practices. While some, particularly those working therapeutically with trauma-affected children (e.g., Interviewee 1), demonstrated strong expertise in trauma theory and neuroscience, others, especially within policing, admitted to limited exposure to even basic concepts such as ACEs. One frontline officer (Interviewee 5) noted that trauma was "extremely common" in daily encounters but emphasised the lack of relevant training to help officers respond with the needed awareness and empathy. This cross-sector discrepancy resulted in trauma interpretation and management disparities for youth. Interviewee 5 described how officer experience and personal background, such as parenting, could affect policing judgements. Moreland and Ressler (2021) agree that standardisation is necessary to ensure consistent, equitable service responses. Without a trauma-informed framework, such decisions become subjective and risk inconsistent or harmful outcomes for vulnerable youth.

Legal professionals (Interviewees 3 and 6) were more structured, although

differences appeared. According to Interviewee 6, trauma influences public interest assessments and young prosecutors under the National Protocol on Reducing Unnecessary Criminalisation of Looked-After Children. Interviewee 3 focused on punishment and court discretion improvements without mentioning the protocol. Role specialisation, institutional training, and access to current advice develop trauma-informed knowledge in the legal system. This issue shows how fragmented trauma knowledge weakens trauma-responsive systems. The absence of uniform understanding and language among those working directly with vulnerable children emphasises the necessity for coordinated national education efforts and consistent cross-sector policy application.

Theme 2. Systemic Barriers and Multi-Agency Disconnection

Participants consistently highlighted how structural and institutional barriers limit the effectiveness of trauma-informed approaches. Overstretched resources, rigid policies, and gaps between strategic aims and daily realities undermine coordinated responses. Interviewee 1 pointed to high caseloads in social care, which prevent in-depth work on generational trauma or family histories. This was an issue echoed by Asmussen et al. (2022), who noted that under-resourced child welfare systems restrict early intervention and the identification of trauma indicators. From a policing perspective, Interviewee 4 described unrealistic post- release demands, such as requiring a young person to attend a rehabilitation meeting hours after leaving prison, effectively setting them up for failure. Legal professionals raised related concerns; Interviewee 3 noted that while courts may acknowledge trauma, decisions often prioritise evidentiary thresholds and public interest over a fuller understanding of behavioural context, particularly in high- profile or repeat-offender cases.

A recurring challenge across sectors was multi-agency disconnection. Interviewee 1 observed that schools, social services, and police often operate in silos, leading to partial or conflicting assessments of a child's situation. Interviewee 2 reflected on past practice and described how multi-agency responses during pre-sentence reporting were inconsistently applied, suggesting long-standing but underused

potential for coordination. Interviewee 7 provided the strongest example of integrated practice, describing daily risk meetings and co-located safeguarding teams that enable early risk identification and joint interventions. These insights reveal that trauma-informed principles risk remaining rhetorical without reforms to resources, accountability, and cross-agency cooperation. As Brierley-Sollis (2023) warns, systemic change must move trauma awareness beyond surface-level commitments. However, Colvin et al. (2020) highlight the persistent challenges and variability in multi-agency collaboration across child welfare and youth justice systems.

Theme 3: Reactive vs. Preventative Approaches

A dominant pattern was the perception that criminal justice responses remain largely reactive. Interviewees in both policing and law described how preventative approaches have been deprioritised in favour of punitive or outcome-based metrics. Interviewee 4 explicitly criticised this trend, noting that preventative roles had been "cut" over time despite their long-term cost-effectiveness and positive impact.

Interviewee 2, drawing on their past experiences in youth justice, also reflected that greater investment in community-based interventions and early engagement with families was once more prevalent. While their account speaks to an earlier policy era, it implies that modern practice might benefit from revisiting those community-oriented models, especially in fostering trusted relationships with at- risk youth.

By contrast, Interviewee 7, in a senior policing role, offered examples of more proactive models currently in use, such as school engagement officers and bespoke safeguarding teams. However, they acknowledged that these practices are often limited by regional variation and are not part of a national strategy. The gap between what is understood to work (early intervention, trust-building) and what is prioritised (enforcement, quick resolutions) illustrates the policy-practice disconnect. This mismatch is directly relevant to the discussion, as it reveals how trauma-informed intentions often lose traction without systemic redesign.

Theme 4: Perceptions of Criminal Responsibility and Youth Vulnerability

The interviews revealed differing professional views on how trauma affects youth culpability, highlighting tensions between individual accountability and contextual mitigation. Legal professionals (Interviewees 3 and 6) acknowledged the relevance of trauma but noted the difficulty of demonstrating its direct influence on behaviour, especially within systems that prioritise evidentiary thresholds and procedural efficiency over therapeutic understanding.

Practitioners working directly with young people emphasised that trauma-related behaviours, such as emotional dysregulation, withdrawal, or aggression, are often misinterpreted as resistance or hostility. Interviewee 1 stressed the neurodevelopmental impacts of early trauma, while frontline officers observed that misunderstanding these trauma responses frequently lead to disproportionate criminalisation. This issue is particularly acute in court settings, where the challenges lie in distinguishing between genuine risk and trauma-induced behaviour under time-pressured, outcome-driven processes.

Notably, the interviews revealed that different sectors approach vulnerable young people through divergent lenses: some professionals focus predominantly on the risks they pose, while others prioritise the support they need. This distinction significantly shapes the outcomes young people experience within the justice system. Legal actors may emphasise accountability, while care-oriented practitioners advocate for rehabilitative, trauma-sensitive responses. These findings reinforce academic arguments, such as those by Case and Haines (2020), that call for embedding developmental psychology and trauma science more deeply into sentencing and legal frameworks. By integrating these insights, the system can move toward responses that are fairer, more developmentally appropriate, and genuinely rehabilitative, breaking cycles of disadvantage and reducing long-term harm.

D. Contribution to the Wider Area of Study

Although trauma, particularly generational trauma, holds notable significance on

development, it remains insufficiently addressed in youth justice discussions. This research underscores trauma's pivotal role in shaping criminal behaviour and stresses the urgent need for trauma-informed practices across the justice system. Drawing on insights from professionals in policing, legal services, social care, and education, the study reveals fragmented and inconsistent understandings of trauma across and within these sectors. A central aim of this article has been to raise awareness of "generational trauma" and expand recognition of trauma as a crucial yet underused concept in criminal justice. The findings show that past trauma significantly shapes present behaviour, and trauma-sensitive approaches offer the potential to improve both policy and outcomes. Early intervention, grounded in awareness of adversity and trauma-linked behaviours, provides an alternative to reactive, punitive models. This aligns with Melander (2023), who notes that preventive approaches are gaining traction in criminal law by addressing root causes while upholding individual rights and dignity.

Interviews highlighted that, while trauma is widely seen as a risk factor for crime, there is no shared operational language or framework guiding professional responses. This undermines fairness and effectiveness, particularly for vulnerable youth in complex situations. The findings align with broader academic arguments that trauma is not solely a clinical or welfare issue but a central social justice concern. Sabnis et al. (2021) argue that trauma intersects with systemic oppression and social inequalities, disproportionately affecting minority communities along race, class, and gender lines. Addressing trauma is thus foundational to advancing social equity and must inform both systemic reform and trauma-sensitive practices.

The research shows how legal, therapeutic, and procedural viewpoints had divided answers, contributing to interdisciplinary collaborative disagreements. A cross-sector framework incorporating trauma-informed safeguarding and legal responsibility is needed to bridge these divisions and ensure protective yet balanced responses. A more just, effective, and humane youth justice system requires addressing trauma as a moral obligation and strategic need.

E. Critical Reflection and Methodological Challenges

Conducting qualitative research on trauma-informed practices within the youth justice context presented practical, ethical, and analytical challenges which were addressed to ensure validity, reliability, and ethical integrity. Maintaining participant anonymity was a key concern, particularly for those within small, interconnected professional networks of criminal justice and social care in the North of England. To protect identities, participants were referred to by interview number and generalised job descriptions (e.g., "court-based professional"), with identifying details removed.

While Purposive Sampling ensured informed perspectives, the small sample size limited generalisability; however, the aim was depth and nuance rather than statistical representativeness. Future research could broaden demographic and regional representation. Open-ended, semi-structured interviews encouraged participants to share differing, personal experiences. However, this made standardisation during coding more difficult, due to varied interpretations of trauma-informed practice and policy. Narrative analysis provided in-depth insights, and thematic analysis following Braun and Clarke's six-step framework supported theme development and analytical rigour. That said, thematic analysis can be vulnerable to researcher bias if not carefully managed (Lochmiller, 2021). As a researcher interested in trauma-informed justice, maintaining objectivity required deliberate reflexivity, ongoing reassessment of personal assumptions, and regular peer feedback and supervisory guidance. Additionally, some interviews were not audio-recorded (at participant request), requiring live notetaking and follow-up email clarifications. While this posed challenges for capturing nuance, detailed summaries were reviewed with participants where possible to ensure accuracy and avoid misrepresentation.

F. Summary and Closing Remarks

This section presents a multi-sectoral view of generational trauma and trauma in general from seven criminal justice professionals. The interview analysis and theme evaluation findings show systemic inconsistencies in trauma-informed

principles' conceptualisation and application in England and Wales' youth justice systems. Some professions, especially in therapeutic and protective roles, understood trauma's impact on behaviour, but others, like frontline policing officers, lacked formal training or awareness of frameworks like ACEs . Further study shows that trauma-informed practice is inconsistently implemented across institutions and regions (Brierley-Sollis, 2023).

The thematic analysis highlighted key structural barriers to trauma intervention, including underfunding, staff shortages, and fragmented multi-agency collaboration. These findings align with Melander's (2023) critique that justice systems often remain reactive and procedurally rigid rather than preventive and supportive. In England and Wales' context, the continued focus on risk containment over holistic intervention hinders trauma-informed integration.

Crucially, the research reinforces that trauma should not be viewed solely as a mental health or social care matter but as a central social justice concern. Young people who experience trauma may show behaviours misinterpreted as misconduct, increasing their risk of disproportionate criminalisation, particularly among looked-after children and socioeconomically marginalised groups (Asmussen et al., 2022). The interviews also revealed contrasting professional paradigms: legal professionals tended to prioritise accountability and risk, while care and community workers leaned toward holistic support and rehabilitation. Bridging these divergent approaches is essential to creating an integrated, trauma-responsive justice model.

Ultimately, this study calls for a consistent, developmentally informed approach to youth justice, where trauma histories, psychological maturity, and social context are central to assessments and interventions. Scholars like Cogan et al. (2025) and Silvester (2022) stress that shifting away from punitive models toward developmental sensitivity is crucial to breaking cycles of disadvantage and criminalisation. By amplifying practitioner insights, this research highlights critical gaps in current practice and lays the groundwork for advancing more preventative, responsive, and ethically grounded approaches.

6. *Trauma-Informed Interventions in Youth Justice – an Analysis of Current Frameworks*

A. Introduction

This section critically examines several key trauma-informed frameworks influencing youth justice practice across England and Wales. While earlier sections referenced these models, this section now assesses their contributions to trauma- responsive and preventative crime strategies. Specifically, it analyses how these frameworks align with trauma-informed principles, their practical application in youth justice settings, and how they inform the central analysis question:

To what extent does trauma contribute to criminal behaviour, and how can understanding these trauma patterns inform more effective crime prevention strategies in England and Wales?

Rather than cataloguing every trauma-informed document, this section focuses on a subset of frameworks that stood out during primary research for their relevance, practitioner endorsement, and academic grounding. These include the National Protocol on Reducing the Criminalisation of Looked-After Children, Richard Rose's Therapeutic Life Story Work, the Trauma-Informed Wales Framework, the Youth Justice Blueprint for Wales, the Child First approach, and the Portsmouth Youth Justice Service model. A striking observation from this review is the disparity between England and Wales in embedding trauma-informed youth justice. Wales has taken significant national steps, including legislative alignment, while England remains more fragmented and locally driven. This discrepancy is notable given the shared legal system.

B. Trauma-Informed Wales Framework

The Trauma-Informed Wales Framework (ACE Hub Wales & Traumatic Stress Wales, 2022) is one of the UK's most comprehensive attempts to embed trauma-

responsive principles across public services, including youth justice. Developed collaboratively by Traumatic Stress Wales and the ACE Hub, the framework takes a holistic approach, recognising trauma not just as an individual psychological concern but as a social and public health issue. It emphasises the cumulative effects of adversity and calls for system-wide action.

Central to the framework is its four-tiered model:

1. Trauma-Aware (universal recognition),
2. Trauma-Skilled (practical application),
3. Trauma-Enhanced (specialist expertise),
4. Specialist Interventions (formal therapies).

(ACE Hub Wales & Traumatic Stress Wales, 2022)

This approach avoids a one-size-fits-all approach, allowing scalable integration depending on professional roles. Youth justice professionals, for example, are expected to distinguish between frontline custody responsibilities and more therapeutic, relational interventions. The framework's five trauma-informed principles, relationship-focused, resilience-based, person-centred, inclusive, and universal, underscore the importance of addressing behaviour's roots, particularly in trauma-affected youth. It promotes cross-sector collaboration, challenging bureaucratic silos that often prevent agencies from sharing crucial trauma histories (Silvester, 2022). Importantly, the model also warns against over-reliance on quantitative "trauma scores," encouraging ethical, person-led evaluations. In youth justice, this means designing systems that heal rather than harm, recognising how trauma mismanagement can lead to reoffending and deepened social exclusion (ACE Hub Wales & Traumatic Stress Wales, 2022).

C. Youth Justice Blueprint and Implementation Plan for Wales

The Youth Justice Blueprint for Wales (Ministry of Justice & Welsh Government,

2023b) operationalises these trauma-informed ideals into concrete justice reforms. Its six priority areas, prevention, diversion, community intervention, custody, resettlement, and system oversight, embed trauma-sensitive practices at every stage. A key innovation is the Enhanced Case Management (ECM) model: a trauma-informed, psychology-led approach for children with complex needs, focusing on clinical formulation, multi-agency collaboration, and regular review. ECM reflects developmental criminology, recognising that unresolved trauma disrupts child development and can manifest as justice-involved behaviour (Brierley-Sollis, 2023).

The Implementation Plan (Ministry of Justice & Welsh Government, 2023a) details how to operationalise trauma principles system-wide: expanding ECM, training Youth Offending Team (YOT) staff, integrating ACEs frameworks into diversion schemes, and developing trauma-informed custodial units located near children's communities. These smaller, integrated facilities aim to prevent re-traumatisation by offering mental health and educational support. While these initiatives reflect promising national coherence, challenges persist. As Brierley-Sollis (2023) notes, implementation still varies across local YOTs, risking uneven delivery. Moreover, trauma-informed practice must contend with entrenched punitive cultures. Achieving long-term change requires sustained structural commitment, evaluation, and accountability.

D. National Protocol on Reducing the Criminalisation of Looked-After Children

In England, the National Protocol on Reducing the Criminalisation of Looked-After Children (Department of Education, 2018) offers one of the clearest trauma-informed justice strategies. The protocol recognises that many children in care have experienced significant trauma, abuse, neglect, disrupted attachment, and urges agencies to respond to behaviours with understanding, not punishment. The protocol mandates trauma and attachment training for professionals working with care-experienced youth, encouraging early intervention, de-escalation, and

diversion. It promotes dynamic risk assessments and restorative responses, reflecting broader youth justice literature that caution against the criminogenic harms of unnecessary formal justice involvement (McAra & McVie, 2017). Importantly, the protocol also recognises trauma's longevity, encouraging continued support for care leavers up to age 25. While non-statutory, it reflects a meaningful shift toward rights-based, trauma-sensitive practice and, when implemented effectively, offers a powerful crime prevention tool.

E. Richard Rose's Life Story Therapy with Traumatised Children

Richard Rose's Therapeutic Life Story Work (Rose, 2012) provides a practical, developmentally sensitive trauma intervention model grounded in neuroscience and attachment theory. Though originally designed for therapeutic settings, its core principles, emotional safety, narrative coherence, and relational healing, are deeply applicable to youth justice.

Rose's model draws on contemporary trauma theory, including Bruce Perry's influential work in The Boy Who Was Raised by a Dog (Perry, 2017), which shows how severe early trauma reshapes the developing brain, impairing trust, impulse control, and emotional regulation. Perry's research demonstrates that defiant or oppositional behaviours often reflect survival adaptations, not inherent delinquency, and that without addressing these neurodevelopmental wounds, justice systems risk reinforcing punishment cycles.

Life Story Therapy helps children construct a coherent narrative of their past, fostering emotional reflection and resilience. Its structured stages and toolkits (such as life story books) provide concrete resources for youth justice professionals seeking to move beyond reactive responses and engage meaningfully with trauma-affected youth.

F. The Child First Approach

The Child First approach (Youth Justice Board, 2022) reframes youth justice by

centering children's rights, development, and potential. It shifts crime prevention strategies away from managing risk and toward relational, strengths-based rehabilitation. Grounded in developmental psychology, Child First recognises that trauma can exacerbate children's emotional and cognitive vulnerabilities, leading to behaviours often misunderstood by justice systems. It promotes diversion, recognising that early system involvement can increase criminality over time (McAra & McVie, 2010), and champions genuine collaboration with children, moving beyond tokenism to involve them in shaping interventions. Child First also acknowledges the structural factors, poverty, discrimination, care experience, that shape trauma exposure. It situates youth justice within a broader socio-political context, urging professionals to see children holistically, not simply as risk profiles.

G. Portsmouth Youth Justice Service (PYJS) Practice Framework

The Portsmouth Youth Justice Service (2025) offers a model for applying trauma-informed principles locally. Aligned with Child First, PYJS emphasises seeing the child holistically, recognising the interplay of developmental, psychological, and social factors. Rejecting "adultification" underscores that children process experiences differently from adults (Cauffman & Steinberg, 2000).

PYJS integrates ACEs awareness through tools like the Iceberg Model, helping practitioners explore hidden trauma drivers. Its relational, reflective, and restorative practices aim to build trust, adapt to environmental triggers, and promote positive identity development. By combining trauma theory with evidence-based approaches such as the Risk, Need, and Responsivity (RNR) model, PYJS balances public protection with child-focused, therapeutic care.

Importantly, PYJS explicitly addresses intersectionality, ensuring that race, gender, disability, and socio-economic inequalities are considered in designing equitable services. This localised application illustrates how trauma-informed principles can be operationalised effectively through tailored, context-sensitive service delivery.

H. Comparative Analysis: England vs. Wales

While both England and Wales share a legal system, Wales has taken a notably more cohesive, nationalised approach to trauma-informed youth justice. The Welsh Trauma-Informed Framework and Youth Justice Blueprint reflect legislative alignment, cross-sector coherence, and a rights-based ethos. England's landscape, by contrast, remains more fragmented, relying on local adaptations like PYJS or non-statutory protocols for looked-after children.

This discrepancy highlights the challenges of scaling trauma-informed principles system-wide. Even in Wales, local implementation variability poses risks (Brierley-Sollis, 2023). Across both jurisdictions, sustained structural investment, national training standards, and long-term evaluation will be critical to ensuring trauma-informed approaches deliver their full preventative and rehabilitative potential.

I. Conclusion

This section has reviewed how key trauma-informed frameworks contribute to evolving youth justice practice in England and Wales. Whether through national models like the Welsh Blueprint, England's National Protocol, or localised innovations like Portsmouth YJS, trauma theory is increasingly shaping justice interventions. Core to all these approaches is the recognition that trauma is not merely a clinical issue but a developmental, social, and structural concern. Trauma-informed systems aim to heal, build resilience, and prevent harm, reframing crime prevention as relational and rehabilitative rather than punitive.

However, significant barriers remain. Variability in implementation, definitional inconsistencies, and entrenched system cultures hinder unified progress. Future research must examine long-term outcomes, ensuring that trauma-informed frameworks move beyond policy rhetoric into embedded, evidence-based practice. Ultimately, justice systems that acknowledge, empower, and co-produce with young people have the greatest potential to break cycles of disadvantage and

create meaningful, lasting change.

7. Conclusion

This article set out to explore the relationship between trauma and youth offending, with a particular focus on how trauma-informed approaches can improve crime prevention strategies and justice outcomes in England and Wales. The study has brought attention to the potential and difficulties of incorporating trauma-informed practices into criminal justice systems by drawing on theoretical frameworks, empirical research, practitioner insights, and policy analyses. The findings show that trauma, particularly when unaddressed, plays a profound role in shaping behavioural trajectories, increasing the likelihood of criminalisation, and perpetuating cycles of harm across generations (Craig et al., 2021; McManus et al., 2018; Halsey, 2018).

The evidence presented in this article demonstrated that children who have been exposed to multiple ACEs are significantly more likely to experience emotional dysregulation, heightened impulsivity, and maladaptive coping mechanisms such as aggression or substance misuse (Craig et al., 2021; Keels, 2022). These behaviours are often misunderstood by justice systems, which tend to interpret them as defiance or inherent delinquency rather than as the survival adaptations and distress signals they are (Perry, 2017; Crosby, 2016). Without addressing the neurodevelopmental and relational impacts of trauma, justice interventions risk reinforcing cycles of punishment rather than breaking them (Rose, 2012). Practitioners interviewed in this study consistently emphasised the need for justice systems to shift their focus from asking "What is wrong with this child?" to "What has happened to this child?" — a shift that reflects the core principles of trauma-informed practice (Crosby, 2016; Brierley-Sollis, 2023).

The research also reveals a striking disparity between England and Wales in the development and implementation of trauma-informed youth justice strategies. Wales has taken significant steps to embed trauma-sensitive principles into its justice

framework, as reflected in national models like the Youth Justice Blueprint and the Trauma-Informed Wales Framework (Ministry of Justice and Welsh Government, 2023a; ACE Hub Wales and Traumatic Stress Wales, 2022). These frameworks integrate clinical, developmental, and rights-based perspectives to create a cohesive, preventative, and rehabilitative system. In England, by contrast, the landscape remains more fragmented, relying on non-statutory protocols such as the National Protocol on Reducing the Criminalisation of Looked-After Children (Department for Education, 2018) and local innovations like the Portsmouth Youth Justice Service (Portsmouth Youth Justice Service, 2025). In order to make trauma-informed approaches more than just words on paper and part of everyday practice at all levels, there needs to be consistency in national policy, consistent funding, and a strong political will to see initiatives through (Brierley-Sollis, 2023; Nicholls, 2024).

However, structural and cultural barriers persist across both jurisdictions. The empirical research highlighted chronic underfunding, heavy caseloads, and inconsistent inter-agency collaboration as key challenges to implementing trauma-informed strategies effectively (Asmussen et al., 2022; Silvester, 2022). Frontline professionals, particularly in policing, reported a lack of formal trauma training and limited institutional support, while legal practitioners described difficulties integrating trauma considerations into evidentiary frameworks and sentencing processes (Interviewee 3 Interviewee 6). Without shared operational frameworks and consistent practitioner education, trauma-informed approaches risk being undermined by reactive, punitive pressures prioritising short-term outcomes over long-term rehabilitation (Brierley-Sollis, 2023; McAra and McVie, 2017).

To address these challenges, this article argues for a multi-level approach. National governments should embed trauma-informed principles directly into legislation, performance standards, and regulatory frameworks, making them core requirements rather than optional add-ons (Ministry of Justice and Welsh Government, 2023a; Youth Justice Board, 2022). Cross-sector collaboration must be strengthened through integrated data systems, joint training, and co-located services

to ensure that vulnerable children are seen holistically rather than through narrow institutional lenses (Silvester, 2022; Wilson et al., 2023). Practitioners must also be supported with adequate resources, reflective supervision, and ongoing trauma-specific education to ensure they can engage meaningfully with the emotional and relational dimensions of their work without burnout or drift (Davies et al., 2023; Booth, 2022).

Importantly, addressing trauma is not just a technical or organisational issue but a fundamental matter of justice. Trauma disproportionately affects marginalised populations, including those disadvantaged by poverty, racial inequality, disability, and care experience, compounding systemic disadvantage and increasing the risk of criminalisation (Keels, 2022; Sabnis et al., 2021). Justice systems that fail to recognise and respond to trauma effectively risk perpetuating the very inequalities they are supposed to mitigate. Conversely, embedding trauma-informed approaches offers the potential to promote individual rehabilitation, community resilience, and social equity (Banwell-Moore, 2024; Randall and Haskell, 2013).

In conclusion, this article calls for a justice system that is developmentally informed, relationally grounded, and socially just. Such a system would recognise that breaking cycles of crime requires first breaking cycles of harm, focusing not only on risk management and punishment but also on healing, resilience, and empowerment (Melander, 2023; Cogan et al., 2025). Trauma-informed practice offers a powerful framework for designing interventions that address the root causes of offending, reduce reoffending, and support the long-term well-being of some of society's most vulnerable young people. By amplifying practitioner voices and integrating empirical evidence with theoretical insights, this study aims to contribute to the ongoing conversation about how justice systems can move beyond reactive, punitive models toward more preventative, responsive, and ethically grounded approaches. The stakes are high, but the potential rewards are substantial: a youth justice system that not only reduces crime but also fosters dignity, hope, and belonging for generations to come.

Are US Publicity Rights the Way Forward in Protecting Artists' Vocal Likeness from Generative AI in the UK?

RORY LYTTLE*

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Abstract

The disruptive impact of artificial intelligence (AI) has shaken the entertainment industry to its core. Amongst the most pressing concerns is AI's ability to replicate artists' voices with startling precision, creating realistic deepfakes that threaten artists' autonomy, reputation, and economic interests. In the face of these uncertainties, artists in the UK are forced to rely on the existing legal framework, yet serious doubts remain over whether these avenues can combat these emerging challenges. This paper argues that the UK should introduce a US-style right of publicity, due to the currents laws' inadequacy in responding to AI vocal replication. It will achieve this by conducting a comparative analysis of the protections available for artists in the UK and the US. It begins by identifying the shortcomings of UK laws pertaining to intellectual property and misrepresentation. These gaps underscore the need to explore alternative approaches, particularly from the US, a fellow common law jurisdiction with a large creative industry. Emphasis will be placed on California's right of publicity, which has been employed to protect indicia of personal identity, including vocal likeness, and has potential to offer robust protections against AI-driven misappropriation. Before calling for reform, the UK's current

policy trajectory regarding AI will be examined, highlighting its ineffectiveness in providing recourse for artists. Ultimately, it concludes that the UK should follow in the footsteps of the US and adopt a right of publicity to give artists greater control over the commercial exploitation of their vocal identity in the digital age.

1. Introduction

After fifteen gruelling years, fans of Oasis are finally witnessing the long-awaited return of the Gallagher brothers, as they reunite on stage and tease the possibility of new music.[1] In this desperate wait, some fans found an unexpected way to hear fresh material, without even needing the brothers to finish their feud. In April 2023, a band named Breezer released an album titled "AISIS"[2], which was entirely written and performed by the band, except for one notable exception: the vocals were not their own. The band had used Artificial Intelligence (AI) to completely recreate Liam Gallagher's vocals[3]. While Liam praised the project as "mega" [4], this episode highlights a growing concern in the music industry. Generative AI now has the capability to convincingly replicate an artist's voice to a near indistinguishable accuracy[5], raising concerns over consent, control, and intellectual property.

In the digital age, society spends increasing time consuming media featuring their favourite artists. Whether these artists are celebrities, influencers or small emerging performers, their work and talents are sources of inspiration, admiration, and

[1] Rose Hill, 'Noel Gallagher records SIX new Oasis songs - and has plan to keep peace with Liam' *The Mirror* (London, 10 November 2024) <https://www.mirror.co.uk/3am/celebrity-news/noel-gallagher-records-six-new-34076388> accessed 21 April 2025.
[2] Breezer, 'AISIS - The Lost Tapes / Vol.1 (In Style of Oasis / Liam Gallagher - AI Mixtape/Album)' (*Youtube*, 14 April 2023) <https://www.youtube.com/watch?v=whB21dr2Hlc> accessed 21 April 2025.
[3] Harry Fletcher, 'Oasis fans 'bored' of waiting for reunion created entire AI album and even Liam was 'mad for it'' *Indy100* (London, 27 August 2024) <https://www.indy100.com/showbiz/oasis-ai-album-liam-gallagher-2669076703> accessed 21 April 2025.
[4] Liam Gallagher (@liamgallagher), 'Mad as f*** I sound mega' (*X/Twitter*, 19 April 2023) <https://x.com/liamgallagher/status/1648540394639032320> accessed 21 April 2025.
[5] Reid M Koski, 'Warhol, Drake, and Deepfakes: Monetizing the Right of Publicity in the Generative AI Era' (2024) 40(4) Georgia State University Law Review 981, 991; Prachi Patel, 'AI Voice Enters the Copyright Regime: Proposal of a Three-Part Framework' (2024) 34(2) Fordham Intellectual Property Media and Entertainment Law Journal 451, 458.

imitation. The commercialisation of an artist's vocal likeness has grown significantly in the past couple of centuries, as artists increasingly monetise their voices through various forms, such as through commercial endorsements and performances. The proliferation of the "culture of celebrity" in the UK has amplified the financial value of an artist's voice, making it a key part of their brand identity and means of trade.[6] Consequently, artists may seek greater control over their vocals to prevent outside actors from using it without their consent. Previously, in response to global advances in communication and reproduction of information, intellectual property rights evolved to protect the artist's creativity and innovation.[7] Yet despite these developments, there has been a lack of willingness in the United Kingdom (UK) to create an explicitly distinct right to protect an artist's unique vocal identity which they spent a lifetime cultivating.[8]

This has become more pertinent with the recent improvement in AI technology to create vocal replications. Vocal replications or 'deepfakes' are synthetically created audio that sound perceptually identical to an individual's voice, without that individual's involvement.[9] This technology has now spread outside of developers and those with advanced technological proficiency to the common internet user[10], presenting a real risk of oversaturation of these AI generations. Without the artist's vocal talent being unique to them and thus scarce, the reduction in market demand could dilute the value of their performances.[11] Consequently, there are fears of job loss and unfair remuneration arising from these programs. A particularly concerning development from these AI-generated vocal replications, is that consumers can no

[6] Simon Boyes, 'Legal Protection of Athletes' Image Rights in the United Kingdom' (2015) 15 International Sports Law Journal 69, 70.
[7] Ana Leticia Sousa Arraes de Resende, and Éfren Paulo Porfirio de Si Lima, 'Challenges of Copyright Law in the Era of Artificial Intelligence: Authorship and Ownership of Posthumous Musical Works Using the Voice of Deceased Artists' (2024) 15 Beijing Law Review 2034, 2035.
[8] Hayley Stallard, 'The Right of Publicity in the United Kingdom' (1997) 18 Loyola of Los Angeles Entertainment Law Journal 565, 565.
[9] Anna Shtefan, 'The Digital Replication Right as the Element of the Right of Publicity in the AI Age' [2024] SSRN Electronic Journal 1, 11.
[10] Kelsey Farish, 'Do Deepfakes Pose a Golden Opportunity? Considering Whether English Law Should Adopt California's Publicity Right in the Age of the Deepfake' (2020) 15(1) Journal of Intellectual Property Law & Practice 40, 41.
[11] Gabrielle Jabour, 'Drake or Fake? Perceptions, Concerns, and Business Implications of AI-Generated Vocals' (Doctoral Dissertation, The University of Texas at Austin 2024) 97.

longer be relied upon to differentiate the original artist's work to that of an AI-created work. A poll revealed that respondents could only correctly distinguish between human and AI vocals 37% of the time.[12] As the technology improves this confusion may only get worse.

Responding to these concerns, many artists have called for greater protections from both the platforms and their governments.[13] However in the UK, it is questionable whether existing protections could sufficiently safeguard artists' interests against emerging AI. To address this, successive UK governments have concentrated their focus on placing accountability in the hands of the developers over safeguards around consensual training data.[14] Even if these platform-level safeguards are implemented, artists are still left with no recourse against entities creating and distributing works using their unauthorised AI-generated voice. As a result, some policymakers, like the All-Party Parliamentary Group on Music (APPG), have proposed the introduction of a right of publicity in the UK, similar to that found in the United States (US).[15] The right of publicity is a right that precludes the unpermitted utilisation of an individual's personality, that being their voice, image, name and likeness.[16] This will provide an unambiguously clear mechanism that can protect artists and individuals alike, without stretching existing doctrines in the UK beyond their intended scope.

This paper will argue that a right of publicity should be adopted in the UK, as the UK's current protections are insufficient to address the challenges posed by generative AI. A comparative legal analysis will be conducted between the UK and US frameworks to determine whether their existing regulations are adequate in securing artists' vocal likenesses against unauthorised imitations. Unlike previous comparative

[12] ibid, 71.
[13] Artist Rights Alliance, '200+ Artists Urge Tech Platforms: Stop Devaluing Music' (*Medium*, 1 April 2024)<https://artistrightsnow.medium.com/200-artists-urge-tech-platforms-stop-devaluing-music-559fb109bbac> accessed 21 April 2025.
[14] Department for Science, Innovation and Technology, *A pro-innovation approach to AI regulation: Government response to consultation* (Cm 1019, 2024) 31.
[15] The All-Party Parliamentary Group on Music, 'Artificial Intelligence and the Music Industry – Master or Servant?' (The All-Party Parliamentary Group on Music, 1 May 2024) 18 <https://www.ukmusic.org/wp-content/uploads/2024/04/APPG-AI-Report-Low-res.pdf> accessed 21 April 2025 (APPG Report).
[16] Bzhar Abdullah Ahmed, 'Critical Analysis of the Right of Publicity: A Comparative Study' (2024) 34(2) Revista Electrónica de Direito 10, 14; APPG Report (n 15), 8.

studies on publicity rights, this paper is novel in its focus on the specific interaction of the law with artists' vocal likeness and AI vocal replications. Section 2 will critique the protections in the UK, first examining the existing intellectual property rights artists can rely on and then assessing the tort of passing off in the context of vocal deepfakes. Section 3 will then consider the US's approach to copyright, before analysing the US right of publicity. It will pay particular attention to California's publicity right and its applicability to the current situation with unauthorised AI vocal replication. Section 4 will critique the UK government's hands-off approach to regulating AI, arguing that a clear legislative response is needed before technology outpaces the law entirely.

2. Protections under UK Law

Neither legislation nor the common law in the UK have enshrined a right over an artist's vocal likeness into law. Instead, protection against unauthorised commercialisation is indirectly addressed through other existing rights and actions, the most notable being through copyright and the tort of passing off. In this section, the current legal protections available to artists will be critically analysed to determine whether they sufficiently protect an artist's voice, particularly in the context of unauthorised AI vocal replication. It will be argued that the current scope of these protections is not sufficient in protecting artists against these modern threats, and that further reform is needed to address this inadequacy in the law.

A. Intellectual Property Law

Copyright

UK copyright protections are governed by the Copyright, Designs and Patents Act 1988 (CDPA)[17]. The CDPA outlines copyright as an intellectual property right that protects both authorial works, such as musical works, and entrepreneurial works, including sound recordings and broadcasts.[18] Copyright grants the owner exclusive

[17] Copyright, Designs and Patents Act (CDPA) 1988.
[18] ibid, s1.

rights to copy, communicate to the public and adapt the work.[19] If an artist's vocal likeness was successfully recognised as a copyrightable subject matter, these rights could offer a potential mechanism for artists to safeguard against unauthorised AI-generated vocal replications.

To obtain copyright protection, two criteria must be satisfied: originality[20] and fixation[21]. Traditionally, the UK adopted an interpretation of originality determined by the degree of "skill, judgment and labour" invested into creating the work.[22] The rationale aimed to protect the author's investment in their creation from unfair competition.[23] Creativity was not important in this determination so long as during the process of creation, the expression had originated from the author and was therefore not copied.[24] However, following the Court of Justice of the European Union (CJEU) decision in *Infopaq International v Danske Dagblades Forening* (*Infopaq*)[25], the test for originality was changed to only require the work to constitute the "author's own intellectual creation".[26] This shift from a labour-based to a creativity-based approach was confirmed in the UK in *NLA v Meltwater*[27], and further clarified in *Painer v Standard*[28], explaining that originality arises through the expression of the author's free and creative choices.[29] The removal of the labour requirement broadened the scope of what may qualify as copyrightable works to any part of the work, even allowing for the inclusion of technical subject matter.[30]

In theory, vocal expressions may satisfy the *Infopaq* standard, as the artist's technical use of their vocals in a work is based on their intentional intellectual decisions,

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[19] ibid, s16(1).
[20] ibid, s1.
[21] ibid, s3(2).
[22] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 278.
[2323] Andreas Rahmatian, 'Originality in UK copyright law: The old "skill and labour" doctrine under pressure.' (2013) 44(1) IIC-International Review of Intellectual Property and Competition Law 4, 5.
[24] *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 609.
[25] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569
[26] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, art 2(a); *Infopaq* (n 25), para 6.
[27] *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch).
[28] C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533.
[29] ibid, para 89.
[30] Case C-833/18 *Brompton Bicycle Ltd v Chedech/Get2Get* [2020] OJ C271/12, para 26.

drawing upon their skill and ability. Nevertheless, copyright only protects specific expressions directly fixed within a work and will not extend to the artist's wider vocal identity.[31] Section 3(2) CDPA explicitly makes clear "copyright does not subsist in a… work unless and until it is recorded"[32]. Consequently, artists may struggle to assert copyright protection in cases of unauthorised vocal replication that result in entirely new composition of their vocals, where no specific vocal element has been clearly reproduced from a pre-existing, fixed recording of their original work.

Inadvertently, *Infopaq*'s broader conception of originality may strengthen the legal standing of the AI-generated works, since it no longer requires demonstrable skill or labour. As confirmed in *Brompton Bicycle v Chedech/Get2Get*[33], originality may still be present despite being "dictated by technical considerations" so long as the work reflected the author's creative choices.[34] While human impersonators may justify the originality of their imitations by citing the effort and skill required to replicate an artist's voice, AI users delegate such labour to the AI's algorithmic processes. Accordingly, provided the user contributes enough creative input through their initial prompts, the resulting AI-generated output containing the artist's voice may qualify for protection.[35] Although the issue of ownership of AI-generated works falls outside the scope of this paper, it is important to note that current copyright law may unintentionally benefit those misappropriating vocal likeness, while failing to protect the original artists the law aims to protect and whose identities are being digitally replicated.[36]

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[31] Dominic Watt, Peter Stuart Harrison and Lily Cabot-King, 'Who Owns Your Voice? Linguistic and Legal Perspectives on the Relationship Between Vocal Distinctiveness and the Rights of the Individual Speaker' (2020) 26(2) International Journal of Speech, Language and the Law 137, 149; Ilya Ilin and Aleksei Kelli, 'The Use of Human Voice and Speech in Language Technologies: The EU and Russian Intellectual Property Law Perspectives' (2019) 28 Juridica International 17, 20; Farish (n 10), 43.

[32] CDPA 1988 (n 17), s3(2).

[33] *Brompton Bicycle* (n 30).

[34] *Brompton Bicycle* (n 30), para 26.

[35] Hafiz Gaffar and Saleh Albarashdi, 'Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape' (2024) 15(1) Asian Journal of International Law 23, 24.

[36] Lindsay Paquette, 'Artificial Life Imitating Art Imitating Life: Copyright Ownership in AI-generated Works' (2021) 33(2) Intellectual Property Journal 183, 208

Furthermore, protecting the fragmented vocal identifiers that cumulatively form an artist's vocal persona under copyright is hindered by the requirement to establish sufficient substantiality to constitute an infringement. Section 16(3) CDPA outlines that infringement occurs if "any substantial part of the work" is copied.[37] Although there is no definitive length of sound that courts have decided amounts to infringement, in *Pelham*[38], the CJEU found that a producer of a phonogram, that is "any exclusively aural fixation of sounds"[39], has the right to prevent another person from sampling their phonogram, even if it amounts to a couple of seconds.[40] Notably, sampling does not require prior authorisation if the modified work is "unrecognisable to the ear".[41] This suggests the test for substantiality is qualitative rather than quantitatively based on duration.[42] However, applying this test to vocal persona introduces a significant level of subjectivity. Courts are required to discern what would be unrecognisable to a fictitious "average music listener".[43] This creates legal uncertainty when applied to AI-generated works that often fragment these samples to a minuscule scale and rearrange them to create the augmented voice. Vocal inflections, cadence, and other unique vocal attributes may be difficult to isolate and identify as originating from a specific work or recording of the artist. The identification of these infinitesimal sound fragments may be considered too trivial for the courts and therefore not satisfy the threshold of substantiality required to be recognised as original works in their own right.[44] This is a reflection of the *de minimis* principle, that the law should not concern itself with small things.[45] From a practical perspective, it would be unwise to further burden the courts with the task of allocating increasing time and resources into parsing the exact minute sample in order to fit vocal likeness

[37] CDPA 1988 (n 17), s16(3).
[38] Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] OJ C319/05.
[39] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (adopted 26 October 1961, entered into force 18 May 1964) 496 UNTS 43 (Rome Convention) art 3.
[40] *Pelham* (n 38), para 29
[41] *Pelham* (n 38), para 39
[42] Eleonora Rosati, 'Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision' (2010) 28(4) Journal of the Copyright Society of the USA 795, 806.
[43] Bernd Justin Jütte and João Pedro Quintais, 'The Pelham Chronicles: sampling, copyright and fundamental rights' (2021) 16(3) Journal of Intellectual Property Law & Practice 213, 217.
[44] Watt and others (n 31), 154.
[45] Henry Campbell Black, *Black's law dictionary*. (7th edn, West Publishing Company 1999).

infringement into the copyright framework. Therefore, the application of this substantiality test to vocal personality presents considerable limitations in addressing AI vocal replication.

Another complication that arises within copyright law in addressing AI vocal replication is the issue of determining which original work the AI is liable for infringing on, and the ownership of that work. AI models generate new works by processing significant amounts of source material.[46] It is near impossible for courts to pinpoint the origin of vocal identifiers used in synthesising the new voice and assign them to particular sources.[47] Without specifying the source of the work, the allocation of liability becomes invariably more difficult. Complicating this further, copyright is not only vested by the vocal performer in many cases, but instead often assigned to multiple differing parties, whether they be authors of the work, publishers, or recording studios.[48] The excessive number of owners of particular works highlights the weakness of attempting to map copyright legislation onto unauthorised vocal replication. The lack of a clear instruction for attributing liability in cases of AI vocal replication sheds lights on a significant gap in current copyright protections. To avoid this dilemma, some scholars argue that UK law should recognise that the rights over an artist's vocal likeness should always be vested in the artist themselves, this position currently having no basis in UK copyright law.[49] This will make it easier for the artist themselves to pursue action against infringers who falsely use their vocal likeness. Without this reform, the law surrounding copyright remains insufficient to address the issues arising from modern AI technology.

Performers' Rights

The CDPA also sets out separately a right addressed to an artist's performance. The statutory definition of a "performance" in the CDPA is a live performance of a dramatic, musical, or recitation of a literary work given by one or more individuals,

[46] Bob LT Sturm and others, 'Artificial Intelligence and Music: Open Questions of Copyright Law and Engineering Praxis' (2019) 8(3) MDPI Arts 115, 116.
[47] Farish (n 10), 43.
[48] CDPA 1988 (n 17), s9(2).
[49] Stallard (n 8), 587; Gillian Black, 'Exploiting Image: Making a Case for the Legal Regulation of Publicity Rights in the United Kingdom' (2011) 33(7) European Intellectual Property Review 413, 418.

including recordings made from that performance.[50] Performers' rights were introduced in 1925[51], to address the concerns of performers that there was no recourse against the unconsented exploitation of their performances through emergent technologies, like the gramophone and radio, that could record and redistribute their work. Performers at the time were disincentivised from agreeing to have their performances recorded, as they feared they would have no control over how their performances would be utilised[52], leading to the introduction of statutory provisions that were stated to prevent a person from "stealing the talents of their neighbour".[53]

However, performers' rights are limited and do not sufficiently address the complexities of AI generation. The requirement that a performance must be "live" creates problems when looking for actions against AI voice replication. Watt *et al* argue that in this way it is not the performer's contribution through projecting their voice into the world that creates the performer's right but instead the act of fixing the voice onto a tangible medium.[54] The voice in these circumstances can only be protected if it has been fixed onto a reproduceable recording or other similar form of capturing. Vocal projections replicated by AI that have not already existed in the past would therefore fall outside the scope of performers' rights.

Performers' rights were designed to address the reproduction of specific performances, not the outright replication of an artist's vocal persona. AI now has the ability to create entirely new performances from an artist's voice. As this effectively amounts to "stealing"[55] the artist's vocal talents, the law currently seems outdated compared to its earlier objectives.

In summary, the difficulty in identifying the source material from fixed performances or existing content creates significant barriers to enforcement of the actions within the CDPA, leaving artists vulnerable to exploitation by unauthorised AI replication.

[50] CDPA 1988 (n 17), s180(2).
[51] Dramatic and Music Performers Protection Act 1925.
[52] Richard Arnold, *Performer's Rights* (4th edn, Sweet & Maxwell. 2008) 18.
[53] HL Deb 13 July 1925, vol 62, col 21.
[54] Watt and others (n 31), 149.
[55] HL Deb 1925 (n 53), col 21.

B. Tort of Passing Off

Under UK common law, the tort of passing off has been developed to intervene in cases where a person attempts to intentionally deceive the public using another's reputation. The tort originated in the case *Perry v Truefitt*[56] introducing the principle that a "man is not to sell his own goods under the pretence that they are the goods of another man"[57]. The tort has usually been applied to cases involving the unauthorised use of a celebrity's image in merchandising. Although many celebrities are heavily involved in the merchandising world, the requirement that the celebrity must be involved in a "common sphere of activity"[58] to the offending party's business has often limited the application of this action. Still, artists may potentially find more concrete relief under this action, as 'performing' is the artist's primary industry, compared to merchandising which is normally seen as a secondary activity. However, the question remains as to whether passing off could also extend to vocal replication. To determine passing off, the claimant must satisfy the "classic trinity test" outlined in the *Jif Lemon*[59] case. The claimant must: "establish a goodwill or reputation attached to the goods or services"; "demonstrate a misrepresentation by the defendant to the public… leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff"; and "demonstrate that he suffers or ... that he is likely to suffer damage by reason of the… misrepresentation"[60].

Goodwill

Artists and celebrities with recognisable voices could arguably establish goodwill under this definition. In *Fenty v Arcadia Group Brands*[61], the singer Rihanna successfully demonstrated that she held a reputation of being a fashion icon from previous partnerships with high street fashion companies[62]. Under these conditions,

[56] *Perry v Truefitt* [1842] 6 Beav 66.
[57] ibid, 73.
[58] *McCulloch v. Lewis A. May (Produce Disributors) Ltd* [1948] 65 R.P.C. 58, 60.
[59] *Reckitt & Colman Products Ltd. v Borden Inc* [1990] 1 WLR 491.
[60] ibid, 499.
[61] *Fenty v Arcadia Group Brands Ltd* [2015] EWCA Civ 3.
[62] Yichi Hu, 'The Interplay Between Celebrity Image Rights and the Tort of Passing Off: An Examination of the Rihanna v Topshop Case and Its Implications' (2024) 3(7) Paradigm Academic Press Law and Economy 30, 31.

a well-known singer or actor could argue that their voice is an essential element of their business, as labels or filmmakers will specifically seek them out to make use of their talents, and therefore holds goodwill.

Complications arise due to the requirement that goodwill must be linked to a specific area of business. In *Lyngstad v Anabas Products*[63] the court rejected the pop group ABBA's passing off claim against the defendant using their image on merchandising on the grounds that there was "no evidence that the plaintiffs have ever themselves carried on any business of any kind in this country"[64], despite being at that time renowned musicians who had multiple number one singles in the UK Charts prior to the action.[65] This success would have required thousands of hard copy records to be sold via retail, making this judgment contentious, as this is clear evidence of the group's business having goodwill within the UK. King argued that this judgment's narrowed interpretation of goodwill creates issues for artists whose vocal likeness is exploited outside their primary business, making it highly ineffectual in protecting them against unfair competition.[66] For example, if a singer's voice is used in a film, they may struggle to establish goodwill in the film industry, even if they are widely recognised in the music industry.

The *Lego*[67] judgment later clarified that goodwill is not confined to one's immediate field of activity, provided there is sufficient evidence that such goodwill extends beyond their current field.[68] While this precedent establishes that the absence of a common field of activity is not necessarily determinative of a lack of goodwill, there remains a high evidential threshold.[69] This principle could enable high-profile artists to argue their famous persona allows their voice and brand to attract goodwill from

[63] *Lyngstad v. Anabas Products Ltd* [1977] FSR 62.
[64] ibid, 64.
[65] The Official UK Charts Company, 'ABBA songs and albums | full Official Chart history' (2024) <https://www.officialcharts.com/artist/8604/abba/> accessed 28 November 2024.
[66] Julie King, 'The Protection of Personality Rights for Athletes and Entertainers under English Intellectual Property Law: Practical Difficulties in Relying on an Action of Passing Off' (2000) 7 Sports Law J 351, 362.
[67] *Lego System Aktieselskab and Another v Lego M Lemelstrich Ltd* [1983] FSR 155.
[68] ibid,194.
[69] See Case T-328/16 Ian Paice v European Union Intellectual Property Office (EUIPO) [2018] OJ C427/51, para 31.

across differing entertainment industries. However, this expansion offers virtually no protection to unknown smaller artists who lack the recognition from the public to declare their voice distinct enough to establish goodwill.[70] This leaves many performers vulnerable to exploitation by more powerful companies who have greater influence over the market so will come to dominate negotiations.

Misrepresentation

The second condition, misrepresentation, exposes further issues. This requires the claimant to prove that there is a real possibility of confusion that the defendant's good or service (product) is associated with the claimant. Courts are often hesitant to find that the public is confused, as they often take the stance that the public would not care if the product has been approved or created by the celebrity, only that the product contains the celebrity.[71] *Halliwell v Panini*[72] reaffirmed the belief that "whether they are official or not is not a factor of any relevance to the purchaser"[73]. This reluctance to find misrepresentation undermines the action of passing off, as it disregards whether the artist built up a strong reputation if the public does not care enough about the true owner of the product.[74] Often, fans of an artist only wish to consume an artist's content without caring to question its authenticity, making it difficult for the artist to prove consumer confusion in cases of AI-generated content.

This approach has begun to change in cases of false endorsement, as it has been recognised that endorsements that are supplemented by a celebrity's fame have intrinsic value that can be exploited for the gain of the product. This expansion of the tort was realised in *Irvine v TalkSport*[75], reasoning that a not insignificant number of the target audience would have believed the endorsements had likely needed to be authorised by the claimant compared to cases of merchandising.[76] This reasoning that distinguishes cases of endorsement is incredibly circular, as the public's belief for

[70] Watt and others (n 31), 160.
[71] *Lyngstad* (n 63), 67.
[72] King (n 66) citing Halliwell v. Panini SpA (Ch, 6 June 1997).
[73] ibid.
[74] King (n 66), 367.
[75] *Irvine v Talksport Ltd* [2003] EWCA Civ 423.
[76] ibid, [2003] EMLR 26, [33].

what needs authorising would be primarily premised on the stance of the law. However, this judgment may provide a basis for extending passing off to vocal replication, but only in instances where the unauthorised use of an artist's voice suggests their false endorsement.

Proving misrepresentation may be even trickier in cases where the defendant did not attempt to mislead the audience through using the artist's voice. If the resulting work highlighted the new creation as an AI-generated work, then a court may determine that there was no misrepresentation.[77] Although there exists no misrepresentation by the letter of the law, this leaves no remedy for artists against the unauthorised appropriation of their vocal talent and strips them of their autonomy to decide what content they wish for their voices to appear.

Limitations

Despite its narrow application to endorsements, passing off remains a limited remedy for vocal replication cases. These remedies only exist when the celebrity's likeness externally increases the marketability of the product. In AI-generated works, the appropriation of the artist's vocal likeness is embedded into the product itself.[78] This appropriation is a deeper issue than that of protecting commercial goodwill, but is instead closer in kind to identity theft. This lack of recognition of the true harm is worsened as the damages awarded in passing off cases are often nominal.[79] They reflect the value that the personality would have demanded for the endorsement rather than the harm caused by the exploitation of an artist's identity. Boyles argues that this remedy incentivises infringers to disregard acquiring the consent of personalities, as the cost incurred would be the same whether they gained consent or not[80], highlighting how this action is poorly equipped to provide remedy for this transgression.

[77] Koski (n 5), 1008.
[78] ibid, 1001.
[79] Reshma Amin, 'A Comparative Analysis of California's Right of Publicity and the United Kingdom's Approach to the Protection of Celebrities: Where Are They Better Protected?' (2010) 1 Case Western Reserve Journal of Law, Technology & the Intern 92, 113.
[80] Boyes (n 6), 75.

Although some argue that if this tort applies to the use of a person's image there would be no reason it could not be expanded to include the reputation of a celebrity's voice[81], there is no evidence that this would be the case. If anything, there is evidence in the contrary. One of the few instances in which this issue was discussed in the courts was in *Sim v Heinz*[82]. The court was not convinced to grant an injunction through passing off, as they believed that there was inadequate evidence to prove irreparable damage caused by the vocal imitation. Despite this, McNair J still recognised that "it would seem… to be a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent"[83]. The gap in the law had been noticed, just remedies could not be actioned through passing off. This case was heard in 1959, and no substantial progress has been made in fixing this gap since. If this remains the case, the law may fail to adapt to the modern technological landscape of AI.

Overall, UK law provides limited protection against the unauthorised replication of an artist's voice. The CDPA focuses on fixed original works and performances, leaving vocal attributes unprotected from newly created AI arrangements of their voice. The tort of passing off provides some relief for artists who are already established in their own industries and in false endorsement cases, but its applicability to vocal replication is doubtful and hard to establish, and its remedies insufficiently address the true extent of the damage incurred. Although the current law may seem wholly unprepared for the increasing use of deepfake technology, it could take inspiration from other common law jurisdictions which may already have stronger protections for personality that may better deal with the future of technology.

3. Protections under US Law

Unsurprisingly, the US, the centre of the modern celebrity world , has taken significant steps in protecting artists' rights. In contrast to the UK, the US legal framework offers

[81] Watt and others (n 31), 160.
[82] *Sim v HJ Heinz Co Ltd* [1959] 1 WLR 313.
[83] ibid, 317.

greater protection over one's likeness, providing a stronger foundation for tackling AI-generated vocal replication. This section examines the protections available to artists under US law. It explores the US approach to copyright before delving into the more compelling mechanism of the right of publicity. By discussing this right at both federal and state level, it will be shown that California's approach to publicity rights is the best suited to navigate the current climate shaped by generative AI.

A. Copyright Law

US copyright protections are codified under Title 17 of the United States Code.[84] These protections only subsist in "original works of authorship fixed in any tangible medium of expression"[85]. Similarly to the CDPA, US copyright law protects musical and audiovisual works.[86] The similarities do not end there. The application of these protections to AI-generated content presents comparatively similar complications, particularly around originality and fixation.

For instance, protections for sound recordings, often used by AI models as training data, can only apply to fixed, actual sounds that have been rearranged.[87] This means that unless an AI model can be shown to have directly copied a substantial portion of a pre-existing work, copyright protections will not apply. This issue has been central to recent defences to legal claims involving AI music generators, where defendants struggle to demonstrate infringement due to the fragmented and transformative nature of the new sounds.[88] *Midler v Ford*[89] confirms the difficulty of granting copyright protection to voices due to the lack of fixation.[90] Instead, it was concluded that a more personal protection was needed which was distinct from the traditional protections afforded to authorship.[91] Their solution will be explored later in this section.

[84] Copyright Law of the United States, 17 United States Code (2024).
[85] ibid §102.
[86] See n 18 in ch 2.
[87] 17 USC 2024 (n 84) §114.
[88] Answer to Complaint, *UMG Recordings Inc v Suno Inc* 1:24-cv-11611 (D Mass Aug 012024) 8.
[89] *Midler v Ford Motor Co* 849 F 2d 460 (9th Cir 1988).
[90] ibid, 461.
[91] ibid, 462

There have been arguments that there has been a potential expansion of copyright liability in the US emerging from the controversial *Williams v Gaye*[92] (aptly named the "*Blurred Lines*" case over the related song).[93] The court found that a song that merely evoked the feel of another work could infringe copyright, without even providing evidence on the use of a direct actual portion of the original recording.[94] However, the applicability of this precedent to AI-generated vocal replication remains questionable. The *Blurred Lines* ruling was shaped by unique procedural complexities, particularly the fact that the original song, published in 1977, was governed by the Copyright Act of 1909, which did not extend copyright protection to sound recordings. As a result, the original sound recording was deemed inadmissible as evidence. Instead, the court permitted the defence to present a limited excerpt of the recording, selectively edited to exclude unprotected elements. This evidentiary limitation significantly influenced the court's reasoning, making the case an outlier rather than a definitive shift in copyright jurisprudence.[95]

The limited influence of this precedent was later demonstrated in *Skidmore v Zeppelin*[96], where the court clarified that a claimant cannot establish substantial similarity by isolating unprotectable elements of a copyrighted work, reassembling them, and then asserting that these elements appear in the defendant's work in a different artistic context.[97] This ruling underscores the position that minor similarities alone do not constitute copyright infringement in US law. Similarly, in *Gray v Hudson*[98], the appellate court rejected the notion that similarly sounding music elements could be granted copyright protection, as it may cause an "improper monopoly" over basic musical elements.[99] These cases illustrate a fundamental complication in extending copyright protection to an artist's voice. Rather than safeguarding the holistic identity of a vocal persona, copyright law is inherently

[92] *Williams v Gaye* 885 F 3d 1150 (9th Cir 2018).
[93] John Quagliariello, 'Blurring the Lines: The Impact of Williams v. Gaye on Music Composition' (2019) 10 Harvard Journal of Sports & Entertainment Law 133, 141.
[94] ibid, 138.
[95] ibid, 140.
[96] *Skidmore v. Zeppelin* 952 F 3d 1051 (9th Cir 2020).
[97] ibid, 1075
[98] *Gray v Hudson* 28 F 4th 87 (9th Cir 2022).
[99] ibid, 101.

limited to protecting fixed, pre-existing works. This causes AI-generated replications that mimic an artist's voice, without directly copying a fixed identifiable segment of a work, to fall outside the scope of infringement.

Even if copyright were extended to cover short sound fragments, it would still fail to protect the voice as a cohesive whole. Instead, it would grant protection only to isolated soundbites, potentially encompassing common vocal characteristics or accents shared by multiple artists. This raises complex questions regarding the extent to which individuals could claim exclusive rights over naturally occurring vocal traits as part of their celebrity identity.[100] Given these challenges, an expansion of copyright in this domain may prove neither practical nor desirable.

Artists in the US face similar obstacles to those in the UK regarding the assignment of rights. Once an artist assigns their copyright to another party, such as a record label, they may lose control over the exercise of their rights. If the assignee elects not to pursue a copyright claim, the original artist may be unable to challenge AI-generated replications of their work. This principle was exemplified in *Baltimore Orioles v Major League Baseball Players' Association*[101], in which Major League Baseball's ownership of the copyright in a game telecast pre-empted the athlete's rights to publicity, effectively depriving control over the use of their likeness.[102]

Another critical limitation is the requirement for copyright registration as a prerequisite for litigation. Without registration, copyright owners are unable to initiate infringement claims or seek statutory damages and attorney's fees.[103] The eligibility requirements for this registration are the same as that of copyright protections in general. Given the previously mentioned complexities surrounding establishing copyright, artists may find themselves unable to access the full extent of their statutory powers.

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[100] Watt and others (n 31), 160-161; Sebastian Saavedra, '"The Gift of a Golden Voice": Shaping the Right of Publicity to Protect Performers from A.I. Abuses' (2025) 43 Cardozo Arts and Entertainment Law Journal 219, 235.
[101] *Baltimore Orioles Inc v Major League Baseball Players Association* 805 F 2d 663 (7th Cir 1986).
[102] ibid, 676.
[103] Dotan Oliar, Nathaniel Pattison and K. Ross Powell, 'Copyright Registrations: Who, What, When, Where, and Why' (2013) 92 Texas Law Review 2211, 2215.

These gaps in protection highlight why US artists are more inclined to pursue legal action through the right of publicity[104], rather than copyright law. As a more effective legal mechanism, the right of publicity offers broader protection for an individual's likeness, including vocal identity, and would provide a stronger basis for challenging unauthorised AI-generated replications with a higher likelihood of success.

B. The Lanham Act

There is no federally recognised right of publicity. Protection is derived from a patchwork of state statutes and common law principles. Artists seeking to challenge the unauthorised use of their likeness at the federal level must instead rely on the Lanham Act, the primary federal statute governing trade marks.[105] Although the Lanham Act was not originally introduced to protect an individual's likeness, it has been increasingly used to accomplish this aim.[106] Notably, unlike most other trade mark-based causes of action, it does not require formal trade mark registration to start an infringement claim.[107] This flexibility allows it to offer some protection to artists' intangible characteristics.

Section 43(a)(1)(A) of the Lanham Act imposes liability on any party whose actions are "likely to cause confusion… as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person".[108] This trade mark-based action parallels the UK tort of passing off[109], as both legal systems seek to prevent the misrepresentation of commercial associations and protect the consumers from deception from false attribution. Unlike the UK equivalent, a claimant under the Lanham Act only needs to demonstrate consumer confusion regarding misattribution.

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[104] See *Haelan Laboratories Inc v Topps Chewing Gum Inc* 202 F 2d 866 (2d Cir 1953); Text at n 122.
[105] Jonathon Schlegelmilch, 'Publicity Rights in the UK and the USA: It is Time for the United Kingdom to Follow America's Lead' (2016) 1 Gonzaga Law Review Online 101, 104.
[106] Barbara Solomon, 'Can the Lanham Act Protect Tiger Woods - An Analysis of Whether the Lanham Act Is a Proper Substitute for a Federal Right of Publicity' (2004) 94(6) The Trade Mark Reporter 1202, 1203.
[107] Quentin J Ullrich, '"Is This Video Real? The Principal Mischief of Deepfakes and How the Lanham Act Can Address It' (2021) 55(1) Columbia Journal of Law and Social Problems 1, 16.
[108] The Lanham Act of 1946 §43(a)(1)(A), 15 USC §1125(a) (2024).
[109] Text at n 56 in ch 2.

They do not need to establish goodwill or commercial reputation. Those elements are covered under a separate false advertisement claim under s43(a)(1)(B).[110]

This action has been used in previous cases seeking to protect an artist's vocal likeness. In *Waits v Frito-Lay*[111], a professional singer brought a false association claim after a commercial used a sound-alike performer to mimic his voice. The court found sufficient evidence that consumers could be misled by the mimicry of a recognisable voice, leading to a successful claim. This contrasts with the approach in UK jurisprudence, as seen earlier in *Sim v Heinz*[112], where the UK courts were reluctant to provide relief for the unauthorised imitation of another's voice.[113]

The likelihood of confusion test for false association is determined by the factors from the *Downing v Abercrombie & Fitch*[114] case. These factors include: the plaintiff's level of recognition, similarity of likeness and evidence of actual confusion.[115] Ullrich argues that this test provides courts with a flexible framework to assess whether a deepfake is misleading or harmful, and whether AI-generated voice replication wrongfully deceives consumers or is clearly distinguishable as a parody or imitation based on case specific facts.[116]

This test has also been seen to cover non-celebrities, as seen in *Doe v Friendfinder Network*[117], where the court ruled that an individual does not need to intend to commercialise their image in order to prevent its unauthorised commercial use. The court reasoned that commercial harm can be presumed when a defendant exploits a plaintiff's persona in an advertisement without permission.[118] However, this has not been consistently applied. Some courts have ruled that non-public figures must show either an intent to commercialise their persona or actual commercial damage in order

[110] Schlegelmilch (n 105), 105.
[111] *Waits v Frito-Lay Inc* 978 F 2d 1093 (9th Cir 1992).
[112] *Sim v Heinz* (n 82).
[113] Text at n 82 in ch 2.
[114] *Downing v Abercrombie & Fitch* 265 F 3d 994 (9th Cir 2001).
[115] ibid, 1007-08.
[116] Ullrich (n 107), 18.
[117] *Doe v Friendfinder Network Inc* 540 F Supp 2d 288 (DNH 2008).
[118] ibid, 306.

to succeed in a claim.[119] There are particular difficulties that arise for non-public figures when proving level of recognition. Without wide recognition, consumers are less likely to be deceived by an AI-generated voice with which they are unfamiliar. If the voice is unknown to them, it lacks any meaningful connection that could lead to confusion. This creates barriers for lesser-known artists who may find their voices used in AI-generated works but lack the necessary amount of public recognition necessary to prove consumer confusion. An issue similar in passing off cases in the UK.

A further issue that is similarly encountered under the tort of passing off, is that if the AI-generated work is labelled as a deepfake, the courts struggle to find actual confusion. This was demonstrated in *Romantics v Activision Publishing*[120], where a video game company rerecorded the underlying composition of a song in its entirety and made fictional characters perform the artist's work. Since the game clearly labelled the song as "made famous by" the band, Romantics, the court ruled that no confusion existed in consumers that the band actually performed the songs themselves.[121] This suggests that AI-generated replications that are properly disclosed may fall outside the scope of the Lanham Act, making enforcement against deepfake vocals more challenging.

While the Lanham Act may provide a viable avenue for addressing vocal replication, it remains inconsistent in its application and shares several limitations with the tort of passing off. As a result, it is not always the primary legal remedy for vocal infringement. Instead, many artists and celebrities opt to pursue protections available under specific state laws for their right of publicity.

C. Right of Publicity

[119] *Condit v Star Editorial Inc* 259 F Supp 2d 1046 (ED Cal 2003), 1052.
[120] *Romantics v Activision Publishing Inc* 574 F Supp 2d 758 (ED Mich 2008).
[121] Yen-Shyang Tseng, 'Protecting the First Amendment Rights of Video Games from Lanham Act and Right of Publicity Claims' (2021) 48 Pepperdine Law Review 425, 451.

The right of publicity was first recognised in US jurisprudence in New York in *Haelan Laboratories v Topps Chewing Gum*[122], where the court acknowledged the need to protect "the value of an individual's name, likeness, or other indicia of identity, by preventing it from being commercially exploited by another".[123] Today, approximately 36 states recognise some form of the right of publicity through either statute or the common law.[124] Although New York was the first state to acknowledge this right, its development has progressed at a comparatively slower pace and remains more limited in scope than its West Coast counterpart, California.[125] California has emerged as the jurisdiction with the most expansive and well-developed body of law on the right of publicity, largely due to its status as the global heart of the entertainment industry[126]. Given California's leading position in protecting celebrity interests, this paper focuses on Californian jurisprudence as a study for examining whether AI vocal replication could fall under the scope of this right.

California's right of publicity is outlined in s3344 Californian Civil Code[127] as "any person who knowingly uses another's name, voice, signature, photograph, or likeness... without such person's prior consent… shall be liable for any damages sustained by the person or persons injured as a result thereof"[128]. The common law publicity right has expanded significantly beyond the statutory right in the Civil Code, as it does not require there to be intention to misuse another's identity.[129] The only requirements under common law that the plaintiffs must demonstrate in order to establish a breach of this right are: (1) the use of the their identity; (2) the appropriation of the their likeness to the defendant's advantage; (3) the lack of consent; and (4) resulting injury.[130] The reasoning for the introduction of this right was to enable individuals, particularly celebrities, to maintain control over the commercial

[122] *Haelan Laboratories Inc v Topps Chewing Gum Inc* 202 F 2d 866 (2d Cir 1953).
[123] *In Re Hearst Communications State Right of Publicity Statute Cases* 632 F Supp 3d 616 (SDNY 2022), 621.
[124] Quinn Emanuel Urquhart & Sullivan LLP, 'The Right of Publicity in the AI Age' (*Quinn Emannuel Trial Lawyers*, 2 October 2023) 2 <https://www.quinnemanuel.com/the-firm/publications/the-right-of-publicity-in-the-ai-age/> accessed 21 April 2025.
[125] Ahmed (n 16), 25.
[126] *Sinatra* (n**Error! Bookmark not defined.**), 1202.
[127] Cal Civ Code §3344.
[128] ibid, §3344(a).
[129] Ahmed (n 16), 27.
[130] Amin (n 79), 103.

exploitation of their image and likeness, which constitutes a primary source of their value within the market. The common law requirement that appropriation be for the defendant's 'advantage' remains open to expansion beyond just commercial misappropriation, as all it requires is to be "used in connection with services rendered"[131] by the defendant. So far there has been a lack of jurisprudence regarding what could fall under this expanded definition beyond commercial misuse, but it leaves open the possibility that non-commercial uses, such as AI-generated vocal reproductions could fall within its scope.

There is strong support for the belief that courts would determine that digital replicas, including AI-generated vocal replications, violate the right of publicity.[132] This was exemplified in *Midler v Ford*, where the court held that a sound-alike imitation of a well-known singer's voice in an advertisement constituted an unlawful appropriation.[133] The Ninth Circuit reasoned that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs"[134]. This judgment shows that this right can extend beyond just the misuse of an artist's actual voice but to imitations as well[135], suggesting that even more precise AI-generated vocal replications could similarly violate an artist's publicity rights.

Furthermore, courts have demonstrated a willingness to adapt the right to the emergence of new technologies, extending protections against "precise computer-generated reproductions"[136]. In *No Doubt v Activision*[137], the court ruled that a video game's use of avatars closely resembling the images of members of a band, which performed songs by other artists, constituted an infringement of their right of publicity. The court emphasised that because the avatars retained the band members' distinctive likenesses without significant alteration, the use was not sufficiently

[131] Restatement (Third) of Unfair Competition § 47 (1995).
[132] Koski (n 5), 1001.
[133] *Midler* (n 90), 463-64
[134] *Midler* (n 90), 463.
[135] Amin (n 79), 106.
[136] *No Doubt v Activision Publishing Inc* 122 Cal Rptr 3d 397 (Cal Ct App 2011).
[137] ibid, 415.

transformative to be considered a new expression.[138] While this ruling only applies to image likeness, it highlights that the possibility that the right of publicity could be similarly extended to protect against digital reproductions of an artist's vocal likeness where the reproduction lacks substantial alteration.

This may be clarified sooner rather than later as there is growing judicial recognition that deepfakes may fall within the scope of the right of publicity. In *Young v. NeoCortext*[139], a reality television star brought a claim against an AI driven refacing app that superimposed his likeness on to images of users without his consent. Again, the end creation was found to not be substantially transformative of the star's appearance as it still depicted his body and likeness which were key attributes of his celebrity status.[140] The court also rejected the defendant's argument that copyright law pre-empted the claim, instead recognising the right of publicity as the more appropriate cause of action for the exploitation of likeness.[141] This acknowledgement that copyright law is not suitable to tackle cases involving deepfakes exposes the significant gaps in the equivalent UK legal framework, which offers few avenues for artists to challenge unauthorised uses of their likeness outside the scope of copyright.

As the right of publicity over one's persona is seen as an inherent right manifesting in every individual, this protection allows for greater remedies to be made available to non-celebrities than that of its UK counterpart. As discussed earlier, UK courts calculate damages for passing off by the hypothetical market rate that the individual could have commanded if they had agreed to participate in the new work[142], as they are wary of placing an inherent value on one's identity[143]. This especially disadvantages private individuals outside of the public eye who lack the fame to command a higher price. This limitation was recognised after cases like *Stilson v Reader's Digest*[144], where ordinary people found difficulties demonstrating any

[138] Koski (n 5), 1004.
[139] *Young v NeoCortext Inc* 2:23-cv-02496 (CD Cal 2023).
[140] Order on Motion to Strike, *Young v NeoCortext Inc* 2:23-cv-02496 (CD Cal Sept 5, 2023) 14.
[141] ibid, 10.
[142] Text at n 79 in ch 2.
[143] Anna Emelie Helling, ''Protection of "Persona" in the EU and in the US: A Comparative Analysis' (MLaws Thesis, University of Georgia Law 2005) 72.
[144] *Stilson (Bruce) v Reader's Digest Association Inc* (1972) 28 Cal App 3d 270.

commercial damage after their name and information had been used in advertising.[145] To counteract this unfair compensation, minimum statutory damages were introduced for misusing another's likeness.[146] *KNB Enterprises v Matthews*[147] reaffirmed this position by expressing that this right was "not limited to celebrity plaintiffs"[148]. This provision ensures access to monetary recovery regardless of celebrity status, offering a stronger deterrent against unauthorised use of likeness.

The minimum statutory recovery is not the sole remedy available. Artists may pursue injunctive actions over the newly created work and may claim further damages. These may be compensatory in nature, calculated upon the extent of the artist's level of fame or previous licensing history. Additionally, the artist can recover any profits accrued from the violating work.[149] This penalty strips the offender from the benefit garnered from the artist's stolen vocal talent. If the infringement is particularly malicious, oppressive, or fraudulent[150], courts may even award punitive damages to serve as an example to others[151]. These punitive measures can help in cases of AI vocal replication as users of these AI platforms will be faced with greater tangible consequences for misusing an artist's voice without consent.

As discussed above, California's right of publicity recognises an artist's vocal likeness as a valuable and protectable asset. Its adaptability makes it well-positioned to tackle the emerging challenges posed by the increasingly sophisticated vocal cloning capabilities of generative AI.

Compared to the UK, the US has a more versatile set of laws for safeguarding an artist's likeness, but they still have shortcomings. Just as in the UK, copyright is confined to fixed, pre-existing works and does not translate to covering an artist's entire vocal persona. While the Lanham Act provides a potential avenue for protection for vocal likeness, its focus on consumer confusion leaves many artists vulnerable,

[145] Farish (n 10), 44.
[146] Cal Civ Code (n 128).
[147] *KNB Enterprises v Matthews* (2000) 78 Cal App 4th 362.
[148] ibid, 367.
[149] Cal Civ Code (n 128).
[150] Cal Civ Code §3294(a).
[151] Cal Civ Code (n 128).

particularly when AI-generated works are accurately labelled. California's right of publicity stands apart offering a more direct and flexible protection of vocal likeness. There is no equivalent to this right in the UK. The UK should look to California for inspiration if it wishes to find a solution to the growing challenges posed by the increasing use of AI vocal replication software.

4. The Way Forward?

In the preceding sections, this paper explored the potential protections afforded to artists wishing to protect their vocal likeness in the UK and US. This examination revealed that the traditional legal rights and remedies offered by the UK are not appropriate to tackle the disruptive impact arising from AI. By contrast, the right of publicity emerged as a possible solution by offering broad protections over artists' attributes. This observation is supported by proposals from within Parliament, specifically by the APPG, advocating for a right over personality within the UK.[152] Nonetheless, the government has avoided directly engaging with this proposal.[153] This section will argue that a right of publicity represents a suitable path forward for safeguarding artists' vocal identities in an increasingly uncertain technological landscape.

A. UK's Proposed Approach

The introduction of a right of publicity stands in stark contrast to the UK government's current laissez-faire approach to regulating AI. The recently published 'AI Opportunities Action Plan'[154] sets out their intention to "turbocharge"[155] the UK AI

[152] APPG Report (n 15), 18.
[153] Intellectual Property Office, Department for Science, Innovation and Technology and Department for Culture, Media and Sport, *Copyright and Artificial Intelligence: Consultation* (Cm 1205, 2024) paras 177-178 (Copyright and AI).
[154] Department for Science, Innovation and Technology, *AI Opportunities Action Plan* (Cm 1241, 2025) <https://assets.publishing.service.gov.uk/media/67851771f0528401055d2329/ai_opportunities_action_plan.pdf> accessed 25 April 2025 (Action Plan).
[155] Department for Science, Innovation and Technology and Prime Minister's Office, 'Press release: Prime Minister sets out blueprint to turbocharge AI' (*GOV.UK*, 12 January 2025) <https://www.gov.uk/government/news/prime-minister-sets-out-blueprint-to-turbocharge-ai> accessed 25 April 2025.

industry, identifying it as a key frontier for economic growth, projected to unlock £400 billion in the economy by the end of the decade.[156] With aims to "be on the side of the innovators"[157] to attract investment from global technology companies, policymakers have emphasised reducing regulations in the sector.[158] This may compromise Britain's well-regarded reputation within the creative industry, which currently contributes £124 billion to the economy.[159] Some estimates forecast that disruption from AI could reduce music artists' revenues by 24% by 2028. [160] Without enacting any meaningful protections for artists, both domestic and international creative talent may be discouraged from engaging and investing in the UK's artistic industries.[161]

The current measure under consultation involves introducing a new exception for text and data mining, amending s29A CDPA[162] to expand the exception to any purpose not just non-commercial research.[163] To curtail abuses of copyright, rightsholders wishing to restrict AI access to their content would have an opportunity to opt-out via a reservation mechanism, similar to that introduced by the EU's AI Act.[164] Under this scheme, rightsholders will have the power to control their work's use as data in AI training, stopping their inclusion altogether or negotiating licenses to AI companies for remuneration under existing copyright protections. In reality, the expansion will

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[156] Public First, 'Google's Impact in the UK 2023' (*Public First*, 15th April 2024) <https://googlesukimpact2023.publicfirst.co.uk/> accessed 25 April 2025 cited in Action Plan (n 154), 19.

[157] Action Plan (n 154), 6.

[158] ibid, 21.

[159] Department for Culture, Media and Sport, 'Accredited official statistics: DCMS Economic Estimates: Annual GVA 2023 (provisional)' *(GOV.UK*, 26 February 2025) <https://www.gov.uk/government/statistics/dcms-economic-estimates-gva-2023-provisional/dcms-economic-estimates-annual-gva-2023-provisional> accessed 25 April 2025, ch 3.2.

[160] PMP Strategy, 'Study on the economic impact of Generative AI in the Music and Audiovisual industries' (*CISAC -International Confederation of Societies of Authors and Composers*, 4 December 2024) <https://www.cisac.org/Newsroom/news-releases/global-economic-study-shows-human-creators-future-risk-generative-ai> accessed 21 April 2025.

[161] Copyright Alliance, 'Copyright Alliance Letter in Response to Consultation re AI and Copyright' (Response to Consultation, Copyright Alliance 20 December 2024) <https://copyrightalliance.org/wp-content/uploads/2024/12/Copyright-Alliance-Letter-Re-AI-and-Copyright-1.pdf> accessed 25 April 2025, 2.

[162] CDPA 1988 (n 17), s29A .

[163] Copyright and AI (n 153), paras 75-81.

[164] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L, 2024/1689, art 53(1)(c).

effectively operate as a subsidy for the AI industry to the detriment of creatives.[165] In contrast, a key rationale underpinning the right of publicity is to prevent the unjust enrichment of an individual's talents and labour, ensuring they achieve fair compensation.[166] This opt-out does not address this imbalance.

Although it sounds good on paper, it does not reflect the practical realities of the technology. Once an AI has scraped data from the internet it is near impossible to fully remove that information from its processes, without having to retrain the whole model.[167] Even when certain programs have boasted about 'unlearning' certain works, research has shown that traces of these works can still be outputted.[168] This means that an opt-out is only effective if reserved prior to the ingestion of the training data. This may be difficult for many artists outside of large collection societies or unions. Even protected artists may struggle to reserve data retrospectively, given that their works have been trained into existing datasets prior to the implementation of any measures.

Furthermore, reservation only applies to copyrighted works, not an artist's abilities. The government intends for rights reservations to be utilised to control copyright works at input stage to prevent the output of digital replications[169], ignoring the reality that most artists do not personally own the works containing them. For example, works in which artists are commissioned, performances recorded by the public at live events, and third-party interviews result in ownership vesting in others. Copyright only protects the recorded material and not the artist attached[170], diminishing the artist's autonomy and control over their own vocal identity. Despite being their personality and reputation that are directly harmed by deepfakes, they must rely on others to exercise their rights and opt out of the training.

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[165] Copyright Alliance (n 161), 3.
[166] Helling (n 143), 21; Paul Czarnota, 'The Right of Publicity in New York and California: A Critical Analysis' (2012) 19(2) Vilianova Sports and Entertainment Law Journal 481, 508.
[167] Shiji Zhou and others, 'On the Limitations and Prospects of Machine Unlearning for Generative AI' [2024] Cornell University arXiv 1, 3; APPG Report (n 15), 15.
[168] See Weijia Shi and others, 'Detecting Pretraining Data From Large Language Models' [2024] Cornell University arXiv 1, 12.
[169] Copyright and AI (n 153), para 170.
[170] Text at n 31 in ch 2.

Ideally, performers' rights could provide another basis for reservation.[171] However, their interaction with training data raises difficulties. Theoretically, if artists wished to prevent their performances' use in training, officially published works could be accompanied by metadata identifying the performer[172], thereby facilitating AI models to recognise and filter out the artist's content. This solution is unlikely to extend to unofficial recordings, as content shared online is likely to lack correct attribution through metadata, either due to the uploader's apathy or limited technological expertise. If this unattributed data appears in AI datasets, then a generative AI model could still realistically produce a vocal replication without the artist's consent.

Even assuming prominent AI developers implement sufficient safeguards preventing the replication of designated vocal likenesses, the technology now exists and cannot be reined in. Rogue platforms may still be developed without respect for rights reservations. If a user, unbeknownst to the AI's illegality, generates a work including the artist's voice, the artist must have access to remedies against that individual user, not just the AI developer. Current proposals fail to account for such scenarios.

The government's proposal is unlikely to fully restrict AI's capacity to generate vocal replications and provides no recourse against individuals who create the AI-generated works featuring unauthorised vocal imitations. This underscores the urgent need for new legislation in this area. Despite the UK government's reluctance to embrace the right of publicity[173], it provides the most comprehensive protection against the unauthorised replication of an artist's vocal likeness.

B. The Publicity Right

Clarity

The most compelling argument for the introduction of a right of publicity is its direct applicability to the subject matter at hand. At present, the UK lacks a clear, targeted

[171] Copyright and AI (n 153), para 172; Text at n 50 in ch 2.
[172] Intellectual Property Office, 'Music metadata matters: how to get paid and credited' (*GOV.UK*, 26 April 2025) <https://ipo.blog.gov.uk/2025/04/26/music-metadata-matters-how-to-get-paid-and-credited/> accessed 28 April 2025.
[173] Copyright and AI (n 153).

mechanism addressing imitations of artists' voices without their authorisation, as shown earlier in the *Sim v Heinz*.[174] Although the tort of passing off has developed since to incorporate a celebrity's image as an essential part of their goodwill with the public[175], there is no guarantee this will extend to encompass artists' voices. Whereas the right of publicity, in both statute[176] and at common law[177], have proven to directly include provisions for protecting the artist's vocal attributes. Creating a new right through legislation would provide artists a defined legal pathway in cases where their voice has been misappropriated by AI. If left as is, artists must navigate through uncertain and protracted litigation, contingent on development of precedent within existing mechanisms. As synthetic voice technologies continue to advance, the incremental evolution of case law could leave artists without meaningful recourse during which time the exploitation of their vocal assets could persist unchallenged. A statutory right would provide clarity, signalling to AI platforms and users alike that consent is required before reproducing an artist's vocals.

Infringement

A further benefit of the publicity right is that it mitigates the practical complexities necessitated by the highly fact-specific judicial assessments of existing actions, dependent on either arguing public recognition in passing off or demonstrating the reproduction of a specific original work in copyright. As recognised in *White v Samsung Electronics*[178], "it is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so" when it comes to the right of publicity.[179] It could be argued that proving infringement on the right of publicity could create similar complex analytical issues, still requiring an objective observer to recognise the voice as widely recognisable.[180] This need not be the case. Several factors could instead be employed to identify whether the voice has been misappropriated.

[174] *Sim v Heinz* (n 82).
[175] See *Fenty v Arcadia Group* (n 61).
[176] Cal Civ Code (n 128).
[177] *Midler v Ford* (n 90).
[178] *White v Samsung Electronics America Inc* 971 F 2d 1395 (9th Cir 1992).
[179] ibid, 1398.
[180] Shtefan (n 9), 29.

These may include proving the intent of the creator behind the work containing the AI-generated output. If it the work is explicitly labelled as imitating the artist's vocals, or if there is evidence of the creator intending to reproduce the voice during the production process, such indicators could provide substantive evidence suggestive of infringement.

Where intent is not clearly ascertainable, then further direct comparison could be used between the artist's voice and the artificial voice. This would not require courts to make a potentially subjective decision on whether an artist's voice was widely known but instead determine whether the created voice sounds sufficiently similar to that of the original artist. That said, particular difficulties arise with this direct vocal comparative analysis. Gaines notes that unlike with image, where two photographs could be observed side by side, human auditory perception struggles to focus on multiple vocal tracks simultaneously.[181] Instead a "reminiscence" from memory is required to recall the previously heard voice before comparing it to the next phonogram.[182] Johnson argues that this method of discerning misappropriation of vocal likeness creates "fuzzy boundaries"[183] around the scope of the right leading to judicial inconsistency. These difficulties around subjectivity are not unfamiliar with law, as highlighted in traditional copyright cases turning on expert diagnosis to determine similarities between short samples in sound recordings.[184] However, copyright claims are hindered by narrow evidential limitations, often constrained to a single discernible work when assessing similarity. Alternatively, Watt et al argue that the "aggregation of acoustic-phonetic properties… extracted and averaged from all of the speaker's utterances that have ever been recorded"[185] could be used to create a fuller and more holistic basis for comparison in publicity claims. While not all past

[181] Jane Gaines, *Contested culture: The image, the voice, and the law* (University of North Carolina Press 1991), 117.
[182] ibid.
[183] Eric E Johnson, 'Disentangling the Right of Publicity' (2017) 111(4) Northwestern University Law Review 891, 908.
[184] See *Sheeran v Chokri* [2022] EWHC 827 (Ch).
[185] Watt and others (n 31), 143.

recordings are needed, access to a broader range of content may assist in the reliability of court assessments.

Watt et al further highlight that the same technological developments that create this issue, could be used to assist in this comparative analysis. Software already designed to detect similarity, such as Automatic Speaker Recognition, are capable of comparing digital voice samples, thereby minimising the subjective human observer's imprecision as much as possible.[186] The viability of this software is evidenced by its adoption within banking verification systems, where the incentive to prevent fraudulent activity is high.[187] Worryingly, they are still susceptible to spoof attacks from fraudsters using voice cloning technology.[188] But for our context, the fact that these systems still find sufficient similarities to wrongly approve verification, even from basic rudimentary synthetic replication, demonstrates their utility in judicial settings, where the ability to detect even imperfect imitations may be critical in establishing infringement.

Scope

A frequent criticism of the right of publicity is its nebulous nature from its lack of clearly defined boundaries.[189] The perceived overbreadth leads to many potential causes of actions falling under its scope, rather than operating as a precise, single cause of action. Consequently, courts must often "subtractively define"[190] its reach by using freedom of expression to demarcate the limits of the right. Unfortunately, conflicts between overlapping rights have long been a subject of debate in UK jurisprudence, so are not novel to the right of publicity. The existing protections over intellectual property and passing off already require attentive weighing against freedom of expression concerns. Even other non-absolute rights like the right to privacy have had to create a careful balancing act to ensure both rights are upheld to an appropriate

[186] ibid 7.
[187] ibid 9.
[188] ibid 10.
[189] Farish (n 10), 41; Johnson (n 183), 905.
[190] Johnson (n 183), 903.

degree.[191] Often in cases with rights of publicity, exceptions are made for public interest works such as news broadcasting[192] and parodies[193].

In response to this ambiguity, both Farish and Johnson instead propose a new legal action of virtual "enlistment"[194] or "impressment"[195] designed specifically to protect artists against another person exploiting their persona in a performance without their consent using an artificial construction.[196] This proposal does not fully resolve their core issue with overreach. This action would still require the court to engage in a balancing exercise with freedom of expression, as these free speech and idea expression counterarguments would always persist regardless of what form the law takes.[197] Still, it would distinguish the right from the tort of passing off which already protects against false endorsement and merchandising. However, this is unnecessary, as a right of publicity could subsume an action of passing off within itself when creating the legislation. This would allow for the tort of passing off to be further clarified creating more coherent law and potentially negate the inconsistent decision making around the 'common sphere of activity'.[198] Attaching passing off to publicity rights would also allow for it to expand beyond its image-based limitations under common law and include other indicia of personality, notably voice. An all-encompassing right would lay the groundwork for the law to address all issues arising with vocal replication, not just in areas of false performance and endorsement, but with other areas outside of the context of artists' rights. Although this paper focuses on artists' vocal likeness, wider concerns arising from deepfakes, including their use in pornography[199] and political misinformation[200], must still be acknowledged. A

[191] *Campbell v MGN Ltd* (2004) 2 AC 457, [2004] UKHL 22.
[192] Cal Civ Code §3344(d).
[193] Shtefan (n 9), 43.
[194] Farish (n 10), 47.
[195] Johnson (n 183), 934.
[196] ibid.
[197] Tseng (n 121), 481.
[198] Text at n 63 in ch 2.
[199] See Ministry of Justice, 'Press release: Government crackdown on explicit deepfakes' (*GOV.UK*, 7 January 2025) <https://www.gov.uk/government/news/government-crackdown-on-explicit-deepfakes> accessed 25 April 2025.
[200] See Sam Stockwell and others, 'AI-Enabled Influence Operations: The Threat to the UK General Election' (Briefing Paper, Centre for Emerging Technology and Security 2024)

broad publicity right could offer individuals recourse to the harms committed by AI-generated content to their dignity and autonomy, outside the strict purview of commercial misappropriation.

In the US, there have been proposals to introduce a sui generis digital replication right rather than federalise the right of publicity in the NO FAKES Act.[201] Instead of establishing a general right over personality, this right is specifically tailored to combat digital replicas.[202] An advantage of this approach is that it allows the courts to tackling the complications associated with identifying what specific elements of a certain physical attribute worthy of protection. However, this narrow scope detracts from the Act's intended objective to protect individuals from 'fake' AI imitations. Limiting the right's remit to AI deepfakes risks leaving the law and thus the artist vulnerable to other methods of unauthorised replication, such as existing manual editing software by a human.[203] Although not as accessible to the public as AI, these alternative forms of replication could still be used to exploit the artist without their consent. Moreover, this rigid application makes the law unadaptable to future developments in technology. For instance, Smith argues that virtual cloning raises similar concerns to that of genetic cloning, especially around consent and autonomy over public perception.[204] While such scenarios may seem speculative, if technologies of this kind become viable and widespread, a strictly defined right would provide no immediate protection for the artist until further sui generis legislation was enacted. The existence of a broad right of publicity allows for the law to be flexible to the unpredictable evolution of technology.

This section highlights the inadequacies of the government's reserved approach to regulating the AI industry, emphasising the need for legislative reform. While their

<https://cetas.turing.ac.uk/sites/default/files/2024-05/cetas_briefing_paper_-_ai-enabled_influence_operations_-_the_threat_to_the_uk_general_election.pdf> accessed 28 April 2025.

[201] Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2024, HR 9551, 118th Congress (2024).

[202] ibid.

[203] Shtefan (n 9), 31.

[204] Shannon Flynn Smith, 'If It Looks Like Tupac, Walks like Tupac, and Raps like Tupac, It's Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications' (2013) 2013(5) Michigan State Law Review 1719, 1744.

proposals may benefit both rights management collectives and developers, they fail to adequately account for the individual most affected, the artist. By contrast, a right of publicity would offer clearer protections tailored to modern technological threats. Compared to the issues befalling current law of limited applicability and difficulty discerning infringement, publicity rights offer a flexible alternative. If the UK is to maintain its reputation as a global leader in the entertainment industry, it must introduce a general right of publicity to safeguard artists against unauthorised vocal replication by generative AI and future innovations.

5. Conclusion

The gross proliferation of generative AI creates considerable uncertainty over the UK's ability to protect artists' vocal identities. As AI generations rapidly improve to increasingly recreate artists' voices with incredible precision, artists lack recourse to their increasing exploitation, economic loss, and loss of autonomy. This paper has argued that the UK's current laws and proposed solutions are not equipped to the rising tide of challenges posed by synthetic voice replication and must be completely reevaluated. Following California's lead, the UK should enshrine a right of publicity in its law to give artists a legal voice to defend their own.

Section 2 examined the current UK legal landscape. Copyright under the CDPA protects the works including the artist but was found to be ineffective against replications that fragment and reassemble vocal elements beyond recognition. Performers' rights are similarly constrained, limited to live, recorded performances and excluding novel AI-augmented reimaginings of an artist's voice. The tort of passing off offers only partial protection, primarily only for well-known artists in cases of false endorsement, and on current precedent its narrow application precludes the vocal imitation. It is incredibly doubtful whether these legal avenues could adequately protect an artist's vocal likeness in the age of AI.

Section 3 then turned to the US choice of pathways for protection which offers comparatively stronger protection. Mirroring the UK's limitations, US copyright is

limited to existing fixed works and would struggle to expand to cover an artist's broad vocal personality. The Lanham act provides some relief but is dependent on consumer confusion and does not cover all forms of identity misuse. In contrast, California's right of publicity provides clear protection over an individual's voice. It has already been applied in cases of vocal imitation, digital replicas, and AI deepfakes. Furthermore, it applies to both celebrities and private individuals, offering a breadth and flexibility unmatched by any UK counterpart. California's publicity right provides a compelling blueprint for how the UK might better address vocal replication harms.

Section 4 critiqued the UK's current lenient pro-innovation approach. The opt-out mechanism fails to address artists' lack of ownership over works featuring their voices. It also simultaneously clears the path for AI developers to legally amass more unclaimed material, embedding it into their system before artists have time to effectively pushback through reservation. This will further confound the access users have to make creations containing the artist's voice without authorisation. To combat this, the right of publicity provides a direct, enforceable basis for artists to challenge misuse of their vocal likeness, avoiding the uncertainty of success of passing off or copyright actions. Although alternative, narrower interpretations of this right were discussed, such limitations would only reduce its effectiveness in responding to the threats posed by other forms of imitation.

In conclusion, this paper has demonstrated the inadequacy of the UK's current measures in dealing with the harms posed by AI vocal replication. California's right of publicity offers a viable and effective solution, already shown to have adapted to the disruption caused to individuals from other forms of deepfake. To protect artistic identity, economic interests and creative autonomy, the UK must introduce a general right of publicity. This reform would not only bridge over the existing legal gap but ensures the law will remain fit for purpose in the face of further rapidly evolving disruptive technologies.

From '*MetaBirkins*' to the '*MetaGala*': Why UK Trade Mark Law Structurally Prioritises Commerciality over Artistic Expression in Metaverse Fashion.

ALISSIA BRIGGS*

Abstract

The metaverse has produced new opportunities for artistic expression through the creation of metaverse fashion. As artists design digital clothing and accessories, concerns arise regarding the application of traditional intellectual property law, particularly trade mark protection. The article contends the current legal framework in the United Kingdom does not accommodate artistic expression as it is structured to prioritise commerciality. It contributes to the existing scholarship by providing a UK-specific doctrinal analysis of metaverse fashion and metaverse fashion shows and proposes a new framework suitable to clarify the role of artistic expression in the metaverse. The article outlines the UK framework, examines the first metaverse fashion dispute Hermès v Rothschild as a case study, and applies these insights to potentially infringing hypothetical scenarios of metaverse fashion shows. The findings indicate that UK courts should treat artistic expression in metaverse fashion as capable of constituting due cause where the use is genuinely expressive rather than indicative of origin, does not generate misleading platform endorsement effects, and where any commercial element is incidental. This approach enables the courts to accommodate artistic expression while preserving the core functions of trade mark law.

1. Introduction

Metaverse fashion marks a new era for commerce and creativity by blurring the boundary between physical and digital goods, which in turn challenges the application of the traditional trade mark framework in the United Kingdom. The article explores whether the current law can adequately protect artistic expression in metaverse fashion alongside protecting trade mark rights. It argues that the law lacks a clear mechanism to address artistic expression and instead prioritises commerciality, leading to legal uncertainty for artists exploring metaverse fashion.

The metaverse is generally understood as an immersive environment where users can create, trade, and interact in ways which reflect reality,[1] and has been embraced by luxury fashion brands who have become 'frontrunners' in this space.[2] In the context of metaverse fashion, Non-Fungible Tokens ('NFTs') may incorporate names, logos or other brand identifiers protected under trade mark law. When such sign appears on metaverse fashion, consumers may infer that the brand has created or endorsed the product, giving rise to potential trade mark infringement. However, within the artistic digital environment of the metaverse the origin function of a trade mark may become attenuated. As such, brand signs can operate as cultural references or reflections of real-world branding practices rather than indicators of commercial origin. A similar

[1] Enrico Bonadio and Rishabh Mohnot, 'Trade Marks and Publicity Rights in the Metaverse', in Larry DiMatteo and Michel Cannarsa (eds), *Metaverse and Law* (CUP 2024); Cheng Lim Saw and Samuel Zheng Wen Chan, 'The subsistence and enforcement of copyright and trade mark rights in the metaverse' (2024) 19(4) JIPLP 371, 371 <https://doi.org/10.1093/jiplp/jpad125> accessed 9 April 2025.
[2] Barbara Bigliardi and others, 'Is any open innovation pattern emerging in the Italian fashion field? Preliminary evidence from some case studies' (2022) 25(6) EJIM 1076, 1077 <https://www.emerald.com/insight/content/doi/10.1108/ejim-06-2022-0322/full/html> accessed 9 April 2025; Charlie Semmence, '8 forward-thinking brands in the metaverse' (*Under Water Pistol*, 19 January 2023) <https://www.underwaterpistol.com/blogs/ecommerce/brands-in-the-metaverse> accessed 9 April 2025; Dani Gibson, '5 brands already boldly embracing the metaverse' (*The Drum*, 17 January 2022) <https://www.thedrum.com/news/2022/01/17/5-brands-already-boldly-embracing-the-metaverse> accessed 9 April 2025; Giorgia Profumo and others, 'Metaverse and the fashion industry: A systematic literature review' (2023) 15(1) JGFM 131, 132 <https://doi.org/10.1080/20932685.2023.2270587> accessed 9 April 2025; Yogesh Dwivedi and others, 'Metaverse marketing: How the metaverse will shape the future of consumer research and practice' (2022) 40(4) PM 750,753 <https://doi.org/10.1002/mar.21767> accessed 9 April 2025.

tension arises in Metaverse Fashion Shows ('MFSs'), where both the metaverse fashion and the performative show function as interwoven forms of artistic expression. Together NFTs and MFSs position metaverse fashion as a 'medium for artistic expression' while simultaneously challenging the application of the traditional trade mark framework.[3]

The growing commercial and legal significance of the metaverse is reflected in the increasing number of trade mark applications seeking protection for digital goods and services.[4] The UK Intellectual Property Office ('UKIPO') acknowledged this shift, providing NFTs can be registered under Class 9, such as 'downloadable virtual handbags', and MFSs under Class 41 as digital entertainment.[5] This is significant as the scope of protection in infringement proceedings is innately tied to the goods and services registered. By treating digital goods in Class 9, and related digital services in Classes 41, the UKIPO effectively frames them as distinct commercial categories for the purposes of assessing the likelihood of confusion. However, the UK has yet to provide guidance on how trade mark infringement will be approached for these new forms of digital use, particularly where the allegedly infringing material is artistic, as with metaverse fashion. UK Trade mark law governed by the Trade Marks Act 1994 ('TMA') does not expressly consider digital goods and services, artistic use, or provide defences for artistic expression, causing concerns for artists who create metaverse fashion as to how the existing principles will be applied.

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[3] Elliot Nitkin, 'Fashion as Canvas, The Evolution of Artistic Apparel in the Digital Age' (*The Art Concierge Clothing,* 27 May 2024) <https://artconciergeclothing.com/canvas-chronicles/fashion-as-a-canvas-the-evolution-of-artistic-apparel-in-the-digital-age/#:~:text=Fashion%20as%20a%20canvas%20is,expression%20in%20the%20modern%20world> accessed 9 April 2025.

[4] As of June 2023 over 31,000 UK trade mark applications referenced the metaverse, Intellectual Property Office, 'An analysis of the Metaverse IP landscape' (*GOV.UK*, 7 March 2024) <https://www.gov.uk/government/publications/an-analysis-of-the-metaverse-ip-landscape/an-analysis-of-the-metaverse-ip-landscape-html#:~:text=As%20of%2030%20June%202023,applications%20relating%20to%20the%20metaverse> accessed 2 December 2024.

[5] Intellectual Property Office, 'PAN 2/23: The classification of non-fungible tokens (NFTs), virtual goods, and services provided in the metaverse' (*GOV.UK*, 3 April 2023) <https://www.gov.uk/government/publications/practice-amendment-notice-223/pan-223-the-classification-of-non-fungible-tokens-nfts-virtual-goods-and-services-provided-in-the-metaverse> accessed 2 December 2024.

As this hybrid phenomenon continues to grow, courts must adopt a nuanced approach which adequately comprehends the intersection of art, fashion, technology, commerce and trade marks. A balanced approach would avoid an overprotection of trade mark rights which suppresses artistic expression or insufficient protection which undermines the trade marks security and its significance in brand protection. The United States has already been compelled to resolve this issue; hence, it is expected that UK courts may soon have to confront it.[6] Throughout the article, it is argued when applied to metaverse fashion the UK framework under the TMA provides inadequate protection for artistic expression. It unfairly prioritises commerciality through its incompatibility with the multifaceted metaverse and failure to align with contemporary theoretical perspectives on trade marks. To facilitate a meaningful analysis, the article adopts a doctrinal and comparative legal methodology. It analyses UK trade mark legislation and case law alongside developments in jurisdictions such as the US and the EU. As UK case law on metaverse disputes is limited, the argument is supported by academic commentary and theoretical frameworks applied to hypothetical scenarios.

Part 1 establishes the legal and theoretical foundations for the article, demonstrating that as it is interpreted at present the structure of section 10 TMA, fails to accommodate expressive uses of trade marks in the metaverse. Next, Part 2 illustrates this doctrinal failure through analysing the *Hermès v Rothschild*[7] case study to display how the infringement claim would develop under UK law and why the outcome exposes the inadequacy of the existing framework for metaverse fashion. Finally, Part 3 identifies the conditions under which a MFS should be regarded as infringing and when it should instead be treated as protected artistic expression. It reveals the absence of an articulate framework in UK law for distinguishing genuine artistic expression from commercial exploitation. The article concludes by proposing a new structured test designed to address this doctrinal issue and provide a principled approach to balancing trade mark functions with artistic expression in the metaverse.

[6] *Hermès Int'l v Rothschild*, No 22-CV0384-JSR, 2023 WL 1458126 (SDNY 2 February 2023).
[7] ibid.

2. *Conceptualising Trade Mark Law and Artistic Expression*

This Part establishes that the current UK trade mark framework is not equipped to address metaverse fashion as the structure of section 10 fails to accommodate expressive uses of trade marks in the metaverse.

A. The Trade Marks Act 1994

The TMA governs the registration and protection of trade marks in the UK.[8] A trade mark serves as a 'significant business asset'[9] which protects 'consumer aesthetic' experiences by preventing deception and safeguarding goodwill.[10] Statutory protection extends to signs, including words, logos, shapes, and colours, which distinguishes the owners goods or services from others.[11] A registered trade mark is a 'property right', and the owner is granted the rights and remedies provided by the TMA.[12] However, these definitions were formulated considering tangible goods and services and traditional marketplaces, not the metaverse where boundaries of use, ownership, and distinctiveness are more complex.[13] For example, a trade mark may appear on digital clothing throughout different platforms in the metaverse and later be sold as an NFT. This creates uncertainty whether the sign used still functions as a badge of origin or serves as a form of artistic expression. Accordingly, the article focuses on the section 10 provisions most relevant to expressive metaverse use, section 10(1), 10(2) and 10(3), and the limits of defences under section 11.

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[8] Intellectual Property Office, 'Trade Marks Act 1994' (*GOV.UK*, 22 July 2008) <https://www.gov.uk/government/publications/trade-marks-act-1994#:~:text=The%20Trade%20Marks%20Act%201994%2C%20as%20amended%2C%20is%20the%20current,trade%20marks%20in%20the%20UK> accessed 2 December 2024; Trade Marks Act 1994.

[9] Mira Wilkins, 'The Neglected Intangible Asset: The Influence of the Trade Mark on the Rise of the Modern Corporation' (2006) 34(1) BH 66, 66 <https://doi.org/10.1080/00076799200000004> accessed 9 April 2025.

[10] Cesar Ramirez-Montes, 'Trade Marking the look and feel of business environments in Europe' (2019) 25(1) 75, 77 <https://heinonline.org/HOL/P?h=hein.journals/coljeul25&i=83> accessed 9 April 2025.

[11] Trade Marks Act 1994, s 1.

[12] Trade Marks Act 1994, s 2.

[13] Monica Santiago, 'Metaverse in the world of Trade Mark law' (2023) 28(3-4) ULR 390, 392 <https://doi.org/10.1093/ulr/unae015> accessed 9 April 2025.

Section 10 outlines the conditions under which trade mark infringement occurs, fundamental to understanding trade mark protection in the context of potentially infringing metaverse fashion. Before turning to each individual provision, it is noted that for infringement the sign must be used 'in the course of trade'.[14] In the metaverse this threshold is not always straightforward to assess as the same activity can serve both commercial and artistic functions. Metaverse fashion may appear as NFTs, which can be monetised, but can also function as an artistic work that is not primarily marketed as a commercial good. Similarly, MFSs may operate as an artistic performance, yet can also involve sponsorship, paid access, or promotional activities which brings the use closer to commercial activity. In this hybrid landscape, use in 'the course of trade' must be understood contextually, with attention given to indicators such as whether the relevant digital good or event is offered for sale or monetised, whether the platform frames the good or event as a commercial product, whether access is conditioned on payment, and whether its presentation involves marketing, sponsorship, or claims of brand affiliation. These indicators illustrate commercial and expressive contexts can overlap but the current framework provides no clear guidance on how to assess such intersection.

Under section 10(1), a sign is infringing if it is 'identical with the trade mark' and used in relation to 'goods or services' 'identical' to those registered.[15] Applied to metaverse fashion, this provision becomes complicated. A digital coat may visually replicate a physical coat, yet its intangible and non-functional nature means it cannot reasonably be regarded as identical to the physical garment for the purposes of section 10(1). The digital and physical goods do not share material properties or functions and occupy different markets and consumer needs. Treating them as 'identical goods' would therefore stretch the statutory language beyond its intended limits. The limited scope of section 10(1) does not account for artistic intent or symbolic use of trade marks in metaverse fashion. As the provision excludes a contextual analysis its application to metaverse fashion risk extending trade mark protection in a way that constrains legitimate artistic expression and thus affords trade mark owners an unjustified

[14] Trade Marks Act 1994, s 10.
[15] ibid s 10(1).

degree of control over cultural symbolism exceeding the origin indicating rationale of the right. Therefore, a more balanced analysis lies in sections 10(2) and 10(3).

Next, section 10(2) addresses a sign 'identical' or 'similar' to a registered trade mark used in relation to 'similar' goods or services where a 'likelihood of confusion' arises.[16] Addressing the likelihood of confusion in regard to comparing the goods and services becomes problematic when applied to metaverse fashion as they do not perform the same functional role as physical fashion products.[17] Metaverse fashion goods exist as an asset which users can buy rights to rather than a wearable product.[18] As a result, consumers are not misled because the digital good functions like its physical counterpart, but because they may believe the digital good is commercially connected to or authorised by the brand. This distinction between actionable confusion and mere mental association is significant in this regard. It is well established that mere association is insufficient to establish infringement.[19] Instead association forms part of the broader concept of confusion which requires a belief the goods or services originate from the same or economically linked undertakings.[20] In contrast, a consumer who purely recognises the sign and mentally recalls the brand without assuming any commercial connection, is experiencing mere association. In an artistic or symbolic use of a trade mark, the consumer will likely experience association without inferring origin or endorsement as the presence of the sign is understood to serve an expressive purpose within the artwork. As such, origin or endorsement confusion must remain the governing criteria in metaverse fashion as prioritising mere association would collapse the distinction between expression and commercial conduct and unduly expand trade mark protection. This analysis can be affected by the market practices of fashion brands. For example, Balenciaga sold a collection

[16] ibid s 10(2).
[17] Rosie Lapper, 'To file or not to file? Trade Mark protection in the metaverse' (*CMS Law-Now*, 23 March 2022) <https://cms-lawnow.com/en/ealerts/2022/03/to-file-or-not-to-file-trade-mark-protection-in-the-metaverse> accessed 2 December 2024.
[18] Allegra Canepa, 'Legal Status of Non-Fungible Tokens and Sales on Marketplaces: the European and U.S. Regulatory Landscape' in Maria-Teresa Paracampo (ed), *Beyond MICA: An Overview of developments on crypto-assets* (G. Giappichelli, 2026).
[19] Case C-251/95 *SABEL BV v Puma AG* [1997] ECR I-06191, para 18.
[20] ibid para 16-17; Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1998] ECR I-05507 para 29-30.

including both digital and physical clothing,[21] this created a fused consumer experience that in turn may increase the likelihood consumers will assume metaverse fashion that references real-world brands is affiliated with that brand.[22] However, the fact a brand operates in the metaverse does not mean all digital use of its trade marks are presumed to be commercially connected. Metaverse fashion referencing Balenciaga can still be understood as artistic particularly where its context signals artistic use rather than commercial intent. Therefore, metaverse fashion disrupts the traditional product categories and predictable consumer expectations. Confusion in the metaverse does not arise from the functional similarity between the goods but from shifting perceptions of brand activity across digital and physical marketplaces. Section 10(2) struggles to distinguish origin confusion from association as the hybrid nature of digital goods and services blurs the boundary between the two in a way which the traditional confusion analysis was not designed to resolve.

Section 10(3) offers broader protection for trade marks with a reputation in the UK.[23] Infringement occurs even where goods and services are dissimilar, provided the use of the mark without 'due cause' 'takes unfair advantage of' or is 'detrimental to' the mark's 'distinctive character' or 'repute'.[24] This provision offers a more 'straightforward' protection for brand owners as it avoids proving confusion.[25] Where metaverse fashion references the existing trade marks of real-world luxury fashion brands, courts must evaluate whether the use exploits the owners reputation to enhance the appeal of the digital good. However, the focus prioritises its economic impact and risks interpreting unfair advantage broadly meaning artistic use is viewed as infringing. Similarly, the threshold for detriment can be difficult to determine where consumer perception is shaped by the context of the platform. Although 'due cause' presents a flexible mechanism which may consider artistic expression, there is

[21] Barbara Pozzo, 'Fashion in the metaverse' in Larry DiMatteo and Michel Cannarsa (eds), *Metaverse and Law* (CUP 2024); Oscar Gonzalez, 'Show off how much of a Fortnite fan you are with $725 Balenciaga hoodie' (*CNET*, 20 September 2021) < https://www.cnet.com/culture/fashion/show-off-how-much-of-a-fortnite-fan-you-are-with-725-balenciaga-hoodie/> accessed 4 December 2024.
[22] Lapper (n 17).
[23] Trade Marks Act 1994, s 10(3).
[24] ibid.
[25] Lapper (n 17).

currently no clear framework for assessing expressive use, particularly in metaverse fashion where use can be both artistic and commercial. As such this lack of structure creates uncertainty. To address this gap, it is argued courts should interpret 'due cause' to treat genuine artistic expression as capable of constituting due cause.

Finally, Section 11 sets out several defences to limit the scope of an infringement.[26] These include provisions such as the use of a later registered mark and one's own name or address, non-descriptive or descriptive uses.[27] While significant, these defences are less applicable to metaverse fashion where direct infringement is the predominant concern. Significantly, the TMA does not explicitly recognise artistic expression as a defence. As discussed in the following section, Article 10 of the European Convention on Human Rights ('ECHR') may arguably provide some protection, but its application remains uncertain. This causes difficulties for artists to rely on artistic justifications where the metaverse fashion incorporates existing trade marks.

B. Artistic Expression

Artistic expression is protected within the freedom of expression under article 10 ECHR, incorporated into UK law through the Human Rights Act.[28] This right includes the freedom to 'receive and impart information and ideas without interference by public authority' which extends to works of art.[29] However, this right is qualified under article 10(2) which permits restrictions necessary for the protection of 'rights of others', such as IP rights.[30] For example, in practice the court would likely assess whether the restriction of IP rights is necessary and proportionate by considering factors such as the risk of misleading consumers and whether the same expressive purpose could be achieved through less intrusive means. Thus, while in theory artistic

[26] Trade Marks Act 1994, s 11.
[27] ibid.
[28] Human Rights Act 1998.
[29] European Convention on Human Rights, art 10; Equality and Human Rights Commission, 'Article 10: freedom of expression' (*Equality Human Rights*, 3 June 2021) <https://www.equalityhumanrights.com/human-rights/human-rights-act/article-10-freedom-expression> accessed 1 December 2024.
[30] European Convention on Human Rights, art 10(2).

expression is protected under article 10, it is limited by ownership rights and its treatment in UK trade mark cases remains largely untested.

The approach to reconciling the tension between trade mark protection and artistic expression varies across jurisdictions. The US relies on First Amendment[31] protection and the fair use doctrine under the Lanham Act,[32] particularly through the *Rogers v Grimaldi*[33] test used to shield expressive works unless there is no artistic relevance, or the use is misleading.[34] In contrast, the UK has no judicial test or fair use equivalent with the closest concept of 'fair dealing' being only applicable in copyright law, leaving article 10 the only potential defence in trade mark cases.[35] However, the application of article 10 is limited and uncertain. As such, it is recommended the UK resolves the lack of consideration for artistic expression within the existing statutory framework, rather than through the introduction of a separate fair use style defence.

Some European jurisdictions have used article 10 as a foundation to recognise limited similar fair use exceptions for parody, art, or critical commentary, but fail to provide an adequate framework.[36] As metaverse fashion grows, there is a need for a coherent framework that respects both trade mark protection and artistic expression. Although article 10 offers a foundation, it must be translated into a more structured framework within the UK doctrine. Until such an approach is developed artists risk legal uncertainty when engaging in metaverse fashion that incorporates trade marks under the current framework.

[31] First Amendment, United States Constitution.
[32] Lanham Act 1946 (United States).
[33] *Rogers v Grimaldi* 875 F2d 994 (2nd Cir 1989).
[34] ibid.
[35] Intellectual Property Office, 'Exceptions to copyright' (*GOV.UK*, 12 June 2014) <https://www.gov.uk/guidance/exceptions-to-copyright> accessed 27 November 2024.
[36] Martin Senftleben, 'Robustness Check: Evaluating and Strengthening Artistic Use Defences in EU Trade Mark Law' (2022) 53 IIC 567, 591 <https://doi.org/10.1007/s40319-022-01182-x> accessed 28 November 2024; *Hermès v Namilia* (2-06 O 533/23) [2023] (LG Frankfurt am Main); Case A/2018/1/8 *Moët Hennessy v Cedric Art* [2019] (Benelux Court of Justice), para 9; TaylorWessing, 'Intersection between artistic expression and Trade Mark rights' (*TaylorWessing*, 9 April 2020) <https://www.taylorwessing.com/en/insights-and-events/insights/2020/04/the-intersection-between-artistic-expression-and-trade-mark-rights> accessed 6 December 2024.

C. Theoretical Perspectives

Traditionally, trade marks served to identify the 'manufacturer of goods',[37] and improve the 'quality' of accurate information in the marketplace.[38] However, the article proceeds on the basis trade marks have evolved beyond their traditional functions particularly in metaverse fashion and instead serve as cultural and artistic symbols. Therefore, as well as protecting commercial interests and brands reputation, trade marks communicate cultural meanings to audiences. Scholars Sableman and Jacques explore this development from 'commercial symbols'[39] to cultural symbols that allow for expression and communication, which complicates a modern application of legal frameworks based on the traditional understanding.[40] This has created a need for legal reform and shift in judicial understanding to align with this theoretical basis.

Scholars assert traditional legal frameworks are inadequate to account for the expressive functions of trade marks.[41] This issue has been contended by the likes of Rahmatian from a human rights perspective and Tang from a doctrinal standpoint.[42] Tang goes further by arguing for a genericide defence in trade mark law.[43] She draws on Dreyfuss's 'expressive genericity' theory,[44] contending as well as trade marks

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[37] Graeme Dinwoodie, 'Ensuring Consumers "Get What They Want": The Role of Trade Mark Law' (2024) 83(1) CUP 36, 37 <https://doi.org/10.1017/S0008197323000636> accessed 2 December 2024.
[38] Mark McKenna, 'The Normative Foundations of Trade Mark Law' (2007) 82(5) NDLR, 1840 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=889162> accessed 20 November 2024.
[39] Mark Sableman, 'Artistic Expression Today: Can Artists Use the Language of Our Culture' (2007) 52(1) SLULJ 187, 203 <https://heinonline.org/HOL/P?h=hein.journals/stlulj52&i=232> accessed 10 December 2024.
[40] ibid 200; Sabine Jacques, 'The EU Trade Mark system's lost sense of humour' (2023) Intellectual Property Quarterly Journal 1, 23 <https://ssrn.com/abstract=4684778> accessed 13 December 2024.
[41] Andreas Rahmatian, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (KLL 2008), 351; Xiyin Tang, 'Against Fair Use: The Case for a Genericness Defense in Expressive Trade Mark Uses' (2016) 101(4) ILR, 2021 <https://heinonline.org/HOL/P?h=hein.journals/ilr101&i=2075> accessed 2 February 2025.
[42] Andreas Rahmatian, 'Trade Marks and Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (KLL 2008), 351; Xiyin Tang, 'Against Fair Use: The Case for a Genericness Defense in Expressive Trade Mark Uses' (2016) 101(4) ILR, 2021 <https://heinonline.org/HOL/P?h=hein.journals/ilr101&i=2075> accessed 2 February 2025.
[43] Xiyin Tang, 'Against Fair Use: The Case for a Genericness Defense in Expressive Trade Mark Uses' (2016) 101(4) ILR 2021, 2057 <https://heinonline.org/HOL/P?h=hein.journals/ilr101&i=2075> accessed 2 February 2025.
[44] Rochelle Dreyfuss, 'Expressive Genericity: Trade Marks as Language in the Pepsi Generation' (1990) 65(3) NDLR 397, 399 <https://scholarship.law.nd.edu/ndlr/vol65/iss3/1> accessed 2 February 2025.

'signalling function', they have an expressive function.[45] Under this defence mrade marks, such as 'LOUIS VUITTON', can become symbolic of the concept of 'luxury' which would allow them to be reinterpreted in artistic works, such as metaverse fashion.[46] Beebe provides the theoretical grounding for this, positioning trade marks as 'floating signifiers' in a semiotic system which communicates meaning beyond the marketplace.[47] He distinguishes 'source distinctiveness', which identifies the product's origin, and 'differential distinctiveness', which determines the marks capacity to stand out from others.[48] In metaverse fashion it is often the latter that drives creativity. Metaverse fashion can draw on well-known branding because of their recognisable visual qualities that carry cultural significance. The mark's distinctiveness therefore may function as a creative resource as well as a badge of origin.

This approach resonates with Breton's 'crisis of the object' theory which states when objects are removed from their usual contexts and 'reassembled' artistically they 'differ' from their functional role and become a form of artistic expression.[49] In this sense, Beebe's semiotic analysis aligns with Breton's surrealist perspective, as both frameworks allude to the sense once a trade mark enters the artistic domain, such as metaverse fashion, it can be transformed from a commercial identifier to a form of artistic expression.[50] If recognised by the law, courts might consider artistic use and the transformative nature of the trade mark when assessing infringement. This outlines how protection for artistic expression may operate without undermining the commercial trade mark rights of brand owners.

A risk of limiting individual expression and creativity is prevalent if the UK adopts a strict approach to trade mark rights in metaverse fashion which does not account for a modern theoretical understanding. In this instance, Beebe's warning, originally

[45] Tang (n 43) 2028-2029.
[46] ibid 2032.
[47] Barton Beebe 'The Semiotic Analysis of Trade Mark Law' (2004) 51(3) UCLALR 621, 626 < https://heinonline.org/HOL/P?h=hein.journals/uclalr51&i=651> accessed 8 March 2025.
[48] ibid 669-683.
[49] André Breton, 'Crisis of the Object' in Lucy Lippard (ed), *Surrealists on Art* (PH 1971) 51-55.
[50] ibid; Beebe (n 47) 626.

directed at US dilution protection which resists 'any attempts to limit its scope', could be applied in the UK as expanding legal protection would enable companies to gain control over cultural symbols.[51] In this regard, Yarmark's critique of the modern-day 'trade mark everything' philosophy is significant.[52] Applying this philosophy to the metaverse would inadvertently constrain artistic freedom by creating a 'lock-in effect' where trade mark overreach limits expressive choices.[53] These perspectives demonstrate the need for a balanced legal approach and understanding that protects brands interests and acknowledges the role of artistic expression in metaverse fashion.

To conclude, the analysis shows that the UK's existing trade mark framework cannot distinguish expressive metaverse use from commercial exploitation. This alludes to the need to adopt the modern theoretical understanding by creating a structured test capable of guiding courts in recognising artistic expression in metaverse fashion.

3. The Hermès Case Study

This Part determines that the difficulties within the UK trade mark framework become clear when applied to *Hermès v Rothschild ('Hermès')*. The MetaBirkin project exposes how the existing UK doctrine cannot satisfactorily accommodate artistic expression in the metaverse.

A. Background

Hermès is a French luxury fashion house[54] and creator of 'one of the most coveted objects of recent decades', the Birkin handbag ('Birkin').[55] In December 2021, Rothschild launched the 'MetaBirkins' as NFTs which depicted the Birkin covered in a variation of designs, from faux fur patterns to artworks, such as Vincent van Gogh's

[51] Beebe (n 47) 701.
[52] Alona Tarmark, 'Trade Mark dilemmas in the Metaverse: interplay between stakeholders' (2025) 0(0) JIPLP 1, 14 <https://doi.org/10.1093/jiplp/jpae118> accessed 12 February 2025.
[53] ibid.
[54] Miles Socha, 'Hermes Touts Craftsmanship Over Metaverse' (*Women's Wear Daily,* 21 April 2022) <https://wwd.com/digital-daily/digital-daily-march-22-2022/full-view/> accessed 20 November 2024.
[55] Hermès, 'Birkin bag' <https://www.hermes.com/uk/en/content/106191-birkin/> accessed 20 November 2024.

'Starry night'.[56] The MetaBirkins were highly popular and sold for 'record prices'.[57] However, later Rothschild revealed via Instagram he received a cease-and-desist letter from Hermès demanding him to stop selling the MetaBirkin NFTs.[58] After receiving the letter the digital marketplace Open Sea removed them from the platform.[59] In response, Rothschild posted to Instagram 'he would not apologise for creating art' and relocated the NFTs to a different platform Rarible.[60]

B. Trade mark Infringement

The issue before the court was whether Rothschild's creation and sale of the MetaBirkins infringed Hermès 'BIRKIN' mark by causing consumer confusion. To determine this the Court applied the *Polaroid v Polarad*[61] *('Polaroid')* test to evaluate Rothschild's use of the mark.[62] The court placed weight on the strength of the 'BIRKIN' mark, which was acknowledged by Rothschild himself as Hermès most 'iconic' product.[63] The similarity between the marks 'BIRKIN' and 'METABIRKIN'

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[56] Lauren Golangco, 'Mad About MetaBirkins: What Is the MetaBirkin and Why Is It Rocking the Fashion World?' (*Tatler*, 10 February 2022) <https://www.tatlerasia.com/power-purpose/technology/what-is-the-metabirkin-metaverse> accessed 21 November 2024; Vincent van Gogh, *Starry Night* (1889).

[57] Sold for 5-25 Ethereum on the secondary market (equivalent to $13,000-$16,000 under the exchange rate at the time), Taylor Dafoe, 'Hermès Is Suing a Digital Artist for Selling Unauthorized Birkin Bag NFTs in the Metaverse for as Much as Six Figures' (*artnet*, 26 January 2022) <https://news.artnet.com/art-world/hermes-metabirkins-2063954> accessed 18 November 2024; Alyssa Kelly, 'Mason Rothschild's 'MetaBirkin' NFTs Sell for Record Prices' (*L'Officiel*, 15 December 2021) <https://www.lofficielusa.com/fashion/hermes-metabirkins-nfts-collection> accessed 18 November 2024.

[58] Clara Tipper, 'NFT Legislation and the Hermès vs. Mason Rothschild Case' (St Andrews Law Review, 5 April 2023) <https://www.standrewslawreview.com/post/nft-legislation-and-the-hermès-vs-mason-rothschild-case> accessed 21 November 2024.

[59] Harper Johnson, 'Case Review: Hermès International v. Rothschild' (*Center for Art Law*, 7 May 2024) <https://itsartlaw.org/2024/05/07/case-review-hermes-v-rothschild/> accessed 15 November 2024.

[60] ibid.

[61] *Polaroid v Polarad Electronics Corp*, 287 F2d 492 (2nd Cir 1961), the factors include: (i) strength of the claimant's mark; (ii) similarity between the marks; (iii) proximity of the products; (iv) likelihood the claimant will bridge the gap; (v) evidence of actual confusion; (vi) defendant's good faith in adopting the mark; (vii) quality of the defendant's product; (viii) sophistication of the buyer.

[62] Plaintiffs' Memorandum of Law in Opposition to Defendant's Motions for Judgement as a Matter of Law or for a New Trial' (28 March 2023) ('Hermès memorandum') <https://artlawpodcast.com/wp-content/uploads/2023/04/2023.03.28-Hermes-Brief-IOT-Motion-for-Judgment-or-New-Trial-Dkt.-183.pdf> accessed 22 November 2024.

[63] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 11.

was evident from the wording and the use of a Birkin schematic to create the MetaBirkins, and reference to them as a 'tribute to Hermès'.[64] In relation to proximity both items appeal to luxury consumers and function as signifiers of ''wealth' and 'success' as expressed by Rothschild himself.[65] Next, the likelihood of Hermès bridging the gap was evident through their potential expansion into the metaverse through the development of Birkin-related NFT projects.[66] Further, evidence of actual confusion was particularly persuasive. Rothschild's attempt to rename the MetaBirkins to 'MetaFurkins' to 'shed confusion' was treated as an acknowledgement of consumer confusion.[67] This was emphasised by survey evidence indicating 18.7% confusion among NFT buyers, media outlets believing the MetaBirkins were associated with Hermès, and comments from consumers who believed they had been 'scammed' as they were under the impression they purchased a Hermès Birkin bag.[68] Additionally, the court found that Rothschild had acted in bad faith through his attempts to capitalise on the reputation of the 'BIRKIN' mark, stating on twitter 'Be early @MetaBirkins… Minting Soon', and falsely claiming to have meetings with Hermès.[69] Finally, the buyers were deemed unsophisticated due to the 'immature' and 'speculative' nature of the NFT market.[70] Accordingly, the court was satisfied that Rothschild's use of the 'BIRKIN' mark supported a finding of Trade mark infringement.

In the UK the MetaBirkins cannot reasonably satisfy the requirements of section 10(1) TMA as it would be unlikely the MetaBirkin would be deemed identical to the 'BIRKIN' mark due to the prefix 'META' and the fact that NFTs are distinct from the 'handbags' which the mark is registered for. As such, the infringement analysis falls to be considered under section 10(2).

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[64] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 1-13.
[65] Yahoo Finance Video, 'NFT artist: 'MetaBirkins' project aims to create 'same kind of illusion that it has in real life' (*Yahoo Finance*, 6 December 2021) <https://finance.yahoo.com/video/nft-artist-metabirkins-project-aims-200930209.html> accessed 29 November 2024.
[66] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 15.
[67] *Hermès v Rothschild* (n 6) Hermès memorandum (n 62) 13.
[68] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 13-14.
[69] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 16-17.
[70] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 18.

The first issue is whether the sign 'METABIRKIN' is sufficiently similar to the 'BIRKIN' mark. Under section 10(2) similarity is assessed in reference to the overall impression of the signs. The words 'METABIRKIN' and 'BIRKIN' are highly similar. The additional prefix 'META' is the only distinguishing component. However, this is arguably descriptive given the goods are sold as NFTs in the metaverse. As such, 'BIRKIN' remains the distinctive element of the sign and is likely to be recognised by consumers. The MetaBirkins use of the Birkin design elements intensifies this similarity further. The sign is likely to bring to mind Hermès 'BIRKIN' mark to the average consumer. Therefore, there is a high degree of similarity.

The analysis then turns to whether the MetaBirkin NFTs and the 'BIRKIN' handbags constitute similar goods for the purposes of Trade mark infringement. In the absence of direct authority addressing metaverse products and physical goods, the UK courts may use the factors from *British Sugar v James Robertson & Son*[71] *('British Sugar')*. The similarity between whether the goods are sufficiently similar is contentious. Firstly, in terms of the 'respective use',[72] the MetaBirkin functions as a digital collectible, while the Birkin is a physical handbag used for fashion and function.[73] It may be acknowledged that both goods serve a broader symbolic purpose as a signifier of wealth and status. However, the difference in the form and function suggests this shared symbolic use does not materially affect the assessment of similarity. The identity of 'users' further distinguishes the goods.[74] As Gery observes, there is a lack of evidence the goods compete as it is difficult to ascertain whether the typical Birkin purchaser would also purchase a MetaBirkin.[75] While both goods are targeted at the

[71] *British Sugar Plc v James Robertson & Sons Ltd* [1996] 2 WLUK 104, [1997] ETMR 118 (Ch), the factors include: (i) respective use; (ii) users; (iii) physical nature of the goods; (vi) trade channels through which they reach the market (v) where self-serve consumer items are found or likely to be found in a supermarket; (vi) whether they are competitive; (vii) whether they are complementary.
[72] ibid 127 (Jacob J).
[73] Bare Fashion, 'Why Handbags Are More Than Just an Accessory' (*Bare Fashion*, 7 February 2024) <https://barefashion.co.uk/blogs/blog/why-handbags-are-more-than-just-an-accessory?srsltid=AfmBOorNhV56BPe_RH_XU98NgmGBu0aWH2pYBxbBHE6LsVhFMWCjIYKu> accessed 22 November 2024.
[74] *British Sugar* (n 71) 127 (Jacob J).
[75] Michelle Gery, 'Understanding the MetaBirkin: Trade Mark Law and an Appropriate Legal Standard for NFTs' (2024) 47(4) CLJLA 634 <https://doi.org/10.52214/jla.v47i4.13098> accessed 21 November 2024.

luxury market, NFT buyers represent a more niche section of the public, distinct from traditional Birkin customers.[76] Additionally, the 'trade channels' also differ,[77] Birkins are sold in Hermès stores, where customers require a relationship with retail assistants while MetaBirkins are traded on NFT platforms, such as OpenSea.[78] This reflects the different purchasing experiences and consumer expectations. If interpreted in this way, courts would find insufficient similarities to find infringement, offering a stronger protection for artistic expression in metaverse fashion. Still, *British Sugar* concerned unrelated food products, a dessert syrup and spread, which may have limited applicability.[79] Thus, courts may adopt a more restrictive approach, potentially favouring brand protection guided by a generalised interpretation of the luxury market reflecting the reasoning in *Hermès*.[80] Therefore, a strict application of traditional factors suggests the goods are dissimilar, but a broad interpretation could support the finding of similarity.

As such, it is unclear whether a likelihood of confusion arises. The challenges of applying traditional trade mark law to metaverse fashion suggests the need for a more flexible approach. An expansive reading of the *British Sugar* factors could be used to argue that metaverse fashion goods share an economic or symbolic function with their physical counterparts, a strict application of the test still leads to the conclusion that such goods are dissimilar under the current law. Though courts may be motivated to stretch the doctrine to protect luxury brands in the metaverse such an approach risks misrepresenting the statutory framework and threatening genuine forms of artistic expression. Hence, the existing test in section 10(2) is not fit for the metaverse. It is recommended that the courts adopt a modernised framework for assessing similarity

[76] Marc Schuler and Inès Tribouillet, 'NFT and virtual objects like "Metabirkin": a challenge for rightsholders' (*TaylorWessing*, 20 June 2022) <https://www.taylorwessing.com/en/insights-and-events/insights/2022/06/nft-and-virtual-objects-like-metabirkin> accessed 9 February 2025.
[77] *British Sugar* (n 71) 127 (Jacob J).
[78] Prarthana Prakash, 'How to buy a Birkin bag: The Hermès exclusivity that's driving shoppers to sue' (*Fortune,* 8 November 2024) <https://fortune.com/europe/2024/11/08/how-to-buy-a-birkin-bag-hermes-lawsuit/#> accessed 2 February 2025.
[79] *British Sugar* (n 71) 119 (Jacob J).
[80] *Hermès v Rothschild* (n 6).

which recognises the unique characteristics of digital goods and services while maintaining the underlying principles of trade mark law.

C. Trade mark Dilution

Hermès claimed Rothschild diluted the distinctiveness of the 'BIRKIN' mark through blurring.[81] Under the Lanham Act, Hermès must prove the mark was 'famous', became 'famous' before the sale of the MetaBirkins, and being associated with the MetaBirkins was 'likely to dilute' the marks distinctiveness.[82] Evidence such as Rothschild's own acknowledgement the 'BIRKIN' mark is 'iconic' supported its fame and distinctiveness.[83] This comment was also made prior to the sale of MetaBirkins.[84] Finally, there was a likelihood to cause dilution, supported by evidence considered in the *Polaroid* factors, alongside Rothschild's own observation the difference between the goods was 'getting a little bit blurred'.[85]

Unlike the US, the UK does not treat dilution as an independent claim, instead, incorporates it in section 10(3) TMA.[86] As such, the first question for the UK court would be whether the 'BIRKIN' has sufficient reputation to trigger protection under section 10(3). The legal framework requires Hermès demonstrates a reputation in the UK and that the sign gives rise to a link even where the goods are dissimilar.[87] Applying this standard, it is highly likely the court would find that the 'BIRKIN' holds a strong reputation in the UK, as like in the US it is synonymous with exclusivity in the luxury fashion market,[88] as acknowledged by Rothschild himself.[89] Therefore, its reputation satisfies the protection of section 10(3).

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[81] ibid; Marie-Andrée Weiss, 'When Faux-Fur Birkin Bags Blur a Famous Mark in the Metaverse' (*TTLF*, 12 May 2023) <https://ttlfnews.wordpress.com/2023/05/12/when-faux-fur-birkin-bags-blur-a-famous-mark-in-the-metaverse/> accessed 6 December 2024.
[82] Lanham Act 1946 (United States), s 43(c); *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 20.
[83] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 11.
[84] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 21.
[85] ibid.
[86] Lanham Act 1946 (United States), ss 32 and 43(c); Trade Marks Act 1994, s 10(3).
[87] Trade Marks Act 1994, s 10(3).
[88] Rupert Neate, 'Hermès reports 23% jump in sales as super-rich continue to spend big' *The Guardian* (14 April 2023) <https://www.theguardian.com/fashion/2023/apr/14/hermes-reports-jump-in-sales-as-super-rich-continue-to-spend-big> accessed 28 November 2024.
[89] Yahoo Finance Video (n 65).

The next issue is whether Rothschild's use of the sign amounts to 'use in the course of trade which includes affixing a sign to goods, offering goods for sale, placing them on the market, or using them in advertising.[90] The MetaBirkin NFTs were promoted and sold on NFT marketplaces. Therefore, Rothschild's use of the ''METABIRKIN' sign would be deemed in the course of trade under UK law.

A further question is whether the use of the 'METABIRKIN' sign would give rise to a link in the mind of the average UK consumer with the earlier 'BIRKIN' mark. It has been established that a link arises where the average consumer, upon encountering the later sign, mentally connects it with the earlier mark, even without confusion to its origin.[91] Applying this to the MetaBirkin NFTs, the distinctive and iconic nature of the Birkin bag makes a mental link likely. The term incorporates the entirety of the earlier mark, with the prefix merely signalling a digital reinterpretation. The average UK consumer would recognise the reference when encountering the MetaBirkin in an online marketplace due to the Birkin bag's reputation. Furthermore, the metaverse does not prevent the mental association from forming, instead the digital setting may reinforce the perception Hermès is extending its brand into metaverse fashion. Thus, it is highly likely the court would find the 'METABIRKIN' sign evokes the earlier 'BIRKIN' mark in the mind of the average consumer.

A key question is whether Rothschild's use of the sign takes unfair advantage of the distinctive character or reputation of the 'BIRKIN' mark. Unfair advantage arises in conduct which allows the defendant to 'ride on the coat-tails' of the earlier mark and thus gain an undue commercial advantage by appropriating the qualities acquired through investment and reputation.[92] The MetaBirkins appeared to appropriate the brand value associated with the Birkin bag. The choice of the sign 'METABIRKIN' incorporates the entirety of the 'BIRKIN' mark which creates a conceptual link between the two. This connection is reinforced by the NFTs being sold at a high price

[90] Trade Marks Act 1994, s10(3), s10(4).
[91] Case C-252/07 *Intel Corporation Inc. v CPM United Kingdom Ltd* [2008] ECR I-08823 para 17.
[92] Case C-487/07 *L'Oreal SA v Bellure NV* [2009] ECR I-05185 para 49.

with some reaching $65,000.[93] This may reflect the artwork itself and collectible nature of NFTs, or the exploitation of the luxury status associated with the 'BIRKIN' mark. Courts would likely interpret the latter as the pricing suggests the commercial success of the NFTs derived from the Birkins' reputation rather than from Rothschild's independent artistic merit. This is further supported by the evidence of misleading claims of partnering with Hermès.[94] Therefore, the court would likely conclude Rothschild took unfair advantage of the Birkins' reputation.

Alternatively, if the court could not find unfair advantage it can assess detriment to the 'BIRKIN' mark's distinctiveness or reputation.[95] The issue is therefore whether Rothschild's use of the sign would cause detriment to the distinctive character to the 'BIRKIN' mark. When interpreting detriment, UK courts require actual effect, not association alone.[96] In *Whirlpool v Kenwood ('Whirlpool')*[97] and *Och-Ziff v Och*[98] *('Och-Ziff')*, judges placed significance on confusion to assess detriment to a mark's distinctiveness, even if momentary.[99] In *Whirlpool*, there was no detriment without 'initial confusion',[100] and in *Och-Ziff* the court assessed 'likelihood of confusion' which included 'initial interest confusion'.[101] It could be argued that the introduction of digital goods bearing a new identical sign threatens to dilute the exclusivity of the Birkin brand. Evidence indicating consumers were confused in the survey supports this.[102] However, under UK law confusion alone is not enough, Hermès would need to demonstrate that exposure to the MetaBirkin NFTs risks eroding the Birkins' capacity to signify a single commercial source. Therefore, the court could likely find detriment if Hermès can show that the MetaBirkin weakens the exclusivity of the Birkin mark or undermines its ability to indicate Hermès as the commercial origin.

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[93] Taylor Dafoe, 'Hermès Is Suing a Digital Artist for Selling Unauthorized Birkin Bag NFTs in the Metaverse for as Much as Six Figures' (*artnet*, 26 January 2022) <https://news.artnet.com/art-world/hermes-metabirkins-2063954> accessed 18 November 2024; Trade Marks Act 1994, s 10(3).
[94] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 17.
[95] Trade Marks Act 1994, s 10(3).
[96] *Premier Brands UK Ltd v Typhoon Europe Ltd* [2000] ETMR 1071 (Ch) 1073 (Neuberger J).
[97] *Whirlpool Corp v Kenwood Ltd* [2009] EWCA Civ 753, [2010] ETMR 7.
[98] *Och-Ziff Management Europe Ltd v Och Capital LLP* [2010] EWHC 2599 (Ch), [2011] Bus LR 632.
[99] *Whirlpool* (n 124) [127] (Lloyd LJ); *Och-Ziff* (n 125) [138] (Arnold J).
[100] *Whirlpool* (n 119) [127] (Lloyd LJ).
[101] *Och-Ziff* (n 120) [138] (Arnold J).
[102] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 14.

The decisive question is therefore whether the MetaBirkins led to a material weakening of the Birkins' distinctiveness. This demonstrates the difficulty of applying the traditional doctrine to metaverse fashion.

Another point the court must consider is whether the MetaBirkins caused detriment to the reputation of the 'BIRKIN' mark. Reputational harm arises if the mark is associated with goods that negatively affect public perception.[103] In *Sheimer's Application*[104] *('Sheimer')* the use of the 'MARS' mark for contraceptives could cause detriment to its reputation by creating 'associations' a candy manufacturer would 'not wish to be identified with'.[105] Likewise, in *Pfizer v Eurofoods*[106] *('Pfizer')* 'VIAGRENE', an aphrodisiac product, was held to cause 'obvious' reputational harm to Pfizer's 'VIAGRA', a medical product, due to the risk of becoming associated as a 'recreational product' rather than a pharmaceutical.[107] Hermès could argue that the NFTs risk tarnishing the Birkins' prestigious reputation by presenting the mark in ways which are aesthetically dissimilar from Hermès controlled image. The MetaBirkins consist of bright furry digital reinterpretations of the bag which may appear inconsistent with the refined aesthetic of Hermès.[108] Additionally, Hermès could argue that it appears in a less selective NFT marketplace which undermines the Birkins' exclusive distribution and allows the mark to be placed alongside lower quality NFTs for sale thereby creating negative associations with the brand. While Hermès planned to enter the metaverse, Rothschild's unauthorised use deprived them the opportunity to control how the 'BIRKIN' mark is represented.[109] However, this harm is undoubtedly

[103] Trade Marks Act 1994, s 10(3).
[104] *CA Sheimer (M) Sdn BHd's Trade Mark Application* [2000] RPC 484 (Trade Marks Registry, Appointed Person).
[105] ibid 508 (Hobbs QC).
[106] *Pfizer Ltd and Pfizer Incorporated v Eurofood Link (United Kingdom) Ltd* [2000] ETMR 896.
[107] ibid [56-58] (Thorley QC).
[108] Lauren Golangco, 'Mad About MetaBirkins: What Is the MetaBirkin and Why Is It Rocking the Fashion World?' (*Tatler*, 10 February 2022) <https://www.tatlerasia.com/power-purpose/technology/what-is-the-metabirkin-metaverse> accessed 21 November 2024; Justin Ray, 'The Hermès Birkin Is the Most Popular Luxury Handbag on the Market, According to Search Data; (*Robb Report*, 24 July 2023) <https://robbreport.com/lifestyle/news/hermes-birkin-luxury-handbag-slingo-1234871666/> accessed 21 November 2024.
[109] Bethanie Ryder, 'Hermès' Entry Into The Metaverse Hails A New Era For Digital Luxury Fashion' (*Jing Daily*, 9 September 2022) <https://jingdaily.com/posts/hermes-trademark-application-metaverse> accessed 21 November 2024.

less severe than in *Sheimer* and *Pfizer*. In contrast, metaverse fashion may be seen as pushing the boundaries of fashion. Courts may therefore view the MetaBirkin images as unconventional rather than reputationally damaging. Therefore, the court could find detriment if it accepted the MetaBirkins create associations inconsistent with Hermès luxury image or may find the use as experimental. This uncertainty again highlights the limitations of applying traditional principles to metaverse fashion.

The remaining issue is whether Rothschild could rely on due cause to justify the use of the 'METABIRKIN' sign. UK courts require a sufficient reason for using the sign and emphasise that expressive intention alone is not enough where the use occurs in the course of trade. As evident in cases such as *Interflora v Marks & Spencer,*[110] motivations must be weighed against the commercial aspect. Rothschild would likely contend the MetaBirkins constitute artistic commentary on animal cruelty.[111] However, applying the UK's narrow interpretation of due cause this argument faces significant difficulty. The MetaBirkins reference the Birkin name directly and were sold to generate revenue, in particular the prices reflected luxury goods which alludes to an intention to capitalise on the Birkins' reputation, not to critique it. Therefore, Rothschild would struggle to establish due cause because of the commercial nature of the MetaBirkins. This finding reinforces the need for a test capable of distinguishing artistic expression from commercially exploitative conduct.

Consequently, the analysis demonstrates a UK court is likely to find significant concerns relating to both unfair advantage and detriment. The judicial prioritisation of commerciality suggests courts would give little weight to Rothschild's claims of artistic expression or contribution to fashion. Once the use is categorised as being 'in the course of trade', expressive motivations recede into the background. Under the current structure the law is therefore orientated towards safeguarding the commercial interests and brand investment of marks with reputation, rather than accommodating the hybrid nature between artistic expression and commercial gain by evaluating the

[110] *Interflora Inc v Marks & Spencer plc* (No 5) [2014] EWCA Civ 1403, [2015] LR 492.
[111] Danielle Garno and Krithika Rajkumar, 'Hermès win in 'MetaBirkin' trial: implications for fashion industry' (*Global Legal Post*, 13 February 2023) <https://www.globallegalpost.com/news/hermes-win-in-metabirkin-trial-implications-for-fashion-industry-1225165154> accessed 3 February 2025.

artistic aspect of digital reinterpretations. As such, the existing approach is weakly equipped to distinguish between authentic artistic expression and commercial exploitation. A modernised framework is required to balance brand protection with the realities of metaverse fashion.

D. Defences

Rothschild's primary defence was that the MetaBirkins constituted artistic expression invoking the *Rogers v Grimaldi*[112] *('Rogers')* test, as they were artistic 'in at least some respect'.[113] He contended the MetaBirkins were artistic commentary on the animal cruelty involved in creating leather goods,[114] inspired by 'fashion's 'fur free' initiatives' and 'embrace of alternative textiles'.[115] Hermès challenged this, arguing Rothschild's use was primarily commercial not expressive and caused consumer confusion.[116] The jury had to determine whether the MetaBirkins were art or a counterfeit product under the guise of art. In this context the commercial nature of the MetaBirkins were central to assessing whether the claimed artistic expression was genuine. Hermès demonstrated buyers were motivated by 'utilities', such as access to metaverse events rather than artistic value, showcased consumers and investors were misled to believe there was an affiliation with Hermès, and ensured the 18.7% confusion rate was above the required threshold which Rothschild disputed.[117]

Throughout Rothschild asserted his use of the 'BIRKIN' mark was artistically relevant, not misleading.[118] However, his own statement, 'I don't think people realise how much you can get away with in art by saying 'in the style of'', largely undermined his defence.[119] This was emphasised by him only referring to the MetaBirkins as 'art' after

[112] *Rogers* (n 33).
[113] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 9.
[114] *Hermès v Rothschild* (n 6); Garno and Rajkumar (n 111).
[115] *Hermès v Rothschild* (n 6); Felicia Boyd, 'Hermès Challenge of "MetaBirkin" NFTs to Continue' (*Norton Rose Fulbright*, July 2022) <https://www.nortonrosefulbright.com/en-bi/knowledge/publications/844123f5/hermes-challenge-of-metabirkins-nfts-to-continue> accessed 3 February 2025.
[116] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 9.
[117] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 28-31.
[118] *Rogers* (n 33).
[119] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 28.

receiving the cease-and-desist letter, and his reference to the MetaBirkins as a 'gem' alluding to the commercial connotations.[120]

However, it is important to separate Rothschild's conduct and consider the broader legal issue. His misleading statements and questionable actions clearly weakened his defence. Yet even an artist who avoids such conduct could face similar challenges. The metaverse is a space where artistic expression and commercial activity can coexist. From a Trade mark perspective this makes it inherently difficult to differentiate whether the use is predominantly artistic or exploitative.

The MetaBirkins hybrid nature complicates this defence, alluding to the inadequacy of traditional Trade mark defences in balancing Trade mark protection and artistic expression. This is supported by scholars Gery and Thede, with Gery noting the MetaBirkin could be categorised as either, 'art', 'commodity', or 'something entirely distinct' lacking legal classification,[121] and Thede describing it as inhabiting a 'space between art, commodity, and investment contract'.[122] The multifarious nature of metaverse fashion NFTs reinforces the notion traditional Trade mark frameworks are ill-prepared to adequately regulate them. This marks a 'battleground' between contemporary art and fashion which UK Trade mark law must confront.[123]

A significant Issue in *Hermès* was whether the MetaBirkins commercial nature undermined artistic expression.[124] The article contends that commerciality should not be treated as a determinative factor in assessing artistic expression. However, under the current approach by the UK courts, commerciality often weighs heavily against expressive use.[125] Commercial behaviour which actively mimics Trade mark functions such as explicit marketing of the work as 'official' or misleading claims of endorsement positioned to capitalise on the brand's signalling power not the artistic value should clearly not be permitted. However, commercial benefit incidental to

[120] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 28-30.
[121] Gery (n 75) 620.
[122] Victoria Thede, 'Purse, Painting, NFT: The Crisis of the Object in Trade Mark Law' (2024) 13(2) JIPEL 382, 419 <https://jipel.law.nyu.edu/purse-painting-nft-the-crisis-of-the-object-in-trademark-law/> accessed 6 December 2024.
[123] ibid.
[124] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 9.
[125] *Interflora Inc v Marks & Spencer plc* (No 5) [2014] EWCA Civ 1403, [2015] Bus LR 492.

artistic practice, such as the sale or exhibition of clearly non-endorsed artwork should not undermine the expressive character of the use. Treating all commercial use as infringing misaligns the Trade mark doctrine with the reality of the inherent artistic expression in the metaverse. Recognising this distinction is significant as it demonstrates why UK courts require a structured method for separating infringement where the commercial acts genuinely interfere with Trade mark functions from those that arise unavoidable from artistic participation in the metaverse. Gery and Gopnik support this position, asserting commercial aspects should not automatically negate artistic value by framing Rothschild's MetaBirkins within the traditional intersection of art and commerce.[126] Gery compares the sale of a 'painting' to the sale of NFTs, arguing it should not 'diminish' its artistic value.[127] Gopnik expands this, he provides examples of artworks, such as Manet's 'Bar at the Folies- Bergère' which included the 'Bass Pale Ale' sign,[128] and Picasso's 'Table in a Café' which featured the 'Pernod' sign ,[129] to demonstrate how artists have historically incorporated Trade Marksinto their work while still profiting.[130] These perspectives suggest commerciality does not lessen the claim of artistic expression, but instead reflects a tradition in contemporary art. Therefore, the issue is whether commerciality outweighs the artistic expression.

Furthermore, this concern is emphasised by the criticism of the *Rogers* test. Thede argues it proved 'ineffectual' in addressing the multifaceted relationship between art, fashion, technology, commerce, and Trade mark protection as an artistic fair use defence.[131] She states the test must adapt to protect IP rights of fashion brands,

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[126] Gery (n 75) 623; Blake Gopnik, 'A misguided jury failed to see the art in Mason Rothschild's MetaBirkins' The Washington Post (24 February 2023) < https://www.washingtonpost.com/opinions/2023/02/24/mason-rothschild-metabirkins-art-bad-jury-verdict/> accessed 21 November 2024.

[127] Gery (n 75) 623.

[128] Édouard Manet, *Bar at the Folies-Bergère* (1882) (oil on canvas painting depicting a barmaid in a Parisian cabaret, a beer bottle on the bar displays the Bass red triangle trade mark, one of the earliest registered UK Trade Marks (UK00000000001, registered 1875))

[129] Pablo Picasso, *Table in a Café (Bottle of Pernod)* (1912) (oil on canvas painting depicting a table with a fragmented bottle of Pernod, the label was registered as a figurative trade mark (UK00000004561, registered 1876)).

[130] Blake Gopnik, 'A misguided jury failed to see the art in Mason Rothschild's MetaBirkins' The Washington Post (24 February 2023) < https://www.washingtonpost.com/opinions/2023/02/24/mason-rothschild-metabirkins-art-bad-jury-verdict/> accessed 21 November 2024.

[131] Thede (n 122) 382.

supporting the notion existing traditional frameworks fail to do so. Drawing on Breton's 'crisis of the object' theory,[132] Thede asserts the MetaBirkin transforms the Birkin from a tangible commodity to an artistic statement.[133] In her view the *Rogers* test is ill-equipped to consider Breton's theory which 'inspires art' but 'plagues' Trade mark law.[134] This alludes to how traditional Trade mark law overlooks the cultural significance of NFTs and luxury brands, suggesting it fails to accommodate artistic expression.

In the UK, Rothschild would rely on the freedom of expression defence under article 10 ECHR. In *Ashdown v Telegraph Group*[135]*('Ashdown')* the Court held political and journalistic expression attracts the highest level of article 10 protection which suggests commercial motivations carry less weight when balanced against competing expressive rights.[136] Although *Ashdown* concerned copyright, it may indicate the approach courts take when expression and IP rights conflict. As such, where expressive purposes carry a high public interest value commerciality is not determinative. However, the weight of artistic expression is unclear. In regard to the MetaBirkins where the purpose is artistic and commercial the protection afforded by article 10 may be limited. Additionally, UK Trade mark law, has focused on consumer confusion, unfair advantage or detriment.[137] This narrow scope outlines the limited applicability of article 10, reinforced by courts lack of engagement with expressive defences in Trade mark cases.[138] This indicates the UK is ill-equipped to address artistic expression in the metaverse. Thus, Rothschild's defence would face significant challenges under UK law, particularly considering his own acknowledgement of the

[132] Breton (n 49).
[133] Thede (n 122).
[134] ibid 382.
[135] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2002] CH 149.
[136] ibid [82] (Lord Phillips MR).
[137] Trade Marks Act 1994, s 10.
[138] Wiggin, '"Hermès or a MetaBirkin?" Jury rules in favour of Hermès in a persuasive case indicating trade mark infringement in the Metaverse' (*Wiggin, 15 March 2023*) <https://www.wiggin.co.uk/insight/hermes-or-a-metabirkin-jury-rules-in-favour-of-hermes-in-a-persuasive-case-indicating-trade-mark-infringement-in-the-metaverse/> accessed 11 December 2024.

MetaBirkins commerciality, consumer confusion, and his misleading statements suggesting affiliation with Hermès.[139]

The verdict has been criticised on the basis of whether commerciality should exclude artistic expression. Scholars like Gery and Gopnik suggest courts should take a more nuanced approach, recognising the intersection of commerce and artistic expression in metaverse fashion.[140] In the absence of clear legal provisions, these critiques present an opportunity for UK jurisprudence to evolve by interpreting the current framework in a way which incorporates the proportionality principles of article 10. While Rothschild may still fail to be protected by a fair use equivalent under a more flexible interpretation due to his misleading conduct, these perspectives outline the need for protection for genuine artistic expression. Reliance on article 10 has been deemed 'unattractive' by Burrell and Gangjee as it risks undermining legal 'certainty'.[141] While a valid concern, it is not suggested courts rely on article 10 as a defence alone, rather that its interpretative principles should inform a structured approach. Therefore, achieving an appropriate balance between Trade mark protection and artistic expression does not require the creation of a new expressive defence but a coherent interpretative approach within the existing framework. Spence views Trade Marksas a 'form of speech' to communicate brand values and identity, this supports the importance of preserving a space for alternative expression rather than allowing Trade mark rights to dominate all cultural and symbolic uses of signs. [142] In the metaverse where expressive and commercial use coexist, courts should interpret 'due cause' in a way that accommodates genuine artistic expression without undermining the essential functions of the mark.

UK courts have shown little inclination to recognise an artistic expression defence, evident from the lack of statutory defences, precedent, or guidance from the UKIPO.

[139] *Hermès v Rothschild* (n 6); Hermès memorandum (n 62) 28-31.
[140] Gery (n 75) 623; Gopnik (n 130).
[141] Robert Burrell and Dev Gangjee, 'Trade Marks and Freedom of Expression: A Call for Caution' (2010) University of Queensland TC Beirne School of Law Research Paper 10-05, 28 <https://dx.doi.org/10.2139/ssrn.1604886> accessed 17 March 2025.
[142] Michael Spence, 'The Mark as Expression/ The Mark as Property' (2005) 58(1) CLP 491, 504 <https://doi.org/10.1093/clp/58.1.491> accessed 2 January 2025.

Without legal protection, artists like Rothschild are extremely unlikely to succeed due to UK courts' prevailing emphasis on commerciality.

E. Outcome

In February 2023, the jury found Rothschild liable for intentional Trade mark infringement and dilution.[143] Hermès was awarded $133,000 and granted a permanent injunction prohibiting Rothschild and his 'associates' from selling, marketing, or promoting the MetaBirkin and related merchandise.[144] This reflects the commercial nature of the MetaBirkins and the US's firm stance on preserving the 'BIRKIN' mark's reputation. It emphasises commercial use of a Trade mark even where the use may be considered artistic in the metaverse will not be tolerated.

While deemed a win for brand owners, the verdict was met with criticism from both fashion and art industries, alluding to the tensions surrounding the courts approach to artistic expression in Trade mark law.[145] Art critic Gopnik questioned why MetaBirkins were treated differently than commercial artworks, arguing historically artists 'loved making a buck' while engaging in consumer culture.[146] Others in the fashion industry questioned Hermès reasoning for litigating, particularly when other reinterpretations, such as MSCHF's sandals made from Birkins named 'BIRKINSTOCKS' which are selling for up to $76,000,[147] have not resulted in legal action.[148] Ian Rogers, former LVHM Chief Digital Officer, described the lawsuit as 'puzzling', suggesting it was potentially driven by personal motivations rather than

[143] Hermès International and Hermès of Paris Inc v "Mason Rothschild" aka Sonny Estival, No 22-cv-384 (JSR) (SDNY, 13 March 2024) <https://caselaw.findlaw.com/court/us-dis-crt-sd-new-yor/115935892.html> accessed 5 January 2025.
[144] ibid.
[145] Erin McCormick, 'Jury rules artist's NFTs of 'MetaBirkins' violate Hermès' Trade Mark *rights' The Guardian* (9 February 2023) <https://www.theguardian.com/fashion/2023/feb/08/hermes-metabirkins-trademark-court-case-mason-rothschild> accessed 2 February 2025.
[146] Gopnik (n 130).
[147] Christian Allaire, 'Of Course Kylie Jenner Has The "Birkinstocks" Made From Hermès Bags' *British Vogue* (17 February 2021) <https://www.vogue.co.uk/news/article/kylie-jenner-birkinstocks-hermes-birkin-bags> accessed 3 February 2025.
[148] Zachary Small, 'Hermès Wins MetaBirkins Lawsuit; Jurors Not Convinced NFTs Are Art' *New York Times* (8 February 2023) <https://www.nytimes.com/2023/02/08/arts/hermes-metabirkins-lawsuit-verdict.html> accessed 2 February.

brand protection.[149] He asserts, Hermès as a luxury fashion house which already justify premium pricing, are well positioned to understand the artistic value of digital reinterpretations.[150] These critiques emphasise the need for clearer legal frameworks that distinguish artistic expression from commercial misuse in the metaverse and provide a greater balance with Trade mark protection.

Rothschild appealed in November 2023, arguing the Court erred in denying the dismissal and summary judgement, misapplied *Rogers*, and wrongly admitted certain expert testimony while excluding others.[151] In support, the Harvard CyberLaw Clinic submitted an amicus brief on behalf of artists and advocacy groups including MSCHF and CTHDRL, emphasising commercial elements should not undermine artistic value and warned upholding the verdict risks suppressing critical artistic voices.[152] Additionally, it criticised the irony of Hermès profiting from Jane Birkin's name while simultaneously preventing artistic uses.[153] As of writing, the appeal remains pending before the US Court of Appeals for the Second Circuit.

In the UK, Rothschild would face similar challenges. Without a clear legal framework for expressive defences, courts would focus on infringement under sections 10(2) and 10(3), with commerciality and confusion weighing against him.[154] However, the complexities in *Hermès* expose the limits of current UK law in addressing metaverse artistic expression. As Gery and Thede explore, the hybrid nature of NFTs poses a unique challenge for Trade mark protection, in particular the role of artistic intent and commerciality may become a significant issue in UK cases.[155] As such the UK can learn from the US jurisprudence and adopt a structured and nuanced framework which

[149] ibid.
[150] ibid.
[151] Johnson (n 59).
[152] Clinic Staff, 'CyberLaw Clinic Files Amicus Brief for Creators and Arts Orgs, Emphasizing Speech Protections for Artists' (*CyberLaw Clinic,* 21 December 2023) <https://clinic.cyber.harvard.edu/2023/12/21/cyberlaw-clinic-files-amicus-brief-for-creators-and-arts-orgs-emphasizing-speech-protections-for-artists/> accessed 2 February 2025.
[153] ibid.
[154] Trade Marks Act 1994 ss 10(2) and 10(3).
[155] Gery (n 75) 620; Thede (n 122) 419.

accommodates artistic expression in metaverse fashion, as until it does so it remains ill-equipped.

Thus, the *Hermès* case illustrates applying UK trade mark law to metaverse fashion reveals the inadequacy of section 10 and the need for a more coherent framework. The absence of such a framework which recognises the hybrid use encourages the courts to default to brand protection, not as a matter of principle but as a doctrinal limitation which creates uncertainty.

4. *When is a Metaverse Fashion Show Infringing?*

This Part demonstrates that determining when MFS shows infringe a trade mark required a principled way to distinguish artistic expression from commercial exploitation. By analysing when a MFS is likely to infringe and when it is more defensible as expressive use, it shows the current law lacks the doctrinal structure to make this distinction.

A. Metaverse Fashion Shows as Art

MFSs blend fashion, technology, art, and commerce, challenging traditional trade mark law. Events like, 'Crypto Fashion Week', the 'Meta Gala', and 'Metaverse Fashion Week' feature digital clothing, NFTs, and digital influencers, where artists may experiment with reinterpretation that could infringe existing trade marks.[156]

Fashion shows have traditionally been regarded as a form of artistic expression, serving as a 'cultural icon',[157] and reflection on society.[158] From a sociological

[156] Rachel Douglass, 'The top metaverse-based fashion events of 2022, and if they are returning next year' (*Fashion United,* 9 December 2022) < https://fashionunited.uk/news/business/the-top-metaverse-based-fashion-events-of-2022-and-if-they-are-returning-next-year/2022120966695> accessed 14 March 2025; Maghan McDowell, 'What fashion week looks like in the metaverse' (*Vogue Business,* 1 February 2022) <https://www.voguebusiness.com/technology/what-fashion-week-looks-like-in-the-metaverse> accessed 14 March 2025.

[157] Lise Skov and others, 'The Fashion Show as an Art Form' (2009) Department of Intercultural Communication and Management, Copenhagen Business School Creative Encounters Working Paper 32, 2 <https://research.cbs.dk/en/publications/the-fashion-show-as-an-art-form> accessed 10 March 2025.

[158] Electric Gallery London, 'From Canvas to Catwalk: Fashion's Influence on Artistic Expression' (*Electric Gallery London*, 15 May 2024) <https://eclecticgallery.co.uk/news/261-from-canvas-to-

perspective, particularly Becker's 'art worlds' criteria, fashion shows constitute art through the 'collective activity' and separation of artist and audience.[159] As fashion shows provide designers with a platform to communicate cultural and social narratives pushing the boundaries between art and commerce, MFSs continue this tradition through offering the opportunity to showcase digital runways and wearable metaverse fashion. As a form of digital art, MFSs also fulfil Becker's criteria[160] by introducing new visual styles intertwining fashion, technology, and artistry, while maintaining exclusivity through VIP experiences,[161] and the rarity of the NFTs.[162] Like traditional artists who use canvases, digital artists use technology as a creative medium through animation and coding to create immersive pieces.[163] Finally, MFSs also involve collective activity amongst artists, programmers, animators, and audiences and the distinct artist-audience divide remains, as avatars replace models and digital front rows mirror physical seating.

However, MFSs possess a commercial element as artists can monetise digital wearables showcased through NFT sales or ticket entry to the event, blurring the line between art and commerce.[164] This complicates traditional trade mark infringement frameworks, particularly where well-known brand elements are used as art or critique which may lead to financial gain. For example, referencing Burberry's check print may serve an artistic purpose but still raises issues of consumer confusion or exploitation of the brand's reputation. Additionally, MFSs also provide a space for creators to engage in parody and cultural critique, expanding fashion's expressive role. Decentraland's creative director, Sam Hamilton stated Metaverse Fashion Week

catwalk-fashion-s-influence-on-artistic-fashion-s-brushstrokes-bridging-art-and-style/> accessed 10 March 2025.

[159] Howard Becker, *Art Worlds* (first published 1982, 25th edn, University of California Press 2008) 1-5.

[160] ibid 1.

[161] Hayley Peppin, 'Metaverse Fashion Week: The virtual show anyone can attend' (*Harpers Bazaar*) <https://harpersbazaar.com.au/metaverse-fashion-week-2022/> accessed 10 March 2025.

[162] OSL, 'What are Fashion NFTs and Will They Transform the Industry?' (*OSL*, 27 February 2025) <https://osl.com/academy/article/what-are-fashion-nfts-and-will-they-transform-the-industry> accessed 10 March 2025.

[163] Özlem Vargün, 'Transformation of Technology and Art: Digital Art' (2023) 6(1) JA 49, 50 <https://doi.org/10.31566/arts.1968> accessed 10 March 2025.

[164] Maghan McDowell, 'What fashion week looks like in the metaverse' (*Vogue Business,* 1 February 2022) <https://www.voguebusiness.com/technology/what-fashion-week-looks-like-in-the-metaverse> accessed 14 March 2025.

would not censor political statements to ensure creative freedom.[165] While this approach supports the freedom of expression, it risks potential trade mark infringement. Hence, even where metaverse fashion is intended as expression it may be scrutinised under trade mark law which alludes whether artistic expression can be adequately accommodated. Its placement within potentially commercial environments limits the extent to which UK trade mark law is likely to prioritise artistic expression over brand protection.

B. Infringement under the Trade Marks Act 1994

(i) Section 10(1)

In MFSs the use of identical marks on digital goods or services raises significant concerns under section 10(1) TMA, particularly when the mark in question belongs to well-established brands, such as Burberry. In a MFS, the sale of digital clothing as NFTs would constitute 'goods', whereas the show itself, for example if the MFS served as a brand showcase, would be categorised as a 'service.'[166] The 'course of trade' could encompass the promotion of brand collaborations, the sale of metaverse fashion goods, or attracting customers for profit.[167] For example, if a MFS designer creates a digital replica of a Burberry trench coat that incorporates the check pattern identical to the real-world design it may be infringing. Considering a traditional stance on trade marks the sign may be seen as identical as the metaverse fashion would serve the same purpose of signifying brand origin.[168]

However, the distinction between digital and physical goods complicates this analysis. While digital goods may visually replicate the physical good, the intangibility of metaverse fashion alludes to the barriers in considering them 'identical' goods under section 10(1).[169] Due to their lack of tangible form, digital items

[165] Booth Moore, 'Moore from LA: What is Metaverse Fashion Week? The Decentraland Event's Creator, Producer Explain' (*Women's Wear Daily,* 22 March 2022) <https://wwd.com/digital-daily/digital-daily-march-22-2022/full-view/> accessed 20 February 2025.
[166] Trade Marks Act 1994, s 10(1).
[167] ibid.
[168] Graeme Dinwoodie, 'Ensuring Consumers "Get What They Want": The Role of Trade mark Law' (2024) 83(1) CUP 36, 37 <https://doi.org/10.1017/S0008197323000636> accessed 2 December 2024.
[169] Trade Marks Act 1994, s 10(1).

in the metaverse are unlikely to be treated as identical. This complexity deepens when these digital goods are not sold but instead displayed in a MFS where entry is monetised. In this case, the commercial nature of the event is sufficient to be regarded as in the 'course of trade'.[170] Even if the digital goods themselves are not sold directly, the MFS itself provides a service aimed to attract paying customers, suggesting infringement could still arise.

The rigidity of section 10(1) cannot accommodate more symbolic uses of trade marks in the metaverse. Therefore, section 10(1) is limited in addressing trade mark infringement in MFSs.

(ii) Section 10(2)

By lowering the threshold that the sign only needs to be 'similar' and that there exists a 'likelihood of confusion', section 10(2) TMA offers broader protection for trade mark holders. However, in the context of MFSs this expansion risks extending infringement to uses of trade marks that function as expressive references rather than indicators of commercial origin.[171] MFSs are likely to be inspired by real-world brands which makes assessing similarity and confusion less straightforward.[172] This becomes particularly complicated as consumers may not expect real-world authenticity but may still associate the MFS with established brands.

In the first scenario the problem is whether a MFS presenting digital clothing branded as 'BURBERRY' which bears the identical check pattern and is later sold as an NFT would be infringing under section 10(2). Infringement arises where a sign identical or similar to a registered trade mark is used in relation to identical or similar goods or services, giving rise to a likelihood of confusion.[173] In *Montres Breguet v Samsung Electronics*[174] Samsung's digital watch-face infringed the physical Montres Breguet watches which suggests even where the digital good is not identical to the physical

[170] ibid.
[171] ibid s 10(2).
[172] ibid.
[173] ibid.
[174] *Montres Breguet SA v Samsung Electronics Co Ltd* [2022] EWHC 1127 (Ch), [2023] FSR 1.

good a risk of confusion remains.[175] Firstly, the use of the 'BURBERRY' sign alongside the identical check pattern constitutes use of an identical sign. The first limb is therefore satisfied. Next, a traditional reading of the *British Sugar* factors suggests digital goods and physical goods are dissimilar given their differing functions and nature.[176] However, in this scenario both the physical trench coat and its digital counterpart function as fashion items worn by the consumer, albeit via an avatar, and are both directed as consumers interested in luxury fashion. This means an expansive reading of the rest test suggests it could support a finding of similarity. Given the identical nature of the signs and on the basis the goods were deemed to be similar this gives rise to a likelihood of confusion. The average consumer is likely to assume that the MFS and the products within originate from or are authorised by Burberry. Therefore, the court would likely find infringement under section 10(2). However, the uncertainty surrounding the interpretation of the *British Sugar* factors demonstrates section 10(2) does not offer predictable protection, and thus there is a need for a structured framework.

In the second scenario the issue is whether a MFS incorporating a distorted version of the Burberry check pattern within a curated artistic performance framed as a critique of luxury fashion may avoid infringement under section 10(2). Even in a distorted form, the Burberry check pattern may remain recognisable which suggests a degree of similarity exists. In terms of goods and services, the MFS operates primarily as an artistic performance rather than fashion goods. Although the event may be monetised through ticket sales, the commercialised product in 'the course of trade' is the experience. This distinguishes the activity from the sale of physical branded fashion items. Considering the similarity of the signs but the low similarity of the goods a likelihood of confusion is significantly less likely. The artistic framing of the MFS signals to the average consumer that the use is expressive rather than indicative of origin. In the context of Breton's 'crisis of the object',[177] the mark undergoes a transformation from a badge of origin into a cultural symbol which in turn weakens

[175] ibid [232] (Falk J).
[176] *British Sugar* (n 71) 127 (Jacob J).
[177] Breton (n 49).

its trade mark function in the metaverse. However, as Bohaczeweksi observes artistic value alone does not automatically make it lawful particularly if it is of a 'commercial nature'.[178] A strict application of section 10(2) may therefore still prioritise the existence of similarity without giving regard for an expressive or transformative nature. Therefore, while such use is more defensible and less likely to generate confusion, the current framework does not clearly accommodate artistic expression which leaves the legal position uncertain.

Consequently, while section 10(2) offers broader protection for trade mark holders, the potential for confusion and the blurred lines between artistic expression and commercial use, emphasises the inadequacy of the law in balancing these interests.

(iii) Section 10(3)

In the first scenario a MFS branded 'BURBERRYVERSE' which features digital trench coats incorporating the Burberry check pattern for commercial sale may constitute infringement under section 10(3). First, the requirement of reputation would be satisfied. The Burberry check pattern is a widely recognised symbol of British luxury and thus clearly meets the threshold of public recognition. Next, such use would occur within the course of trade. Where the check pattern is affixed to the metaverse fashion and those fashion items are marketed and sold as digital wearables, the use is commercial in nature. Thirdly, the use should establish a link in the mind of the average consumer. In *Match Group v Muzmatch*,[179] Muzmatch infringed Match.com's trade mark, despite differences in wording.[180] The reproduction of the 'BURBERRY' mark within 'BURBERRYVERSE', combined with the use of the check pattern ensures immediate association with Burberry. The most compelling basis for infringement is apparent in unfair advantage. UK courts have been influenced by the EU case *L'Oréal v Bellure*[181] where the defendant 'intended to take advantage' of the reputation of the

[178] Michal Bohaczewski, 'Conflicts Between Trade mark Rights and Freedom of Expression Under EU Trade mark Law: Reality or Illusion?' (2020) 51 IIC 856, 873 <https://doi.org/10.1007/s40319-020-00964-5> accessed 1 December 2024.
[179] *Match Group LLC and others v Muzmatch Ltd and another* [2023] EWCA Civ 454, [2023] Bus LR 1097.
[180] ibid [121] (Arnold LJ).
[181] *L'Oreal* (n 93).

trade mark.[182] This was relied upon in *Lidl v Tesco,*[183] where Tesco's use of a blue and yellow 'Clubcard prices' sign was infringing as it resembled Lidl's branding, thus taking unfair advantage of its reputation for offering lower cost products.[184] *Whirlpool v Kenwood*[185] held unfair advantage occurs if it is 'obtained intentionally'.[186] However, in this case it was noted intention was not the only factor to consider, but Lord Justice Lloyd did not refer to the additional factors.[187] This ambiguity was reinforced in *DataCard v Eagle*[188] where intention was established but did not amount to unfair advantage because the use was necessary to indicate the compatibility of the products.[189] In this scenario, the appeal and value of the MFS arises from the association with Burberry's established prestigious reputation. Even with absent explicit intention, the effect of the use is to enhance the commercial appeal. There is also a credible argument for detriment. The widespread digital reproduction of the check pattern risks diluting its distinctiveness by placing it within an unregulated an potentially lower quality digital marketplace. Additionally, in regard to detriment to reputation if the digital goods fail to replicate the craftsmanship and exclusivity associated with the Burberry brand, their use may herm the brand's reputation by weakening its association to luxury. Finally, the use is unlikely to be justified by due cause. Although artistic motivation may be asserted, the commercial nature of this scenario suggests that the primary purpose is to benefit from the brand's reputation rather than engage in genuine artistic expression. Therefore, the court would likely find infringement under section 10(3).

A different conclusion may be reached in the scenario where the use occurs within a clearly artistic and critical MFS. For example, where a designer distorts the Burberry check pattern within a performative MFS that critiques luxury fashion where the user must pay entry to attend. As above, the requirement for reputation is satisfied.

[182] ibid para 48.
[183] *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262, [2024] ETM2 25.
[184] ibid [205-207] (Lewison LJ).
[185] *Whirlpool Corp v Kenwood Ltd* [2009] EWCA Civ 753, [2010] ETMR 7.
[186] ibid [112] (Lloyd LJ).
[187] ibid [136] (Lloyd LJ).
[188] *DataCard Corp v Eagle Technologies Ltd* [2011] EWHC 244 (Pat), [2012] Bus LR 160.
[189] ibid [341] (Arnold J).

Additionally, the use would also fall within the course of trade. The monetisation of the MFS through paid access indicates a commercial nature. Next, a link in the mind of the average consumer would likely still arise. Even in distorted form, the recognisable elements of the check pattern are sufficient to evoke Burberry's brand identity. However, the artistic transformation weakened the immediacy and clarify of that link as the use is less likely to be perceived as indicating origin. In this context, the assessment of unfair advantage is much more complicated. The MFS does not market digital fashion products as branded goods, instead its value arises from the performance. The Burberry check is not used to confer luxury status on the goods as the connotations of luxury build part of an artistic narrative. Any commercial benefit is therefore incidental, rather than constituting a transfer of brand value. The case for detriment to distinctiveness is weakened when considering harm to the source distinctiveness and differential distinctiveness. Consumers encountering the check pattern within an artistic MFS are able to recognise its reference to Burberry while simultaneously understanding there is no affiliation with the brand. The source distinctiveness of the check pattern remains intact as consumers continue to identify Burberry as the origin of its physical products. However, the current framework does not clearly accommodate this distinction meaning that detriment could still be inferred from perceived association. As for detriment to reputation it may be argued that the critical or transformative use reflects negatively on the brand. However, such an approach risks disregarding the artistic context of the use. Where the MFS operates as commentary on luxury fashion any negative connotations arise from expression rather than the degradation of product quality and should not automatically amount to reputational harm. Finally, the use may be justified by due cause, Here, the artistic and critical nature of the MFS provides a plausible basis for justification. The use is transformative and expressive not purely commercial. As such while such use should be more likely to be defended as artistic expression, but the current framework leaves this uncertain.

Therefore, section 10(3) is limited in its recognition of artistic contexts which exposes clearly expressive uses to potential infringement.

C. Platform Liability

The issue of platform liability is significant to the analysis of section 10 when applied to decentralised MFSs. The structure of the metaverse complicates the question of who should be regarded as the infringer as the current framework requires identifying the party who 'uses' the sign 'in the course of trade'.[190] If the platform facilitates or approves metaverse fashion in a MFS that resembles registered trade marks, it indirectly contributes to consumer confusion. Platforms, such as Decentraland, rely on a community-driven 'curators' committee' to filter out infringing content.[191] However, despite some human oversight, it is often automated making it difficult to ensure full compliance.[192] If a consumer encounters a MFS and perceives it to be associated with a luxury fashion brand, this perception does not arise solely from the artistic qualities but also from the platform's role in displaying or promoting it. It is expected the artist is the primary infringer as they use the sign in trade. However, the metaverse complicates this assumption as it may approve or commercially benefit from a MFS. The undesirability of metaverse platform liability hinders efforts to attribute responsibility creating uncertainty whether platforms operate as active facilitators or are passive intermediaries.[193] Although this article does not attempt to resolve the broader doctrinal issue of metaverse platform liability, it is significant to acknowledge that the artist remains the clear infringer under the current framework. Nonetheless, the platforms contribution cannot go unnoticed. In scenarios where the platform engages in conduct that amounts to infringing use, such as promoting infringing content for commercial gain, its actions may contribute to the commercial communication of the sign. In such cases the platform materially shapes consumer

[190] Trade Marks Act 1994, s 10.
[191] Moore (n 165).
[192] ibid.
[193] Hadar Jobotinsky and Michal Lavi, 'Regulating the Metaverse: Reducing Diffusion of Trader Responsibility' (2024) University of Michigan Journal of Law Reform 1,1 <https://ssrn.com/abstract=4753418> accessed 26 March 2025; Trade Marks Act 1994, s 10(2).

perception of potential endorsement or affiliation, thus moving toward a position where trade mark liability may in principle be justified.

D. Trade Mark Defences

Section 11 provides exceptions for descriptive and referential use, such as to be used when it is necessary to communicate product characteristics.[194] This was upheld in *Philips v Remington*[195] and *British Airways v Ryanair*,[196] where references to competitors' branding were found to be lawful if they are not misleading.[197] If a MFS is marketed as a 'Burberry-inspired metaverse collection' it could be argued it alludes to Burberry's aesthetic but does not imply association. It also allows for referential use if it does not mislead consumers or suggest affiliation, as confirmed in *Interflora v Marks & Spencer*[198] and *Asprey & Garrard Ltd v WRA*[199] where the courts distinguished legitimate referential use from misleading.[200] If a MFS incorporated Burberry's check pattern but altered its colour scheme and clearly stated the collection was Burberry-inspired, this could be a viable defence.

Applying article 10 ECHR protection to MFSs is controversial. Zhang advocates for a strict approach, prioritising brand owners' rights over artistic expression.[201] However, while trade mark rights should be adequately protected, these must be balanced with the protection of artistic expression. Zhang's narrow traditional view[202] risks overlooking the cultural significance of trade marks as explored by Beebe.[203] Disregarding the role of trade marks as a medium for artistic expression brings about the risks of subduing creative freedom and undermining the significance of

[194] Trade Marks Act 1994, s 11(2).
[195] *Philips Electronics NV v Remington Consumer Products Ltd* [1998] PRC 283 (Patents Ct).
[196] *British Airways Plc v Ryanair Ltd* [2001] FSR 32 (Ch).
[197] ibid [45] (Jacob J); *Philips Electronics* (n 195) [12] (Jacob J).
[198] *Interflora Inc v Marks & Spencer plc* (No 5) [2014] EWCA Civ 1403, [2015] Bus LR 492.
[199] *Asprey & Garrard Ltd v WRA (Guns) Ltd (t/a William R Asprey Esquire)* [2001] EWCA Civ 1499, [2002] FSR 31.
[200] ibid [49] (Gibson LJ); *Interflora* (n 237) [142-144] (Kitchin LJ).
[201] Youfei Zhang, 'Trade Marks in the Digital Age: The Current Challenges and Legal Protections' (2024) 69 LNEP 73, 76 <https://doi.org/10.54254/2753-7048/69/20240156> accessed 10 March 2025.
[202] ibid.
[203] Beebe (n 47) 626.

technology and fashion as an art form. For example, if Burberry's check pattern were to be reinterpreted within a MFS by altering its colour scheme or used to contribute to an artistic narrative on luxury fashion, the use is more accurately characterised as artistic expression. As such, article 10 may be engaged. However, without UK trade mark law addressing expressive defences it is unclear how much protection reliance on article 10 will permit. This creates a legal gap that prevents authentic artistic expression from being protected.

Therefore, while UK trade mark law in principle provides defences for artistic expression, the balance is subjective and dependent on the approach taken by the courts. In practice UK law provides inadequate defences to address artistic expression in the metaverse.

E. EU and European Jurisprudence

While UK law is not bound by EU law post-Brexit or European jurisprudence, it holds influence on trade mark disputes.[204] This provides insights into how the UK could approach MFSs to determine whether it would assist in better accommodating artistic expression. Though the UK, EU and European courts share similar approaches to trade mark law, both the EU and certain European courts have recognised artistic expression to an extent.[205]

In *Plesner v Louis Vuitton*[206]*('Plesner')* the District Court of the Hague recognised that artistic expression under article 10 could justify the use of protected brand elements where the use is for a critical or expressive purpose.[207] Despite being a design rights case, it marked a judicial shift in recognising artistic expression through critique over

[204] Pinsent Masons, 'UK Retained EU Law Bill's impact on intellectual property' (*Pinsent Masons*, 10 November 2022) <https://www.pinsentmasons.com/out-law/analysis/uk-retained-eu-law-bill-impact-intellectual-property> accessed 20 April 2025.
[205] Case C-17/06 *Celine SARL v Celine SA* [2007] ETMR 80; Case C-375/97 *General Motors Corp v Yplon SA* [1999] CLMLR 427; Case C-252/07 *Intel Corp Inc v CPM United Kingdom Ltd* [2009] Bus LR 1079; *Visual Entidad de Gestión de Artistas Plásticos (Vegap) v Punto SA (Mango)* (2024) (9th Commercial Law Court Barcelona), ECLI:ES:JMB:2024:1.
[206] *Plesner Joensen v Louis Vuitton Malletier SA* [2011] ECDR 14 (Court of the Hague).
[207] ibid para 4.9.

proprietary rights.[208] Plesner's work, 'Simple Living,'[209] featured an African child with a Louis Vuitton-inspired bag to criticise celebrity culture and raise awareness.[210] LV demanded an injunction, but the District Court of The Hague quashed it, affirming the artist's right to express artistic commentary.[211] Despite commercial elements, artistic expression under article 10 still served as a defence.[212] *Plesner* reflects a modern example of Breton's crisis of the object theory[213] by taking the LV bag design and reinventing it to become an artistic critique.[214] Significantly, the Court accepted that the art work possessed commercial characteristic and it did not displace its expressive purpose showing there is a willingness to tolerate incidental commerciality where brand elements are repurposed as cultural symbols. Whether the Court would have come to this decision in a trade mark case is unknown. Nonetheless, If this approach was undertaken in interpreting UK trade mark cases, it would enable courts to separate artistic expression from commercial exploitation and recognise instances where trade marks function as cultural symbols in metaverse fashion, rather than a badge of origin. This would facilitate a more balanced relationship between trade mark protection and artistic expression.

Following *Plesner,* the EU trade mark Directive[215] and trade mark Regulation[216] introduced the 'honest practices' rule applying to artists incorporating trade marks into their work.[217] Albeit potentially viewed as progress towards a greater balance by acknowledging the role of trade marks in artistic expression, its practical effectiveness remains uncertain. Artists must demonstrate their use complies with honest practices in 'industrial and commercial matters', which creates additional obscurities as it lacks

[208] ibid.
[209] Nadia Plesner, *Simple Living* (2008) (Drawing which depicts an African child holding a Louis Vuitton handbag and a miniature Chihuahua).
[210] *Plesner* (n 206) para 2.6.
[211] ibid para 5.1
[212] ibid paras 4.8 and 4.9.
[213] Breton (n 49).
[214] *Plesner* (n 206) para 2.6.
[215] European Parliament and Council Directive (EU) 2015/2436 of 16 December 2015 to approximate the laws of the Member States relating to Trade Marks (EU Trade Mark Directive) [2015] OJ L336/1 OJ L154/1.
[216] European Parliament and Council Regulation (EU) 2017/1001 of 14 June 2017 on the European Union Trade Mark (codification) [2017] OJ L154/1.
[217] ibid; EU Trade Mark Directive (n 215).

a clear definition.[218] In MFSs artists would face significant challenges proving their use corresponds with ambiguously defined legal standards, thus creating legal uncertainty. This ambiguity risks discouraging sincere artistic expression and complicates enforcement for brand owners. As Senftleben observes, while the rule operates under a façade of safeguarding artistic freedom in reality it 'cements the supremacy of proprietors' interests'.[219] He alludes to a lack of actual protection for artistic expression by acknowledging artists 'can hardly be expected to be aware' of such standards.[220] Though the Directive was transposed into UK law, post-Brexit UK courts are no longer bound by the EU's interpretation, thereby introducing a degree of uncertainty. [221] Subsequently, the flaws of the 'honest practices' requirement in the EU validates the need for a tailored UK framework to artistic expression in metaverse fashion.

More recently, *Hermès v Namilia*[222] *('Namilia')* outlines how artistic expression may be protected where trade marks are used to critique luxury fashion when a version of the Birkin bag was showcased at Berlin Fashion Week.[223] The Frankfurt Regional Court balanced Hermès' trade mark rights with Namilia's right to artistic freedom. [224] The Court ruled in favour of Namilia, finding her use of Birkin elements an artistic critique of luxury fashion which therefore did not infringe Hermès' rights.[225] This decision may reflect a similar approach the UK could implement in regard to MFSs which similarly operate as expressive environments where many are free to attend.[226] It

[218] ibid.
[219] Martin Senftleben, 'The Unproductive "Overconstitutionalization" of EU Copyright and Trade Mark Law – Fundamental Rights Rhetoric and Reality in CJEU Jurisprudence' (2024) 55 IIC 1471, 1502 < https://doi.org/10.1007/s40319-024-01527-8> accessed 10 March 2025.
[220] ibid 1501.
[221] The Trade Marks Regulations 2018.
[222] *Hermès v Namilia* (2-06 O 533/23) [2023] (LG Frankfurt am Main).
[223] ibid; TFL, Hermès Can't Block Namilia's Use of Birkin Trade Marks , Per German Court' (*The Fashion Law, 26 September 2023)* < https://www.thefashionlaw.com/hermes-cant-block-namilia-from-displaying-birkin-esque-runway-designs/ > accessed 2 March 2025.
[224] ibid.
[225] Ibid.
[226] Laia Casado, 'Metaverse Fashion Week: fashion shows come to the virtual world' (*Magazine Horse*, 3 April 2022) <https://www.magazinehorse.com/en/metaverse-fashion-week-fashion-shows-come-to-the-virtual-world-2/#:~:text=Any%20user%20with%20an%20Internet,with%20cryptocurrencies%20exclusive%20to%20NFT> accessed 9 March 2025.

demonstrates courts are willing to recognise artistic reinterpretation of trade marked elements where the use does not function to indicate brand origin.[227] However, *Namilia* includes a commercial caveat, the Court advised if Namilia's garments are sold, Hermès are able to initiate new infringement proceedings.[228] This caution suggests artistic expression protection may diminish once the art is commercialised. Applied to MFSs, the later sale of showcased designs as NFTs may shift the balance in favour of trade mark protection.[229] This approach reflects a concern to preserve the core function of trade marks as the use moves beyond critique into the commercial marketplace. However, this case revealed the limitations of treating commerciality as a binary determinant. In MFSs artistic works are displayed for free but could later be monetised through NFTs.[230] Even if this subsequent sale may properly justify the finding of trade mark infringement, the absence of a clear criteria for assessing when commercial elements are incidental to artistic use instead of exploitative creates uncertainty for brand owners and artists. This development reflects a more effective attempt to accommodate artistic expression, which could have a positive influence on the evolution of UK trade mark law. However, the ambiguity surrounding commerciality remains a significant barrier to achieving a truly equitable balance between artistic expression and trade mark rights.

EU and European jurisprudence show that artistic expression can justify the inclusion of trade mark elements into artistic works. The reasoning in *Plesner*, though a designs case, provides insight that courts recognise luxury signifiers may operate as cultural symbols and not merely indicators of origin. Furthermore, the 'honest practices' rule outlines an attempt, albeit limited, to recognise artistic expression. Similarly, while *Namilia* demonstrates that artistic performances involving trade mark elements may fall outside the scope of infringement, it also alludes to the instability of this position

[228] *Hermès v Namilia* (n 6); TFL, Hermès Can't Block Namilia's Use of Birkin Trade Marks , Per German Court' (*The Fashion Law, 26 September 2023)* < https://www.thefashionlaw.com/hermes-cant-block-namilia-from-displaying-birkin-esque-runway-designs/ > accessed 2 March 2025.
[229] Casado (n 226).

as the same design may become infringing if offered for sale. It is argued when approaching potentially infringing metaverse fashion the UK should be influences by these cases and accept that trade marks can function as symbolic or cultural signifiers which are subject to an artistic transformation. However, the UK should not be influenced by the EU's vague 'honest practices' doctrine or its tendency toward broad proportionality balancing. Instead, the UK requires a clear structured test which separates artistic use from commercial exploitation.

Therefore, this Part confirms that UK courts require a framework to differentiate expressive metaverse fashion shows as a form of artistic expression from the commercial misuse of a trade mark.

5. *Conclusion*

In conclusion, this analysis reveals that the current trade mark law framework in the UK fails to satisfactorily protect artistic expression. The ambiguous interpretations of similarity, unfair advantage, detriment, and due cause does not consider artistic use. This stems from the absence of a principled distinction between authentic artistic expression and commercial exploitation founded in a trade marks ability to operate beyond its essential functions in art. This article therefore argues that courts should implement a structured approach that explicitly accounts for artistic use in metaverse fashion.

(1) Is the sign being used as artistic expression rather than an origin indicator?

The first stage of the test should require the court to characterise the nature of the defendant's use of the sign within the metaverse. The question is whether the sign, as incorporated in the metaverse fashion, primarily fulfils an expressive function or whether it operates as an indicator of origin. This limb focuses beyond than the depiction of the sign to assess its role within the artistic work, the degree of transformation, and any contextual norms of the platform in which it appears. Only where the use is deemed prima facie expressive the test can proceed to the next stage.

(2) Does the expressive use nonetheless create a platform driven endorsement effect arising from the structure of metaverse platform environments?

The second stage evaluates whether the expressive use creates unintended impressions of endorsement or affiliation arising from the architecture of the metaverse, rather than the defendant's intention. At this stage, unfair advantage or detriment under section 10(3) will already have been established, the question is whether those effects are attributed to the defendant's use or reflect the way digital environments may shape consumer perception. The focus is therefore on whether any apparent association arises from the context of the metaverse itself or from the conduct that properly falls within the scope of trade mark protection.

(3) Is the commercial use merely incidental to artistic expression?

The final stage conducts a balancing exercise grounded in the proportionality principles which underpin due cause. Central is the question of the overriding purpose which is whether the use of the sign forms an fundamental part of the artistic or expressive character of the metaverse fashion, or whether it serves primarily as a mechanism of commercial exploitation. This recognises the fact that references to real-world consumer marks often serve as cultural signifiers which is essential to creating art, satire, criticism or depictions of digital life. Where the sign is used to function as an element of the creative vocabulary, the presence of incidental commercial gain should not automatically defeat due cause.

Doctrinally, this proposed framework should operate within the existing architecture of UK trade mark law by functioning as a structured consideration under the section 10(3) 'due cause' requirement where the case involves potential infringement through metaverse fashion. It is recognised that due cause is a context sensitive mechanism yet currently there is no clear methodology for assessing expressive uses of trade marks in the metaverse. The present test fills this gap by supplying a coherent structure for examining when artistic digital uses should be regarded as appropriately justified to defeat a claim of unfair advantage or detriment. At the same time, the framework is

compatible with the proportionality analysis required by article 10. The test incorporates proportionality internally at the stage of due cause to ensure that restrictions on expression are imposed only where necessary. In this way, the framework preserves the essential functions of the trade mark, particularly its ability to indicate origin and maintain distinctive, while accommodating authentic artistic expression in the metaverse. Thus, the framework ensures trade mark law remains effective in the evolving digital landscape.

She Said, He Sued: Contracting Silence and Bankrupting Dissidents. How Private Law Mechanisms Silence Victims of Sexual Misconduct in England and Wales.

ALEXANDRA LANE-DURAND*

I would like to extend my sincerest thanks to my supervisor Rebecca Moosavian for all her support in guiding me through this process. I would also like to acknowledge the brave women who have inspired this project. Their fearlessness in standing up against their abusers and facing the potential for legal consequences in order to have their voices heard, and let other women know that they are not alone, is courage that I could only hope to share one day. They make the world a better place and without them this research project would not exist. Thank you.

Abstract

Since the #MeToo movement's resurgence in 2017, sparked by revelations of Harvey Weinstein's extensive use of non-disclosure agreements (NDAs), and further shaped by the contrasting outcomes in the Depp-Heard defamation cases, critical discourse on the legal silencing of sexual misconduct victims has intensified. This paper examines how private law mechanisms, specifically NDAs and defamation law, operate to silence victims while shielding perpetrators from accountability in England and Wales. Through a feminist theoretical framework integrating MacKinnon's dominance theory, Fineman's vulnerability thesis, and Fricker's concept of epistemic injustice, this research demonstrates how ostensibly neutral legal tools function as sophisticated silencing mechanisms. NDAs transform systemic patterns of misconduct into privatised individual matters through confidentiality clauses, while defamation law creates insurmountable barriers through prohibitive costs and reverse burden of proof. These mechanisms reinforce gendered hierarchies by systematically undermining women's testimony within institutional frameworks defined by male standards of credibility. Without comprehensive reform addressing these power asymmetries, the law will continue to protect perpetrators and prevent victims from forming collective understanding of sexual misconduct.

1. Introduction

Private law mechanisms, particularly non-disclosure agreements (NDAs) and defamation actions, have emerged as powerful tools that systematically silence victims of sexual misconduct while shielding perpetrators from accountability in England and Wales.[1] This paper examines the contradiction between the formal neutrality of legal tools and their role in perpetuating gender-based oppression. Through a feminist socio-legal analysis, it is revealed how these mechanisms transform systemic patterns of misconduct into privatised, individualised matters beyond public scrutiny or collective understanding.[2] The prevalence of sexual misconduct within society emphasises the significance of this research. Approximately 97% of women in the UK have experienced sexual misconduct, with 96% never reporting these incidents.[3] Sexual violence has been identified by the World Health Organisation as a global public health problem and human rights violation primarily affecting women and girls.[4] Despite numerous legal reforms supposedly designed to address this violence, systematic silencing mechanisms persist within private law. Following the #MeToo movement's emergence in 2017, which exposed the widespread use of NDAs to conceal sexual harassment and assault,[5] there has been growing recognition of how legal mechanisms can function as tools of silence rather than justice.

The central claim of this paper is that NDAs and defamation law operate not

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[1] Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law 8; Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): A Critical Interrogation of Legislative and Judicial Responses' (2025) *Journal of Media Law* https://doi.org/10.1080/17577632.2024.2443096 accessed 8 August 2024.

[2] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238

[3] Nishat Choudhury, 'Research finds that 97% of women in the UK have been sexually harassed' (Open Access Government, 2021) https://www.openaccessgovernment.org/97-of-women-in-the-uk/105940/ accessed 3 April 2025

[4] World Health Organization, 'Violence Against Women' (WHO, 8 March 2021) https://www.who.int/news-room/fact-sheets/detail/violence-against-women accessed 5 March 2025

[5] Jennifer Robinson and Keina Yoshida, *'How Many More Women? The Silencing of Women By the Law and How to Stop It'* (Endeavor 2022)

merely as isolated tools but as interconnected mechanisms within a broader system that maintains gender hierarchies. This is achieved through three processes: transforming systemic patterns of misconduct into privatised, individualised matters; exploiting economic and procedural barriers that disproportionately affect victims; and undermining the credibility of victims' testimonies through gendered assumptions about truth and consent.[6] By integrating feminist legal theory with analysis of legislative frameworks, case law, and empirical evidence this research aims to show how seemingly neutral legal mechanisms disadvantage those with less power while simultaneously protecting established interests.

The theoretical framework integrates three complementary approaches to analyse these silencing mechanisms. MacKinnon's dominance theory reveals how legal structures that appear neutral reinforce male power by indoctrinating gendered standards into supposedly objective procedures.[7] Fineman's vulnerability thesis demonstrates how structural inequalities create asymmetric access to justice, particularly for those with limited resources to navigate complex legal processes.[8] Fricker's concept of epistemic injustice highlights how victims suffer both testimonial injustice, where their accounts are devalued, and hermeneutical injustice, where they lack the conceptual resources to articulate their experiences within legal frameworks.[9] Together, these theories provide a nuanced lens for understanding how private law mechanisms function as technologies of silencing that privatise knowledge of misconduct while maintaining male-defined standards of acceptable speech.

By adopting a feminist socio-legal methodology that examines how the law

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[6] Lizzie Barmes, 'Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs' [2023] 52(1) Industrial Law Journal 4; Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' in Michael Freeman, Lloyd's Introduction to Jurisprudence (9th edn, Sweet & Maxwell 2013) 1092; Rebecca Moosavian and Pete Coe, 'The Personal is Political: Sexual Misconduct Allegations, Defamation and Gender Politics' (2025) *Journal of Media Law Full article: 'The personal is political': sexual misconduct allegations, defamation and gender politics* accessed 11 November 2024

[7] Catharine A MacKinnon, 'Difference and Dominance: On Sex Discrimination', in Katharine T Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory Readings in Law and Gender* (Westview Press 1991)

[8] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ 251

[9] [9] Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (1st ed, OUP, 2007)

operates in practice rather than limiting itself to doctrinal analysis,[10] which is limited due to the inherent silencing function of NDAs. This research draws on a range of sources focused on exploring the silencing of sexual harassment and exploring the gap between formal legal protections and their practical implementation, ultimately revealing how procedural mechanisms undermine statutory aims. Traditional legal analysis often reduces NDAs and defamation to their doctrinal functions, whereas this methodology uncovers their role as mechanisms of silencing and reinforcement of power structures.[11]

This paper consists of three substantive sections. Section 1 establishes the theoretical framework which aims to demonstrate how legal structures maintain power asymmetries, create vulnerability, and enable epistemic injustice against victims of sexual misconduct. Section 2 considers NDAs in the UK context analysing their legal framework, enforcement challenges, and specific silencing through case studies such as Zelda Perkins' Weinstein agreement.[12] Section 3 examines defamation law as a silencing tool, exploring how reforms, burden of proof issues, credibility assessments, and cost barriers combine to create insurmountable obstacles for sexual misconduct victims. This analysis contributes to key debates in law and feminist scholarship. This paper challenges the concept of 'neutrality' in private law, demonstrating how procedural mechanisms program gendered assumptions and power dynamics.[13] It questions piecemeal reforms that fail to address these structural inequalities,[14] and interrogates the tension between privacy and transparency; particularly how confidentiality can function as systemic

[10] Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2002) 35 Journal of Law and Society 351

[11]Martha Chamallas, 'Social Justice Tort Theory' [2021] 14 Journal of Tort Law 309; Lizzie Barmes, 'Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs' [2023] 52(1) Industrial Law Journal 4

[12]Zelda Perkins, *Written evidence submitted to the Women and Equalities Committee, Sexual Harassment in the Workplace (SHW0052)*, HC 725 (2017–19)
https://committees.parliament.uk/writtenevidence/88646/html/ accessed 17 November 2024

[13]Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' in Michael Freeman, Lloyd's Introduction to Jurisprudence (9th edn, Sweet & Maxwell 2013) 1092

[14]House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720)

oppression rather than legitimate protection.[15] Through interrogation of broader debates about whether law serves to challenge or entrench gender hierarchies, this paper demonstrates how private law mechanisms reframe public wrongs into confidential matters beyond collective scrutiny.[16]

By analysing the specific mechanisms through which NDAs and defamation law operate as tools of silencing, this paper aims to expose how private law can be weaponised against victims of sexual misconduct. It also touches upon the structural reforms necessary to create a more equitable legal system, arguing that addressing these issues requires more than incremental adjustments to existing tools. It calls for a fundamental rethinking of how power operates through ostensibly neutral legal mechanisms and whose interests these mechanisms protect.

2. Power, Vulnerability, and Knowledge: Theorising Private Law Through MacKinnon, Fineman, and Fricker.

A. Introduction

This section establishes the theoretical framework through which this paper will analyse how private law mechanisms silence victims of sexual misconduct while shielding perpetrators from accountability. Examining power asymmetries in legal structures, vulnerability dynamics, and silencing mechanisms within legal discourse creates a foundation for understanding how seemingly neutral legal tools function as sophisticated mechanisms of oppression. The integration of MacKinnon's dominance theory,[17] Fineman's vulnerability thesis,[18] and Fricker's

[15]David Erdos, 'Data Protection and the Right to Reputation: Filling the "Gaps" After the Defamation Act 2013' (2014) 73(3) Cambridge Law Journal 536
[16]Margaret Thornton, 'Privatising Sexual Harassment' (2023) 45(3) Sydney L Rev 371

[17]Catharine A. MacKinnon, 'Difference and Dominance: On Sex Discrimination', in Katharine T. Bartlett and Rosanne Kennedy (eds), Feminist Legal Theory Readings in Law and Gender (Westview Press 1991)
[18] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ, 251

epistemic injustice framework[19] offers a nuanced lens to critically evaluate NDAs and Strategic Litigation Against Public Participants (SLAPPs) in subsequent sections.

B. Power Asymmetry in Legal Structures

Power asymmetry in legal structures forms a critical foundation for understanding how private law mechanisms operate to silence victims of sexual misconduct. MacKinnon's dominance theory provides a compelling framework through which to analyse these mechanisms, demonstrating that the law is neither neutral nor equal in its treatment of gender issues.[20] Legal conceptualisations of gender equality contain a fundamental contradiction, simultaneously relying on notions of sameness through equality doctrine while emphasising difference through sex discrimination frameworks.[21] This epistemological inconsistency undermines legal remedies for sexual misconduct victims by trapping women within restrictive definitional boundaries that prevent meaningful recognition of systemic power disparities.

Through legal mediation, male dominance becomes naturalised rather than recognised as a constructed power imbalance that serves the dominant group's interests.[22] This is particularly relevant when examining how NDAs and SLAPPs function within the legal system, as coercive practices become legitimised as consensual agreements, and discriminatory outcomes are masked by seemingly neutral legal processes.[23]

The legal language itself reflects and reinforces these power imbalances, as Finley

[19] Miranda Fricker, 'Epistemic Injustice: Power & the Ethics of Knowing' (1st ed, OUP, 2007)
[20]Catharine A. MacKinnon, 'Difference and Dominance: On Sex Discrimination', in Katharine T. Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory Readings in Law and Gender* (Westview Press 1991).
[21] Ibid.
[22] Catherine A. MacKinnon, *Toward a Feminist Theory of the State,* (1989) Harvard University Press
[23] Ibid

argues, being fundamentally shaped by male experiences and perspectives.[24] The consequence of this is that experiences predominantly affecting women, such as sexual misconduct,[25] are systematically marginalised within legal frameworks that fail to recognise their systemic nature.[26] Chamallas bridges feminist legal theory with private law by identifying how systemic injustices manifest at the individual level.[27] This connection explains how mechanisms like NDAs and defamation proceedings effectively privatise systemic issues of sexual misconduct, removing them from public discourse and accountability structures. This framework reveals how ostensibly 'neutral'[28] private law mechanisms serve to reinforce power asymmetries and silence victims, creating a legal environment where victims of sexual misconduct face structural barriers to justice that are embedded within seemingly objective legal processes.

This power asymmetry is further ingrained through specific mechanics of private law that systematically privilege perpetrators of sexual misconduct. NDAs routinely include clauses that not only prevent victims from speaking about their experiences but also restrict their ability to seek professional support,[29] demonstrating what MacMillan identifies as 'terms that compel victims to live with ongoing psychological and emotional burdens'.[30] The legal profession's complicity is evident in how external law firms conduct investigations under the cover of legal privilege, deliberately restricting complainants' access to evidence.[31] Similarly, the defamation framework creates what Coe and others term a 'fertile

[24]Lucinda M. Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning'.
[25] Jennifer Robinson and Keina Yoshida, *'How Many More Women? The Silencing of Women By the Law and How to Stop It'* (Endeavor 2022).
[26]Catharine A. MacKinnon, 'Difference and Dominance: On Sex Discrimination', in Katharine T. Bartlett and Rosanne Kennedy (eds), Feminist Legal Theory Readings in Law and Gender (Westview Press 1991).
[27]Martha Chamallas, 'Social Justice Tort Theory' [2021] 14 Journal of Tort Law 309.
[28] Catharine A. MacKinnon, 'Difference and Dominance: On Sex Discrimination', in Katharine T. Bartlett and Rosanne Kennedy (eds), Feminist Legal Theory Readings in Law and Gender (Westview Press 1991).
[29] Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law.
[30] Ibid.
[31] House of Commons Women and Equalities Committee, The Use of Non-Disclosure Agreements in Discrimination Cases (HC 2017–19, 1720).

ground' for suppression through prohibitively high legal costs, reverse burden of proof, and jurisdictional flexibility, which serves wealthy claimants.[32] This highlights a key contradiction between the state's duty to ensure equal protection and its role in enabling silencing mechanisms. The supposedly neutral principle of contractual freedom[33] becomes, in practice, a vehicle for what MacKinnon identifies as 'institutional mechanisms of oppression' that systematically silence and isolate victims through legal formalism.[34] While these private law mechanisms will be examined in depth in sections 2 and 3, respectively, their theoretical significance merits introducing them here. They operate not only as isolated legal tools but as sophisticated technologies that silence and transform systemic issues of misconduct into privatised matters beyond public scrutiny or collective understanding.

C. Vulnerability and Victimhood

Complementing MacKinnon's dominance theory, Fineman's vulnerability thesis provides a more nuanced analytical framework for understanding how legal structures systematically marginalise sexual misconduct victims. While MacKinnon emphasises gender-based power imbalances, Fineman critiques the fundamental 'sameness-of-treatment version of equality' that obscures contextual differences in circumstances, resources, and social positioning.[35] This theoretical intersection is crucial for understanding how ostensibly neutral private law mechanisms function as instruments of silencing. The principles of contractual autonomy that underpin NDAs suggest that parties are 'free to determine the content

[32]Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): A Critical Interrogation of Legislative and Judicial Responses' (2025) *Journal of Media Law* https://doi.org/10.1080/17577632.2024.2443096 accessed 8 August 2024 1, 5

[33]Luan Hasneziri, 'The Principle of Autonomy of Contractual Will' (2023) 8(1) European Journal of Multidisciplinary Studies.

[34]Catherine A. MacKinnon, Toward a Feminist Theory of the State (Harvard University Press 1989), 238

[35] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ, 251

of the contract in accordance with their interests.'[36] This fundamentally misrepresents power dynamics in sexual misconduct cases, where victims often 'do not participate in drafting the content of the contract, but [are] only entitled to choose to sign the contract or not.'[37] Similarly, defamation law's procedural requirements presume equal capacity among parties while ignoring structural inequalities that make defending against defamation claims prohibitively expensive for victims.[38] Fineman's conception of state responsibility to prevent systems that privilege certain groups[39] starkly contradicts the legal landscape. NDAs often restrict victims' access to professional support,[40] and defamation proceedings serve as tools for powerful entities to suppress legitimate criticism.[41]

This analysis reveals how private law mechanisms transform systemic issues into individualised matters, effectively recasting sexual harassment from what Barmes describes as a structural problem that maintains gender hierarchies into discreet incidents suitable for private resolution.[42] Through this deliberate privatisation of misconduct, confidentiality mechanisms not only silence individual voices but also systematically prevent the development of broader discourse that might challenge existing power structures.[43] The state's regulatory failures in this domain reflect the fundamental gender inequality in sexual violence cases that MacMillan identifies;[44] ultimately demonstrating how legal frameworks prioritise protecting perpetrators' reputations over victims' rights to articulate their experiences. While

[36] Luan Hasneziri, 'The Principle of Autonomy of Contractual Will' (2023) 8(1) European Journal of Multidisciplinary Studies, 134-135.
[37]Ibid
[38] Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): A Critical Interrogation of Legislative and Judicial Responses' (2025) *Journal of Media Law* https://doi.org/10.1080/17577632.2024.2443096 accessed 8 August 2024.
[39]Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ
[40]Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law
[41]Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): A Critical Interrogation of Legislative and Judicial Responses' (2025) *Journal of Media Law* https://doi.org/10.1080/17577632.2024.2443096 accessed 8 August 2024.
[42] Lizzie Barmes, 'Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs' [2023] 52(1) Industrial Law Journal, 4.
[43]Miranda Fricker, 'Epistemic Injustice: Power & the Ethics of Knowing' (1st ed, OUP, 2007).
[44]Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law, 8.

vulnerability theory powerfully illuminates structural inequalities, it risks overlooking the specific gendered dynamics that MacKinnon's dominance theory[45] captures. A synthesis of both approaches, recognising both universal vulnerability and gender specific oppression, offers the most comprehensive framework for analysing how NDAs and SLAPPs silence sexual misconduct victims.

D. Silencing Mechanisms in Legal Discourse

Building on the analysis of power asymmetry and vulnerability in legal structures, the silencing of sexual misconduct victims operates through sophisticated epistemological mechanisms. This works to systematically undermine their credibility and capacity to articulate experiences. Fricker's concept of testimonial injustice reveals how victims suffer identity-based credibility deficits, whereby their accounts are devalued based on gender rather than evidence.[46] This manifests in what has been identified as the 'twin myths' in sexual misconduct cases, which presume that a complainant's sexual history affects both the likelihood of consent and witness credibility.[47] These prejudicial inferences persist despite formal prohibitions, representing the societal silencing that MacKinnon describes affecting women broadly.[48] NDAs exacerbate this epistemic harm by contractually enforcing silence through terms that often prevent victims from seeking professional support, creating ongoing psychological burdens that victims bear in isolation.[49] The defamation framework further weaponises these biases through a reverse burden of proof that requires victims to demonstrate 'substantial truth' in circumstances where evidence is typically limited to personal

[45]Catharine A. MacKinnon, *'Difference and Dominance: On Sex Discrimination'*, in Katharine T. Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory Readings in Law and Gender* (Westview Press 1991)

[46] Miranda Fricker, 'Epistemic Injustice: Power & the Ethics of Knowing' (1st ed, OUP, 2007).

[47]Lisa Dufraimont, 'Myth, Inference and Evidence in Sexual Assault Trials' (2019) 44(2) Queen's LJ 316, 332.

[48]Catherine A. MacKinnon, Toward a Feminist Theory of the State (Harvard University Press 1989) 238.

[49]Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law.

testimony.[50] This is exemplified in the case of *Economou v de Frietas*,[51] which starkly illustrates these epistemic injustices, however, this will be explored further in subsequent sections.

Beyond testimonial injustice, victims face hermeneutical injustice, lacking the conceptual resources to articulate their experiences within legal frameworks.[52] This marginalisation intensifies when NDAs prevent the development of collective understanding that would validate individual experiences.[53] SLAPPs, through prohibitively high legal costs and complex procedural requirements, actively punish victims' attempts to voice their experiences outside established categories.[54] As Finley argues, the law's neutrality façade conceals underlying biases against women's testimony.[55] While Fricker's framework illuminates these credibility deficits, it potentially overemphasises individual prejudice at the expense of analysing how institutional arrangements systematically structure whose knowledge is legitimised within legal discourse.[56] Private law mechanisms thus function as epistemological gatekeepers that determine whose knowledge counts and what experiences merit recognition. This demonstrates how ostensibly neutral legal procedures operationalise gender-based prejudice while rendering women's experiences legally unintelligible.

E. Alternative Theoretical Perspectives

While examining how private law mechanisms silence sexual misconduct victims,

[50]Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): A Critical Interrogation of Legislative and Judicial Responses' (2025) *Journal of Media Law* https://doi.org/10.1080/17577632.2024.2443096 accessed 8 August 2024.
[51]Economou v de Freitas [2018] EWCA Civ 2591.
[52] Miranda Fricker, 'Epistemic Injustice: Power & the Ethics of Knowing' (1st ed, OUP, 2007).
[53]House of Commons Women and Equalities Committee, The Use of Non-Disclosure Agreements in Discrimination Cases (HC 2017–19, 1720) 12
[54]Rebecca Moosavian and Pete Coe, 'The Personal is Political: Sexual Misconduct Allegations, Defamation and Gender Politics' (2025) *Journal of Media Law Full article: 'The personal is political': sexual misconduct allegations, defamation and gender politics* accessed 11 November 2024
[55]Lucinda M. Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989)
[56] Elizabeth Anderson, 'Epistemic Justice as a Virtue of Social Institutions' (2012) 26(2) Social Epistemology 163

alternative theoretical approaches offer distinctive analytical frameworks. Relational contract theory challenges traditional notions of freedom of contract by recognising that contracts exist within ongoing relationships rather than as isolated agreements.[57] As Davidson Gray argues, the voluntary aspect that legitimates state enforcement assumes equal bargaining power, a problematic assumption in sexual misconduct cases.[58] This theory would analyse NDAs not merely as private agreements but as mechanisms that operate within broader relational contexts marked by significant power imbalances. For defamation, relational theory illuminates how reputation itself involves social relationships, with historic protections evolving from concerns on social standing to modern monetary remedies that quantify reputational harm.[59]

Similarly, public/private dichotomy theory examines how law maintains boundaries between public matters subject to regulation and private matters ostensibly beyond governmental interference.[60] Mnookin's analysis reveals how this dichotomy influences the legal framing of individual rights versus state interests.[61] Applied to sexual misconduct, this perspective would critique how private law mechanisms privatise matters of public concern, allowing misconduct to remain hidden behind contractual confidentiality or threats of reputation-based litigation. However, these theoretical approaches have significant limitations for analysing silencing mechanisms. Relational contract theory, while acknowledging power dynamics, lacks specific focus on gender-based hierarchies that systematically disadvantage women in legal contexts.[62] Public/private dichotomy theory, though identifying problematic boundaries, does not adequately address epistemic dimensions of silencing that prevent victims from articulating

[57]Anthony Davidson Gray, '*Relational contract theory, the relevance of actual performance in contractual interpretation and its application to employment contracts in the United Kingdom and Australia*' [2023] 52(2-3) Common Law World Review 61

[58] Ibid

[59] [59] Jideofor Adibe, *Freedom of Speech v Protection of Reputation,* (Adonis & Abbey 2010)

[60]Robert H. Mnookin, '*the Public/Private Dichotomy: Political Disagreement and Academic Repudiation*' (1982) 130(6) University of Pennsylvania Law Review 1429

[61]Ibid

[62] Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2002) 35 Journal of Law and Society 351

their experiences.[63] Combining Mackinnon, Fricker, and Fineman's theories offers a more focused lens on how law reinforces gendered power, vulnerability, and epistemic injustice. This integrated approach reveals how NDAs and SLAPPs enable systemic silencing, helping explain patterns like those identified by White and others regarding the dismissal of sexual misconduct claims as a systemic pattern rather than isolated incidents.[64] The following section will demonstrate how this theoretical synthesis offers the most appropriate framework for analysing how private law mechanisms silence victims while shielding perpetrators from accountability.

F. Theoretical Synthesis: An Integrated Framework for Analysis

Synthesising the theories of MacKinnon, Fineman, and Fricker offers a complementary insight into how private law mechanisms often operate against the best interests of victims of sexual misconduct.[65] MacKinnon and Fricker both examine how power shapes knowledge and credibility, with MacKinnon highlighting the universalisation of male perspectives and Fricker analysing whose testimony is believed.[66] Their work aligns in showing how dominant groups construct reality, using silencing mechanisms that marginalise women's voices and define objectivity on their own terms. This is evidenced by White and others[67] in their exploration of the connection between the response to the MeToo movement, and the pervasiveness of rape myths. Their study suggests that persistent patriarchal

[63]Nancy Fraser, '*Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*' (1990) 25/26 Duke University Press 56

[64]Carly White, Aleksandra Monteiro & Fenia Ferra, *'An exploration of the rape myths effect on the MeToo movement acceptance in the UK'*, [2024] Psychiatry, Psychology and Law <https://www.tandfonline.com/doi/full/10.1080/13218719.2024.2346730> accessed 14 March 2025

[65] Catherine A. MacKinnon, 'Toward a Feminist Theory of the State' (Harvard University Press 1989), 238; Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ, 251; Miranda Fricker, 'Epistemic Injustice: Power & the Ethics of Knowing' (1st ed, OUP, 2007).

[66]Catherine A. MacKinnon, 'Toward a Feminist Theory of the State' (Harvard University Press 1989), 238; Miranda Fricker, 'Epistemic Injustice: Power & the Ethics of Knowing' (1st ed, OUP, 2007).

[67]Carly White, Aleksandra Monteiro & Fenia Ferra, *'An exploration of the rape myths effect on the MeToo movement acceptance in the UK'*, [2024] Psychiatry, Psychology and Law <https://www.tandfonline.com/doi/full/10.1080/13218719.2024.2346730> accessed 14 March 2025

norms[68] contribute to the dismissal of sexual abuse claims, particularly when women's testimonies challenge established power structures.[69] This dismissal operates through what Fricker identifies as testimonial injustice, as women's accounts are systematically devalued within legal frameworks that are themselves 'based on authority, which lies at the heart of male domination'.[70]

Most significantly, White's finding that 'understanding sexual violence leads to lower levels of dismissal'[71] demonstrates why silencing mechanisms within the law function so effectively at reinforcing existing power structures; preventing the development of collective knowledge that might otherwise challenge the credibility deficits women face when speaking about sexual misconduct. This analysis reveals why NDAs and SLAPPs function as particularly powerful silencing tools in sexual misconduct cases. By contractually enforcing silence and imposing male-oriented evidentiary standards, these mechanisms directly implement the systematic dismissal of women's experiences.[72] The theoretical framework employed here reveals how ostensibly neutral legal mechanisms function not only at an individual level but also reinforce broader hierarchies of knowledge. These hierarchies work to prevent victims' experiences, forming collective narratives and challenging male epistemic authority.

G. Conclusion

This framework recognises and explores the concept of 'neutral' legal mechanisms from a feminist position, exposing the hidden power hierarchies that have allowed victims to be silenced and perpetrators to be enabled. These hierarchies are reinforced through multiple interconnected dynamics: they transform systemic

[68] Sylvia Walby, *Theorising Patriarchy,* (1st ed, Basil Blackwell, 1990)
[69]Carly White, Aleksandra Monteiro & Fenia Ferra, *'An exploration of the rape myths effect on the MeToo movement acceptance in the UK',* [2024] Psychiatry, Psychology and Law <https://www.tandfonline.com/doi/full/10.1080/13218719.2024.2346730> accessed 14 March 2025: 1, 2
[70]Ibid.
[71]Ibid 1, 9
[72] Ibid

patterns of misconduct into privatised individual matters;[73] they exploit economic and procedural barriers that disproportionately affect victims;[74] they undermine the credibility of victim testimonies through gendered assumptions about truth and consent;[75] and they prioritise protecting perpetrators reputations over victims' rights to articulate their experiences.[76] The theoretical framework established in this section reveals how NDAs and defamation laws work not only as isolated legal mechanisms but as interconnected tools of silencing that transform systemic patterns of misconduct into privatised, individualised matters. Synthesising MacKinnon,[77] Fineman,[78] and Fricker's[79] theories while considering alternative approaches, demonstrates that understanding these mechanisms requires simultaneous attention to gendered power structures, structural vulnerabilities, and barriers to epistemic credibility. This perspective reveals how seemingly neutral tools sustain power structures by controlling whose experiences are acknowledged and validated. The following sections will apply this theoretical framework to examine specific legal mechanisms that enable the silencing of victims, analysing how they function in practice to shield perpetrators while reinforcing hierarchies of knowledge and power.

3. Non-Disclosure Agreements in the UK context

A. Introduction

Non-disclosure agreements, while ostensibly designed to protect legitimate

[73]Lizzie Barmes, 'Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs' [2023] 52(1) Industrial Law Journal, 4
[74] Martha Chamallas, 'Social Justice Tort Theory' [2021] 14 Journal of Tort Law 309
[75]Lucinda M. Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989)
[76]Rebecca Moosavian and Pete Coe, 'The Personal is Political: Sexual Misconduct Allegations, Defamation and Gender Politics' (2025) *Journal of Media Law Full article: 'The personal is political': sexual misconduct allegations, defamation and gender politics* accessed 11 November 2024
[77]Catharine A. MacKinnon, 'Difference and Dominance: On Sex Discrimination', in Katharine T. Bartlett and Rosanne Kennedy (eds), Feminist Legal Theory Readings in Law and Gender (Westview Press 1991); Catherine A. MacKinnon, Toward a Feminist Theory of the State (Harvard University Press 1989), 238.
[78]Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ, 251
[79] Miranda Fricker, 'Epistemic Injustice: Power & the Ethics of Knowing' (1st ed, OUP, 2007)

commercial interests,[80] have become sophisticated mechanisms for silencing victims of sexual misconduct in the UK.[81] Through MacKinnon's lens of institutional oppression,[82] Fineman's notion of vulnerability,[83] and Fricker's concept of epistemic injustice[84] the analysis explores three interconnected dimensions. The inadequacy of current legal protections, enforcement challenges that privilege institutional interests, and the specific mechanisms through which NDAs silence victims while shielding perpetrators. This examination reveals how seemingly neutral contractual tools function to privatise systemic misconduct by transforming public wrongs into individual, confidential matters.

B. The Legal Framework and Its Limitations

This section critically explores the laws and courts decisions surrounding NDAs, with particular focus on the Public Interest Disclosure Act (PIDA) 1998, the Equality Act 2010, and the role of private settlements, showing how existing legal standards can facilitate the concealment of sexual misconduct and reinforce structural power imbalances. PIDA 1998 established foundational protections through section 43B, defining 'qualifying disclosures' across six areas including criminal offences and legal non-compliance.[85] Section 43J renders void any contractual provisions preventing workers from making protected disclosures.[86] However, as MacMillan notes, these protections primarily concerned whistleblowing, and omitting

[80]Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law

[81]Arcadia Group Limited and others v Telegraph Media Group Ltd [2019] EWHC 223 (QB) [40]; Zelda Perkins, *Written evidence submitted to the Women and Equalities Committee, Sexual Harassment in the Workplace (SHW0052)*, HC 725 (2017–19) https://committees.parliament.uk/writtenevidence/88646/html/ accessed 17 November 2024; M Marriage, 'Men Only: Inside the Charity Fundraiser Where Hostesses Are Put on Show' Financial Times (23 January 2018) https://www.ft.com/content/075d679e-0033-11e8-9650-9c0ad2d7c5b5 accessed 16 December 2024

[82]Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238

[83]Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ 251

[84]Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (1st ed, OUP, 2007)

[85]Public Interest Disclosure Act 1998, s.43B.

[86] Public Interest Disclosure Act 1998, s.43J.

considerations of sexual misconduct, creating what Fricker would identify as a hermeneutical gap in legal protection.[87] This gap exemplifies how legal frameworks fail to adequately conceptualise women's experiences with statutory language that does not explicitly acknowledge sexual misconduct as warranting similar protection. The Equality Act 2010 attempted to strengthen these protections with s.144 invalidating contractual terms that exclude or limit statutory provisions.[88] Section 26 of the Equality Act provides a comprehensive definition of harassment with specific relevance to misconduct cases. It establishes three distinct forms of harassment; harassment related to a protected characteristic, sexual harassment, and less favourable treatment based on rejection of or submission to harassment.[89] Sexual harassment is explicitly defined in s.26(2) as 'unwanted conduct of a sexual nature' that has the purpose or effect of violating dignity or creating and intimidating, hostile, degrading, humiliating, or offensive environment.[90] The Act incorporates both subjective and objective elements by requiring consideration of three factors when determining effect. The victim's perception, the circumstances of the case, and whether it was reasonable for the conduct to have that effect.[91] This definition creates a legal framework that recognises sexual harassment as a specific form of discrimination, distinct from other types of harassment. Most significantly, section 40A imposes a proactive duty on employers to prevent sexual harassment, with section 120(9) enabling employment tribunals to apply compensation uplifts in harassment cases.[92]

Despite the existence of these supposedly protective measures, the Women and Equalities Committee has highlighted how these are routinely circumvented through private settlements containing confidentiality clauses. For example, the Committee found that victims are frequently unaware of prior complaints due to

[87] Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law 8; Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (1st ed, OUP, 2007) 1.
[88]The Equality Act 2010, s.144
[89]The Equality Act 2010, s.26
[90]The Equality Act 2010, s.26(1)-(2)
[91]The Equality Act 2010, s.26(4)(a)-(c)
[92] Equality Act 2010, s.40A, s.120(9)

confidentiality restrictions, as well as employers leveraging the need for references to coerce employees into signing NDAs. Clawback clauses also operate as a persistent psychological deterrent with legal experts stressing their function as realer silencers regardless of their enforceability.[93] These practices thus demonstrate Fineman's 'sameness of treatment' model of equality, overlooking contextual power imbalances that leave victims structurally disadvantaged.[94] These legislative provisions theoretically protect victims but fail to adequately address the specific context of sexual misconduct, illustrating MacKinnon's opinion that seemingly neutral laws maintain existing power structures through their application. While the law explicitly recognises sexual harassment as discrimination, it simultaneously permits its privatisation through confidential settlements effectively turning a public wrong into a private matter. The Women and Equalities Committee finding that 'organisations' only incentive to settle employment disputes instead of taking them to tribunal is the existence of NDAs and the protection of their reputation' reveals how the legal framework prioritises institutional interests over victim justice.[95] This gap between statutory intent and practical application demonstrates how seemingly protective legislation can facilitate silencing when implementation mechanisms favour powerful parties. These statutory limitations directly enable NDAs to function as silencing mechanisms in sexual misconduct cases. The following section will examine how this contradiction manifests in enforcement challenges and power imbalances that systematically disadvantage victims while shielding perpetrators from accountability.

C. Enforcement Challenges and Power Imbalances

Although statutory protections exist, their implementation is often undermined

[93]House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) 12
[94]Martha Albertson Fineman, '*The Vulnerable Subject and the Responsive State.*' (2010) 60 Emory LJ 251, 251
[95] House of Commons Women and Equalities Committee (n 8) 14

by power imbalances between employers and employees which weakens the efficacy of employment dispute resolution processes. The enforcement model for equality and whistleblower protections disadvantages victims by imposing procedural and financial barriers, while privatised processes enable NDAs to silence victims and enable perpetrators. MacMillan identifies a considerable weakness in the current system where enforcement of the Equality Act 2010 falls upon those who have suffered discrimination, with the near removal of legal aid creating an enormous power imbalance against those alleging discrimination.[96] This individualised approach illustrates what Fineman's vulnerability theory identifies as state sanctioned vulnerability; legal frameworks that claim to protect victims while placing the entire burden of enforcement on those least able to bear it.[97] Allen and Blackham's research reveals how the UK's enforcement model deliberately directs claims of discrimination into private Alternative Dispute Resolution (ADR) processes, prioritising institutional interests over accountability.[98] The consequences of this are made stark in the Fawcett Society's finding that 45% of women never reported sexual harassment, with 24% citing fear of negative career consequences;[99] a direct manifestation of what MacKinnon terms the material consequences of systemic power asymmetry.[100]

These enforcement challenges are further ingrained through institutional complicity among legal professionals who facilitate problematic NDAs. The SRA's own Thematic Review found that NDAs were often applied in a standardised, uncritical way, creating significant knowledge gaps about their effects with only

[96]Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law 132
[97]Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ 251
[98]Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality, and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) Melbourne University Law Review 384
[99]Fawcett Society, 'Sexual Harassment in the Workplace' (2021) https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=8eabc7f1-07c0-4d7e-9206-de431524301e accessed 15 March 2025
[100] Catherine A. MacKinnon, Toward a Feminist Theory of the State (Harvard University Press 1989)

28% of firms training staff on vulnerability issues.[101] Concerningly, fewer than 10% of firms raised ethical concerns regarding NDA clauses or demonstrated awareness of reporting duties suggesting widespread acceptance of potentially problematic practices.[102] This institutional complicity reflects what Moorhead characterises as lawyers effectively cheating on behalf of their clients through oppressive agreements.[103] Despite the SRA's warning notice which acknowledges the risks of taking advantage of opposing parties or applying undue pressure, these practices persist in a profession where 84% of firms rely on generic NDA templates.[104] Even protective measures can reinforce power imbalances. The SRA's acknowledgement that employers typically cover employees' legal costs creates an illusion of fairness when this support often only secures minimal advice compared to the extensive legal representation available to employers.[105] This funding model reflects Fineman's concept of institutionalised vulnerability, where protective measures entrench power imbalances by fostering dependency and limiting victims' ability to challenge unfair terms.[106]

Barmes demonstrates how, as society shifted away from collectivist ideologies toward liberal individualism, individuals are increasingly expected to tackle workplace wrongdoing on their own. This, therefore, removes the burden from the employer and places it back onto the victim to enforce their own rights against the

[101]SRA, *Thematic Review: The Use of Non-Disclosure Agreements in Workplace Complaints* (August 2023) https://www.sra.org.uk/globalassets/documents/thematic-reviews/thematic-review-use-non-disclosure-agreements-workplace-complaints.pdf accessed [10 November 2024]

[102]SRA, *Thematic Review: The Use of Non-Disclosure Agreements in Workplace Complaints* (August 2023) https://www.sra.org.uk/globalassets/documents/thematic-reviews/thematic-review-use-non-disclosure-agreements-workplace-complaints.pdf accessed [10 November 2024]

[103]Richard Moorhead, 'Professional Ethics and NDAs: Contracts as Lies and Abuse?' in Paul S Davies and Magda Raczynska (eds), *Contents of Commercial Contracts - Terms Affecting Freedoms* (Hart Publishing 2020)

[104]SRA, Thematic Review: The Use of Non-Disclosure Agreements in Workplace Complaints (August 2023) https://www.sra.org.uk/globalassets/documents/thematic-reviews/thematic-review-use-non-disclosure-agreements-workplace-complaints.pdf accessed 10 November 2024

[105] Solicitors Regulation Authority, *Non-disclosure agreements (NDAs): Guidance* (updated 6 August 2024) https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/ accessed 10 February 2025.

[106]Martha Albertson Fineman, '*The Vulnerable Subject and the Responsive State.*' (2010) 60 Emory LJ 251, 251

considerable resources of an organisation.[107] This creates what Fricker would identify as hermeneutical injustice; victims lacking both conceptual resources to articulate their experiences and the collective validation needed to challenge systemic misconduct.[108] These knowledge asymmetries are compounded by procedural tactics such as imposing artificial time limits and denying victims copies of their own agreements.[109] While regulatory guidance acknowledges these problems, the soft law approach has proven ineffective at addressing fundamental power imbalances, with the SRA finding limited evidence of clear advice to employees before signing NDAs.[110] This regulatory gap reveals how professional practices maintain power structures while appearing neutral, embodying MacKinnon's theory of the law's tendency to turn systemic discrimination into seemingly neutral processes.[111] These enforcement gaps and institutional practices enable NDAs to operate as sophisticated silencing tools, privatising misconduct and shielding perpetrators; an issue which will be explored further through analysis of their specific legal mechanisms.

D. The Role of Solicitors and SRA Guidance

The legal profession plays a crucial role in facilitating NDAs' silencing effects through institutional complicity. The current Solicitors Regulation Authority (SRA) guidance creates a superficial regulatory framework that does little to prevent solicitors from drafting oppressive agreements in cases of sexual misconduct. The Solicitors Code of Conduct requires practitioners to 'uphold the rule of law', 'act

[107]Lizzie Barmes, 'Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs' [2023] 52(1) Industrial Law Journal

[108] Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (1st ed, OUP, 2007) 1

[109]Solicitors Regulation Authority, *Non-disclosure agreements (NDAs): Guidance* (updated 6 August 2024) https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/ accessed 10 February 2025; Zelda Perkins, *Written evidence submitted to the Women and Equalities Committee, Sexual Harassment in the Workplace (SHW0052)*, HC 725 (2017–19) https://committees.parliament.uk/writtenevidence/88646/html/ accessed 17 November 2024 - this case demonstrates a real life example of these oppressive clauses in action.

[110] Solicitors Regulation Authority, Thematic Review: The Use of Non-Disclosure Agreements in Workplace Complaints (August 2023) https://www.sra.org.uk/globalassets/documents/thematic-reviews/thematic-review-use-non-disclosure-agreements-workplace-complaints.pdf accessed 10 November 2024

[111]Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238

with integrity', and prioritise public interest when met with conflicting principles,[112] which suggests that adequate safeguards exist. In the case of *Wingate & Evans v The Solicitors Regulation Authority*, the court clarified that integrity in professional conduct 'connotes moral soundness, rectitude and steady adherence to an ethical code',[113] creating a clear standard with which to judge NDA drafting. However, in practice, these standards offer limited protection for victims, often failing to counteract the power of institutional incentives that favour silencing. The structural tension between professional duties and client interests creates what the Women and Equalities Committee described as a 'public policy judgement' where solicitors must decide whether safeguarding a perpetrator's reputation outweighs a victim's right to access justice.[114] This judgement is obscured by commercial interests as evidenced by the Law Society's research, which shows that 84% of firms use template NDAs which lack customisation that takes the needs of vulnerable clients into account.[115] The heavy focus on client confidentiality causes what Barmes identifies as a privatisation of justice, in which legal professionals play a key role in systematically shielding misconduct from public scrutiny.[116] These practices are evident in dangerous professional patterns, including the use of overly legalistic warning language that discourages reporting, hiding exceptions to confidentiality with complex clauses, and the failure to provide clear guidance on what victims can disclose, despite the SRA warning against these practices.[117]

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[112]Solicitors Regulation Authority, SRA Principles (SRA, 25 November 2019) https://www.sra.org.uk/solicitors/standards-regulations/principles/ accessed 10 February 2025

[113]Wingate & Evans v The Solicitors Regulation Authority [2018] EWCA Civ 366, [2018] 1 WLR 3969 [66] - The court found that the solicitor in this case had acted dishonestly and without integrity in their professional conduct in relation to their client entering a 'sham' contract that was known to the solicitor.

[114]House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) para 42

[115]SRA, *Thematic Review: The Use of Non-Disclosure Agreements in Workplace Complaints* (August 2023) https://www.sra.org.uk/globalassets/documents/thematic-reviews/thematic-review-use-non-disclosure-agreements-workplace-complaints.pdf accessed [10 November 2024].

[116] Lizzie Barmes, 'Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs' [2023] 52(1) Industrial Law Journal 4

[117] Solicitors Regulation Authority, 'Balancing Duties in Litigation: Ethical Challenges in the Solicitor Role' (SRA, November 2022) https://www.sra.org.uk/sra/research-publications/balancing-duties-litigation/ accessed 12 February 2025, 3; Excerpt NDA Agreement,

Using Mackinnon's dominance theory, these practices represent how supposedly neutral professional standards reinforce male power by turning public wrongs into private, confidential matters that can be paid away.[118] Lawyers act not simply as neutral advisors but actively participate in maintaining hierarchies that silence victims and protect their abusers. Fineman's vulnerability thesis is pertinent here as it demonstrates how professional regulations fail to protect parties while almost enabling their exploitation.[119] This is particularly evident when the SRA acknowledge that employers typically fund employees' legal costs but only for 'the most basic level of input'.[120] This power imbalance is made evident in Moorhead's criticism of Weinstein's lawyers defence regarding the Perkins case that he was compliant with his obligation, as Perkins had representation.[121] Moorhead notes that even when victims obtain legal representation, it is often less specialised than aggressive counsel secured by clients of Weinstein's calibre and not continuous, leaving them abandoned in the aftermath.[122] Fricker's concept of epistemic injustice is reflected in the role of solicitors as gatekeepers of knowledge, drafting contracts that prevent victims from understanding their own rights.[123] By controlling victim access to NDAs and requiring any potential advisors to also sign confidentiality agreements, solicitors are creating hermeneutical isolation, stopping victims from being able to access resources needed to voice their experiences. This professional complicitly reinforces the validity of NDAs, which is necessary for their function as silencing mechanisms.

Zelda Perkins, *Written evidence submitted to the Women and Equalities Committee, Sexual Harassment in the Workplace (SHW0052)*, HC 725 (2017–19) https://committees.parliament.uk/writtenevidence/88646/html/ accessed 17 November 2024

[118] Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238

[119]Martha Albertson Fineman, '*The Vulnerable Subject and the Responsive State*' (2010) 60 Emory LJ 251

[120]Solicitors Regulation Authority, Non-disclosure agreements (NDAs): Guidance (updated 6 August 2024) https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/ accessed 10
February 2025

[121]Richard Moorhead 'Professional Ethics and NDAs: Contracts as Lies and Abuse? in Paul S Davies and Magda Raczynska (eds), Contents of Commercial Contracts - Terms Affecting Freedoms (Hart Publishing 2020)

[122]Richard Moorhead 'Professional Ethics and NDAs: Contracts as Lies and Abuse? in Paul S Davies and Magda Raczynska (eds), Contents of Commercial Contracts - Terms Affecting Freedoms (Hart Publishing 2020)

[123]Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (1st ed, OUP, 2007)

E. The Specific Mechanics of How NDAs Silence Victims and The Broader Systemic Consequences

In cases of sexual misconduct, a complex web of restrictive clauses is employed far beyond legitimate confidentiality concerns. These agreements systematically employ interweaving provisions that create comprehensive isolation exemplified by complete secrecy requirements preventing disclosure to family, medical professionals, and even legal personnel without prior confidentiality agreements.[124] The financial structure focuses on 'clawback clauses' which legal experts characterise as 'a massive deterrent' and a 'real silencer' regardless of their potential unenforceability.[125] As the Women and Equalities Committee found, victims facing opponents with 'relatively unlimited means' derive little comfort from theoretical protections due to their inability to secure representation to challenge these provisions.[126] The Zelda Perkins case, while representing one of the few publicly documented examples, presents a methodological limitation that ironically reinforces the argument of systemic silencing, illuminating these mechanisms.

In 1998, Perkins, a former assistant to Harvey Weinstein, signed an NDA following sexual harassment by the film producer. She broke her silence nearly two decades later during the MeToo movement, she described her NDA as 'stringent and thoroughly egregious'.[127] The contract Perkins signed contained several provisions which epitomise the theoretical framework established in section 1. One particularly troubling clause was a mandated 48-hour notice period

[124]Jennifer Robinson and Keina Yoshida, *How Many More Women? The Silencing of Women by the Law and How to Stop It* (Endeavour 2023)
[125]House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) para 99, Q137 (Kiran Daurka)
[126]House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) para 100

[127]Zelda Perkins, *Written evidence submitted to the Women and Equalities Committee, Sexual Harassment in the Workplace (SHW0052)*, HC 725 (2017–19) https://committees.parliament.uk/writtenevidence/88646/html/ accessed 17 November 2024 [0]

before any potential police reports.[128] This demonstrates how these agreements function not merely as confidentiality tools but as mechanisms that shield perpetrators from accountability through procedural barriers, particularly when viewed through MacKinnon's dominance lens. Perkins described her harassment experience as 'an exhausting campaign of coercive, intimidating, and frightening behaviour, which appeared rooted in a driving need to assert power and force submission.'[129] This description perfectly encapsulates MacKinnon's analysis of how male dominance operates institutionally, turning systemic abuse into a privatised, contractual matter.[130]

The agreement's clause preventing Perkins from keeping a copy of her own NDA demonstrates exactly what Fricker identifies as epistemic injustice.[131] By denying her access to the very document restricting her speech, the agreement created both testimonial injustice, by undermining her capacity to be heard, and hermeneutical injustice, by preventing her from understanding the nature of her own constraints. This asymmetry of knowledge further reinforced Perkins' account of the 'disparity of wealth and power'[132] between the victims of Mr Weinstein's harassment and Mr Weinstein himself, along with his company. Illustrating the structural vulnerability that Fineman's theory identifies, which allows these agreements to work so well for perpetrators of sexual harassment.[133] This case also reveals the legal profession's complicity in these silencing mechanisms. Allen & Overy, who drafted the agreement, included provisions preventing Ms. Perkins from seeking professional support without prior confidentiality agreements being signed. This clause demonstrates how the legal system itself becomes a vessel for maintaining power hierarchies rather than challenging them.[134] The SRA later acknowledged

[128] Ibid [6(a)]
[129] Ibid [1]
[130] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238
[131]Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (1st ed, OUP, 2007)
[132] Ibid [3]
[133] Martha Albertson Fineman, '*The Vulnerable Subject and the Responsive State.*' (2010) 60 Emory LJ 251
[134] Richard Moorhead, 'Professional Ethics and NDAs: Contracts as Lies and Abuse?' in Paul S Davies and Magda Raczynska (eds), Contents of Commercial Contracts - Terms Affecting Freedoms (Hart Publishing 2020)

these provisions as highly inappropriate,[135] but this only occurred after the public exposure Perkins gained by breaking her silence. Thus, revealing the gap between regulatory intent and practical implementation, enabling agreements such as these to act as silencing mechanisms.

F. Psychological Silencing and Collective Knowledge Suppression

The theoretical protections for whistleblowing under s.43J of the Public Interest Disclosure Act[136] are similarly ineffective, having 'not been tested in practice', leaving victims with 'little understanding of how their potential rights under whistleblowing law might be affected.'[137] This gap between theoretical protections and practical vulnerabilities extends to employment contexts. Victims report being 'terrified of breaking the terms' in job interviews, instead taking responsibility for employment termination, further eroding their 'confidence and feelings of self-worth.'[138] The Women and Equalities Committee found similar patterns across multiple cases, noting that NDAs are routinely 'used to conceal misdeeds, immoralities and even crimes.'[139] This directly contradicts regulatory statements while revealing a structural gap between institutional intentions and legal practice. MacKinnon's analysis of seemingly neutral legal structures encoding male power, demonstrated here, systematically prevents victims from speaking while enabling perpetrators to continue harmful behaviour with impunity.[140]

NDAs in sexual misconduct cases create multidimensional silencing effects operating at individual, professional, and systemic levels simultaneously. Psychologically, they cause what Lipton characterises as 'mental solitary

[135] Solicitors Regulation Authority, *Thematic Review: The Use of Non-Disclosure Agreements in Workplace Complaints* (August 2023)
[136] Public Interest Disclosure Act 1998, s.43J
[137] House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) para 80, 82
[138] House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) para 73
[139] Ibid para 9
[140] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238

confinement' eroding victims' sense of identity and agency.[141] While Lipton's single case focus limits the broader applicability of her findings, her observations align consistently with testimonies documented by the Women and Equalities Committee where multiple individuals reported diminished self-worth and persistent feelings of being 'bound and gagged' by their agreements.[142] These psychological constraints exemplify Fricker's concept of hermeneutical injustice as victims experience not just external silencing but a profound internal constraint on their ability to conceptualise and articulate their own experiences.[143] This enforced silence creates what trauma specialists identify as a 'secondary victimisation' that compounds the initial harm.[144] Herman's work on trauma recovery demonstrates how important it is for victims to be able to vocalise their experiences and have them acknowledged in order to heal.[145] When NDAs contractually prevent this, they cause unprocessed trauma to manifest in persistent physiological and psychological symptoms.[146] Evidence from the Women and Equalities Committee reveals this phenomenon directly with victims reporting ongoing anxiety, intrusive thoughts, and 'difficulty sleeping' for years after agreements are signed.[147]

This enforced counter-narrative creates what psychologists term 'cognitive dissonance',[148] where victims must pretend the misconduct never occurred or are forced to take responsibility for it happening.[149] Maintaining this state of contradiction, knowing harm occurred but being contractually bound to deny it,

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[141] Leah Lipton, 'Cutting Out Her Tongue: The Impact of Silencing Trauma through a Nondisclosure Agreement' (2019) 55(4) Contemporary Psychoanalysis 373, 386

[142] House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) para 73, 82

[143] Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (1st ed, OUP, 2007)

[144] Rebecca Campbell and Sheela Raja, 'Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence' (1999) 14(3) Violence and Victims 261

[145] Judith Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* (Basic Books 2015)

[146] Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (Penguin 2014)

[147] Leah Lipton, 'Cutting Out Her Tongue: The Impact of Silencing Trauma through a Nondisclosure Agreement' (2019) 55(4) Contemporary Psychoanalysis 373

[148] Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford University Press 1957)

[149] Leah Lipton, '*Cutting Out Her Tongue: The Impact of Silencing Trauma through a Nondisclosure Agreement*' (2019) 55(4) Contemporary Psychoanalysis 373

requires significant psychological effort, often draining victims' ability to keep up with daily tasks. One witness who spoke to the Women and Equalities Committee said she felt as though she was 'living a double life… constantly monitoring what I could say to whom.'[150] This self-censoring reflects what MacKinnon would recognise as the ultimate achievement of patriarchal power, the internalisation of oppression leading victims to police their speech even in settings where it would not be necessary.[151] These consequences extend into professional spheres creating employment gaps and career disruptions that further marginalise victims demonstrating how legal structures compound existing vulnerabilities, as Fineman's theory suggests.[152] Beyond individual harm, NDAs systematically obstruct collective knowledge from forming by preventing evidence sharing between victims, obscuring patterns of repeat offending.[153] This division helps explain the gap between prevalence and reporting. 81% of university students experiencing sexual misconduct never report to police, while five in six rape victims remain silent.[154] Though these statistics have methodological limitations, such as self-reporting biases and sampling constraints, the consistency across multiple data sources suggests a pattern of systemic underreporting.

These psychological effects extend further than individual victims to create vicarious trauma amongst broader communities.[155] When potential witnesses see the psychological impacts on victims who have signed NDAs they develop anticipatory anxiety[156], which causes fear of similar outcomes should they vocalise their own

[150] House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) para 76

[151] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238

[152] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ 251

[153] House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720)

[154] Office for Students, *Sexual Misconduct Prevalence Poll: Summary of Key Findings* (Savanta, 2023) https://www.officeforstudents.org.uk/media/tm5nn0wc/sexual-misconduct-prevalence-poll-summ ary-of-key-findings.pdf accessed 3 March 2025; Rape Crisis, 'Rape and Sexual Assault Statistics: Sources' (March 2025) https://rapecrisis.org.uk accessed 13 April 2025

[155] Laurie Anne Pearlman and Paula S. Mac Ian, 'Vicarious Traumatization: An Empirical Study of the Effects of Trauma Work on Trauma Therapists' (1995) 26(6) *Professional Psychology: Research and Practice* 558

[156] Patricia A. Resick, 'Psychological Effects of Victimization: Implications for the Criminal Justice System' (1987) 33(4) Crime & Delinquency 468

experiences. This creates a domino effect of silence extending beyond the contractually bound victim. The Presidents Club scandal effectively demonstrates this mechanism; only through investigative journalism that connected multiple silenced experiences did the institutional pattern of harassment become visible.[157] Many of the women who worked at this event reported seeing harassment taking place, as well as being warned of it by other employees, but they remained silent.[158] This privatisation transforms what should be recognised as systemic misconduct into apparently isolated incidents, exemplifying MacKinnon's analysis of how legal mechanisms legitimise male dominance by individualising patterns of gendered violence.[159] Universities £90 million expenditure on NDA settlements reveals the substantial institutional investment in maintaining this silence.[160] Environments where "abuse is tolerated" foster cycles of misconduct, creating a dual effect whereby victims cannot speak while perpetrators avoid accountability.[161] This analysis shows that NDAs act not as neutral contracts but as pointed mechanisms that isolate victims and protect perpetrators by fragmenting their experiences. These private law mechanisms silence victims and prevent accountability, with agreements meant to protect privacy ultimately obscuring systemic misconduct that requires institutional reform.

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[157] M Marriage, 'Men Only: Inside the Charity Fundraiser Where Hostesses Are Put on Show' *Financial Times* (23 January 2018) https://www.ft.com/content/075d679e-0033-11e8-9650-9c0ad2d7c5b5 accessed 16 December 2024 - Hostesses were hired and made to sign NDAs preempting the sexual harassment they would experience by the guests attending the event. Their employer even warned them of 'handsy' guests and how best to avoid situations which would lead to more explicit acts of sexual abuse.

[158] M Marriage, 'Men Only: Inside the Charity Fundraiser Where Hostesses Are Put on Show' *Financial Times* (23 January 2018) https://www.ft.com/content/075d679e-0033-11e8-9650-9c0ad2d7c5b5
accessed 16 December 2024

[159] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238

[160] Simon Murphy, 'UK universities pay out £90m on staff "gagging orders" in past two years' (The Guardian, 17 April 2019) https://www.theguardian.com/education/2019/apr/17/uk-universities-pay-out-90m-on-staff-gagging-orders-in-past-two-years accessed 23 November 2024; Jennifer Robinson and Keina Yoshida, *How Many More Women? The Silencing of Women By the Law and How to Stop It* (Endeavor 2022) 89

[161] Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law 10

G. Conclusion

Ultimately, the legal framework, while supposedly protective, creates an implementation illusion in which the theoretical safeguards fail to account for the profound power disparities in their application.[162] The enforcement model systematically disadvantages victims through financial barriers, knowledge asymmetries, and institutional complicity within the legal profession.[163] These foundational weaknesses enable specific silencing mechanisms, from restrictive clauses to clawback provisions,[164] that creates both individual trauma and knowledge suppression.[165] Most significantly, NDAs transform systemic patterns of misconduct into apparently isolated incidents, exemplifying MacKinnon's analysis of how legal mechanisms legitimise male dominance through privatisation.[166] The

£90 million spent by universities on NDA settlements reveals the substantial institutional investment in maintaining this silence.[167] Reform efforts must therefore address not only specific contractual provisions but the fundamental power imbalances that enable these agreements to function as sophisticated mechanisms of oppression.

4. The English Law of Defamation as a Silencing Tool

A. Introduction

This section examines how defamation law functions as a silencing mechanism for

[162] House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720) para 9
[163] Catherine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(17) European Review of Contract Law 132; Solicitors Regulation Authority, *Thematic Review: The Use of Non-Disclosure Agreements in Workplace Complaints* (August 2023)
[164] House of Commons Women and Equalities Committee, *The Use of Non-Disclosure Agreements in Discrimination Cases* (HC 2017–19, 1720)
[165] Leah Lipton, 'Cutting Out Her Tongue: The Impact of Silencing Trauma through a Nondisclosure Agreement' (2019) 55(4) Contemporary Psychoanalysis 373
[166] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 238
[167] Jennifer Robinson and Keina Yoshida, *How Many More Women? The Silencing of Women By the Law and How to Stop It* (Endeavor 2022)

victims of sexual misconduct while enabling perpetrators to escape accountability. While presented as a neutral framework to protect reputation, England's defamation system creates significant barriers for victims speaking about their experiences.[168] Through MacKinnon's dominance theory,[169] Fricker's concept of epistemic injustice,[170] and Fineman's vulnerability thesis,[171] this analysis shows how ostensibly objective legal mechanisms systematically disadvantage those with less power. Four key dimensions of defamation's silencing effect will be explored. The post-2013 reforms to the Defamation Act (DA), the burden of proof and evidential standards, credibility assessment and Deny, Attack, and Reverse Victim and Offender (DARVO) tactics, and prohibitive financial barriers. Together, these components create a comprehensive mechanism of silence that privatises sexual misconduct allegations while protecting powerful interests under the guise of reputational protection.[172]

B. Legal Framework for Defamation post 2013 Defamation Act SLAPPs and the Defamation Act 2013

Strategic Litigation Against Public Participation (SLAPPs) represents the improper, coercive use of legal action by powerful individuals to suppress criticism.[173] In sexual misconduct contexts, these abusive legal threats function as sophisticated mechanisms of oppression that work to silence victims and shield

[168] Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): A Critical Interrogation of Legislative and Judicial Responses' (2025) *Journal of Media Law* https://doi.org/10.1080/17577632.2024.2443096 accessed 8 August 2024.
[169] Catharine A. MacKinnon, *'Difference and Dominance: On Sex Discrimination',* in Katharine T. Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory Readings in Law and Gender* (Westview Press 1991)
[170] Miranda Fricker, *'Epistemic Injustice: Power & the Ethics of Knowing'* (1st ed, OUP, 2007)
[171] Martha Albertson Fineman, '*The Vulnerable Subject and the Responsive State.*' (2010) 60 Emory LJ 251
[172] Rebecca Moosavian and Pete Coe, 'The Personal is Political: Sexual Misconduct Allegations, Defamation and Gender Politics' (2025) *Journal of Media Law* accessed 11 November 2025.
[173]Adam Bodnar and Aleksandra Gliszczynska-Grabias, 'Strategic Lawsuits against Public Participation (SLAPPs), the governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive' [2023] 19(4) European Constitutional Law Review

perpetrators.[174] While the Economic Crime and Corporate Transparency Act's definition of SLAPPs narrowly focuses on economic crime cases,[175] it provides a valuable lens for understanding defamation as a silencing tool, despite these cases falling outside its scope. The Coalition Against SLAPPs in Europe (CASE) statistics confirm defamation as the predominant SLAPP action making up 74.5% of cases brought forward.[176]

Through the lens of MacKinnon's dominance theory[177] SLAPPs transform supposedly neutral legal tools into weapons, reinforcing gender hierarchies, as women are overwhelmingly the victims in cases of sexual misconduct.[178] The *McDonalds Corp v Steel & Morris* case demonstrates this 'inequality of arms' where powerful entities exploit legal mechanisms against vulnerable defendants.[179] Fineman's vulnerability thesis[180] is apt in these instances as it demonstrates how these threats exploit structural inequalities, particularly affecting those with limited resources to defend against well-funded litigants. As Justice Twomey noted, 'millionaire costs' effectively 'blackmail parties to settle', demonstrating how defamation law accommodates coercive actions brought to silence critics.[181]

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[174] Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): A Critical Interrogation of Legislative and Judicial Responses' (2025) *Journal of Media Law* https://doi.org/10.1080/17577632.2024.2443096 accessed 8 August 2024.

[175] Economic Crime and Corporate Transparency Act 2023, s 195(1) ~ 'For the purposes of section 194 a claim is a "SLAPP claim" if - (a) the claimant's behaviour in relation to the matters complained of in the claim has, or is intended to have, the effect of restraining the defendant's exercise of the right to freedom of speech, (b) any of the information that is or would be disclosed by the exercise of that right has to do with economic crime, (c) any part of that disclosure is or would be made for a purpose related to the public interest in combating economic crime, and (d) any of the behaviour of the claimant in relation to the matters complained of in the claim is intended to cause the defendant - (i) harassment, alarm or distress, (ii) expense, or (iii) any other harm or inconvenience, beyond that ordinarily encountered in the course of properly conducted litigation.

[176] Open SLAPP Cases in 2022 and 2023: The Incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union

[177] Catharine A. MacKinnon, '*Difference and Dominance: On Sex Discrimination*', in Katharine T. Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory Readings in Law and Gender* (Westview Press 1991)

[178] Jennifer Robinson and Keina Yoshida, *'How Many More Women? The Silencing of Women By the Law and How to Stop It'* (Endeavor 2022)

[179] McDonalds Corp v Steel and Morris [1995] 3 All ER 615, [50] ~ McDonalds, a corporation with worldwide sales of approximately $30 billion at the time of the case, brought a libel action against two activists of limited financial means who had distributed critical leaflets, resulting in a trial of 313 days in which the defendants were forced to largely represent themselves due to the denial of legal aid.

[180] Martha Albertson Fineman, '*The Vulnerable Subject and the Responsive State.*' (2010) 60 Emory LJ 251

[181] Connective Energy v Energia Group ROI Holdings DAC [2024] IEHC 23 [34]

Thus revealing how SLAPPs function not simply as legal disputes but as institutional mechanisms of domination that privatise systemic issues of sexual misconduct.

The DA 2013 introduced significant reforms to English defamation law that, while supposedly addressing excessive litigation, created new evidentiary barriers disproportionately affecting sexual misconduct victims aiming to defend against defamation claims. Defamation was traditionally defined at common law as a statement substantially affecting others' attitude toward the claimant,[182] without requiring proof of actual damage. The 2013 Act introduced three key reforms developing this. The 'serious harm' threshold under s.1; codified defences of truth (s.2) and public interest (s.4); and tightened jurisdictional rules (s.9).[183] In *Lachaux v Independent Print,* Lord Sumption established that 'serious harm' requires factual proof of actual or likely damage rather than merely the inherent tendency of words to harm reputation.[184] The reverse burden of proof on defendants, the high evidential threshold for 'substantial truth', and the heavy legal costs together create deeply asymmetric barriers.[185]

While reforms addressed certain excesses, they failed to rectify fundamental power asymmetries in defamation law. The Act maintained the reverse burden of proof;[186] particularly problematic for sexual misconduct victims whose experiences typically lack witnesses or documentation.[187] The 'serious harm' threshold, while theoretically filtering frivolous claims, adds an additional evidentiary hurdle without addressing structural disadvantages victims face.[188] As Erdos notes, these challenges may deter legitimate claims while simultaneously making defence more difficult for those with

[182] Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 (QB)
[183] Defamation Act 2013, s 2; s 4; s 9.
[184] Lachaux v Independent Print Ltd [2019] UKSC 27 [14]
[185] Rebecca Moosavian and Pete Coe, 'The Personal is Political: Sexual Misconduct Allegations, Defamation and Gender Politics' (2025) *Journal of Media Law Full article: 'The personal is political': sexual misconduct allegations, defamation and gender politics* accessed 11 November 2024
[186] Defamation Act 2013, s 2
[187] Mandi Gray, 'Suing for Silence: Sexual Violence and Defamation Law' (UBC Press 2024)
[188] Lachaux v Independent Print Ltd [2019] UKSC 27 [12]

limited resources.[189] The requirement to provide concrete evidence of reputational harm advantages claimants with resources to gather such evidence, typically those in positions of power.[190] This creates barriers for sexual misconduct victims who already face significant obstacles in having their experiences recognised and validated in legal contexts.[191]

Through MacKinnon's dominance theory, these reforms represent superficial adjustments, maintaining male-oriented evidentiary standards.[192] When applied to sexual misconduct cases, the 'serious harm' threshold creates testimonial injustice with victims' accounts facing greater scrutiny than claimants' assertions of reputational harm.[193] The courts' evaluation of 'serious harm' privileges quantifiable evidence over the qualitative harm of silencing victims, reflecting how legal standards remain attuned to protect powerful interests. These reforms maintain what White et al. identify as 'persistent patriarchal norms' contributing to the dismissal of sexual abuse claims, particularly when challenging established power structures.[194] These structural biases in defamation law manifest in specific defences that create further barriers for sexual misconduct victims. The truth and public interest defences, examined next, reveal how ostensibly neutral reforms continue to enable the silencing of victims through gendered interpretations of evidence and credibility.

C. Key Defences and Their Application

The truth defence under s.2 requires defendants to prove their allegations are

[189] David Erdos, 'Data Protection and the Right to Reputation: Filling the "Gaps" After the Defamation Act 2013' (2014) 73(3) Cambridge Law Journal 536
[190] Margaret Thornton, 'Privatising Sexual Harassment' (2023) 45(3) Sydney L Rev 371, 393
[191] Nicole Ligon, 'Protecting Women's Voices: Preventing Retaliatory Defamation Claims in the MeToo Context' (2022) 94(4) St Johns Law Review 961, 965
[192] Catharine A MacKinnon, 'Difference and Dominance: On Sex Discrimination', in Katharine T Bartlett and Rosanne Kennedy (eds), Feminist Legal Theory Readings in Law and Gender (Westview Press 1991)
[193] Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing (Oxford University Press 2007)
[194] Carly White, Aleksandra Monteiro and Fenia Ferra, 'An Exploration of the Rape Myths Effect on the MeToo Movement Acceptance in the UK' (2024) Psychiatry, Psychology and Law 9

'substantially true' on the balance of probabilities,[195] placing the entire evidential burden on those speaking about their experiences. In *Chase v News Group Newspapers*, the court established that defendants must prove the essential or substantial truth of the libel's sting,[196] creating a nearly impossible standard for sexual misconduct victims whose experiences typically lack documentation or witnesses.[197] *Hay v Cresswell* demonstrates a rare successful application of this defence in a sexual assault case, as the defendant was able to establish that on the balance of probabilities she was sexually assaulted as described and that the plaintiff was the perpetrator.[198] On the other hand, *Stocker v Stocker,* which will be explored further in section 3.2, reveals how courts can become fatally distracted by peripheral inaccuracies rather than focusing on the essential core of allegations in domestic abuse contexts.[199] The Supreme Court ultimately corrected this approach, clarifying that the proper approach is to assess the substantial truth by concentrating on the core meaning of the libel, rather than minor inaccuracies.[200] This ambiguity in interpreting 'substantial truth' creates space for problematic judicial discretion that systematically disadvantages victims.

Through MacKinnon's dominance theory, the 'substantial truth' standard emerges as a subtle means of epistemic suppression reflecting what Finley identifies as the gendered nature of legal reasoning; a framework informed by men's experiences and deriving from the powerful social position of men.[201] This aligns with Nielsen's conception of mechanisms that maintain the status quo by restricting different groups' access to means of gaining knowledge.[202] As well as Chamallas' social justice tort theory, which reveals how legal doctrines perpetuate systemic inequalities by creating hierarchical frameworks that devalue certain forms of

[195] Defamation Act 2013, s 2(3)
[196] Chase v News Group Newspapers Ltd [2003] EWCA Civ 1086 [34]
[197] Mandi Gray, 'Suing for Silence: Sexual Violence and Defamation Law' (UBC Press 2024)
[198] *Hay v Cresswell* [2021] EWHC 65 (QB)
[199] Stocker v Stocker [2019] UKSC 17
[200] Rothschild v Associated Newspapers Ltd [2013] EWCA Civ 197
[201] Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' in Michael Freeman, Lloyd's Introduction to Jurisprudence (9th edn, Sweet & Maxwell 2013) 1092
[202] McCarl Nielsen (ed), Feminist Research Methods (1990) 9

harm.[203] The truth defence therefore functions as a vehicle for testimonial injustice,[204] systematically undermining and delegitimising victims' experiences of violation.

Moving on to consider the public interest defence under s.4 of the DA 2013 represents a significant reform intended to protect those who speak out on matters of public concern,[205] however, its application in practice reveals substantial barriers for victims of sexual misconduct. This defence requires defendants satisfy a three-part test. They must objectively demonstrate that the statement concerns a matter of public interest;[206] they must prove their subjective belief that publication served the public interest at the time of publication;[207] and thirdly, they must establish the reasonableness of this belief through evidence of appropriate inquiries.[208] While sexual misconduct is generally recognised as a matter of public interest, with courts acknowledging 'a strong public interest in ensuring that victims of rape come forward',[209] there are limitations to the defences efficacy in supporting victims of sexual misconduct. The defence failed in the case of *Aaronson v Stones,* as the court recognised sexual abuse as a matter of public interest, yet rejected the defence when the specific perpetrator was named, as the defendant failed to meet professional journalistic standards.[210] This creates an almost impossible standard for trauma survivors.

Similar cases, which have seen the defence succeed, but create additional hurdles for survivors, are *Economou v de Frietas* and *Hay v Cresswell.*[211] In *Economou,* the successful defendant was not the victim herself but her father, who advocated for her posthumously after she died by suicide following a prosecution for perverting the course of justice.[212] By prosecuting the victim and requiring her father to

[203] Martha Chamallas, 'Social Justice Tort Theory' (2021) 14 Journal of Tort Law 309
[204] Miranda Fricker, *'Epistemic Injustice: Power & the Ethics of Knowing'* (1st ed, OUP, 2007)
[205] Defamation Act 2013 s.4
[206] Doyle v Smith [2018] EWHC 2935 (QB) [64]
[207] Turley v Unite [2019] EWHC 3547 (QB); Economou v de Freitas [2018] EWCA Civ 2591
[208] Economou v de Freitas [2018] EWCA Civ 2591; Serafin v Malkiewicz [2020] UKSC 23
[209] Economou v de Freitas [2018] EWCA Civ 2591 [89]-[91]
[210] Aaronson v Stones [2023] EWHC 2399 (KB) [384]
[211] Economou v de Freitas [2018] EWCA Civ 2591; *Hay v Cresswell* [2021] EWHC 65 (QB)
[212] *Economou v de Freitas* [2018] EWCA Civ 2591

become the posthumous bearer of her narrative, the legal system demonstrated MacKinnon's argument: the very act of being a predominantly female experience becomes the reason to dismiss, minimise, and ultimately silence the experience.[213] In *Cresswell,* despite the judge acknowledging the claimant's immediate reporting as evidence of reasonable belief in the public interest,[214] this standard disadvantages many victims who delay reporting due to trauma. This creates what Fricker identifies as testimonial injustice, where victims' accounts are systematically devalued.[215] Even statements that 'came closer to being 'on' a matter of public interest' were deemed not to 'cross the relevant threshold'.[216] Through the lens of dominance theory,[217] these standards appear neutral but enforce male-oriented expectations of 'reasonable' behaviour. The defence creates a catch-22: although courts recognise sexual misconduct as a matter of public interest, they still expect victims to meet standards which do not align with common trauma responses[218] or ordinary thinking on publication.[219] When combined with heightened evidential standards for 'serious' allegations,[220] S.4 functions less as protection for truth-telling and more as a sophisticated silencing mechanism that privatises systemic issues while enabling perpetrators to control public narratives.

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[213] Catherine A. MacKinnon, *Toward a Feminist Theory of the State,* (1989) Harvard University Press; Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press 1979)

[214] Hay v Cresswell *[2021] EWHC 65 (QB), [206]*

[215] Miranda Fricker, *'Epistemic Injustice: Power & the Ethics of Knowing'* (1st ed, OUP, 2007).

[216] Aaronson v Stones [2023] EWHC 2399 (KB) [351]

[217] Catharine A. MacKinnon, *'Difference and Dominance: On Sex Discrimination',* in Katharine T. Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory Readings in Law and Gender* (Westview Press 1991) [218] Laura M. Monroe and others, 'The Experience of Sexual Assault: Findings from a Statewide Victim Needs Assessment' (2005) 20(7) *Journal of Interpersonal Violence* 767: the authors found that more than half of the victims of sexual violence interviewed waited years before reporting for various reasons associated with trauma from the event.

[218] Laura M. Monroe and others, 'The Experience of Sexual Assault: Findings from a Statewide Victim Needs Assessment (2005) 20(7) Journal of Interpersonal Violence 767: the authors found that more than half of the victims of sexual violence interviewed waited years before reporting for various reasons associated with trauma from the event.

[219] Aaronson v Stones [2023] EWHC 2399 (KB)

[220] Richards LJ in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468

D. Burden of Proof Issue for Victims

Evidential Hierarchies and the "Stronger Evidence" Paradox

The evidential standards in defamation cases create structural barriers for sexual misconduct victims through both the 'flexible application' of the civil standard established in *R (N) v Mental Health Review Tribunal*[221] and judicial hierarchies of evidence that systematically disadvantage victim testimony. The principle that 'the more serious the allegation, the stronger must be the evidence'[222] creates a paradox in sexual misconduct cases where the gravity of the allegation correlates with heightened evidentiary burdens. This 'flexible application' of the civil standard does not just raise the bar for victims but creates evidential barriers that suppress their voices. In *Hunt v Times Newspapers,* the court's requirement for 'clear evidence'[223] illustrates how this standard, though appearing neutral, can inadvertently disadvantage sexual misconduct allegations, which usually occur following private encounters. Considering this alongside White et al.'s finding that 'understanding sexual violence led to lower levels of dismissal'[224] shows a troubling pattern in which the legal system requires rarely available evidence, while simultaneously undermining the recognition of victims' experiences that could support the disclosure of similar harm.

The case of *Aaronson v Stones* demonstrates this paradox, as despite having video evidence, a rarity in cases such as these, the court deemed the victim's testimony 'unreliable',[225] privileging the alleged perpetrator's subjective belief over objective documentation. This demonstrates what Finley identifies as legal frameworks 'fundamentally shaped by male experiences and perspectives',[226] where hierarchies of evidence systematically devalue victims' accounts while demanding forms of

[221] R (N) v Mental Health Review Tribunal [2006] QB 468
[222] Ibid
[223] Hunt v Times Newspapers [2013] EWHC 1868
[224] Carly White, Aleksandra Monteiro and Fenia Ferra, 'An Exploration of the Rape Myths Effect on the MeToo Movement Acceptance in the UK' (2024) Psychiatry, Psychology and Law 9
[225] Aaronson v Stones [2023] EWHC 2399 (KB) [422]
[226] Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' in Michael Freeman, Lloyd's Introduction to Jurisprudence (9th edn, Sweet & Maxwell 2013) 1092

corroboration structured to be nearly impossible to provide. These evidential standards leave victims without the legal recognition needed to validate their experiences and the practical means to meet the threshold of proof. Drawing on Fricker's concept of hermeneutical injustice,[227] victims are caught in a system that fails to provide the legal frameworks needed to express their experiences and demands stronger evidence that it structurally prevents from existing. This combination transforms ostensibly neutral procedural requirements into sophisticated mechanisms that effectively privatises knowledge of misconduct, turning systemic issues into isolated incidents that fall below the evidential threshold.

E. Credibility Assessment and DARVO

Defamation proceedings in sexual misconduct cases systematically enable DARVO tactics.[228] This creates a legal framework where victims' credibility is undermined while alleged perpetrators are repositioned as victims of false accusations. Research by Harsey and Freyd reveals that defamation lawsuits embody all three DARVO components.[229] This mechanism is particularly effective as experimental studies show that exposure to DARVO leads observers to see the perpetrator as 'less abusive and less responsible' and view the victim as 'less believable';[230] though its experimental design may not fully reflect the complexities of real-world proceedings. The prevalence of DARVO is not limited only to the courtroom room with approximately half of sexual abuse survivors reporting that perpetrators used elements of the tactic in post-assault interactions.[231] These

[227] Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing (Oxford University Press 2007)
[228] Jennifer J Freyd, 'Violations of Power, Adaptive Blindness and Betrayal Trauma Theory' (1997) 7(1) *Feminism & Psychology* 22
[229] Sarah J Harsey and Jennifer J Freyd, 'Defamation and DARVO' (2022) 23(5) Journal of Trauma & Dissociation 481
[230] Sarah J Harsey, Alexandra A Adams-Clark and Jennifer J Freyd, 'Associations between defensive victim-blaming responses (DARVO), rape myth acceptance, and sexual harassment' (2024) 19(12) PLOS ONE 3
[231] Marina N Rosenthal and Jennifer J Freyd, 'From DARVO to distress: College Women's Contact with their Perpetrators after Sexual Assault' (2022) 31(4) Journal of Aggression, Maltreatment, & Trauma 459

tactics are reinforced through their alignment with prevailing rape myths embedded in judicial reasoning.[232] White et al. found that the myths 'it wasn't really rape' and 'she lied' were most strongly correlated with resistance to validating sexual misconduct experiences.[233] This explains the contradictory credibility assessments seen in cases such as *Aaronson*, where the court found the victim's evidence 'unreliable' despite acknowledging they 'did not believe [the victim] was lying'.[234] Amber Heard's public experience illustrates these tactics in practice. Despite evidence of abuse being found 'substantially true' in UK courts,[235] she faced overwhelming vilification during the US defamation trial, with the hashtag #JusticeForJohnny garnering over 21 billion views, demonstrating DARVOs effectiveness when broadcast across social media.[236] Despite evidence that 97% of women have experienced sexual harassment, with 96% not reporting these incidents,[237] legal frameworks continue to reinforce false narratives.

During defamation proceedings, victims face invasive inquiries that contradict their experiences, contributing to their vulnerability and undermining their credibility.[238] The discovery process in legal proceedings formalises elements of DARVO tactics, forcing victims to defend the truth of their own experiences while facing procedural mechanisms structured around male-defined standards of consistency and reliability.[239] The judiciary consistently fails to empathise with sexual misconduct victims, instead relying on antiquated views that reinforce the idea that women are unreliable in narrating their own experiences.[240] This institutional endorsement of DARVO tactics reveals why defamation threats are

[232] Olivia Smith and Tina Skinner, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26(4) *Social & Legal Studies* 441
[233] Carly White, Aleksandra Monteiro and Fenia Ferra, 'An Exploration of the Rape Myths Effect on the MeToo Movement Acceptance in the UK' (2024) Psychiatry, Psychology and Law 8
[234] Aaronson v Stones [2023] EWHC 2399 (KB) [58]
[235] Depp v News Group Newspapers Ltd [2020] EWHC 2911 (QB) (2 November 2020)
[236] Sandra Robinson and Emily Hiltz, 'Platformed Misogyny in Depp v Heard: #justiceforjohnny and Networked Defamation' (2024) 24(1) Feminist Media Studies 13
[237] Nishat Choudhury, 'Research finds that 97% of women in the UK have been sexually harassed' (Open Access Government, 2021) https://www.openaccessgovernment.org/97-of-women-in-the-uk/105940/ accessed 3 April 2025
[238] Mandi Gray, 'Suing for Silence: Sexual Violence and Defamation Law' (UBC Press 2024)
[239] Ibid
[240] Helena Kennedy, Eve Was Framed, Women & British Justice (Vintage 1993)

such effective silencing mechanisms. White et al.'s finding that 'understanding sexual violence leads to lower levels of dismissal'[241] highlights the cyclical nature of the problem. Defamation proceedings prevent the development of collective knowledge about sexual misconduct while simultaneously demanding levels of evidence that could only reveal themselves from such collective understanding. Using Fricker's framework, this not only leads to testimonial injustice in individual cases but also creates a hermeneutical gap that prevents victims from articulating their experiences within legal discourse.[242] The formalisation of DARVO within legal processes turns individual tactics into complex institutional mechanisms that privatise the knowledge of misconduct, while at the same time upholding male-defined standards of credibility and the protection of reputation at the expense of justice.

F. Cost Barriers in English Defamation Proceedings

Finally, this section will examine how the English defamation system functions as a mechanism of economic silencing via prohibitively high costs, which disproportionately impact victims of sexual misconduct.[243] Industry experts estimate that approximately $500,000 is spent by litigants to dismiss defamation suits,[244] creating extraordinary barriers for individual defendants. While this figure comes from American litigation, the same financial dynamics are evident in the English system. The high-profile case of *Vardy v Rooney* demonstrates this as costs were initially agreed at £540,779 but ultimately rose to £1.8 million, with the winner still bearing 10% of her own costs.[245] Similarly, *Riley v Sivier* shows the disproportionate damages-to-cost ratio with £50,000 damages awarded, following years of litigation

[241] Carly White, Aleksandra Monteiro and Fenia Ferra, 'An Exploration of the Rape Myths Effect on the MeToo Movement Acceptance in the UK' (2024) Psychiatry, Psychology and Law [5]
[242] Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing (Oxford University Press 2007)
[243] Jennifer Robinson and Keina Yoshida, *'How Many More Women? The Silencing of Women By the Law and How to Stop It'* (Endeavor 2022)
[244] Nicole Ligon, 'Protecting Women's Voices: Preventing Retaliatory Defamation Claims in the MeToo Context' (2022) 94(4) St Johns Law Review 961, 962
[245] Vardy v Rooney [2022] EWHC 2017 (QB)

costing substantially more.[246] These financial barriers function not merely as practical obstacles but as institutional mechanisms that systematically deny access to justice based on economic power. The disparity between damages and legal costs demonstrates how defamation proceedings act not as compensatory tools but as punitive mechanisms for those who speak out against their abusers. This creates a no-win situation for victims of sexual misconduct in that the threat of defamation action forces silence, while defending against claims almost ensures financial devastation. As sexual misconduct allegations typically involve significant power imbalances,[247] these financial barriers have profound gendered implications. The strategic use of pre-action threats further exacerbates this silencing effect. The Time's Up Legal Defence Fund reported assisting 33 individuals sued for defamation in just two years, comprising nearly 20% of its entire caseload, demonstrating how frequently legal action follows sexual misconduct disclosures.[248] These threats achieve their silencing objective without perpetrators incurring court costs, functioning as economic deterrents, and exploiting the resource disparities between victims and perpetrators. This aligns with Foohey and Odinet's analysis of how powerful entities 'harness legal processes to draw together those who allege harm and pressure them into swift settlements',[249] indicating how financial pressures are deliberately leveraged against those with fewer resources.

Procedural mechanisms further intensify cost barriers. *McDonalds Corp v Steel & Morris* exemplifies procedural inequality, as it follows a 313-day trial involving 40,000 pages of documentary evidence, creating what the European Court of Human Rights called an 'inequality of arms [that] could not have been greater.'[250] The court explicitly recognised how the defendants, 'a part-time bar worker earning a maximum of £65 a week' and 'an unwaged single parent', faced

[246] Riley v Sivier [2022] EWHC 2891 (KB)
[247] Jennifer Robinson and Keina Yoshida, *'How Many More Women? The Silencing of Women By the Law and How to Stop It'* (Endeavor 2022)
[248] Madison Pauly, 'She Said, He Sued' (Mother Jones, March/April 2020) <https://www.motherjones.com/criminal-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/> accessed 3 February 2025
[249] Pamela Foohey and Christopher K. Odinet, 'Silencing Litigation Through Bankruptcy' (2023) 109(6) Virginia Law Review 1261
[250] McDonalds Corp v Steel & Morris [1995] 3 All ER 615, [50]

insurmountable disadvantages against a corporation whose 'economic power outstripped that of many small countries'.[251] The UK's lack of anti-SLAPP provisions for early dismissal of meritless claims further distinguishes it from jurisdictions with stronger protections against abusive litigation.[252] Through MacKinnon's dominance theory,[253] these cost barriers reveal how seemingly neutral procedural mechanisms encode male power by making litigation accessible only to the economically privileged. The financial metrics of defamation proceedings operationalise MacKinnon's theory of economic power, reinforcing gender hierarchies where formal equality masks substantive inequality of access.[254] Similarly, Fineman's vulnerability theory[255] helps identify how these procedural costs function as structural gatekeeping mechanisms that disproportionately impact those with limited resources. These financial barriers contribute to epistemic injustice by ensuring that certain voices, those with less economic influence, remain excluded from public discourse on sexual misconduct.[256]

This effectively privatises knowledge of abuse while maintaining male-defined standards of acceptable speech.

G. Conclusion

This examination of defamation law reveals a sophisticated legal framework that operates to silence victims of sexual misconduct through multiple, interconnected mechanisms. Despite reforms intended to balance free speech and reputation, the fundamental power asymmetries remain unchallenged.[257] The reverse burden of

[251] Steel & Morris v United Kingdom (2005) EMLR 314, [59]
[252] Mark Hanna, 'SLAPPs: What are they? And how should defamation law be reformed to address them?' (2024) 16(1) Journal of Media Law 118
[253] Catharine A MacKinnon, Toward a Feminist Theory of the State (Harvard University Press 1989)
[254] Ibid
[255] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251
[256] Miranda Fricker, *'Epistemic Injustice: Power & the Ethics of Knowing'* (1st ed, OUP, 2007)
[257] David Erdos, 'Data Protection and the Right to Reputation: Filling the "Gaps" After the Defamation Act 2013' (2014) 73(3) Cambridge Law Journal 536

proof, heightened evidential standards, systematic dismissal of victim testimony, and prohibitive costs create insurmountable barriers for those attempting to share their experiences.[258] These seemingly neutral procedural requirements function as institutional mechanisms of oppression that transform systemic issues of sexual misconduct into privatised matters beyond public scrutiny.[259] When viewed through feminist theoretical frameworks, defamation law emerges not as a neutral mediator of truth and reputation, but as a tool for maintaining existing gender hierarchies by controlling whose narratives can permeate public discourse.[260] Without significant reform addressing these structural inequalities, defamation law will continue to operate as a powerful weapon against those seeking to challenge sexual misconduct.[261]

5. Conclusion

This article has examined how non-disclosure agreements and defamation law function as sophisticated mechanisms that silence victims of sexual misconduct while shielding perpetrators from accountability in England and Wales. Through a feminist theoretical framework integrating MacKinnon's dominance theory, Fineman's vulnerability thesis, and Fricker's concept of epistemic injustice, research has revealed how ostensibly neutral private law mechanisms systematically dismiss victims through multiple interconnected processes.

The investigation into NDAs reveals a complex architecture of silencing through restrictive clauses extending beyond legitimate confidentiality needs. Agreements routinely include complete secrecy provisions preventing disclosure to family,

[258] Sarah J Harsey and Jennifer J Freyd, 'Defamation and DARVO' (2022) 23(5) Journal of Trauma & Dissociation 481

[259] Carly White, Aleksandra Monteiro and Fenia Ferra, 'An Exploration of the Rape Myths Effect on the MeToo Movement Acceptance in the UK' (2024) Psychiatry, Psychology and Law

[260] Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' in Michael Freeman, Lloyd's Introduction to Jurisprudence (9th edn, Sweet & Maxwell 2013) 1092

[261] Jennifer Robinson and Keina Yoshida, How Many More Women? The Silencing of Women By the Law and How to Stop It (Endeavor 2022)

medical, and legal professionals, alongside clawback clauses creating financial deterrents regardless of enforceability. These mechanisms exemplify epistemic injustice by systematically preventing victims from understanding their legal constraints and seeking support. While statutory frameworks theoretically provide protection through the Public Interest Disclosure Act 1998 and Equality Act 2010, implementation is undermined by profound power disparities. Most significantly, NDAs prevent evidence sharing between victims, obscuring patterns of repeat offending and enabling perpetrators to continue undetected. By fragmenting experiences into seemingly isolated incidents, these mechanisms illustrate how legal tools legitimise male dominance through privatisation of systemic issues.

Examination of defamation law revealed how supposedly neutral reforms continue to create barriers for sexual misconduct victims. Despite the Defamation Act 2013's intended reforms, the reverse burden of proof requiring defendants to establish 'substantial truth' creates insurmountable challenges for victims whose experiences typically lack documentation or witnesses. Heightened evidential standards for 'serious allegations,' and the facilitation of DARVO tactics further undermine victims' credibility while repositioning alleged perpetrators as victims themselves. Combined with prohibitive legal costs, these procedural mechanisms operate as tools of economic silencing, disproportionately affecting those with limited resources.

Together, these private law mechanisms create a comprehensive system that shields perpetrators through three key processes. Transforming systemic patterns of misconduct into privatised, individualised matters beyond collective understanding. Exploiting economic and procedural barriers that disproportionately affect victims. Finally, undermining the credibility of victims' testimonies through gendered assumptions about truth and consent. Addressing these silencing mechanisms requires reforms that go beyond piecemeal adjustments to address the fundamental power imbalances which facilitate such situations. Reforms that shift responsibility from individual victims onto

institutions with the power and obligation to prevent harassment and challenge systemic gender inequalities.

The Hidden Logic of Labour Trafficking: Opportunity Structures and Prevention in Western Countries

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Abstract

Labour trafficking (LT) persists across Western countries despite extensive legislation, enforcement initiatives, and awareness campaigns. This article applied crime script analysis (CSA) and situational crime prevention (SCP) to uncover the hidden logic of LT, examine how offender decision-making and opportunity structures sustain exploitation, and develop stage-specific, proportionate, and context-sensitive interventions. A crime script for Western contexts was constructed through qualitative analysis of 23 academic and non-governmental organisations (NGO) sources. To evaluate prevention practices, the United Kingdom (UK) was used as a national example, selected for its prominence in trafficking research and global prevention ranking. The crime script revealed a multi-stage procedural logic covering recruitment, transportation, reception, and exploitation, characterised by offender role fluidity, adaptability, and recycling of coercive tactics across stages. Analysis integrating SCP's five dimensions with the script highlighted how these factors interact across stages, revealing the adaptive strategies offenders use to exploit vulnerabilities and sustain operations. Reassessment of UK prevention measures through the SCP lens identified a heavy reliance on risk-focused interventions, with other dimensions underutilised. A new suite of interventions was developed from the script findings, supported by existing literature, and evaluated against principles of "elegant security" to ensure effectiveness, proportionality, and feasibility. These measures aim to close systemic vulnerabilities, strengthen safeguards, and anticipate offender adaptation. The study contributes theoretically by refining the integration of CSA and SCP for complex,

adaptive crimes, and practically by providing a transferable, stage-specific prevention framework. It concludes that multi-dimensional, opportunity-focused strategies offer a

sustainable path to disrupting LT, protecting workers, and strengthening labour market integrity.

1. Introduction

Labour trafficking (LT) persists in Western countries despite decades of legislation, enforcement initiatives, and public awareness campaigns (Walk Free, 2023a). It is embedded across sectors, from agriculture and construction to manufacturing and care work, affecting both migrant and domestic workers (The Centre for Social Justice [CSJ], 2024). Global estimates indicate that millions of people are subjected to LT each year, generating significant illicit profits while undermining lawful businesses and labour standards (International Labour Organization [ILO], 2024). The human impact is severe, leaving victims with lasting psychological, physical, and financial harm (Focus on Labour Exploitation [FLEX], 2024). Although governments and organisations have made progress in raising awareness and prosecuting cases, the problem endures (Gallagher and Holmes, 2008; Broad and Turnbull, 2019), indicating that traditional prevention strategies alone are not enough.

The persistence of LT is not simply the result of weak laws or limited resources. Offenders adapt quickly to changes in enforcement and regulation, shifting their methods to exploit new opportunities and avoid detection (Cockbain and Bowers, 2019). Globalised supply chains and the growth of informal labour markets create conditions where exploitation can occur out of sight of regulators (ILO, 2024). Oversight gaps, particularly in subcontracting, recruitment, and seasonal or temporary employment, allow offenders to operate with relative impunity (FLEX, 2024). Victim's vulnerabilities are central to this process, as undocumented migrants may

fear deportation if they report abuse, while citizens in precarious or low-paid employment may feel they have no viable alternative but to endure exploitative

conditions (ILO, 2024). Together, these factors create a resilient environment for LT that adapts faster than many prevention efforts can respond to.

Research in other areas of trafficking has shown the potential of combining crime script analysis (CSA) with situational crime prevention (SCP) to map offending processes and identify targeted points of disruption. Unpacking complex crime into its procedural stages can reveal vulnerabilities that might otherwise be overlooked. This approach has been used to examine internal child sex trafficking (Brayley et al., 2011), irregular migration (Bish et al., 2025), and cross-border bride trafficking (Wei et al., 2025). The adaptability of offenders, the hidden nature of the crime, and the multiple actors involved make LT particularly suited to such an approach. However, to the researcher's knowledge, this combined approach remains limited in its application to LT in Western countries. This gap means that prevention strategies in these contexts often lack a detailed procedural evidence base, limiting their capacity to disrupt trafficking before exploitation occurs.

This article addresses that gap by applying CSA and SCP to LT in Western countries, with the United Kingdom (UK) providing the focal point for detailed analysis. Throughout, LT follows the Palermo Protocol's definition (United Nations, 2000), and "Western countries" is used operationally to mean the EU-27 (European Union, no date), the UK, the United States, Canada, Australia and New Zealand. Within this design, the populated crime script examines LT across Western contexts, while the analysis of existing prevention measures uses the UK as the national example. This reflects both the UK's prominence in academic research on trafficking and its recognition for strong prevention efforts.

The study aims to reconstruct the hidden procedural logic of LT in these contexts and analyse how offenders exploit opportunity structures at each stage. It then assesses how existing prevention measures address these vulnerabilities, using the UK as the national example. Finally, it develops targeted, proportionate, and context-sensitive interventions that are effective while also being minimally intrusive and respectful of the rights and needs of those affected. By doing so, the study seeks not only to advance academic understanding but also to offer

policymakers and practitioners a practical framework for more effective and sustainable prevention.

This research will demonstrate that LT in Western countries operates through a multi-stage procedural logic in which offenders repeatedly exploit a core set of vulnerabilities. Many of these vulnerabilities persist across stages, creating recurring opportunities for offending that are only partially addressed by current prevention measures. Existing strategies often prioritise risk-focused interventions, leaving other situational dimensions underdeveloped. By integrating CSA's detailed mapping of the process with SCP's broader toolkit, the study identifies intervention points that are both precise and practical. This approach moves beyond broad deterrence toward a more balanced, multi-dimensional approach to prevention, one capable of disrupting offending earlier, addressing neglected vulnerabilities, and remaining sensitive to ethical and practical constraints.

The article is organised into seven sections. Following this introduction, Section Two reviews the theoretical and methodological foundations of the study, outlining the principles of SCP and CSA and assessing their strengths and limitations. Section Three turns to the empirical context, examining the extent and nature of LT in Western countries while using the UK as a national example to explore existing prevention measures. Section Four sets out the research design and explains how the populated crime script was developed. Section Five then presents the findings from the analysis, detailing how offenders exploit opportunity structures across the trafficking process. Section Six reassesses existing UK prevention measures through the SCP lens, proposes SCP-based interventions, and reflects on their theoretical and practical implications, as well as the study's limitations. Section Seven synthesises the key findings and highlights their broader significance, concluding with priorities for future research.

2. *Literature Review I: Situational Crime Prevention and Crime Script Analysis*

LT and other forms of organised crime present persistent challenges due to their procedural complexity and offenders' adaptive strategies, which often undermine conventional approaches (Cockbain and Bowers, 2019). This section reviews SCP and CSA, highlighting their development, limitations, and relevance to this study. It then examines Chainey and Alonso Berbotto's (2021) structured methodology, which addresses gaps in contemporary crime scripting and underpins the analytical framework used in this article.

A. Situational Crime Prevention

SCP was developed in response to dispositional criminology, which attributes crime to individual traits or deep-rooted social problems (Clarke, 1995; Clarke, 2017). SCP focuses on the immediate environment, emphasising how situational opportunities shape offender decision-making (Clarke, 1983; Clarke, 1995). Drawing on routine activity theory, rational choice theory, and environmental criminology, it views offenders as rational actors who weigh risk, rewards, effort, and situational constraints (Clarke, 2017). SCP uses a problem-oriented process that includes identifying specific problems, analysing the situational factors, designing targeted interventions, and evaluating their effectiveness (Clarke, 1995; Clarke and Newman, 2009). It is flexible and context-sensitive, allowing tailored interventions to the unique characteristics of each crime setting (Clarke, 2017; Clarke and Bowers, 2017).

The framework's 25 techniques are grouped under five main strategies which include increasing effort, increasing risk, reducing rewards, reducing provocations, and removing excuses (Cornish and Clarke, 2003; Clarke and Newman, 2009). These techniques have been successfully applied to various crime types that include vehicle theft, where interventions like electronic immobilisers led to sharp declines (Farrell and Tilley, 2022), as well as cybercrime (Tilley and Sidebottom, 2017), and terrorism

(Clarke and Newman, 2009).

SCP has faced sustained criticism for allegedly oversimplifying human behaviour, neglecting deeper structural causes, and risking displacement or exclusionary effects (Clarke and Bowers, 2017). However, its robust theoretical grounding and consistent practical results remain widely acknowledged, particularly where interventions are tightly aligned to the opportunity structures of specific offences (Clarke and Bowers, 2017). Empirical reviews show that displacement is often limited with diffusion of benefits more likely to happen, spreading positive effects beyond the targeted area (Guerette, 2009).

Moreover, recent developments such as the concept of "elegant security" demonstrate SCP's capacity to adapt by emphasising prevention that is both effective and publicly acceptable. Farrell and Tilley (2022) argue that the most desirable security is sufficiently integrated into everyday environments that it becomes unobtrusive and often goes largely unnoticed, avoiding the "fortress" cues associated with crude or highly visible controls. In this sense, "elegant security" aligns crime prevention with ethical and quality-of-life considerations by prioritising measures that are default-secure, aesthetically neutral, effortless to use, and principled in terms of liberty, while still retaining a powerful preventive mechanism. Importantly, SCP's systematic and procedural orientation has inspired the development of more granular analytical tools, most notably CSA (Cornish, 1994) which enables detailed mapping of complex, multi-stage crimes and will be explored in the next section.

B. Crime Script Analysis

CSA, introduced by Cornish (1994), extends rational choice theory and SCP by mapping the procedural logic of offending as a sequence of interlinked decisions and actions. Rather than viewing crime as a single event, CSA conceptualises offending as a structured process where each stage involves decisions, actions, and situational conditions (Cornish, 1994; Borrion, 2013). Key components include "scripts" that map the full crime process, "tracks" for alternative methods, "scenes"

for distinct phases, and "roles" identifying the actors involved (Cornish, 1994; Borrion, 2013).

CSA enables a tailored analysis of complex and organised crimes, assisting the identification of critical intervention points to inform prevention and policy (Brayley et al., 2011; Tompson and Chainey, 2011; Borrion, 2013). It has been applied to a range of issues, including child sex trafficking (Brayley et al., 2011), illegal waste activities (Tompson and Chainey, 2011), irregular migration (Bish et al., 2025), and cross-border bride trafficking (Wei et al., 2025), illustrating its versatility in integrating diverse data sources and generating actionable recommendations.

Despite its utility, CSA faces methodological limitations, including a lack of standardised scripting procedures, limited replicability, and inconsistent transparency in data selection and validation (Borrion, 2013; Dehghanniri and Borrion, 2021). These challenges can undermine reliability and have prompted calls for greater methodological rigour (Dehghanniri and Borrion, 2021; Chainey and Alonso Berbotto, 2021). CSA has also been critiqued for overemphasising offender actions and overlooking the roles of victims and guardians (Leclerc and Wortley, 2014; Bish et al., 2025). Recent studies have responded by broadening scripts to include these perspectives and by connecting CSA to broader procedural models (Chainey and Alonso Berbotto, 2021; Bish et al., 2025). These advances have improved the transparency and relevance of crime scripting. The next section demonstrates how Chainey and Alonso Berbotto (2021) applied this development in their method on crime scripting.

C. Chainey and Alonso Berbotto's Methodological Approach

Addressing these issues of methodological rigour and being difficult to replicate, Chainey and Alonso Berbotto (2021) propose a structured, transparent approach that standardises data collection, validation, and analysis through four main stages. First, a crime script template is developed to identify the main acts and scenes structuring the offence, supported by guiding questions for data extraction (Tompson and Chainey, 2011; Chainey and Alonso Berbotto, 2021). Second, systematic

document analysis is conducted using Scott's (1990) criteria of authenticity, credibility, representativeness, and meaning, alongside clear protocols for data collection and management (Gross, 2018). Third, a focused coding protocol extracts and categorises relevant content, iteratively refining the codebook to ensure consistency (Chainey and Alonso Berbotto, 2021). Finally, axial coding and synthesis link categories and decision points with analytic memos and visual mapping techniques to synthesise the procedural logic (Saldana, 2021; Chainey and Alonso Berbotto, 2021). The completed script is then analysed using SCP's five strategies to inform intervention design.

This structured process directly addresses previous concerns about subjectivity and opacity, enhancing transparency and replicability in crime scripting (Chainey and Alonso Berbotto, 2021). However, its effectiveness still depends on the quality and availability of documentary sources and requires critical interpretation during coding and synthesis (Chainey and Alonso Berbotto, 2021; Saldana, 2021). Overall, this method marks a significant advance in the rigour and practical values of CSA, providing a robust foundation for empirical research on complex organised crime.

D. Summary

This section has reviewed the theoretical and methodological evolution of SCP and CSA, demonstrating how systematic, transparent and context-sensitive approaches underpin this articles' analytical framework. The structured method advanced by Chainey and Alonso Berbotto (2021) provides a robust foundation for subsequent analysis by clarifying how scripts can be constructed and assessed with greater rigour and transparency. The next section examines the extent and nature of LT and current prevention measures, before these frameworks are applied to construct and analyse the populated crime script.

3. Literature Review II: Labour Trafficking

LT remains a persistent challenge in Western countries due to contested definitions, inconsistent measurement, and institutional gaps (Guth et al., 2014; Weitzer, 2015;

Gallagher, 2017; Walk Free, 2023a; CSJ, 2024; FLEX, 2024; Childress et al., 2024). This section first reviews the extent and nature of LT, then critically examines existing prevention measures. While international frameworks are considered, the UK is used as the main national example to support wider insight across Western contexts. This enables deeper analysis and is justified by the UK's prominence in the literature (Strauss, 2017; Cockbain et al., 2018; Cockbain and Brayley-Morris, 2018; Broad and Turnbull, 2019; Cockbain and Bowers, 2019; CSJ, 2024; Cockbain et al., 2025) and the acknowledged strength of its government response (Walk Free, 2023a). This focus provides a detailed empirical basis for the CSA and assessment of prevention strategies developed in subsequent sections.

A. The Extent and Nature of Labour Trafficking

Definitional ambiguities have long complicated efforts to address LT. While the ILO Convention No. 29 (1930) and the Palermo Protocol (United Nations, 2000) provide the main legal foundations, their definitions remain contested and difficult to operationalise, especially as new forms of exploitation emerge in the private sector and among migrants (ILO, 2014; Weitzer, 2015; Gallagher, 2017). National frameworks such as the UK's Modern Slavery Act 2015 have broadened legal categories but in practice, attention and enforcement have often remained shaped by more visible type like sex trafficking, with sectors like construction and agriculture often overlooked (Broad and Turnbull, 2019; Cockbain and Bowers, 2019; CSJ, 2024). The resulting legal uncertainty and narrow evidentiary thresholds leave many victims unprotected, particularly those whose experiences do not fit conventional narratives (McGeehan, 2012; CSJ, 2024).

Measurement of LT is fraught with uncertainty and systematic undercounting. Prevalence estimates vary widely depending on definitions and methodology. While the ILO (2022a) uses household surveys to estimate hidden exploitation, national referral mechanisms (NRM) such as the UK NRM capture only a fraction of cases actually occurring, especially among male and migrant workers in under-

monitored sectors (Cockbain and Brayley-Morris, 2018; Walk Free, 2023b; Cockbain et al., 2025). Methodological ambiguities, inconsistent data collection, and political priorities continue to produce "blind spots' in official statistics, skewing resources toward more visible forms of exploitation and limiting effective policy responses (Guth et al., 2014; Weitzer, 2015; Fukushima et al., 2020).

The drivers of LT are rooted in broader political and economic systems that generate individual vulnerability (Arhin, 2016; Cockbain and Bowers, 2019; ILO, 2024). Weak institutional oversight, underfunded labour inspectorates and restrictive immigration regimes allow exploitation to go undetected, especially in sectors like agriculture or informal work (LeBaron, 2016; Farrell et al., 2020; CSJ, 2024). At the individual level, migrants with insecure status, language barriers or limited access to services are especially targeted, as traffickers exploit debt, misinformation, and social marginalisation to exert control (Fukushima et al., 2020; Fabbri et al., 2023; CSJ, 2024). These overlapping vulnerabilities sustain LT and constrain victims' choices (Weitzer, 2015; ILO, 2024).

LT causes profound psychological and social harm with victims often experiencing trauma, isolation, and ongoing anxiety that is exacerbated by unstable legal status, stigma, and disbelief from authorities (Fukushima et al., 2020; Villacampa, 2024). Violence and deprivation are well documented in sectors like UK construction, with inadequate institutional support and fragmented services worsening survivors' recovery (Cockbain and Brayley-Morris, 2018; Childress et al., 2024; CSJ, 2024). Legal responses can reinforce harm when survivors are treated as tools for prosecution or excluded by narrow definitions and high evidentiary thresholds (McGeehan, 2012; Strauss, 2017; Villacampa, 2024). Systematically, LT embeds exploitative business practices, generates billions in illegal profits and erodes public trust in institutions, reinforcing marginalisation and structural inequality (Kara, 2011; LeBaron, 2016; Cockbain et al., 2018; Davies et al., 2024; ILO, 2024).

These definitional ambiguities, measurement challenges, persistent drivers, and wide-ranging harms underscore the importance of examining how existing

prevention measures respond to these realities, as explored in the next section.

B. Existing Prevention Measures

Prevention strategies against LT involve legal, regulatory, and civil society responses, each with notable achievements and persistent limitations. Legal and criminal justice efforts are grounded in international and national frameworks requiring criminalisation of trafficking, cross-border cooperation, and victim support (United Nations, 2000; Council of Europe, 2005; Gallagher and Holmes, 2008). In the UK, the Modern Slavery Act 2015 unifies offences and establishes statutory mechanisms for victim identification and support (Cockbain and Bowers, 2019), yet enforcement is often fragmented and underfunded, with prosecution disproportionately focused on sexual exploitation while sectors such as agriculture and construction are neglected (Weitzer, 2015; Broad and Turnbull, 2019; CSJ, 2024; United Nations Office on Drugs and Crime [UNODC], 2024). Evidence of systematic exploitation in sectors like construction is frequently overlooked (Cockbain and Brayley-Morris, 2018).

The UK's NRM was introduced to improve victim identification and support (CSJ, 2024). However, it faces criticism for bureaucratic delays, inconsistent outcomes, and incomplete reporting, which hinder timely assistance, complicate coordination, and impede resource allocation and evaluation (Farrell and Reichert, 2017; Cockbain and Bowers, 2019). Legal and investigatory tools have also struggled to keep pace with traffickers' use of online platforms, with law enforcement agencies lagging in their response to digital recruitment and transnational exploitation (Organization for Security and Co-operation in Europe [OSCE] and Tech Against Trafficking, 2020; Volodko et al., 2020; CSJ, 2024).

Meanwhile, the Gangmasters and Labour Abuse Authority (GLAA) licenses and monitors labour providers in high-risk sectors, aiming to prevent exploitation through inspection and enforcement of labour standards (GLAA, 2019). However, their effectiveness is constrained by limited resources, a narrow mandate, and

fragmented oversight, leaving many sectors and vulnerable groups unprotected (Cockbain et al., 2018; UK Home Affairs Committee, 2023; ILO, 2024; CSJ, 2024). Large companies are required, under the Modern Slavery Act, to report annually on efforts to address exploitation in their supply chains to foster business accountability (Corporate Justice Coalition [CORE], 2017). Yet compliance is largely voluntary and rarely leads to substantive change or penalties, limiting the impact on corporate behaviour (CSJ, 2024).

NGOs trade unions and other non-state actors play a vital role in prevention by identifying victims, providing support and building trust with at-risk populations (OSCE, 2018; International Organization for Migration [IOM], 2019; FLEX, 2024). Their interventions include awareness campaigns, peer networks, and increasingly, the use of technological innovations such as risk assessment tools and worker complaint platforms to enhance transparency and empower workers to report abuse (Anti-Slavery International, 2018; OSCE and Tech Against Trafficking, 2020). However, these organisations face challenges of unstable funding and inconsistent collaboration with governments (OSCE, 2018; FLEX, 2024). Many vulnerable workers lack access to these technologies, and regulatory capacity to enforce standards remains limited (OSCE and Tech Against Trafficking, 2020; FLEX, 2024; CSJ, 2024). Victims who have experienced previous discrimination or exploitation may not trust official organisations or NGOs (IOM, 2019; CSJ, 2024). Governments often expect civil society to fill gaps in public provision without addressing root causes or providing long-term support (IOM, 2019; CSJ, 2024).

Together, these overlapping efforts and their limitations highlight the need for more integrated, well-resourced and adaptable prevention strategies which will be examined in depth in later sections.

C. Summary

This section has shown that LT remains a serious problem. Challenges in definition, measurement, deep structural drivers, and widespread harms all

contribute to its persistence. While legal, regulatory, and civil society efforts have made important progress, their impact is limited by fragmentation and gaps in protection and enforcement. These findings suggest that more procedurally grounded and context-sensitive analytical frameworks are needed to better understand trafficking and guide more effective interventions. The following sections set out the methodological approach and the process for applying CSA to LT in this study.

4. Methodology

This section details the systematic construction and analysis of a crime script for LT, employing qualitative document analysis to synthesise high-quality secondary sources where direct observation or primary data are rarely possible (Bowen, 2009). CSA maps complex crime processes into actionable steps and roles, making visible intervention points often missed in statistics or narrative accounts (Cornish, 1994; Brayley et al., 2011; Leclerc and Wortley, 2014). Applications in areas such as child sex trafficking (Brayley et al., 2011) and irregular migration (Bish et al., 2025) further demonstrate CSA's explanatory and preventive value.

However, critiques of intuition-driven and opaque scripts highlight risks of subjectivity and limited replicability (Borrion, 2013; Dehghanniri and Borrion, 2021). In response, this research adopts the structured, multi-stage methodology by Chainey and Alonso Berbotto (2021), previously described in Section 2. Their approach emphasises systematic template development, rigorous document analysis, detailed coding, and data integration. It addresses the methodological weaknesses in earlier crime script literature and is particularly suited to research on hidden, complex crimes. The following sections present each stage of this process in detail.

A. Stage One: Script Template Development

This first stage constructs a structured crime script template as the foundation for analysis. Following Chainey and Alonso Berbotto (2021), the script breaks the offence into four distinct "Acts" (recruitment, transportation, reception and exploitation), with each further subdivided into "Scenes" (preparation, pre-activity, activity, and post-activity), allowing the complex, multi-stage nature of LT to be mapped comprehensively. For each Act, the template identifies not just the main offenders, it presents the broader "Cast" of facilitators, intermediaries, and supporting actors. It also records the "Conditions" necessary for each Act or Scene, such as required documents, debt, or coercion. This approach reflects a more structured and transparent practice in crime scripting and addresses critiques of unstructured methods (Tompson and Chainey, 2011; Borrion, 2013). The resulting script, developed by adapting these methods to the Western LT context (see Table 1), serves as a dynamic tool for data organisation.

To guide the systematic population of the script, targeted questions were developed for each element to ensure that all relevant stages, actors and enabling factors were captured (see Table 2). The next stage outlines how these templates and guiding questions were operationalised through the systematic identification and analysis of relevant documents.

Table 1. A potential crime script. Adapted from Tompson and Chainey (2011), and Chainey and Alonso Berbotto (2021).

Act	Scene	Cast	Condition
	Preparation		Need fake document; Fake jobs; Transport contacts; Information of potential victims; Target region; Fake job advertisement;
	Pre-Activity	Unofficial Recruiter/Trafficker (Neighbour; Victim's	

Recruitment	Activity Post-Activity	friend; Victim's family; Online friends); Document Forger.	Connection; Poverty; Unemployment; Debt; Lack of supervision; Poor awareness of risks; transportation
Transportation	Preparation Pre-Activity Activity Post-Activity	Recruiter/Trafficker; Officials; Driver; Employer	Document seizure; Corrupt Official connection; Weak border security; Bribery; Lack state supervision; Low risk of detection; Isolation
Reception	Preparation Pre-Activity Activity Post-Activity	Trafficker; Employer	Debt trap; Isolating victim; Document seizure; Forced to sign contract; Monitoring; Threats
Exploitation	Preparation Pre-Activity Activity Post-Activity	Employer	Debt trap; Low/no pay; Violence; threats; Document seizure; Isolation

Table 2. Questions to guide data collection. Adapted from Tompson and Chainey (2011), and Chainey and Alonso Berbotto (2021).

Question to attempt to answer to populate the script	
Act	

	What are the main stages or steps involved in the commission of this crime?
Scene	
Preparation	What planning or arrangements are required before the main activity takes place?
Pre-Activity	What actions or contacts typically occur just before the main activity begins?
Activity	What is the principal criminal act or event?
Post-Activity	What steps or arrangements occur immediately after the main activity to complete or conceal the crime?
Cast	
	Who are the main offenders, facilitators, and other parties involved at each stage?
	What are the relationships or roles among those involved?
	What legitimate or third-party actors interact with offenders (if any)?
	What specific skills, resources, or knowledge does each actor bring?
Conditions	
Preconditions	What tools, equipment, or information are needed for each stage?
	What prior circumstances or vulnerabilities must exist for the crime to occur?
	What locations or environments are necessary or advantageous?
Facilitators	What networks, resources, or opportunities make the crime easier or more profitable?
	What factors increase the likelihood of successful commission or benefit to offenders?
	What features of the situation or context reduce barriers for offenders?
Enforcement	What laws, regulations, or oversight mechanisms apply to each stage?

	Which authorities or actors are responsible for enforcement or intervention?
	What challenges, gaps, or weaknesses might hinder detection, investigation, or prosecution?
	How might offenders exploit legal, procedural, or resource-based limitations?

B. Stage Two: Document Identification and Quality Assessment

The second stage focused on the systematic identification and quality assessment of documents to support the crime script which follows the overall approach outlined by Chainey and Alonso Berbotto (2021). Given the researchers' practical constraints on time and resources, a more modest and targeted method was adopted. Academic literature formed the core dataset, supplemented where necessary by NGO reports, rather than the broader open-source intelligence-led dataset in their original framework.

Three core keywords, "labour trafficking process", "forced labour process", and "worker exploitation", were used and searched across two platforms, the University of Leeds library search engine and Google Scholar. Retrieval was limited to the first 100 sources for each keyword on each search engine to maintain a manageable and focused sample, resulting in an initial pool of 600 sources. Titles and abstracts were screened to retain sources with relevant content on the organisation or operation of LT in Western countries. This strategy is justified both by the research's practical limitations and by best practice in document sampling, which encourages clear inclusionary criteria to reduce irrelevant data (Gross, 2018). Opinion-based editorials were excluded to ensure analytic appropriateness (Chainey and Alonso Berbotto, 2021).

Throughout this process, quality assurance drew upon established criteria in documentary analysis, namely authenticity, credibility, representativeness, and meaning (Scott, 1990; Chainey and Alonso Berbotto, 2021). Additional safeguards included limiting the sample to sources published between 2010 and 2025, focusing

on Western countries as destination or source country, and allowing a maximum of two documents per author to avoid overrepresentation. This is in line with best practices to reducing sampling bias (Gross, 2018). This process resulted in 25 documents deemed appropriate for in-depth analysis in Stage Three, providing a robust foundation for subsequent coding and analysis.

C. Stage Three: Coding and Data Extraction

The third stage involved the systematic coding and extraction of relevant information from the selected documents to populate the performed crime script. Following the method set out by Chainey and Alonso Berbotto (2021), each document was reviewed in detail and coded according to the Acts, Scenes, Cast and Conditions established in Stage One. NVivo software was used in this research to support the data extraction and coding process.

Each extract from the 25 selected sources was assigned to a clearly defined code, reflecting both the relevant act and the analytical element. The coding system used in this study is summarised in Table 3, with codes such as "R_1" representing recruitment-preparation or "T_3" for transportation-activity. This structured approach allowed for efficient organisation and subsequent retrieval of supporting data across the crime script. During coding, two sources did not provide relevant data for the specific focus of the script and were excluded. This left 23 documents in the final analytic sample. This targeted process ensured that the resulting script was grounded only in sources with direct relevance to the organisation and execution of LT in Western countries.

Despite the structured methodology, the process of coding relied primarily on the researcher's judgement, creating potential for subjectivity or bias in the interpretation of supporting data (Chainey and Alonso Berbotto, 2021). Nevertheless, the transparency of the coding scheme and the triangulation of different sources were designed to mitigate these limitations and provide a clear audit trail for future review (Chainey and Alonso Berbotto, 2021).

Table 3. The coding procedure for recording data extracted from information sources.

SCRIPTING CODE	
Script Element	**Code**
Recruitment	R
Transportation	T
Reception	RP
Exploitation	E
Preparation	1
Pre-Activity	2
Activity	3
Post-Activity	4
Cast	C
Preconditions	P
Facilitators	F
Enforcement	En

Source	**Code**
Source 1: …	R_1
Source 2: …	T_3
Source 3: …	RP_En
Source 4: …	E_C
Source 5: …	T_P

D. Stage Four: Axial Coding and SCP Interpretation

The fourth stage used axial coding to synthesise the data extracted in earlier stages. Axial coding extends the analytic work by strategically reassembling fragmented data, linking categories and subcategories to clarify their relationships and eliminate redundancy (Saldana, 2021; Chainey and Alonso Berbotto, 2021). In this study, the process involved systematically reviewing the full set of coded extracts to develop a more comprehensive and coherent picture of the crime process.

Overlapping codes were grouped together and the distinctions between categories were sharpened. The Acts, Scenes, and Cast identified in the initial coding were revisited to assess whether any categories should be merged, split or redefined to better reflect the complexity observed in the data. Axial coding thus provided an opportunity to ensure the script accurately captured both diversity and interconnectedness across the various stages and elements of LT.

Additionally, axial coding facilitated the integration of findings from multiple sources, as data points describing similar patterns or behaviours could be consolidated under unified codes. This iterative and reflective process enhanced both the analytical depth and the transparency of the crime script, ensuring it was responsive to the nuances in the evidence (Saldana, 2021; Chainey and Berbotto, 2021). Where new patterns or gaps were identified, the coding scheme was adapted accordingly, maintaining a flexible approach that aligns with the dynamic and complex reality of LT.

With the crime script fully populated, the final analytic procedure focused on interpreting the script through the lens of offender decision-making, as guided by the SCP framework (Cornish and Clarke, 2003; Chainey and Alonso Berbotto, 2021). This stage aimed to identify the conditions, choices, and opportunities that shape offender behaviour. It then clarified how these may be manipulated through targeted interventions. Each item in the script was coded according to the five decision-making considerations which were risk, reward, effort, excuses and provocations. These dimensions reflect the key factors offenders weigh in the commission of a crime. Table 4 summarises the SCP coding scheme applied in this stage.

Each relevant extract in the script was assigned to the most appropriate SCP code based on its content and the role it played, supported by NVivo. If a particular consideration could not be determined, no code was assigned. This structured approach ensured that the script was descriptive and analytically actionable. This approach helped identify clear opportunity structures and potential points for SCP-based intervention. Therefore, this stage connected the detailed, stage-by-stage analysis of LT directly to the development of prevention strategies. The result was a script that both explains offender behaviour and supports the design of targeted and evidence-based responses.

Table 4. Coding procedure applied to data in the crime script with regards to the five decision-making considerations. Adapted from Chainey and Alonso Berbotto (2021).

SCP CODE
Rk: Risk
Et: Effort
Rd: Reward
Es: Excuses
Ps: Provocations

Source	Code
Data 1: ...	Rk
Data 2: ...	Et
Data 3: ...	Rd
Data 4: ...	Es
Data 5: ...	Ps

E. Summary

This section has outlined a transparent and systematic method for developing a crime script for LT in Western countries. The approach ensures both analytical depth and practical relevance by combining a structured template, rigorous document analysis and a decision-making framework. Meanwhile, the researcher also acknowledges inherent limitations such as resource constraints and the potential for subjectivity. The resulting crime script forms a robust foundation for the next stage of the article. The following section will present and analyse the populated script, focusing on how offender decision-making and opportunity structures are distributed across stages of LT.

5. Findings

This section presents the findings generated from the crime script and decision-making analysis of LT, based on the analytic procedures set out in Section 4. The populated script provides a detailed reconstruction of the procedural logic of LT which highlights how offender behaviour is shaped by opportunity structures and situational factors. The analysis is organised into two main sections. First, it summarises the core activities, patterns, and vulnerabilities identified in the full crime script. Second, it applies the SCP framework to offender decision-making, using the

"Reward" dimension as a detailed example while also drawing on insights from the other four dimensions. By integrating these findings with established analytic frameworks, this section provides a foundation for the critical evaluation of prevention strategies in subsequent sections.

A. The Populated Crime Script

This section distils the script's key structural and procedural findings, drawing attention to major cross-cutting patterns and using examples to illustrate how offender tactics, roles and vulnerabilities interact across the LT process.

Analysis of the populated crime script reveals distinct features and vulnerabilities at each stage of the LT process. During recruitment, offenders exploit social and digital networks to advertise fraudulent employment opportunities, often using shell companies or informal agents to evade regulatory scrutiny. Victims are typically enticed with promises of legal work or improved living conditions, only to be subjected to high recruitment fees or fabricated migration costs that generate debt bondage.

In transportation and reception, traffickers routinely manipulate travel documents, coordinate with corrupt intermediaries to ensure the safe passage and concealment of victims, while further restricting their freedom through document confiscation or threats of exposure. Exploitation is characterised by contract manipulation, wage withholding, debt escalation and frequent transfers between worksites to maintain victims' dependency and limit their ability to resist or escape.

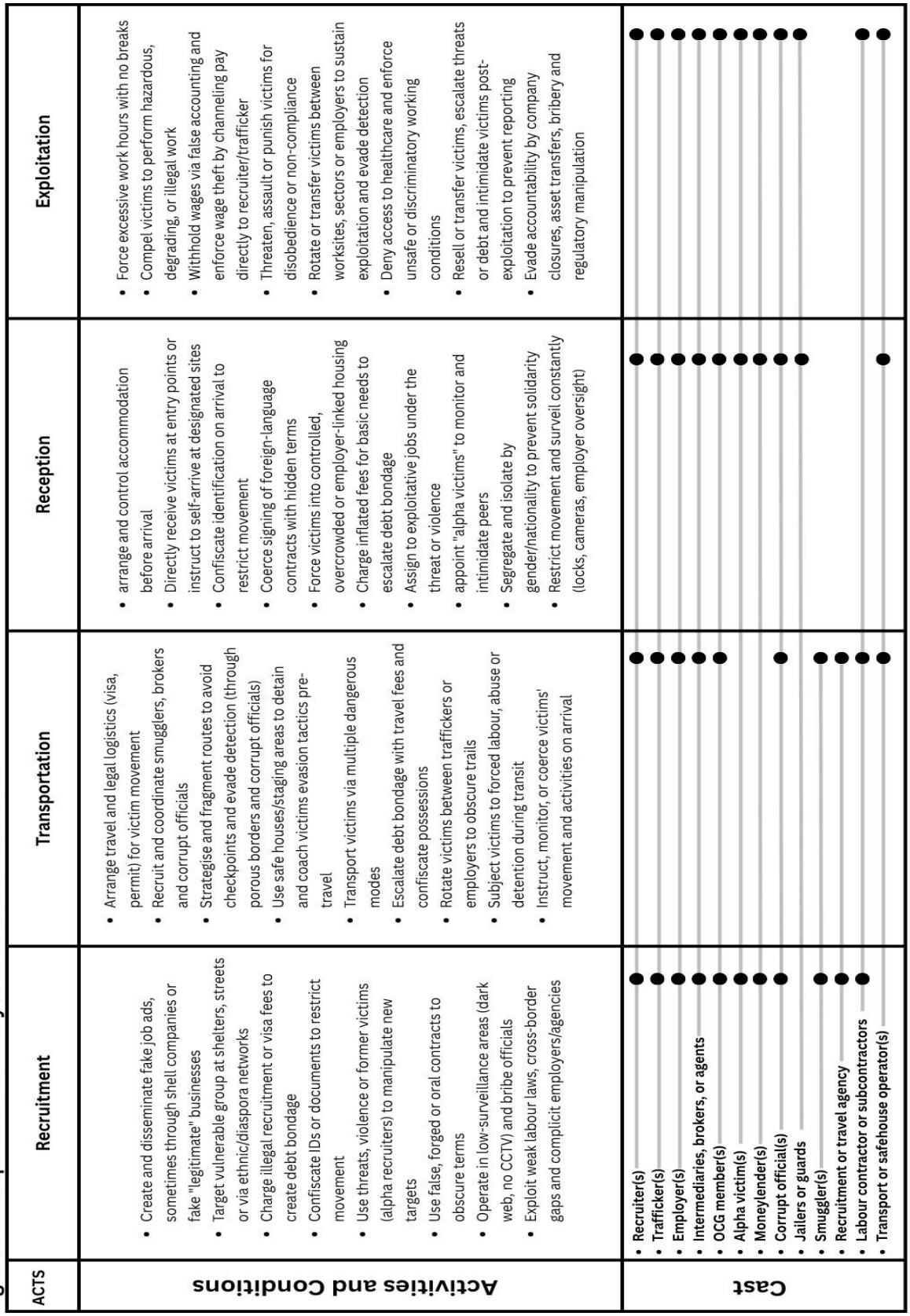
A further critical observation is that enforcement-related themes remain broadly consistent across all acts. This reflects a well-recognised limitation in the current evidence base. Most literature continues to analyse enforcement challenges at a systemic level rather than providing act-specific insight (Crane, 2013; Ollus et al., 2013; Phillips and Mieres, 2015; UNODC, 2015; Arhin, 2016; Cockbain et al., 2018; David et al., 2019; Farrell et al., 2020; Thiemann et al., 2024). This evidentiary limitation reinforces the importance of analysing the full script as it uncovers how

vulnerabilities and enforcement gaps are reproduced and adapted throughout the process.

To contextualise these findings within the broader logic of LT, Figure 1 presents a visual synthesis of the entire crime script. The diagram integrates the four principal acts, highlighting not only their sequential flow but also the interconnections and overlaps that characterise real-world LT cases. By mapping the main activities and associated roles at each stage, Figure 1 provides a concise overview of how individual acts interact which illustrates the continuous movement of victims, the transfer of control between offenders, and the layering of coercive mechanisms across the process. This visual summary serves as an analytical bridge, linking specific script findings to the macro-level dynamics that underpin the persistence and adaptability of trafficking networks.

Several cross-cutting patterns become particularly clear when the process is viewed holistically. Offender adaptability is a defining feature, with individuals or groups shifting between roles as circumstances evolve. Deception and manipulation are consistently deployed to secure initial compliance. For instance, fraudulent job offers and personal networks are used to lure victims, while recruitment fees or migration costs create early debt bondage. These forms of coercion are then recycled and reinforced at later stages through document confiscation, contract manipulation, wage withholding and threats of deportation. The diagram highlights how these tactics are not confined to a single stage but are actively adapted and recycled across the trafficking process, enabling traffickers to maintain control and respond to emerging risks. This cyclical exploitation of vulnerability and the fluidity of roles underpin the resilience and persistence of LT networks.

Fig 1 Crime script visual summary of LT in Western countries



It should be acknowledged that the level of detail achieved across different stages of the script varies according to the quality and specificity of available evidence.

This inherent variation inevitably shaped the granularity of analysis, with some acts being reconstructed more comprehensively than others. Nevertheless, by foregrounding both the distinctive and recurring features of the LT process, this section underscores the value of systematic crime scripting for exposing intervention points and hidden vulnerabilities. The next section applies the SCP framework to examine how offender decision-making is shaped across the full crime script.

B. Offender Decision-Making

Offender decision-making in LT can be understood through the five dimensions of SCP. This section uses the "Reward" dimension as a detailed case example, not because it is more important, but to demonstrate the explanatory value of SCP when applied in depth.

Financial incentives are central to many trafficking practices, and focusing on reward illustrates how profit is embedded across stages of the crime script. Financial rewards are systematically embedded across all stages of the LT process with offenders employing a diverse range of strategies to generate profit and sustain control. At recruitment, victims are often subjected to advance or placement fees, trapping them in debt bondage before exploitation begins. During transportation and reception, coerced financial activities such as opening bank accounts or claiming benefits generate further income, while forged contracts or document manipulation set the conditions for later abuse. Exploitation itself is characterised by wage theft, underpayment, contract substitution and the imposition of extra or hazardous work, with victims rotating between sites or sectors to guarantee an uninterrupted revenue stream. As Table 5 shows, these practices are reinforced in three main ways: first, through economic manipulation such as delayed or denied payments; second, through institutional collusion where complicit employers and corrupt officials help sustain profit flows; and third, through structural inequalities with offenders exploiting discrimination and regulatory blind spots to justify lower wages and avoid scrutiny. Together, these interlocking strategies demonstrate the adaptability

of traffickers, who shift tactics across contexts but consistently pursue financial gain as the organising logic of their operations.

While financial rewards underpin LT, the analysis also shows that the other four dimensions significantly shape offender decision-making. Perceived risk is consistently low because traffickers employ tactics such as confiscating documents, placing victims in controlled accommodation, and restricting their movement and communication to reduce opportunities for escape or disclosure. These risks are further diminished through collusion with authorities, routine bribery and the use of high-security measures such as locks and surveillance at worksites. In terms of effort, offenders reduce their own involvement by delegating tasks to brokers, intermediaries or even senior victims, while using digital technologies to manage operations efficiently and remotely. Victims may also be concentrated in reception hubs or safe houses, making exploitation easier to manage. Excuses are used to neutralise blame, with debts framed as legitimate obligations, recruitment fees normalised as industry practice, and oral or falsified contracts employed to obscure responsibility. Finally, provocations emerge from the structural vulnerability of workers themselves, with traffickers exploiting poverty, irregular status or social marginalisation, while leveraging debt, deception and dependency on basic needs to increase victim compliance. Together, these dimensions interact with reward, as low risk and reduced effort make exploitation more profitable, while excuses and provocations reinforce its persistence by legitimising abuse and weakening resistance.

Table 5. Offender decision-making for LT associated with reward.

Reward
Profiting from debts, fees, and upfront payments: Offenders collect advance, application, placement and ongoing hidden fees to trap victims in debt before and during exploitation to maximise profit and control

Wage theft and benefit diversion: Offenders withhold, underpay or seize wages and benefits earned during or after employment
Contract deception and substitution: Offenders use false, oral or manipulated contracts to impose worse terms or deny pay
Compelling extra, hazardous, or illegal work: Offenders require victims to work excessive hours, perform dangerous tasks or commit crimes to increase profit
Forcing victims into financial activities for offender gain: Victims are coerced into opening bank accounts, claiming social benefits or taking out loans, with offenders appropriating the resulting funds or assets
Continuous exploitation through rotation and sector-hopping: Victims are moved between sites, employers, or sectors, or their labour is sold or transferred to ensure a continuous revenue stream for offenders
Leveraging high demand for cheap, flexible or undocumented labour: Offenders target sectors with strong demand for exploitable workers to guarantee a steady supply of victims and sustained income
Maintaining impunity and profit through political or regulatory protection: Offenders use political influence, bribery or exploit regulatory gaps to shield operations from scrutiny, enabling ongoing profit with little risk
Collaboration with complicit employers or actors: Working with corrupt or complicit employers allows offenders to control wages, benefits and job conditions that maximise financial rewards and ensure sustained exploitation
Delayed, denied, or manipulated payments post-exploitation: After exploitation, offenders use excuses, contract manipulation or agent-blaming to delay, deny, or reduce payment, retaining

profits and avoiding financial liability
Exploiting discrimination to increase profit: Offenders use discrimination (race, nationality, gender, status) to justify lower pay, denial of benefits or worse conditions, increasing their financial reward

C. Summary

This section has provided a detailed account of the procedural logic and decision-making dynamics underpinning LT. By systematically analysing the crime script and offender behaviour through the lens of SCP, the analysis has highlighted both the diversity and adaptability of tactics used to exploit victims and sustain LT operations. While the "Reward" dimension was examined in greatest detail, the findings also demonstrate that low perceived risk, minimised effort, enabling excuses and the exploitation of provocations interact with financial incentives to reinforce the resilience of trafficking networks. This multidimensional understanding of offender strategies and systemic vulnerabilities forms a critical foundation for evaluating the effectiveness of existing prevention measures and for developing more targeted interventions, as explored in the following section.

6. Discussion

This section draws together the findings of the preceding analysis to critically evaluate existing prevention measures and develop recommendations for targeting LT in Western countries. Consistent with Section 3, the discussion uses the UK as the national example, justified by its prominence in academic literature (Strauss, 2017; Cockbain et al., 2018; Cockbain and Brayley-Morris, 2018; Broad and Turnbull, 2019; Cockbain and Bowers, 2019; CSJ, 2024; Cockbain et al., 2025) and international assessments of government response (Walk Free, 2023a), as well as the practical constraints of in-depth comparative analysis. However, the analysis and

recommendations are intended to provide an adaptable framework for similar Western contexts with appropriate contextual adaptation. Building on the crime script and situational analysis from earlier sections, the discussion reassesses existing interventions through the lens of SCP. It then proposes SCP-based interventions grounded in the research's findings and, where relevant, informed by existing literature, before considering broader theoretical and policy implications, along with limitations and directions for future research.

A. Reassessment of Existing Prevention Measures through the SCP Lens

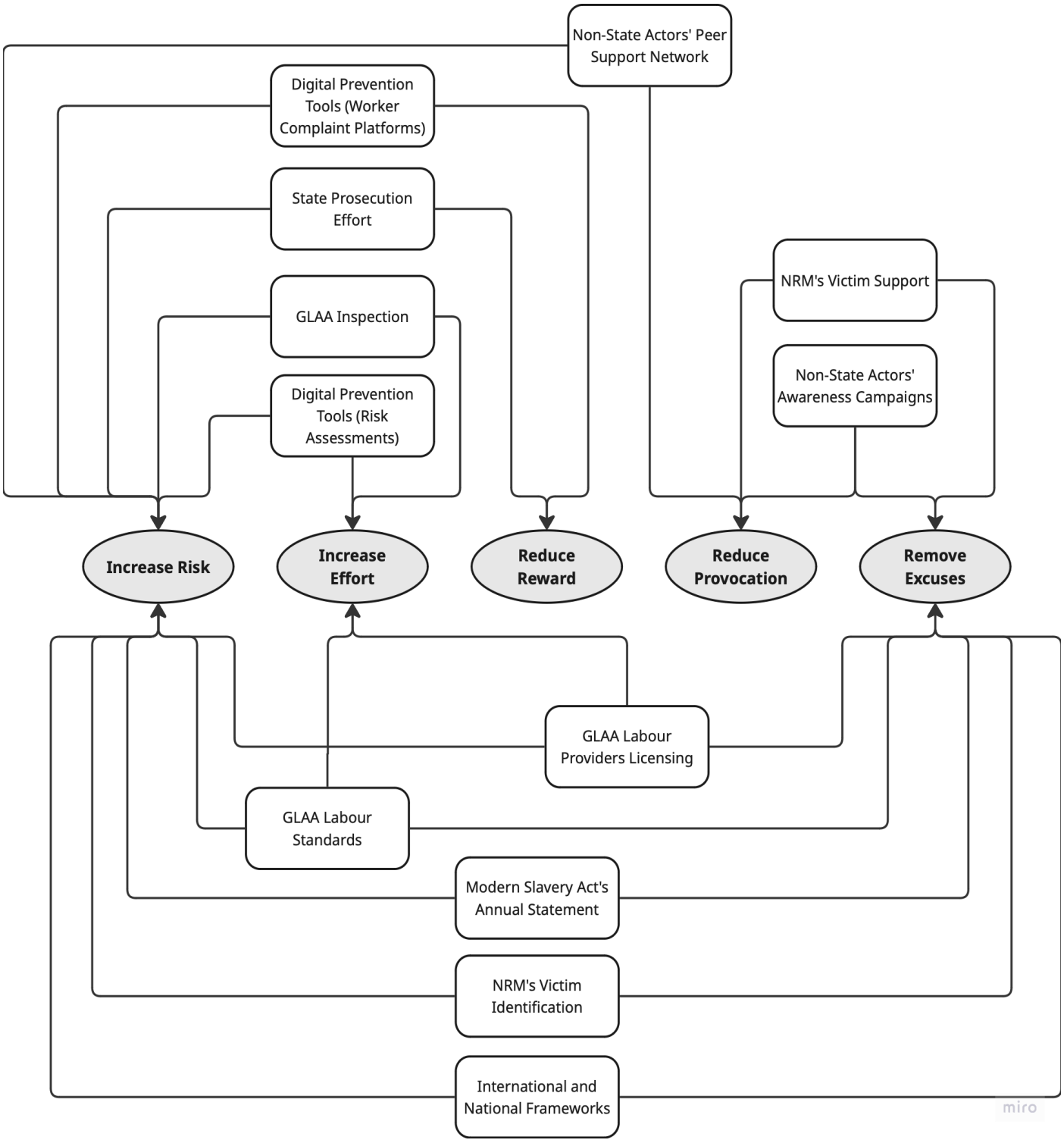
This section directly builds on the literature-based assessment of existing LT prevention measures provided in Section 3 but moves beyond prior analysis by systematically reassessing these interventions through the lens of SCP. Figure 2 visually maps current prevention efforts across the five SCP dimensions and sets the stage for a more critical evaluation of their distribution and effectiveness.

Analysis of Figure 2 reveals a clear pattern in the distribution of existing measures across the SCP framework. Existing prevention measures are unevenly distributed across the SCP framework with a marked concentration on strategies that increase risk for offenders, such as regulatory enforcement, inspections, and sanctions. In contrast, the other four dimensions are comparatively underutilised with only isolated interventions. For example, there are few measures aimed at reducing provocation or excuses, despite evidence that workplace conditions and social norms can enable exploitation (CSJ, 2024). Consistent with Cockbain et al. (2025), these findings indicate that current practice remains largely anchored in traditional deterrence and compliance logic rather than leveraging the full range of SCP approaches to disrupt LT.

While Walk Free's (2023a) ranks the UK's government response among the most effective globally, this analysis demonstrates that, in practice, substantial gaps remain, particularly in the application of a balanced and comprehensive SCP framework. Since these limitations have been discussed in Section 3, they are not

repeated here. Instead, the present analysis underscores the necessity for new, more balanced and supplementary recommendations. The following section responds directly to this need by proposing interventions that are grounded in the findings of this study and designed to enhance the breadth and effectiveness of LT prevention.

Figure 2. Visual summary of existing prevention measures analysed through the SCP framework.



B. SCP-Based Interventions

This section presents a new suite of SCP-based interventions designed to address the imbalances identified in the previous reassessment of current LT prevention

measures. These recommendations were developed through a systematic process that drew directly on the crime script and opportunity structure analysis in Section 5, ensuring that each intervention responds to specific vulnerabilities and decision points identified in the findings. Once potential interventions were identified, they were critically assessed using the principle of "elegant security" (Farrell and Tilley, 2022), which prioritises not just effectiveness but also proportionality and real-world feasibility. Where relevant, the proposals build on recommendations in existing academic literature, ensuring they are informed by both this research's findings and earlier studies. For clarity, Table 6 presents only two representative examples from each SCP dimension to ensure the main text remains concise.

The proposed interventions represent a deliberate shift from the predominantly risk-heavy focus of current measures towards a more balanced and comprehensive application of SCP principles. Each dimension targets specific procedural weaknesses identified in the crime script. Under "increase effort", tamper-proof, independently verified digital contracts for all recruitment, including informal sectors, would close opportunities for document fraud and unauthorised recruitment, while active monitoring of digital recruitment platforms would disrupt deceptive or illicit practices at their source (Volodko et al., 2020). For "increase risk", empowering local leaders, peer workers and diaspora networks would extend detection and prevention into communities where formal oversight is limited (OSCE, 2018), while public, mandatory registration of recruitment agents would enhance transparency and accountability (GLAA, 2019). "Reduce reward" measures would remove incentives by partnering with tech firms to detect fraudulent advertisements (OSCE and Tech Against Trafficking, 2020) and by disqualifying employers benefiting from trafficking from holding licenses or public contracts (CSJ, 2024). "Reduce provocation" would focus on worker protection through confidential complaint channels with interpreter access and anonymous reporting systems that protect against peer exclusion. Finally, "remove excuses" would clarify obligations and rights through clear, multilingual rules for workers, recruiters, and employers (FLEX, 2024), supported by visible multilingual reporting instructions at worksites and accommodation sites.

Table 6. Examples of SCP-based intervention for LT.

SCP dimension	SCP Techniques	Interventions
ncrease Effort	**Target harden**	Require tamper-proof, independently verified digital contracts for all recruitment, including informal sectors, to supplement existing licensing and standards.
	Control tools/weapons	Actively monitor and regulate digital recruitment platforms to supplement risk assessment and reporting tools, targeting deceptive or illicit activity at the source.
ıcrease Risk	**Extend guardianship**	Train and empower local leaders, peer workers, and diaspora networks to detect and respond to risky recruitment, supplementing peer support initiatives with proactive community guardianship.
	Reduce anonymity	Require public, mandatory registration of all recruitment agencies and agents to enhance transparency and supplement existing licensing schemes.
Reduce Reward	**Disrupt markets**	Partner with tech firms to detect and remove fraudulent recruitment ads and suspicious activity online.
	Deny benefits	Disqualify or bar employers and recruiters found benefiting from trafficking from holding business licenses or public contracts.
Reduce	**Reduce frustration and stress**	Ensure efficient, confidential channels for workers to seek help or make complaints with interpreter access if needed.

Provocation	**Neutralise peer pressure**	Provide anonymous reporting channels that protect against peer group exclusion, supplementing existing complaint platforms.
Remove Excuses	**Set rules**	Provide clear, simple, multilingual written rules and rights to all workers, recruiters, and employers.
	Post instructions	Clearly display multilingual reporting instructions at worksites, agencies, and accommodation sites.

In addition to addressing these procedural weaknesses, some interventions deliberately supplement existing measures by adding safeguards or extending their reach. For example, expanding public registration of recruitment agencies builds on current licensing schemes by introducing greater transparency, while empowering local leaders and diaspora networks strengthens community-based prevention already present in certain sectors. Other interventions are entirely new to UK practice, such as digital contract verification requirements or embedding multilingual rights communication and anonymous reporting systems that operate effectively regardless of language barriers or literacy levels. This distinction is important. The supplementary measures reinforce and improve the reliability of systems already in place, while the new measures address long-neglected gaps that leave workers unprotected, particularly those in informal and hard-to-monitor labour markets.

Taken together, these measures create a mutually reinforcing prevention framework. By layering interventions across all five SCP dimensions, the system is designed to achieve "defence in depth". Even if traffickers adapt to circumvent one barrier, others continue to obstruct their progression through the crime script. This integrated approach is designed to adapt to evolving trafficking methods, with each measure functioning independently while also complementing the others to constrain opportunities. The deliberate alignment with "elegant security" principles ensures these layers remain proportionate, minimally disruptive to

legitimate activity, and feasible to implement across diverse institutional and sectoral contexts.

The effectiveness of this framework will ultimately depend on the capacity and commitment of stakeholders such as regulators, employers, and community networks to implement and sustain it. Risks remain, as heightened oversight could impose administrative burdens on compliant actors, encourage some recruiters to move underground, or prompt traffickers to innovate new tactics. Continuous evaluation and adaptive refinement will therefore be essential. By prioritising interventions that balance security with accessibility and minimal disruption, the framework aims to maximise impact while reducing unintended negative consequences, ensuring that prevention efforts remain resilient against the evolving challenges of LT.

C. Theoretical and Policy Implications.

The analysis undertaken in this article offers substantive contributions to both the theoretical development and practical application of SCP and CSA within the field of LT. By systematically mapping existing and proposed interventions onto the SCP framework, this research demonstrates the value of moving beyond a narrow, risk-centric logic and adopting a holistic, context-sensitive approach to opportunity reduction. The integration of CSA has proven particularly valuable for illuminating the procedural complexity and multiple stages of the trafficking process which in turn reveals new points of intervention and highlights the limits of one-size-fits-all models. This study reinforces recent theoretical arguments (Chainey and Alonso Berbotto, 2021; Farrell and Tilley, 2022) that SCP's effectiveness depends on tailoring interventions to the specific logics and vulnerabilities of each crime type rather than relying solely on established categories or enforcement routines. In this way, the findings contribute to a more nuanced and adaptive understanding of SCP, underscoring its capacity to inform dynamic prevention strategies in complex, evolving criminal contexts.

The findings also have direct implications for policy and practice. This research provides a clear rationale for reforming existing prevention strategies by exposing the limitations of a risk-heavy orientation and demonstrating the added value of a more balanced, multi-dimensional approach. The recommendations developed here, particularly those targeting under-addressed dimensions, offer policymakers a practical blueprint for more comprehensive and resilient anti-trafficking efforts. The emphasis on "elegant security" (Farrell and Tilley, 2022) further encourages practitioners to prioritise interventions that are effective, proportionate, minimally intrusive, and sensitive to the needs and rights of both workers and employers. Achieving these outcomes will require sustained coordination among regulatory agencies, community organisations and private actors, alongside ongoing adaptation to address evolving trafficking tactics (Walk Free, 2023a; CSJ, 2024). Collectively, these insights challenge policymakers to move beyond headline enforcement indicators as measures of success and adopt a more systematic, evidence-led approach to evaluating and designing future interventions in the field of LT. The potential impact of these recommendations, however, must be considered in light of the study's methodological and theoretical limitations, which are examined in the following section.

D. Limitations and Future Research.

This section briefly reflects on key methodological and theoretical limitations of the study and identifies priorities for future research. A primary limitation concerns the geographic and evidentiary scope of the research design. While the literature review and discussion sections use the UK as the principal national example, the crime scripting and findings section focuses more broadly on Western countries. This dual approach was necessary to balance depth with regional relevance, but it introduces challenges for generalisability and transferability, given the significant cultural, legal and institutional variation both within and beyond Western contexts.

Another notable limitation is that the study was relatively modest with only 23 sources compared to Chainey and Alonso Berbotto's (2021) 104 documents. It relied

primarily on academic literature, supplemented by NGO reports, whereas their approach drew on a wider range of open-source materials. Although relevance was maximised by focusing on sources from 2010-2025, the dynamic nature of LT means some developments or local variations may not be fully captured. The exclusive reliance on secondary sources, without primary empirical data such as interviews, means that some perspectives and nuances may remain underrepresented (Chainey and Alonso Berbotto, 2021).

Methodologically, the study used systematic document analysis and established coding protocols to enhance rigour, but the researcher's interpretation was required at each stage. Although document triangulation aimed to reduce this risk, the potential for subjectivity remains even where best practices are followed (Chainey and Alonso Berbotto, 2021). Theoretically, the SCP and CSA framework cannot address the broader structural, socio-economic or institutional forces underpinning LT (Clarke and Bowers, 2017). Moreover, the research does not incorporate direct insights from practitioners or survivors which may be important for understanding lived experiences and practical implementation challenges (Chainey and Alonso Berbotto, 2021). Nor does it empirically evaluate the effectiveness, sustainability, or potential negative consequences of the proposed interventions. Barriers such as resource limitations, institutional inertia or unintended impacts remain largely unexamined here.

To address these limitations, future research should supplement documentary analysis with primary qualitative methods such as interviews or direct engagement with relevant stakeholders to provide a richer understanding of both barriers and opportunities for prevention, as recommended by Chainey and Alonso Berbotto (2021). Comparative studies that test and adapt the proposed interventions in other Western countries, as well as in non-Western settings, are needed to evaluate transferability, assess adaptation requirements, and avoid Western-centric bias. Collaborative research promoting data sharing and partnerships between academics, policymakers and NGOs would further enhance assessment and real-world relevance. Finally, integrating the situational and procedural insights of this study

with broader theoretical frameworks, and conducting longitudinal research on intervention outcomes, will be essential for understanding effectiveness, sustainability and any unintended consequences.

E. Summary

This section has drawn together the main findings from the CSA and literature-based review to provide a critical evaluation of existing prevention measures and to develop evidence-based recommendations for addressing LT. By reassessing current interventions through the SCP lens, the analysis has demonstrated both the strengths and gaps in prevailing approaches. The proposed framework directly targets procedural vulnerabilities identified in the crime script, offering a more balanced, context-sensitive and ethically grounded set of interventions. At the same time, it clearly acknowledges the practical, methodological, and theoretical constraints identified throughout the research. Ultimately, the section underscores the need for prevention strategies that are adaptive, collaborative and underpinned by ongoing rigorous research to remain effective and sustainable in the face of evolving trafficking dynamics.

7. Conclusion

This study examined how LT in Western countries can be more effectively disrupted by integrating CSA with SCP. The crime script reconstructed the procedural logic of LT across Western contexts, while the UK was used as a national example for evaluating prevention measures, reflecting its prominence in academic research and its recognition for strong prevention efforts. The research aimed to map process stages, identify key vulnerabilities, and consider their implications for designing proportionate, context-sensitive and multi-dimensional prevention strategies.

The crime script revealed that LT in Western countries operates through a multi-stage

procedural logic covering recruitment, transportation, reception, and exploitation. Offender roles were fluid, with individuals or groups shifting roles as opportunities and resources changed. This adaptability enabled rapid responses to regulatory changes, market conditions and enforcement pressures. Across these stages, recurring opportunity structures were exploited, including weak oversight in recruitment and subcontracting, the use of informal or deceptive intermediaries, and manipulation of legal processes to conceal activities and restrict victim mobility. Economic leverage such as inflated recruitment costs or withheld wages was reinforced by threats and other forms of coercion to deter resistance or reporting. These tactics were not confined to single acts but were recycled and adapted throughout the process, maintaining victim dependency and creating a resilient foundation for exploitation that cannot be effectively disrupted through isolated measures alone.

While the reward dimension was examined in greatest detail, the analysis engaged all five SCP dimensions, showing that financial incentives operate alongside low perceived risk, reduced effort, enabling excuses, and engineered provocations. These included sustained profits through fees, wage manipulation and sector-hooping, along with limited detection from fragmented enforcement and collusion. Offenders also reduced effort through intermediaries and digital recruitment, exploited cultural norms and contractual ambiguities, and manipulated workers' poverty, migration status or social isolation to secure compliance. The interplay of these dimensions demonstrated how opportunity structures are layered and mutually reinforcing, underscoring the need for prevention strategies that address them in combination rather than in isolation.

This study advanced the theoretical application of CSA and SCP by demonstrating how procedural mapping, integrated with the five decision dimensions, can be used to analyse a complex and adaptive crime such as LT. By linking process stages to situational vulnerabilities, it refined the utility of these frameworks for revealing multi-stage intervention points. The analysis showed that, while traditional prevention efforts in LT have concentrated on risk-based measures,

systematically linking crime script vulnerabilities to all five SCP dimensions demonstrated how balanced, multi-dimensional prevention can be operationalised in practice, ensuring interventions directly address the procedural weaknesses of the offender's exploit. This theoretical reorientation underscored the value of opportunity-focused analysis for designing prevention strategies that are proportionate, context-sensitive, and capable of addressing the layered nature of situational vulnerabilities.

Building on these conceptual advances, the research translated them into actionable guidance for policymakers, enforcement agencies, labour market regulators and civil society actors. By mapping proposed measures directly to the stages of the crime script, it equipped practitioners with a structured basis for intervening before exploitation occurs. The recommendations combined actions that raise risk and effort for offenders, remove excuses and provocations, and reduce rewards, ensuring a comprehensive approach to prevention. Developed directly from crime script findings and, where relevant, informed by prior academic literature, these measures were filtered through the principles of "elegant security" to ensure they are effective, proportionate and feasible, while directly targeting procedural vulnerabilities identified in the analysis. Their adaptability across jurisdictions enabled integration into diverse prevention portfolios capable of responding to evolving methods.

Several limitations should be acknowledged in interpreting the findings of this study. The dual geographic scope, developing a crime script for Western countries while using the UK as a national example for prevention assessment, limits the generalisability of results, given variations in legal, cultural, and institutional contexts. The analysis relied on a modest sample of secondary documentary sources, which, while diverse, may not capture all perspectives or rapidly changing developments in LT practices. The absence of primary data constrained insight into lived experiences and implementation challenges, while qualitative interpretation introduced potential for subjectivity despite systematic coding protocols. Finally, SCP and CSA address situational opportunities but cannot resolve deeper structural, socio-economic or institutional drivers of LT. Future

research should integrate primary qualitative methods, test and, adapt proposed interventions in varied contexts, foster collaboration between academics and practitioners, and conduct longitudinal evaluation to assess effectiveness, sustainability, and potential unintended consequences.

This study has shown that combining CSA with SCP offers a practical, evidence-based way to uncover the hidden logic of LT, expose vulnerabilities, and design interventions that are both targeted and balanced across multiple situational dimensions. Embedding multi-dimensional, opportunity-focused strategies in policy and practice can strengthen labour market integrity, protect workers, and create a sustainable foundation for reducing LT in the face of evolving trafficking methods.

Are Football Banning Orders a legitimate legal response to football-related violence and disorder?

IOAN BUSH*

Abstract

Football Banning Orders (FBOs) were introduced as part of a targeted legal response to the issue of violence and disorder at, or in relation to, football matches. They now form the cornerstone of a public order strategy for preventing football-related disorder, by excluding recipients from football stadiums and other spaces where there is potential for troublemaking. This article uses a bespoke framework to critically assess the legitimacy of FBO legislation, with regard to its implications for civil liberties, effectiveness and perceived legitimacy. Whilst the objective of the legislation is preventative, FBOs have punitive consequences for the liberty to move and assemble freely with others, with limited due process protections. The legitimacy of FBO legislation is undermined by its growing infringement upon civil liberties, in particular the 'hybrid' procedure for imposing FBOs on complaint in the civil courts. The article recommends the introduction of official guidelines for the imposition of FBOs, the creation of a specialist FBO tribunal and stronger evidential safeguards for FBOs imposed in the civil courts upon complaint. These reforms are fundamental to the mitigation of concerns regarding civil liberties, whilst ensuring that FBOs are capable of successfully preventing football-related disorder and maintaining a public perception as a legitimate legal response.

1. Introduction

Since the establishment of association football in 1863, there have been incidents of violence and disorder involving supporters at matches.[1] This came to be popularly recognised in the 1970s by the term 'football hooliganism'.[2] Major stadium disasters in the 1980s embedded a perception worldwide that football hooliganism was an "English disease" and defined the legal response which ensued. [3] This prompted the enactment of a legislative framework for banning troublemaking supporters from football stadiums.[4] However, the sport has continued to be tarnished by outbreaks of violence and disorder, leading to the most significant development of the legislative framework to date: the Football Banning Order (FBO).[5] This article argues that the legitimacy of FBOs is undermined by an infringement of free movement and free assembly liberties, as well as a lack of appropriate due process safeguards.

For the purposes of this article, the legitimacy of FBO legislation is critically assessed using a bespoke framework for normative analysis. Legitimacy is a broad legal concept, making it important to define how it will be understood and applied for the purposes of this article.

The primary criterion for analysing legitimacy will be the extent of compliance with the liberal concept of 'civil liberties'. This requires assessing a law's impact on fundamental individual rights.[6] Occasionally, this will include consideration of specific protected rights under the Human Rights Act 1998;[7] however, the criterion is more concerned with the broader concept of 'civil liberties', particularly in relation to the extent of state interference with the freedoms of its citizens.[8]

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[1] Geoffrey Pearson, *Hooligan: A History of Respectable Fears* (Macmillan 1983) 64.
[2] Clifford Stott and Geoff Pearson, *Football 'Hooliganism', Policing and the War on the 'English Disease'* (Pennant 2007) 15.
[3] Matt Hopkins and James Treadwell, *Football Hooliganism, Fan Behaviour and Crime: Contemporary Issues* (Palgrave Macmillan 2014) 14 and 25
[4] Arabella Thorp and Graham Vidler, *The Draft Football (Disorder) Bill* (House of Commons Library Research Paper 00/70, 13 July 2000) 8.
[5] Mark James and Geoff Pearson, 'Football Banning Orders: Analysing Their Use in Court' (2006) 70 Journal of Criminal Law 509, 510; Geoff Pearson, 'A Cure Worse than the Disease? Reflections on *Gough and Smith* v. *Chief Constable of Derbyshire*' (2002) 1 Entertainment Law 92, 94.
[6] John Rawls, 'The Law of Peoples' (1993) 20 Critical Inquiry 36, 59.
[7] Human Rights Act 1998, sch 1.
[8] Helen Fenwick, *Civil Liberties & Human Rights* (4th edn, Cavendish 2007) 6 and 7; Howard Davis, *Human Rights and Civil Liberties* (Taylor & Francis 2013) 3.

The 'civil liberties' criterion will be supplemented by two further sources of legitimacy: 'effectiveness' and 'perceived legitimacy'. 'Effectiveness' requires an evaluation of whether the legislation meets its objectives. Here, this entails considering whether FBOs successfully prevent football-related disorder, thus facilitating an empirical analysis of the legislation's practical effect. It is important to note that, whilst 'effectiveness' will be an important criterion when discussing whether the civil liberties infringements are justifiable, it cannot itself be a primary source of legitimacy. To do so would be to adopt an 'ends justify the means' approach, which would be contrary to the core liberal principle of procedural fairness.[9]

'Perceived legitimacy' is a further secondary source of legitimacy under this bespoke framework. Adopting a Tylerian empirical approach, legitimacy can be derived from the perception that a procedure is fair, or that its outcome is desirable.[10] Therefore, just as legitimacy can be partially derived from evidence as to the efficacy of FBOs, legitimacy can also be derived from the perception that FBOs are effective. As with 'effectiveness', it would be undesirable to place 'perceived legitimacy' at the forefront of the legitimacy framework. The exercise of state power through legislation may be perceived to be legitimate, whilst simultaneously undermining the 'civil liberties' criterion.[11] Therefore, the bespoke legitimacy framework of this article will prioritise the implications of FBOs for 'civil liberties', but analysis will be supplemented by considerations of 'effectiveness' and 'perceived legitimacy'.

This article takes the form of three substantive sections: 1) the FBO framework; 2) a legitimacy analysis; and 3) a ranked programme of reform.

2. What are FBOs and How Do They Work?

[9] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 87.
[10] Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime and Justice 283, 294.
[11] Mike Hough and others, 'Procedural Justice, Trust, and Institutional Legitimacy' (2010) 4 Policing 203, 204. See also Peter Whelan, *Parental Liability in EU Competition Law: A Legitimacy-Focused Approach* (OUP 2023) 38.

This Section identifies the central challenges to the legitimacy of the existing FBO framework: free movement, free assembly and due process. Section 1.1 considers the objective of introducing and amending FBO legislation, before the statutory framework for imposing an FBO is explained in Section 1.2. This is complemented by discussion, in Section 1.3, of the wide-ranging effects of an FBO. Section 1.4 engages with the judicial interpretation of FBO legislation, in relation to its compatibility with the Human Rights Act 1998. Finally, Section 1.5 seeks to position the issue of FBOs within broader concerns as to 'hybrid' preventative orders imposed under procedures of civil complaint. These key issues form the themes of analysis in Section Two.

A. The Objective of Football Banning Orders

The early football-specific legislative framework was introduced and developed under the premise of a preventative objective. Exclusion orders, the initial form of the FBO, were introduced by the Public Order Act 1986, with the clear stated ambition to "exclude the troublemakers" from football stadiums.[12] This sentiment was informed by the prevalence of hooligan activity in the 1980s, which made football matches "intolerable" for supporters and brought the entire sport into "disrepute".[13] When introducing the Football Disorder Bill in 2000, the Home Secretary was keen to emphasise that the FBO is "preventative and not penal in nature";[14] the extent to which this indicative of the bill's objective, rather than a careful attempt to assure Parliament of its compliance with the European Convention on Human Rights (ECHR),[15] is not entirely clear. It is notable that the Bill underwent careful scrutiny in the House of Lords. Multiple peers cautioned that the FBO amounted to a criminal sanction, whilst some even questioned the legislation's compatibility with the

[12] HC Deb 13 January 1986, vol 89, col 799.
[13] ibid col 842.
[14] HC Deb 17 July 2000, vol 354, col 88.
[15] ECHR discussion can be found in Section 1.4.

ECHR.[16] More recently, FBOs have been championed as the "highly effective cornerstone" of a wider government strategy for preventing football-related disorder.[17] Banning order legislation has always specified a preventative objective, although parliamentary debates highlight longstanding concerns that this intention does not necessarily correlate to the potential effect of FBOs.

B. Making a Football Banning Order

An FBO is imposed, conventionally, following conviction for an offence relevant to a football match. This mechanism can be found in s 14A of the Football Spectators Act 1989 ('the 1989 Act').[18] Section 14A will apply when a "relevant offence" is committed, as defined in Schedule 1 of the 1989 Act.[19] For some relevant offences, an FBO will always be available or will always be available if the offence was committed under particular circumstances related to a football match.[20] Notable relevant offences include possession of alcohol, or a Class A drug, at a designated football match and any offence involving "the use or threat of violence" during a period relevant to a football match;[21] For other offences listed under Schedule 1, a "declaration of relevance" must be made by the courts before an FBO can be imposed.[22] This provides flexibility for prosecutors seeking to pursue FBOs for offences beyond those associated with disorder on football matchdays, such as offences of an online nature.[23]

Previously, an FBO would be imposed under s 14A if a relevant offence had been committed, and the court was satisfied that there were reasonable grounds to believe

[16] HL Deb 24 July 2000, vol 616, cols 146-148.
[17] HC Deb 12 June 2013, vol 564, col 332W.
[18] Football Spectators Act 1989, s 14A.
[19] ibid s 14(8).
[20] Crown Prosecution Service, 'Football Related Offences and Football Banning Orders' (2022) <https://www.cps.gov.uk/legal-guidance/football-related-offences-and-football-banning-orders> accessed 29 March 2026.
[21] Football Spectators Act 1989, schs 1(1)(b) and 1(1)(z); Sporting Events (Control of Alcohol etc.) Act 1985, ss 2 and 2A; Misuse of Drugs Act 1971, ss 4(3) and 5. See also Football Spectators Act 1989, sch 1(1)(c); Public Order Act 1986, ss 4, 4A and 5.
[22] Football Spectators Act 1989, s 23(5).
[23] Crown Prosecution Service (n 20). See also Online Safety Act 2023, s 181.

that an FBO would help to prevent violence or disorder at football matches.[24] However, the Police, Crime, Sentencing and Courts Act 2022 considerably increased the likelihood of a s 14A order upon conviction.[25] The court is now obligated to make an FBO where a relevant offence is committed, unless there are "particular circumstances" that would make it unjust to do so.[26] Where the court does not make an order, it must state its reasons for not doing so.[27] This has introduced a de facto presumption that a FBO is necessary for the prevention of violence or disorder, following conviction for a football-related offence.

The Football (Disorder) Act 2000 introduced the most significant reworking of the 1989 Act to date. As well as upon conviction, FBOs can now also be made upon complaint.[28]

Prosecutors can apply for an FBO under s 14B if it appears to them that the respondent has "at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere".[29] An FBO will be imposed where the court finds that this condition is met, and it is satisfied that there are "reasonable grounds" to believe that an FBO would help to prevent violence or disorder at, or in connection with, any regulated football matches.[30]

C. The Effect of a Football Banning Order

The implications of an FBO are potentially serious and wide-ranging for an individual's movement and assembly rights.[31] A person subject to an FBO is prohibited from entering any premises for the purpose of attending regulated football matches in the UK.[32] The person must report to a specified police station within five

[24] Football Spectators Act 1989, ss 14A(1) and 14A(2) (as at 1 December 2020).
[25] Police, Crime, Sentencing and Courts Act 2022, s 192(1).
[26] Football Spectators Act 1989, s 14A(2).
[27] ibid s 14A(3).
[28] ibid s 14B; Football (Disorder) Act 2000, sch 1(2).
[29] Football Spectators Act 1989, ss 14B(1) and 14B(2).
[30] ibid s 14B(4)(b).
[31] Further discussion of the implications for these civil liberties can be found at Section Two.
[32] Football Spectators Act 1989, s 14(4)(a).

days.[33] There, they will be made aware of any requirements, as determined by the Football Banning Orders Authority (FBOA), that are necessary for giving effect to the FBO, as regards matches outside the UK.[34] The person will be served a notice if the FBOA is of the view that it is "necessary or expedient" for reducing the likelihood of violence or disorder at, or in conjunction with, a match outside the UK.[35] This requires the recipient to report to a specified police station to surrender their passport, at a specified time.[36] Such a notice can only be issued during a control period in relation to a match outside the UK or an external tournament.[37] For a football competition that includes football matches outside the UK, the control period is specified in an order made by the Secretary of State.[38]

The court may impose additional requirements on the recipient of the FBO.[39] Such requirements may include the creation of a restricted area around a football ground for a period before and after a match, or prohibitions on using the railway network without the prior approval of the British Transport Police.[40] Prosecutors believe that this discretion strengthens the effectiveness of FBOs, with police able to implement restrictions that it believes would be most effective for particular persons.[41]

When imposed in addition to an immediate custodial sentence, an FBO carries a maximum duration of ten years, with a minimum of six years.[42] Orders made under s 14B previously carried a maximum duration of three years,[43] likely in recognition of the lack of any criminal conviction. However, the Violent Crime Reduction Act 2006 brought the duration of FBOs on complaint in line with s 14A orders of a non-custodial nature, with a maximum of five years, at a minimum of three.[44] A person subject to an

[33] ibid s 14E(2).
[34] ibid s 19(2).
[35] ibid s 19(2A).
[36] ibid s 19(2B); Crown Prosecution Service (n 20).
[37] Football Spectators Act 1989, s 19(2E).
[38] ibid s 14(6).
[39] ibid s 14G(1).
[40] Crown Prosecution Service (n 20).
[41] Crown Prosecution Service (n 20).
[42] Football Spectators Act 1989, s 14F(3).
[43] ibid s 14F(5) (as at 28 August 2000).
[44] Football Spectators Act 1989, ss 14F(4) and 14F(5); Violent Crime Reduction Act 2006, sch 3(6).

order may appeal to terminate their FBO after two-thirds of the period has passed.[45] When considering such an appeal, the courts must have regard to: the person's character; conduct following the imposition of the FBO; the nature of the conduct that led to that imposition; and any other relevant circumstances.[46]

A person subject to an FBO who fails to comply with any requirement imposed by the order, or a requirement following a police notice, is guilty of a criminal offence and is liable to summary conviction, punishable by imprisonment for a term not exceeding six months or an unlimited fine, or both.[47] The legitimacy of FBOs as a whole must be considered in light of these potentially severe criminal consequences.[48]

D. The Case Law

Gough and another v Chief Constable of the Derbyshire Constabulary provides the leading authority for the compatibility of FBOs in the context of the Human Rights Act 1998.[49] Mr Gough and Mr Smith received two-year FBOs when evidence was adduced describing their participation in incidents of disorder at multiple football matches.[50] In the Divisional Court, an appeal was brought by four men, inter alia, against the imposition of FBOs made under s 14A and s 14B.[51] Laws LJ, delivering the leading judgment, held that there was no violation of Article 7 of the ECHR.[52] Mr Gough and Mr Smith then appealed to the Court of Appeal, on the grounds that, inter alia, the imposition of FBOs under s 14B violated Article 6 of the Convention: the right to a fair trial.[53] The appeal was dismissed. Two key conclusions can be made from the leading

[45] Football Spectators Act 1989, s 14H(1).
[46] ibid s 14H(3).
[47] ibid s 14J(1).
[48] This forms the subject of analysis at Section Two.
[49] [2002] EWCA Civ 351, [2002] QB 1213.
[50] ibid [28]-[33].
[51] *Gough and another v Chief Constable of Derbyshire; R (on the application of Miller) v Leeds Magistrates' Court; Lilley v Director of Public Prosecutions* [2001] EWHC 554 (Admin), [2001] 3 WLR 1392.
[52] ibid [43].
[53] Human Rights Act 1998, sch 1, art 6.

judgment of Lord Phillips MR, in concordance with the approved judgment of Laws LJ. These conclusions will be discussed in turn.

The Court of Appeal endorsed the finding of Laws LJ that FBOs do not impose a "penalty" for the purposes of Article 7.[54] At first instance, Laws LJ was assisted by the judgment of Lord Phillips MR in *R (McCann) v Crown Court at Manchester*,[55] where a similar appeal was brought in relation to Anti-Social Behavioural Orders (ASBOs). In considering whether an FBO is a penalty, it is inherently "necessary to look beyond its consequence".[56] Rather, the question for the courts is whether the predominant purpose of the order is punitive, or for the protection of the public.[57] Laws LJ, answering this question, declared that "it is no part *at all* of the purpose of…[an FBO] to inflict punishment".[58] His Lordship conceded that an FBO does impose a detriment, but this does not correlate to the punitive extent of such an order.[59] The punitive effect is merely incidental to Parliament's preventative intention.[60] Problematically, the ruling avoids judging the actual severity of the restrictions imposed by an FBO, with Laws LJ dismissing the harshness on any given individual to be "largely subjective".[61]

The submission that s 14B proceedings are criminal in nature was promptly rejected by the Court of Appeal.[62] This was justified by the fact that no proof of a criminal offence is required for s 14B, but also the lack of any penalty.[63] Critically, the court determined that the standard of proof in civil proceedings is flexible, and so the magistrates' ought to "apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard".[64] It is to be applied, in s 14B

[54] *Gough* [2002] (n 49) [89].
[55] [2001] EWCA Civ 281, [2001] 4 All ER 264.
[56] *Gough* [2001] (n 51) [35].
[57] ibid [37].
[58] ibid [42].
[59] ibid.
[60] James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 513.
[61] *Gough* [2001] (n 51) [42(4)].
[62] *Gough* [2002] (n 49) [89].
[63] ibid.
[64] ibid [90].

proceedings, to the question of whether the respondent has contributed to any violence or disorder, as well as whether there are "reasonable grounds" to believe that an FBO would help to prevent such violence or disorder at future football matches.[65] FBOs imposed under s 14B, therefore, require the same standard of proof as ASBOs and sex offender orders.[66] This application of a "quasi-criminal burden of proof", as described by Pearson,[67] demonstrates greater acknowledgement of the consequences of an FBO than the judgment provided by Laws LJ in the court below. However, the ruling that s 14B proceedings are civil in character prevents the respondent from the guarantee of procedural safeguards under Article 6. The civil libertarian implications of this will be analysed in Section Two.

At face value, the Court of Appeal decision in *Gough* offers a welcome clarification of the compatibility of FBOs with the Human Rights Act 1998. By asserting the standard of proof under s 14B to be akin to that of the criminal standard, the court has improved fair trial protections under Article 6.[68] However, the research of James and Pearson exposes fundamental issues with FBOs, under s 14A and s 14B, that have continued post-*Gough*.[69] Analysing the use of FBOs by the lower courts, it is clear that the standard of proof set out by Lord Phillips MR has not been "rigorously applied".[70] There are also concerns regarding the quality of evidence being relied upon when FBOs are imposed, as well as a lack of consideration being accorded to the second limb of the test for a s 14B order upon complaint.[71] This lies within the context of FBOs as a preventative order that has a significant effect on the ability of football supporters to associate with one another. Therefore, although the decision in *Gough* was initially welcomed, it must be considered in light of revelations about its practical effect.

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[65] ibid [92].
[66] ibid [90].
[67] Pearson, 'A Cure Worse than the Disease?' (n 5) 96.
[68] ibid 100.
[69] James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 529.
[70] ibid 521.
[71] ibid 521 and 522.

E. The Issue of 'Hybrid' Orders

The issue with FBO orders upon complaint must be addressed with regard to the statute and case law discussed. Parliament has created a 'hybrid' order under s 14B, whereby a civil court order is used to target criminal behaviour.[72] Hopkins and Hamilton-Smith suggest that s 14B is symptomatic of a "paradigm shift" towards increased use of preventative measures, designed to mitigate risks, notwithstanding the absence of any criminal procedure.[73] Consequently, there is a danger that s 14B becomes a means for prosecutors to circumvent pursuing the requisite criminal conviction for an FBO under s 14A.[74] This, however, is not unique to FBOs: there are concerns that hybrid procedures, as a whole, are becoming a means of criminalisation "by the back door".[75] From this perspective, hybrid preventative orders will provide a useful avenue with which to critically analyse the civil libertarian implications of FBOs in in Section Two.

FBOs have been created with a deliberately sweeping remit, granting authorities the power to address a wide variety of offences and misbehaviours relevant to football matches. FBOs have always had a preventative purpose; this was, understandably, later acknowledged by the courts in *Gough*. However, the effect of FBOs also impose a heavy detriment. The implications for a recipient's freedom to travel, within or across borders, and freedom to assemble with others is infringed, to a potentially large extent. The contentiousness of these issues is exacerbated by concerns about the implications of 'hybrid' orders upon complaint, namely whether it provides the authorities with a means of circumventing a criminal conviction, to impose an FBO

[72] Jennifer Hendry and Colin King, 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2017) 11 Criminal Law and Philosophy 733.
[73] Matt Hopkins and Niall Hamilton-Smith, 'Football Banning Orders: The Highly Effective Cornerstone of a Preventative Strategy?' in Matt Hopkins and James Treadwell (eds), *Football Hooliganism, Fan Behaviour and Crime: Contemporary Issues* (Palgrave Macmillan 2014).
[74] Pearson, 'A Cure Worse than the Disease?' (n 5) 96.
[75] George Lubega and others, 'Lowering the Standard: A Review of Behavioural Control Orders in England & Wales' (JUSTICE, 2023) 42 <https://files.justice.org.uk/wpcontent/uploads/2023/11/06143241/Lowering-the-Standard-a-review-of-Behavioural-Control-Orders-inEngland-and-Wales-September-2023.pdf> accessed 30 January 2025.

with an indistinguishable effect. These civil liberties concerns provide the key themes for critical analysis in Section Two, with particular regard to the proportionality of the infringements identified.

3. *Are Football Banning Orders Legitimate?*

The current implications of FBOs for civil liberties are not satisfactory. This Section supports the legitimacy framework analysis of FBOs under three central themes: free movement, free assembly and due process. This will be achieved through reliance upon the bespoke legitimacy framework set out in the Introduction: primary adherence to 'civil liberties', but supported by 'effectiveness' and 'perceived legitimacy'.[76] Section 2.1 critiques the proportionality of FBO travel restrictions, both in relation to international matches and domestic movement conditions, before considering the effectiveness of the legislation. Subsequently, Section 2.2 considers the implications of police surveillance for free assembly liberties, before evaluating the manner in which football is a specific target of public order legislation and whether FBOs benefit from a form of 'perceived legitimacy'. Finally, Section 2.3 draws upon the worrying trends identified in sections 2.1 and 2.2 to criticise the lack of due process safeguards afforded to respondents in s 14B proceedings, with regard to broader concerns as to the legitimacy of civil-criminal hybrid provisions. In doing so, this Section provides the substantive basis for analysis of reforms.

A. Free Movement

The prohibition of international travel, during an FBO control period, is indicative of a significant infringement upon the individual liberty to move freely. Requiring an FBO recipient to surrender their passport is an example of the state exercising the power to restrict its citizens from moving beyond its borders, for the purpose of

[76] Text to n 10.

preventing crime.[77] However, to analyse whether this restriction is proportional to its preventative aim first requires understanding the modern football context. The introduction of new tournaments, and expansions of existing ones, has led to a significant rise in the frequency of football matches, both domestically and internationally.[78] For Pearson, the implications are abundantly clear: an FBO is activated for approximately ten times as many matches as was initially anticipated in 2000,[79] thus infringing upon the recipient's liberties at a far greater frequency. By excluding the recipient from certain areas, there is a denial of moral agency, irrespective of what choices the recipient would have made within that given space.[80] Under existing plans to expand the FIFA World Cup,[81] and potentially even increase its frequency,[82] the trend identified by Pearson is set to continue further. The provision for travel exemptions, where the recipient has "special circumstances" to justify such an exemption,[83] arguably acts a check against this growing infringement. However, such provisions have not been bolstered by Parliament, nor the courts, in parallel with the increasing reach of FBOs. Whilst the FBO, in its infancy, raised concerns for imposing significant movement prohibitions, it is the unchecked trend toward greater restriction that is most alarming. FBO restrictions on international travel increasingly restrict the moral agency of recipients, thus infringing free movement liberties.

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[77] Football Spectators Act 1989, s 19(2B). For further examples, see Serious Crime Act 2007, s 5(3)(f) and Bail Act 1976, s 3(6)(b).

[78] Miguel Delaney, 'How Much Football is Too Much Football?' *The Independent* (London, 1 November 2019) 66.

[79] Mark James and Geoff Pearson, '30 Years of Hurt: The Evolution of Civil Preventive Orders, Hybrid Law, and the Emergence of the Super-Football Banning Order' (2018) 1 Public Law 44, 54.

[80] AP Simester and Andrew von Hirsch, 'Regulating Offensive Conduct Through Two-Step Prohibitions' in
AP Simester and Andrew von Hirsch (eds), *Incivilities: Regulating Offensive Behaviour* (Bloomsbury Publishing 2006) 186. See also Antony Duff, 'Perversions and Subversions of the Criminal Law' in Antony Duff and others (eds), *The Boundaries of the Criminal Law* (OUP 2010) 100.

[81] Matt Lawton, 'Fifa Faces Legal Action Over Expansion of World Cup' *The Times* (London, 15 October 2024) 57.

[82] Paul MacInnes, 'Fifa Floats Idea of Men's World Cup Finals Tournament Every Three Years' *The Guardian* (London, 20 December 2022) <https://www.theguardian.com/football/2022/dec/20/fifa-floatidea-of-mens-world-cup-finals-every-three-years> accessed 29 March 2026.

[83] Football Spectators Act 1989, s 20.

Whilst the frequency of FBO activations has expanded, the conditions attached to such orders have not been accommodating of the trend. Analysis of their use in court has identified a longstanding lack of individual consideration for the appropriate duration and conditions of an FBO.[84] This aligns with broader concerns regarding hybrid orders, specifically whether there is fair imputation of conditions with the activity that actually led to those conditions being imposed.[85] This presents a conceptual challenge to the position that FBOs are, by design, proportional measures. Attaching generic conditions to orders would appear to undermine the stated objective for FBOs to act as a purely preventative measure.[86] Furthermore, the judgment of Lord Phillips MR in *Gough* emphasised the role of the FBOA in providing the "individual consideration" afforded to FBO conditions, yet it is clear that this is not consistently delivered.[87] The use of formulaic restrictive measures can even be counter-productive;[88] research of Anti-Social Behaviour Orders (ASBOs) demonstrates that broad and untargeted prohibitions have the potential effect of making compliance unnecessarily difficult, and therefore less likely.[89] Thus, recipients are more likely to be brought under the remit of the criminal law, as a result of FBO conditions that are often a dubious reflection of past actions. Given the frequency of modern football, it is vital for FBOs to adapt to the context in which they hold effect, in order to remain a proportionate response to the objective of preventing football disorder. Instead, the infringements upon free movement have gone unchecked, thus damaging the legitimacy of FBOs in the process.

Despite these ranging criticisms, legitimacy can still derive from the effectiveness of FBOs in preventing disorder at football matches. The prevailing view among Football Intelligence Officers (FIOs) is that FBOs have been largely responsible for the declining

[84] James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 526.
[85] Simester and von Hirsch (n 80) 182.
[86] James and Pearson, '30 Years of Hurt' (n 79) 53.
[87] *Gough* [2002] (n 49) [70]-[74]. For more discussion of the case, go to Section 1.4.
[88] Simon Hoffman and Stuart Macdonald, 'Should ASBOs be Civilized?' (2010) Criminal Law Review 457, 465.
[89] Aikta-Reena Solanki and others, *Anti-Social Behaviour Orders* (Youth Justice Board for England and Wales, 2006) 141.

prevalence of football hooliganism.[90] FIOs from all seven areas of Hopkins' study suggested that FBOs offer a specific deterrence function, particularly when leaders of hooligan organisations, or "firms", are the target of FBOs.[91] However, it is important to note that organised hooliganism is not uniquely responsible for the disorder that can result in an FBO being imposed, as evidenced by the events surrounding the Euro 2020 final held at Wembley Stadium.[92] The Home Office has previously gone as far as to suggest that, in 92 per cent of cases, the recipient of an FBO "no longer pose[s] a risk" by the time the order has expired;[93] it has been observed that no explanation to justify this figure was actually provided.[94] Whilst arrest figures are "notoriously unreliable" indicators of public disorder at crowd events,[95] an overall decline in football-related incidents does appear to have taken place.[96] More thorough research of the particular impact of FBOs on football-related disorder is needed before reaching an assured conclusion, in view of the role that FBOs possess within a broader public order strategy. It would be pre-emptive, therefore, to declare that the effectiveness of FBOs is such as to bolster their legitimacy, particularly given the growing infringement upon free movement liberties.

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[90] David Stead and Joel Rookwood, 'Responding to Football Disorder, Policing the British Football Fan' (2007) 1 Journal of Qualitative Research in Sports Studies 33, 36.

[91] Matt Hopkins, 'Ten Seasons of the Football Banning Order: Police Officer Narratives on the Operation of Banning Orders and the Impact on the Behaviour of 'Risk Supporters'' (2014) 24 Policing and Society 285, 295.

[92] The Baroness Casey of Blackstock DBE CB, 'The Baroness Casey Review: An Independent Review of
Events Surrounding the UEFA Euro 2020 Final 'Euro Sunday' at Wembley' (2021) <https://democracy.brent.gov.uk/documents/s128049/Background%20Reading%201%20-%20Independent%20Review%20of%20events%20surrounding%20the%20UEFA%20Euro%202020%20Fi nal%20at%20Wembley.pdf> accessed 1 March 2026.

[93] Home Office, 'Statistics on Football-Related Arrests & Banning Orders' (2011) 2 <https://assets.publishing.service.gov.uk/media/5a7ad1f9ed915d670dd7ecb0/fbo-2010-11.pdf> accessed 29 March 2026.

[94] Hopkins, 'Ten Seasons of the Football Banning Order' (n 91) 294.

[95] Clifford Stott and others, 'Tackling Football Hooliganism: A Quantitative Study of Public Order, Policing and Crowd Psychology' (2008) 14 Psychology, Public Policy, and Law 115, 118.

[96] Ashley Jane Lowerson, 'Football Spectatorship: Are the Home Office Statistics a Reliable Indicator for
Measuring Football-Related Violence & Disorder?' (2023) 87 Journal of Criminal Law 386, 405. See also Clifford Stott and Geoff Pearson, 'Football Banning Orders, Proportionality, and Public Order Policing' (2006) 45 The Howard Journal of Criminal Justice 241, 242.

B. Free Assembly

S. 14B proceedings pose a particular challenge to free assembly rights, due to the potential for FBOs to be imposed against respondents following their association with known troublemakers. FIOs have developed a practice of compiling "profiles" of potential risk supporters.[97] In many instances, being in close proximity to football-related disorder, and association with known risk supporters, has been sufficient for opening new police profiles.[98] This, in itself, would appear to be a standard police practice, posing little objectionable threat to free assembly rights. However, the real-world application of this information by the courts is a concern. James and Pearson document an over-reliance by the courts upon poor-quality, often circumstantial, evidence by the Magistrates' Courts.[99] It was found that FBO applications often involve listing occasions in which the respondent has been known to associate with 'risk supporters' or in disorderly groups, even where there was no evidence of the respondent's actual involvement.[100] This was pertinent in *Gough*, where the appellate courts offered no indication that the a specific offence had been committed by the appellants,[101] yet were keen to draw attention to their association with "prominent" football hooligans.[102] By raising the question of why Mr Gough and Mr Smith were not charged with criminal offences, a concerning response emerges: s 14B enables the relevant authorities to circumvent the evidential difficulties of securing a criminal conviction.[103] The football supporter experience, by its very nature, holds mass congregation at its absolute core. Thus, by exposing supporters to the possibility of "guilt by association,"[104] there is an abundant *prima facie* breach of their right to freely assemble with others. It is therefore necessary to next consider whether this is a proportional response.

[97] James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 512.
[98] Hopkins, 'Ten Seasons of the Football Banning Order' (n 91) 291.
[99] James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 523.
[100] ibid 524.
[101] Geoff Pearson, 'A Cure Worse than the Disease?' (n 5) 96.
[102] *Gough* (n 49) [30].
[103] Pearson, 'A Cure Worse than the Disease?' (n 5) 96.
[104] James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 521 and 522.

In considering whether the infringement upon free assembly is proportional, it is useful to analyse whether the specific targeting of football disorder is justified. Many commentators have sought to criticise the 1989 Act for responding to a loose and ill-defined conceptualisation of the 'football hooligan';[105] Russell criticises FBOs for over-reacting to the issue of football disorder altogether, given how hooligans have always made up only a fraction of all supporters.[106] However, this line of critique fails to comprehend the football experience, where only a minute number of troublemakers can be responsible for generating an atmosphere of fear. Football continues to be responsible for the majority of high-profile disorder at sporting events.[107] The Baroness Casey Review, commissioned following the disturbances at the Euro 2020 final, conveys this analysis to the modern context: FBOs are a necessary tool in the response to football-related disorder.[108] Those events of June 2021 should stifle any view that disorder is a threat of the past. It is right to acknowledge that the difference between fans and hooligans has often been wilfully ignored, by policymakers and in public discourse,[109] but the law holds a duty to protect the liberties of the average, peaceful football supporter. As such, whilst the specific targeting of football supporters is revealing, that does not equate to it being an illegitimate policy pursuit. Therefore, the criticisms of FBOs, as analysed by this article, should not detract from the clear need for legislation that responds to football-specific issues.

Despite the interference with the freedom of football fans to associate with others, the law on FBOs may still derive legitimacy from a perception that it provides an effective response to disorder. Perceptions are particularly relevant for analysing free assembly, as a wide range of stakeholders are impacted by the legal response, in contrast to the themes of free movement and due process, which bear a more specific effect upon FBO recipients themselves. 89 per cent of supporters report a decrease in

[105] David McArdle, Football Society & The Law (Routledge-Cavendish 2013) ch 4 <https://www.perlego.com/book/1556885> accessed 3 March 2025. See also Geoff Pearson, 'Legitimate Targets? The Civil Liberties of Football Fans' (1999) 4 Journal of Civil Liberties 28, 30.
[106] Dave Russell, *Football and the English: A Social History of Association Football in England, 18631995* (Carnegie Publishing 1997) 62.
[107] Culture, Media and Sport Committee, *Safety at Major Sporting Events* (HC 2023-24, 174-I) para 9.
[108] Baroness Casey (n 92) 15.
[109] Pearson, 'Legitimate Targets?' (n 105) 29 and 30.

violence since the 1980s;[110] many, however, attribute this to the increased use of CCTV and better policing of crowds.[111] Cleland and Cashmore identify concerns of some fans, namely that FBOs are too severe in their effect and that the targeting of football supporters is unjustified.[112] This may suggest that many supporters perceive FBOs to be an effective deterrent but take issue with its application. It is certainly true that a gentrified culture has emerged,[113] in tandem with the expanded use of FBOs. In relation to perceptions of their effectiveness, it is notable that a number of players' unions have called for greater use of FBOs to counter growing concerns from players about their safety on the pitch.[114] This would suggest that FBOs are regarded as a legitimate public order response to the issue of disorder on football matchdays.

It may be possible to extrapolate a similar perception among supporters in relation to the increased prevalence of cocaine at football matches. 47% of respondents to the Casey Review reported seeing the use of illegal drugs upon arrival at the Euro 2020 final.[115] This has obvious repercussions for the likelihood of violence or disorder,[116] leading to the introduction of Class A drug offences to the list of "relevant offences" for the purposes of s 14A.[117] A perceived legitimacy of FBOs, therefore, may also derive from the legislation's ability to adapt to changing concerns of stakeholders. There is a general acceptance of the need for targeted response to football disorder, reinforced by perceptions of declining violence at matchdays and the role of FBOs as a response mechanism. The free assembly critique should centre upon s 14B measures,

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[110] Jamie Cleland and Ellis Cashmore, 'Football Fans' Views of Violence in British Football: Evidence of a Sanitized and Gentrified Culture' (2016) 40 Journal of Sport and Social Issues 124, 129.
[111] ibid.
[112] ibid 138.
[113] Jamie Cleland, *A Sociology of Football in a Global Context* (Routledge 2015) 38.
[114] FIFPRO, 'Men's Workplace Safety Report: The Impact of Violence Towards Footballers in Their Workplace' (2023) 37 <https://fifpro.org/media/equii03m/fifpro_workplace-safety-report-2023_final_light.pdf> accessed 13 March 2026. See also Paul MacInnes, 'Male Footballers Concerned for Safety Amid 'Violent and Abusive' Fan Culture' *The Guardian* (London 11 January 2024) <https://www.theguardian.com/football/2024/jan/11/male-footballers-concerned-for-safety-amid-violentand-abusive-fan-culture> accessed 12 March 2026.
[115] Baroness Casey (n 92) 26. See also Culture, Media and Sport Committee (n 107) paras 55 and 57.
[116] ibid.
[117] Football Spectators Act 1989, sch 1(1)(z); The Football Spectators (Relevant Offences) Regulations 2022, SI 2022/1168, reg 2.

given the potential to impose FBOs using circumstantial evidence of association with known troublemakers.

C. Due Process

With regard to the proportionality concerns raised in relation to free movement and free assembly rights, it is vital to consider whether s 14B affords the criminal safeguards protected by Article 6 of the ECHR. The European Court of Human Rights, in *Engel v Netherlands*, held that "criminal charge", for the purpose of Article 6, has an autonomous definition under the Convention, with the courts required to evaluate the substance of proceedings, rather than form.[118] It is now well-established that the severity of the sanction is a particularly important criterion when the court has to consider whether proceedings are criminal in nature.[119] However, the domestic courts have appeared to stray from this authority. Whilst acknowledging the "serious restraint on freedoms" imposed, the Court of Appeal in *Gough* paid little regard to the punitive elements of FBOs, instead opting to focus upon its preventative purpose.[120] The notion that FBOs are purely preventative has become increasingly outdated, rendering it difficult to escape the view that the labelling of s 14B proceedings as civil in nature has moved the 1989 Act perilously closer to conflicting with the "anti-subversion doctrine" set out in *Engel*.[121] It is therefore doubtful whether *Gough* did indeed apply the relevant case law appropriately, particularly given the significant consequences the decision has had on the criminal safeguards afforded under Article 6.

However, the elevated standard of proof, set out in *Gough*, does not provide a satisfactory safeguard for due process. The protections, whether viewed through the lens of Article 6 or broader civil libertarian notions of due process, ought to form a

[118] *Engel* v *Netherlands* [1978] 1 EHRR 647, para [81].
[119] ibid, para [82]; *Garyfallou A.E.B.E.* v *Greece* [1999] 28 EHRR 344, para [33]; Andrew Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 Law Quarterly Review 263, 276.
[120] *Gough* (n 49) [90]. For more discussion of the case, text to n 55.
[121] *Engel* (n 118).

coherent obstacle to potential abuses of power. This is particularly pertinent given the gravity of potential infringements of liberty upon breach.[128] *McCann*, and later *Gough*, softened the edges of due process concerns regarding hybrid preventative orders.[122] At the time, Pearson offered a cautiously optimistic response to the ruling, suggesting that *Gough* brought FBO proceedings closer in line with the UK's ECHR commitments.[123] However, the failure to implement *Gough*, in the lower courts, may have contributed to a reverse effect. James and Pearson's later research strongly indicates that the courts have not followed *Gough* in practice,[124] as has been discussed above in relation to individual consideration of FBO conditions, yet infringements upon free movement have expanded.[125] This raises the question of whether it is correct for the courts to be prioritising the protection of some criminal safeguards, at the expense of others. The Commissioner of the Council of Europe has condemned the use of untested hearsay, when applying a criminal standard of proof.[126] In the case of ASBOs, the admissibility of hearsay was justified on the basis of potential witness intimidation within communities.[127] However, it is difficult to conceive of a similar threat being posed in relation to football supporters. Equally, later reforms have demonstrated that exceptions to hearsay can indeed be accommodated by the criminal courts.[128] This rebukes the notion of a binary distinction between the evidential safeguards in the criminal and civil courts, with s 14B FBOs now imposed by a procedure that lies between the "civil and criminal paradigms".[129] Consequently, s 14B sits in a self-perpetuating limbo, requiring a criminal standard of proof and de facto criminal activity, but without the evidential safeguards afforded by the criminal courts. Therefore, there are strong normative arguments in favour of due process safeguards that are more thorough in their protection of civil liberties, in contrast to

[122] Ashworth, 'Social Control and "Anti-Social Behaviour"' (n 119) 268.
[123] Pearson, 'A Cure Worse than the Disease?' (n 5) 100.
[124] James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 529.
[125] See Section 2.1.
[126] Office of the Commissioner for Human Rights, 'Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, On His Visit to the United Kingdom (4-12 November 2004)' (CommDH(2005)6, Council of Europe 8 June 2005) para 115.
[127] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (1st edn, OUP 2014) 80.
[128] Criminal Justice Act 2003, s 116(2)(e); Stuart Macdonald, 'ASBOs and Control Orders: Two Recurring Themes, Two Apparent Contradictions' (2007) 60 Parliamentary Affairs 601, 617.
[129] Ashworth, 'Social Control and "Anti-Social Behaviour"' (n 119) 276.

the existing compromise that continues to prioritise the standard of proof over other liberties.

The criticisms of FBOs can be developed by a broader discussion of hybrid preventative measures, in particular whether there are political motivations behind the disregard for due process safeguards. Through a systems theory analysis, Hendry conceptualises the "privileging of expediency" in relation to hybrid orders, reinforcing the view that the application of FBOs is somewhat assisted by political undercurrents.[130] This resonates with a growing sense that the criminal justice system poses barriers to "swift and effective" outcomes,[131] with Dershowitz going as far as to suggest that the liberal criminal justice model, with its wide array of safeguards, is a victim of its own success.[132] Due process, as a result, has been held up as an obstacle to the prevention of crime;[133] its traditional value has become a legal luxury, rather than a well-protected civil liberty.[134] That is not to argue that hybrid orders do not provide a useful tool for criminal justice; even strong critics would concede as much.[135] Hybrid preventative orders provide a swift mechanism of intervention, which is particularly useful where the risk of repeated action is high, such is the case with football-related disorder. However, the criticism stems from the position that legislation, such as s 14B, are a deliberate means of circumventing due process protections, thus avoiding the securing of a criminal conviction and the subsequent mandatory s 14A FBO.[136] Therefore, a more holistic analysis of FBOs strongly indicates that the significance of due process rights has been deflated, in order to subvert the

[130] Jennifer Hendry and Colin King, 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2017) 11 Criminal Law and Philosophy 733, 734.
[131] Ashworth, 'Social Control and "Anti-Social Behaviour"' (n 119) 273.
[132] Alan M. Dershowitz, *Preemption: A Knife That Cuts Both Ways* (Norton 2007) 40; Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' 60 Current Legal Problems 174, 201.
[133] Ashworth and Zedner, *Preventive Justice* (n 127) 79.
[134] Lucia Zedner, *Security* (Routledge 2009) 80. See also Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh University Press 2005) 34 and 35.
[135] See James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 529.
[136] Pearson, 'A Cure Worse than the Disease?' (n 5) 96.

need for a conviction through the criminal courts. This oversight of civil liberties provides further weight to the view that the legitimacy of FBOs has been undermined.

Analysis of the interrelated themes of free movement, free assembly and due process demonstrates that the existing civil liberty implications of FBOs are not satisfactory. Article 6 protections have been subverted by the use of the s 14B procedure, resulting in a compromise that undermines the civil libertarian notion of due process. A significant encroachment has taken place in the time since FBOs were re-engineered in 2000, to the extent that the restrictions on movement cannot be deemed proportional to, or a fair imputation of, the risk that the conditions seek to prevent. Concerns as to free assembly, in relation to association with known troublemakers, are also justifiable. Both themes of analysis contribute to the strong criticism of infringements upon due process safeguards. Although it remains difficult to establish the specific effectiveness of FBOs on reducing disorder, FBOs retain a degree of legitimacy from stakeholder perceptions. Section Three is therefore informed by the threats to civil liberties identified in this Section, but also the need to maintain a perception of legitimacy.

4. *How Should FBO Legislation be Reformed?*

This Section analyses three potential areas for reform: FBO conditions, football identity cards and the s 14B procedure. Table 1 (below) illustrates how these reforms correspond to the themes of analysis in Section Two, as well as the bespoke legitimacy framework utilised throughout this article. Section 3.1 considers how to ensure fairer imputation of FBO conditions, providing concrete reforms to how the terms and duration of an order are imposed by the courts. Subsequently, Section 3.2 revisits the potential for a football identity card scheme, as originally proposed by the Football Spectators Act 1989.[137] Finally, Section 3.3 analyses the implications of repealing s 14B, before proposing alternative reforms to the procedure that would strengthen due

[137] Football Spectators Act 1989, ss 4 and 5 (as enacted).

process protections. It is recommended that official guidelines for the imposition of FBOs are introduced, supplemented by the establishment of a specialist tribunal body and stronger evidential safeguards for the s 14B procedure.

<table>
<tr><th>Proposed Area of Reform</th><th>Theme of Analysis</th><th colspan="2">Legitimacy Framework</th></tr>
<tr><td>3.1 FBO Conditions</td><td>2.1 Free Movement</td><td rowspan="3">Legitimacy</td><td rowspan="3">Civil Liberties

Effectiveness

Perceived Legitimacy</td></tr>
<tr><td>3.2 Integrated Identity Card Scheme</td><td>2.2 Free Assembly</td></tr>
<tr><td>3.3 s 14B Procedure</td><td>2.3 Due Process</td></tr>
</table>

Table 1. Please note that each proposed reform is not exclusive with its aligned theme of analysis. This table seeks to illustrate how the proposals broadly correlate with the conclusions of Section Two.

A. Football Banning Order Conditions

To improve generic conditions of restriction upon free movement, FBOs must be representative of the misbehaviour that preceded them. The courts, where it "thinks fit", retains the discretion to impose additional requirements for an FBO;[138] a useful starting point would be to consider how this discretion could be better applied in practice. A case-by-case approach to the most stringent free movement restrictions

[138] Football Spectators Act 1989, s 14G(1).

would be welcomed: in Germany, an individualised risk assessment is carried out before a travel ban is imposed.[139] However, that is not to suggest that foreign travel restrictions ought to necessitate a separate assessment in England and Wales. This would, in effect, signal a return to the distinct categorisation of FBOs, prior to the Football Disorder Act 2000, as either 'domestic' or 'international'.[140] Rather, it is the individualised consideration of restrictions that a reformed FBO framework should strive to emulate. This would be complemented by Pearson's proposed obligation for the courts to state the reasons, in open court, for imposing each condition of an FBO.[141] This could provide a useful check against the generic conditions that are currently being imposed.[142] Therefore, case-by-case consideration of FBOs, in conjunction with a more stringent role for the courts, would provide a useful remedy to concerns regarding fair imputation.

In addition to the conditions imposed by an FBO, it is important to reconsider the length for which the restrictions are imposed. In the case of s 14B proceedings, the minimum duration of three years, with a maximum of five years, grants the court with very limited discretion for considering individual orders.[143] Consequently, lowering the minimum duration to one year would be a welcome reform, enabling the courts to impose shorter-term measures as it thinks fit. Similarly, short-term orders are utilised in the Netherlands, as part of a more preventative approach to disorder.[144] However, Dutch orders are designed to restrict stadium access for people "merely

[139] Marco Noli, 'Legal Measures and Strategies Against Violence at Football Events in Germany' in Anastassia Tsoukala, Geoff Pearson and Peter T.M. Coenen (eds), *Legal Responses to Football "Hooliganism" in Europe* (ASSER International Sports Law Series, Springer 2016) 71.
[140] Matt Hopkins and Niall Hamilton-Smith, 'Football Banning Orders: The Highly Effective Cornerstone of a Preventative Strategy?' in Matt Hopkins and James Treadwell (eds), *Football Hooliganism, Fan Behaviour and Crime: Contemporary Issues* (Palgrave Macmillan 2014) 236.
[141] Mark James and Geoff Pearson, '30 Years of Hurt: The Evolution of Civil Preventive Orders, Hybrid Law, and the Emergence of the Super-Football Banning Order' (2018) 1 Public Law 44, 61.
[142] For analysis of FBO conditions, see Section 2.1.
[143] Football Spectators Act 1989, s 14F(5).
[144] Peter T.M. Coenen, 'The Proposed Dutch Football Law and Lessons Learned From the English Approach to Spectator Violence Associated with Football' (2009) 1 International Journal of Sport Policy and Politics 285, 301.

suspected" of involvement in disorder.[145] There are also concerns that the short-term duration of such an order undermine its ability to contain disruption.[146] A more flexible range of one to five years, for s 14B orders, would enable the FBO to retain its ability to respond to serious disorder, whilst providing the courts with greater discretion. It would also be beneficial to make termination available sooner. Similar reforms to ASBOs have been suggested in the past, as a means of reducing breaches.[147] The opportunity to annul the FBO after, for example, serving half the order peaceably could provide a greater incentive for compliance. In doing so, the effectiveness would be improved, mitigating the concern that existing FBOs often make compliance less likely as a result of their generic punitiveness.[148] As a result, wide-ranging reforms to the duration attached to FBO conditions, in conjunction with greater consideration for fair imputation, would markedly improve the proportionality of movement restrictions imposed by the existing FBO framework.

Official guidelines would facilitate a more individualised approach to FBO conditions and their duration, thus mitigating against civil liberties concerns. The FBOA holds a statutory right to establish criteria for providing a notice to those subject to an FBO;[149] however, no such criteria has been produced for the benefit of the courts.[150] Official guidelines would provide the courts with a defined framework, so that certain risk behaviours can be consistently aligned with appropriate restrictions in response. Such a model could take inspiration from the framework of risk and culpability produced by the Sentencing Council.[151] Consideration of aggravating and mitigating factors, following a risk/culpability assessment,[152] would provide for greater individual

[145] Peter T.M. Coenen, 'Football-Related Disorder in the Netherlands' in Anastassia Tsoukala, Geoff Pearson and Peter T.M. Coenen (eds), *Legal Responses to Football "Hooliganism" in Europe* (ASSER International Sports Law Series, Springer 2016) 112.
[146] ibid 117.
[147] Aikta-Reena Solanki and others, *Anti-Social Behaviour Orders* (Youth Justice Board for England and Wales, 2006) 127.
[148] See Section 2.1.
[149] Football Spectators Act 1989, s 19(2D).
[150] James and Pearson, '30 Years of Hurt' (n 141) 56.
[151] Sentencing Council, 'General Guidelines' (2019) <https://www.sentencingcouncil.org.uk/overarchingguides/crown-court/item/general-guideline-overarching-principles/> accessed 6 March 2026.
[152] ibid.

consideration of FBO conditions. The perception of FBOs as a legitimate response to football-related disorder could be also bolstered,[153] provided that the guidelines take stock of supporters' views. To achieve this, a broad consultation is advisable, to include fan organisations and football clubs. This would signal publicly that the nature of FBO restrictions has been reconsidered. Therefore, official guidelines for individually assessing conditions would have considerable implications for the proportionality, and potentially the perceived legitimacy, of the FBO framework, thus improving its overall legitimacy.

B. An Integrated Identity Card Scheme

A radical, albeit controversial, reform to FBOs would be to reconsider an ID card scheme for football supporters. This was the original intention of the Football Spectators Act 1989,[154] with the then Environment Secretary declaring that it offered "the real prospect of ending football hooliganism".[155] A modern equivalent could be envisaged, whereby a digitised form of identification is held by all supporters, with an FBO triggered upon attempted access to stadiums. The Teressa del Tifoso scheme in Italy offers guidance on how such an approach could be implemented, with banning orders integrated into a club membership scheme.[156] Although it has provoked a sceptical response, the Interior Ministry has claimed that the scheme has successfully reduced violence on matchdays.[157] A similar scheme in England and Wales could improve the enforceability of FBOs and provide a deterrent against potential breaches. Equally, mandatory ID could reduce the risk of 'guilt by association' at matches,[158] as FBO recipients would be unable to gain entry to stadiums

[153] For analysis of perceived legitimacy, see Section 2.2.
[154] Football Spectators Act 1989, ss 4 and 5 (as enacted); David McArdle, *Football Society & The Law* (Routledge-Cavendish 2013) ch 4 <https://www.perlego.com/book/1556885> accessed 6 March 2026.
[155] Home Office, *The Hillsborough Stadium Disaster* (Inquiry by The Rt Hon Lord Justice Taylor, Cm 962, 1990) para 338.
[156] Arianna Sale, 'Return to 'Radio Nostalgia': Twenty Years of 'Anti-Violence' in Italian Stadia' in Anastassia Tsoukala, Geoff Pearson and Peter T.M. Coenen (eds), *Legal Responses to Football "Hooliganism" in Europe* (ASSER International Sports Law Series, Springer 2016) 30.
[157] Alberto Testa, 'The All-Seeing Eye of State Surveillance in the Italian Football (Soccer) Terraces: The Case Study of the Football Fan Card' (2018) 16 Surveillance & Society 69, 75.
[158] For discussion of "guilt by association", see Section 2.2.

and thus be prevented from assembling with other supporters. It would be pre-emptive to declare that a football ID card scheme could actually strengthen civil liberties.

An integrated ID card system also bears significant drawbacks. Football ID cards, undoubtedly, sit at the more draconian end of the anti-hooliganism measures proposed in the 1980s.[159] This aligns with general concerns regarding the civil libertarian implications of ID cards for state monitoring.[160] Conceptually, the scheme would integrate all supporters into the FBO framework. Compelling every willing football supporter to present some form of identification would be an abrupt policy shift, yet the effectiveness of such a scheme remains far from clear. The Taylor Report, commissioned following the Hillsborough disaster, raised "grave doubts" with the original membership card scheme, both in terms of its implementation and its ability to control crowds of spectators.[161] This acts as a reminder of the comparative benefits of the current framework. The existing FBO allows for conditions to be imposed beyond stadium access itself; whilst this carries proportionality concerns of its own,[162] the practical use of the mechanism cannot be ignored. Given how the ID card model would struggle to derive legitimacy from its limited effectiveness, the civil libertarian consequences cannot be justified. Existing forms of surveillance, such as the use of CCTV and fan 'profiling', are certainly preferable, due to the more limited interference in the majority of fans' matchday experiences. Therefore, the draconian implications of an integrated ID card scheme, in conjunction with doubts regarding its effectiveness, strongly indicate that the legitimacy of the FBO framework would be undermined if such a reform was ever enacted.

The integrated ID card model would also have severe consequences for the perception that FBOs are a legitimate tool. The context underpinning the *Terresa del Tifoso* scheme

[159] Hopkins and Hamilton-Smith, 'Football Banning Orders: The Highly Effective Cornerstone of a Preventative Strategy?' (n 140) 236.
[160] David Lyon, *Identifying Citizens: ID Cards as Surveillance* (Polity Press 2009) 59; HL Deb 30 April 2019, vol 797, col 858.
[161] Home Office, *The Hillsborough Stadium Disaster* (n 155) para 424.
[162] See Section 2.2.

is markedly different to that of England and Wales: Italian football continues to be plighted by the Ultras movement, which is often closely associated with mafia organisations and the extreme Right.[163] Nonetheless, the deep unpopularity of the Italian scheme, particularly regarding the "excessive profiling" of supporters, is a notable concern.[164] Although grounded in a different context, namely the crowd safety concerns of the 1980s, a similar response was provoked when membership cards were first proposed for English football.[165] It is important to recognise that the perceived legitimacy of FBOs, analysed in Section Two,[166] is not unconditional. Criticisms of the specific targeting of football were dismissed in the previous Section;[167] this would have to be re-evaluated should such a drastic reform ever take place. Indeed, it would go against the purported intention for FBOs to be "directly and solely" aimed at those who cause football-related disorder.[168] To retain a perception of legitimacy, the FBO must continue to play a minimal role in the average football supporter's experience.

C. The s 14B Procedure

One posited solution to the due process concerns, as regards FBOs, is to repeal s 14B altogether. This finds recent support among Pearson, James and Stott, all of whom can profess to be leading academics in this specific field of law.[169] Repeal would provide a simple solution to the critiques detailed in Section Two, restoring the FBO to its original position of only being available upon conviction for a relevant offence. However, more evidence as to the effectiveness of s 14B, in relation to prevention of football-related disorder, would be required before repeal could be given thorough consideration. James and Pearson's recent stance on repeal stands in considerable contrast to only a few years prior, when it was suggested that the s 14B procedure

[163] Testa (n 157) 72.
[164] Sale (n 156) 30.
[165] Geoff Pearson, 'Legitimate Targets?' (n 105) 30.
[166] See Section 2.2.
[167] ibid.
[168] Home Office, *The Hillsborough Stadium Disaster* (n 155) para 350.
[169] Geoff Pearson, Mark James and Clifford Stott, 'Response to DCMS Consultation on the Laws Regulating Football Spectators' (2022) <https://committees.parliament.uk/writtenevidence/111193/pdf/> accessed 2 April 2025 8.

could be amended to improve due process standards.[170] To propose that s 14B should be repealed, citing doubts regarding its effectiveness,[171] appears to be premature, given how the Home Office continues to draw no distinction between s 14A and s 14B applications in its annual data.[172] The efficacy of s 14B is therefore far from clear. Refocusing on securing convictions, and subsequent s 14A FBOs, could provide a greater deterrent function, whilst ensuring that criminal behaviour results in criminal consequences.[173] On the contrary, it would be more desirable to avoid criminalisation where possible, as it may actually serve to increase the likelihood of reoffending.[174] It would be useful here to draw upon the approach in Scotland, where a similar legal framework is retained but orders on complaint are "hardly used at all".[175] Although not entirely influenced by due process concerns,[176] the cautious Scottish approach demonstrates an alternative means of ensuring that civil liberties are not unduly infringed by a civil FBO procedure. A restrained approach to s 14B, combined with stronger evidential safeguards, is preferable to repeal.

To strengthen the legitimacy of FBOs, as regards due process, the evidential safeguards afforded to recipients should be raised. Having analysed the shortcomings in the existing framework, and questioned the merits of repeal, it is inevitable to conclude that due process liberties must be bolstered, to be akin to that of a criminal trial. This would include, crucially, legislating to make hearsay evidence inadmissible in any FBO proceeding, subject to the exceptions specified by the Criminal Justice Act 2003.[177] The civil complaints procedure would not need to be abolished, thus enabling the authorities to retain the benefit of swift intervention under the s 14B mechanism.[178]

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[170] James and Pearson, '30 Years of Hurt' (n 141) 61.
[171] Pearson, James and Stott, 'Response to DCMS Consultation' (n 169) 7.
[172] Richard Hester, 'Assessing the UK Football Policing Unit Funding of Football Banning Orders in Times of Policing Austerity' (2021) 15 Policing: A Journal of Policy and Practice 1188, 1194.
[173] Coenen, 'Football-Related Disorder in the Netherlands' (n 145) 125.
[174] Hester (n 172) 1195.
[175] Niall Hamilton-Smith and Matt Hopkins, 'The Transfer of English Legislation to the Scottish Context: Lessons From the Implementation of the Football Banning Order in Scotland' (2013) 13 Criminology & Criminal Justice 279, 291.
[176] ibid.
[177] Criminal Justice Act 2003, s 114.
[178] See Section 2.3.

It would undesirable to shift s 14B proceedings to the criminal courts at a time of strained caseloads;[179] the advantage of s 14B as a fast procedure would be lost. The heightened standards of due process would act as a counterweight to the "de-coupling" of hybrid order proceedings,[180] ensuring that both proceedings, for application and for breach, uphold the necessary criminal safeguards. By taking these steps to protect the right to a fair trial, doubts regarding the compatibility of the 1989 Act and Article 6 ECHR would be allayed. Equally, it would provide assurance that due process protections are not being deliberately circumvented for the purpose of political expediency.[181] A broader function would also be served, signalling that the prevention of disorder need not come at the expense of traditional liberal notions of criminal justice. Therefore, improving the evidential safeguards in civil s 14B proceedings would reveal multifaceted benefits for due process protections, whilst still retaining the scope for swift FBO applications.

Wholescale reform to the FBO procedure could take the form of a specialist tribunal court. The s 14B application procedure would be identical to that proposed for the civil courts in the previous paragraph: greater individual consideration for FBO conditions and heightened due process safeguards. The significant advantage would take the form of specialist knowledge of the 1989 Act, in contrast to the lay magistrates criticised by James and Pearson.[182] A specialist tribunal would develop experience from its focus upon FBO hearings, thus making it well-placed to implement the individual consideration reforms discussed in Section 3.1. Following conviction for a relevant offence in the criminal courts, s 14A FBO proceedings could also be heard by the tribunal. Consequently, the effectiveness of the FBO would benefit from a more expert means of implementation, whilst also enacting the necessary standards of due process. The obvious drawback would be the expense of creating and running such a body. It would be unrealistic to expect the tribunal to be publicly funded, given the

[179] Alastair Gray and Amy Borrett, "'Tens of Thousands of Lives on Hold': The Crisis in English Courts' *Financial Times* (London, 13 December 2024) <https://www.ft.com/content/d145cd1c-23c6-4615-aebabd10299de338> accessed 6 April 2025.
[180] Andrew Ashworth, 'Social Control and "Anti-Social Behaviour"' (n 119) 278.
[181] For discussion of the "privileging of expediency", see Hendry and King (n 130) 734.
[182] James and Pearson, 'Football Banning Orders: Analysing Their Use in Court' (n 5) 522.

current fiscal climate and lack of obvious demand for the reform.[183] However, it may be possible to draw parallels with the proposed plan to finance the new Independent Football Regulator using a levy on licensed football clubs;[184] this indicates that innovative funding models are possible, although the efficacy of the levy is yet to be realised. What can be concluded is that there are creative solutions to the shortcomings of the existing FBO framework. Establishing a specialist tribunal would come at considerable time and expense, however it is also the surest means of improving the legitimacy of FBO legislation. Therefore, the expedience and relative cost of introducing official guidelines justifies its prioritisation in the recommended reforms of this article.

Changes to s 14B proceedings, in tandem with greater individual consideration for FBO conditions, would significantly improve the legitimacy of the FBO framework. The creation of official FBO guidelines would be a welcome step towards ensuring that movement restrictions are proportional to the football-related disorder that led to the FBO initially being imposed. Holding a consultation also offers an opportunity to improve the perception that FBOs are a legitimate response mechanism. However, concerns as to perceived legitimacy provide a concrete rebuttal to the football ID card scheme proposed in Section 3.2; this is furthered by the potentially severe civil libertarian consequences. Despite claims as to its efficacy, integrating FBOs into a wholescale football ID card scheme cannot be justified due to these detailed concerns. In relation to s 14B proceedings, it would be premature to repeal the procedure altogether when evidence of its distinct effectiveness remains thin. Rather, there are two visions for reforming s 14B, both of which are worthy of merit. FBOs can continue to be imposed upon complaint in the civil courts, provided that the criminal standards of due process are implemented. Alternatively, an FBO tribunal would be able to retain the benefits of the reformed s 14B procedure, in terms of due process protections

[183] Magdalena Dominguez and Ben Zaranko, *Justice Spending in England and Wales* (Institute for Fiscal Studies, 2025) 24 <https://ifs.org.uk/sites/default/files/2025-02/Justice%20spending%20in%20England%20and%20Wales.pdf> accessed 4 April 2025.

[184] Department for Culture, Media and Sport, 'Fact Sheet - The Independent Football Regulator (IFR)' (2025) <https://www.gov.uk/government/publications/football-governance-bill-2024-supportingdocuments/fact-sheet-the-independent-football-regulator-ifr#funding> accessed 31 March 2025.

and swift intervention, whilst also fostering a specialist approach to FBOs. Although the cost of the reform would not be insignificant, the legitimacy of the FBO framework would benefit from a broad, creative approach to the existing challenges.

5. Conclusion

The legitimacy of the existing FBO legislation is not satisfactory. Application of the bespoke framework has highlighted the potentially severe civil libertarian implications of FBOs for free movement, free assembly and due process. This cannot be justified by 'effectiveness' or 'perceived legitimacy'. However, it is acknowledged that football-specific legislation continues to be a reasonable response to the dangers of violence or disorder at matches. This has facilitated the subsequent finding that it is still possible to reform the existing law to bolster its overall legitimacy.

FBO legislation was introduced and developed with a preventative purpose, but there is a disparity between this preventative purpose and the increasingly detrimental effect of FBOs for recipients' civil liberties. Free movement restrictions have intensified in the 21st century, as a result of longer and more frequent international football competitions. However, there is a clear lack of individual consideration for the conditions and duration of FBOs, thus resulting in generic orders that are not proportional to the risks posed by the recipient. In relation to free assembly, it was found that there is a risk of FBOs being imposed for association with known troublemakers. Despite these ranging concerns, Article 6 protections have been subverted by the use of the s 14B procedure, resulting in a compromise that undermines the civil libertarian notion of due process. The overall effectiveness of the FBO framework, in addressing football-related disorder, remains unclear, however it is important to acknowledge that FBOs are perceived by some stakeholders to be a legitimate preventative measure.

The recommended reforms of this article can be ranked as follows:

(1) **Create official guidelines for imposing FBOs**. This would provide assurance that conditions, and their duration, are granted the appropriate case-by-case consideration.

(2) **Establish a specialist FBO tribunal**. Such a body would be capable of upholding due process safeguards within the remit of a swift mechanism for intervention.

(3) **Strengthen the evidential safeguard provisions for the s 14B procedure**. This would address due process concerns regarding FBOs imposed upon complaint.

To What Extent are Holistic Approaches More Effective at Dealing with Female Offenders Compared with Traditional Punitive Methods?

IMOGEN RAIL*

Abstract

This paper aims to explore the extent to which holistic approaches are more effective in addressing the needs of female offenders compared to traditional punitive methods. Through a critical review of existing literature, this paper argues that punitive responses not only fail to address the root causes of female offending but often exacerbate existing vulnerabilities, having profound negative impacts on both the individual and wider society. This paper will explore the theories that aim to resolve this, exploring the divide in the literature regarding the implementation of holistic practice: one calling for holistic methods to be implemented within prisons, the other calling for their use as alternatives to incarceration. Particular attention given to trauma-informed care, gender-responsive interventions, and community-based support. Ultimately, this paper suggests that while holistic practices within prison settings offer certain benefits, holistic alternatives to imprisonment, when properly funded and effectively managed, demonstrate the greatest potential for promoting rehabilitation, reducing recidivism and diverting women from custody. As such, this paper argues for future policy should implement and fund a widespread adoption of Women's Centres whilst further research should explore female offender's experiences in modern day holistic alternatives to prison.

1. Introduction

The conditions outlined in the Time to Care report conducted by His Majesty's Inspectorate of Prisons (2025) highlight a bleak picture of rising self-harm rates, notable feelings of invisibility, unsafety and the inability to cope, and a failure of action from the Criminal Justice System (CJS) to change this. This is not a new

revelation however, as the Corston Report (2007) brought attention to this failure and articulated clear holistic recommendations for the future. Nevertheless, a decade on, a review of the report was conducted by Women in Prison, finding that 'only two of the 43 recommendations had been fully achieved, with no progress in 13' (HMIP, 2025, p.7). Furthermore, a 2021 review of the 2018 Female Offender Strategy found that 'only 31 of the 65 commitments had been fully achieved' (HMIP, 2025), with little or no information on whether the steps taken were in fact improving outcomes for incarcerated women (HMIP, 2025). With the Ministry of Justice (2024) predicting a 16% rise in the female prison population between 2023-2028, these issues are only set to intensify, with increasing numbers of women entering a system that is failing them.

A holistic approach within criminology is defined by its understanding of crime as a 'complex phenomenon that is influenced by a range of social, economic and psychological factors' (Sarraf, 2021, p.1). This is particularly applicable to females in custody as they disproportionately experience the deprivation of these factors within society. For example, common pathways for women into the CJS include early and long-term child-hood victimisation, the use of drugs to self-medicate and the involvement in bad company and abusive relationships (Van Wormer, 2010). This paper uses feminist theory literature to argue that a holistic approach should be applied to female offenders to address the root causes of their offending and support effective rehabilitation. By using this framework, this paper argues that the current punitive model of incarceration exacerbates the root causes of offending, leading women, most of whom were serving very short sentences, into a cycle of re-offending. For instance, the Bromley Briefing reports that '44% of women leaving prisons are reconvicted within one year', 72% of which were serving a sentence of 6 months or less (Prison Reform Trust, 2024, p.51). These recent findings highlight the argument that prisons are currently not providing spaces where women can rehabilitate, indicating that women are continuing to fall through the gaps of the CJS and more needs to be done to highlight the necessity for further and faster reform.

This paper also explores the divide within the literature that calls for the application of a holistic approach to female offenders. Some argue that a holistic approach can be

implemented within penal institutions, to alleviate the pains experienced by women during incarceration and to promote rehabilitation, whilst maintaining security and safety (De Cou; 2002, Kubiak; 2004, Ferguson;2024 and Stevens; 2015). Conversely, other key scholars argue that prisons create an environment where the implementation of holistic treatment is incompatible, as control and security will always be prioritised within these institutions (Corston, 2007, Armstrong and Malloch, 2024 and McIvor, 2022). Therefore, this paper aims to explore whether holistic approaches to engaging with women, whether through integrated implementation within prisons or as complete alternatives to incarceration, result in better outcomes for women and, by extension, society, compared to traditional punitive methods. This research fills a gap not addressed by the Time to Care report, despite its significant findings.

To achieve this, the paper conducts a critical literature review and subsequent comparative analysis of traditional punitive and holistic approaches to female offending. Drawing on academic research, government reports, and third-sector evaluations, this paper assesses the effectiveness of each model in addressing the complex needs of women in the CJS. Effectiveness is evaluated through criteria such as recidivism rates, trauma recovery, wellbeing and reintegration outcomes. Relevant academic literature was collected using specific library searches, using key words and phrases such as 'holistic', 'punitive' and 'females in custody', and citation searching to trace the development of ideas and build a comprehensive and interconnected understanding of the topic. This large body of literature was then stored and organised thematically in a table, to be easily and critically analysed.

The overall structure of this paper comprises three main sections. Following this introduction, section one draws on literature to explore the current punitive method of incarceration and the effect it has on incarcerated women, highlighting the need for further research into methods of dealing with this population. Section two begins by introducing and explaining the emergence of calls for holistic methods, exploring their origins and development. It then breaks down the key themes, examining separately the call for holistic implementations within prisons, and the call for holistic

alternatives to incarceration. Finally, section three, consolidates the research to examine and evaluate key examples of both forms of holistic approaches in practice. Ultimately, this paper argues that holistic approaches are more effective than punitive models in addressing female offending as they recognise the complex and intersecting needs of female offenders, offering some degree of relief and support. It concludes that holistic alternatives to prison, when specifically, and effectively implemented, hold the greatest potential to produce the most positive outcomes for women and society.

2. *The Punitive Model of Incarceration and its Outcomes for Women.*

This section examines the current punitive model of incarceration and the reality of the outcomes it has on female offenders. It begins by introducing the theoretical background of punitive punishment towards women, highlighting the ideologies behind it and how they relate to them. Through thematic analysis of the literature, it finds there are emerging issues the model seems to exacerbate, including sentencing issues, the over-criminalisation of the vulnerable, re-traumatisation, mental health, and separation and isolation from family. These are then explored in relation to the detrimental impact on society, not just the individual, as the explored vulnerabilities go untreated and, in some cases, intensify. Ultimately, this section concludes that it is essential to examine and compare this approach and its outcomes with holistic approaches to establish the most effective way to ensure rehabilitation and resettlement without leading to recidivism.

A. Historical Context of Punitive Methods

The early history of incarceration for women was marked by a heavy focus on punishment and control. Additionally, it reflected the prevalent view that crime was inherently male (Moore and Scraton, 2016). As Moore and Scraton (2016) argue, incarceration was upheld as a 'deeply gendered character of punishment' that reinforced the gendered hierarchy of society (Moore and Scraton, 2016, p.550). Central

to this was the ideal of femininity, with women expected to be passive, moral, domestic, and in need of protection yet Walkowitz (1980) notes that this perception primarily reflected middle-class women. In contrast, working-class women also had to work alongside their husbands to survive, meaning they were already deviating from these narrow social ideals and ideal of respectability (Walkowitz, 1980). As a result of this perceived deviation, they became subject to intensified surveillance, with plain-clothed police officers empowered to arrest women they suspected of prostitution and even 'force them to undergo a genital examination' to check for venereal disease (Walkowitz, 1980, p.127). This unjust and invasive practice illustrated how working-class women were not inherently more likely to offend but were increasingly targeted by punitive policing that stationed them as criminal risks.

Additionally, within early forms of penal institutions aimed at those seen as socially problematic, women faced further victimisation following their arrest. For example, during the Industrial Revolution, Houses of Corrections and Bridewells were set up as punishment for petty offenders (Moore and Scraton, 2016). Within these establishments, women were exposed to sexual exploitation by 'turnkeys and fellow prisoners' with prison pregnancies becoming a recurrent scandal (Morris and Rothman, 1995, p.297). Furthermore, throughout the 18th and 19th centuries, during and after penal transportation to Australia or North America, female offenders were subject to sexual violence from male convicts (Moore and Scraton, 2016). In continuation from this, when women were sentenced and entered the penal system, despite being very rare, their treatment continued to be punitive. For example, by the 1870s, all women faced nine months of separation at Millbank prison before being transferred to another prison to complete their sentence (Walkowitz, 1980). During this separation, these women would have to complete long hours of needlepoint in their cells (Walkowitz, 1980). At the subsequent prisons, labour for women involved needlework, knitting and laundry and occasionally work in the kitchens (Walkowitz, 1980). While this work was framed as rehabilitation, it functioned as a gendered form of control, enforcing ideals of femininity and domesticity rather than addressing the underlying causes of offending. Therefore, even when women's imprisonment appeared reformative on the surface, it remained deeply punitive by reinforcing

gender norms and disproportionately targeting working-class women. This historical context reveals how the penal system used gendered punishment as a tool for social control.

B. Sentencing Issues

The punitive model of incarceration has widely been criticised for perpetuating systemic inequalities, particularly through the argued overuse of sentences for female offenders (Roberts and Watson, 2017). An example of this is seen through the Female Offender Strategy plan (MoJ, 2022), where a reported '69% of women sentenced to custody served less than 12 months' (p.4). These findings paired with the fact that many crimes for which women receive short sentences are non-violent and minor, such as theft, suggests that women are spending unnecessary time in prison for crimes that do not warrant nor benefit from custodial sentences (MoJ, 2022 and Johnston, 2015). This is further demonstrated by the 2022 Bromley Briefing that found '72% of women remanded and tried by the magistrates court did not receive a custodial sentence' and that 21% of women held on remand had been in prison for longer than six months (Prison Reform Trust, 2024, p.49). Furthermore, over half of the female prison population is serving very short sentences for minor offences, highlighting a systemic issue with the over-incarceration of women.

Moore and Scraton (2016) argue that these disparities can be explained through the fact that female offenders are often perceived as doubly deviant by both society and the judicial system. This is because their criminal behaviour is seen not only as a violation of the law, but also as a transgression against the traditional notions of femininity (Moore and Scraton, 2016). For example, Johnston (2015) states that feminine ideals are constructed by the 'patriarchal system of reproduction' and so historically, women have been seen solely as domestic caretakers of the family (Johnston, 2015, p.123). As such, female offenders have been stigmatised as abnormal and unwomanly, resulting in the perception that they should be doubly punished (Moore and Scraton, 2016). This is also evident in Cúnico and Lermen's (2020) work

where they state that female crime is understood socially as a 'violation of norms and expectations about female behaviour' as women who engage in crime 'act beyond the domestic, conjugal and/or maternal roles' (p.208). This highlights the argument that patriarchal attitudes within the CJS influence judicial outcomes, leading to more women receiving punitive custodial sentences than necessary. These sentencing disparities have additional consequences, further entrenching women's marginalisation in the penal system.

C. Over-Criminalisation of the Vulnerable (Pathways Into Crime)

In addition to sentencing disparities, it is widely acknowledged that women are often incarcerated for behaviours rooted in poverty, addiction, trauma or survival strategies, reflecting systemic failures to address underlying issues. For example, Carlen (2002) states that women in prison 'are likely to have suffered disproportionately from…a cluster of social deprivations' (p.5). Similarly to this, Gelsthorpe et al. (2007) assert that female offenders experience a range of criminogenic needs (women's pathways into crime) that indicate their background of 'severe social exclusion' (p.18). These include histories of unmet needs within areas of education, housing and employment; sexual and physical victimisation; high levels of poverty and substance abuse; and the responsibility of often being the sole caregiver of children (Gelsthorpe et al., 2007). Taken together, these findings suggest that there are clear pathways into crime for women that tend to stem from their disparities within society. It is therefore argued by Armstrong and Malloch (2024) that the punitive model of incarceration is viewed as by academics and penal reformers as being a 'substitute for solving social problems' instead of a reserve for those who 'pose a serious risk to the public and commit the most serious offences' (p.404).

It is also crucial to acknowledge the high victimisation of this population. For example, it is evidenced by The Prison Reform Trust (2017) that 'more than half of the women in prison (53%) report having experienced emotional, physical or sexual abuse as a child, compared to 27% of men' (no pagination). Furthermore, '57% report having

been victims of domestic violence as adults' (The Prison Reform Trust, 2017, p.7). This reinforces the notion that it is the most vulnerable women, who have most likely been victims of crimes themselves, that are ending up involved in the CJS and sentenced to custody. This suggests that the punitive model of incarceration is being used to punish some of society's most deprived and vulnerable, as they are being locked away, instead of having their needs addressed (Armstrong and Malloch, 2024). This is essential to acknowledge as once women enter the penal system, these vulnerabilities 'immediately become intertwined with formal penal sanctions', resulting in the experience of a heavy penal burden for these women (Carlen, 1998, p.39). This therefore suggests that the penal environment has the potential to intensify these disparities faced by female offenders.

D. Re-Traumatisation and Mental Health

Mental health is widely recognised as being a particularly acute concern within the penal system, particularly in the context of women's imprisonment. A substantial proportion of incarcerated women enter custody with pre-existing mental health conditions and histories of trauma, yet these are not being adequately addressed within prisons (Mills and Kendall, 2016). Women in Prison (2024), states that 1 in 3 women are self-harming whilst incarcerated and Coyle (2005) notes a growing number of incarcerated women engaging in suicide and self-harm. Taken together, these findings further illustrate the concerning levels of mental illness within the current prison system, that are resulting in significant harm. This trend suggests that, despite clear documentation, the issue remains inadequately addressed, and that such neglect may be exacerbating the mental health conditions experienced by women. This is demonstrated in the Time to Care report (2025) where HMIP conducted a prisoner survey within four prisons, gathering a total response rate of 83% (HMIP, 2025). The survey found that despite 87% of respondents reporting the need for mental health support, 21% reported not receiving any support at all, and of those who did, 28% reported that it was 'not so useful' in helping (HMIP, 2025, full survey results, p.2). Furthermore, the report found that the rate of self-harm per 1,000 prisoners in

women's prisons has risen by 4,079 from 2013 to 2023 (HMIP, 2025). This substantiates Coyle's (2005) findings two decades on and consolidates that there is not enough being done within punitive institutions, to tackle this. Therefore, this highlights the importance of investigating the effectiveness of alternative models of addressing female offenders, as without attention, this issue of severe mental health is likely to continue to increase.

Trauma is also found to be a prevalent issue for female offenders, both prior to incarceration and whilst behind bars. O'Brien and Leem (2007) state that an additional challenge that female offenders face is mental disorders often related to trauma, whilst Stevens (2015) asserts that experiences of incarcerated women typically involve 'recurrent episodes of multiple forms of trauma in childhood' (p.179). This suggests that a frequent catalyst of some of the mental health issues prevalent within the penal setting comes from past trauma Therefore, the literature indicates that punitive imprisonment can both trigger new trauma and exacerbate pre-existing trauma significantly. For example, Kubiak (2004) asserts that 'prison itself can bring about new traumatic experiences in addition to triggering traumatic memories' (p.425), highlighting the frequent criticisms of women's prisons due to incidents of sexual assault committed by male staff. This was also found by Geer (2000), 'increasing numbers of women's lives are reduced to half-lives under the torturous effects of sexual abuse by corrections officials (p.74). Such treatment poses a significant risk of re-traumatization, particularly for women with prior experiences of sexual abuse or violence. Therefore, this presents the argument that current punitive penal institutions are not only neglecting the mental health issues and trauma that are prevalent within the population of female offenders, but they are also sustaining an environment where new trauma is created, and past trauma is reactivated. This may have implications for post-release outcomes where underlying vulnerabilities remain unaddressed or are exacerbated.

E. Separation and Isolation From Family

Building on these findings of the impact of trauma, Breuer et al. (2021) asserts that 'repeated separation and disruptions between mother and child are implicated in

trauma and cycles of reoffending' (p.15). This paired with the fact that approximately two thirds of incarcerated mothers in Australia identify as being 'a parent of at least one dependent child' illustrates the number of imprisoned women that are facing the trauma of being separated from their dependent child/children (p.2). This also seems to translate globally, as Casey-Acevedo et al. (2004) more generally found that 'between 65% and 80% of the women in prisons are mothers of minor children' (p.418). However, the Joint Committee on Human Rights (2019) affirms that there is a 'lack of reliable quantitative data on the number of mothers in prison… and the number of women who are pregnant and give birth in prison', suggesting that such figures may not capture the full scope of the issue (p.3).

Despite this uncertainty in figures, it is widely recognised that the separation of children and mothers due to incarceration leads to profoundly harmful outcomes. For example, Carlen (1998) asserts that the most significant effect of 'the penal burden' for women comes from 'the pain that [they] experience as a result of being deprived of their children' (p.39). This suggests that on top of the vulnerabilities female offenders face prior to and within the CJS, another exacerbation of their mental health lies in the separation from their children. Breuer et al. (2021) argue that the separation disrupts the mother- child relationship, leaving the mothers experiencing feelings of 'hopelessness and frustration' as they are removed from their children's lives (p.11). Additionally, imprisoned mothers may experience social marginalisation not only for their criminal behaviour, but also through the internalisation of stigma surrounding 'bad motherhood' (Baunach, 2020). Carlen (1998) similarly argues that imprisonment 'punishes mothers by inducing guilt and anxiety about children left "abandoned" outside prison while they are serving their sentences' (p.42). This indicated that within a penal environment primarily aligned towards punishment, such emotional stressors are likely to be intensified, as responsibility for separation is individualised and maternal guilt is reinforced rather than alleviated (Baunach, 2020).

Furthermore, within Western discourse, the ideal mother is portrayed as self-sacrificing, domestic, and exceptionally sensitive to her children's needs (Baunach, 2020). Therefore, incarcerated mothers are immediately accused of deviating from this

and stigmatised as bad mothers (Baunach, 2020). This intense guilt, both internally felt and externally imposed by society, combined with the emotional pain of separation from their children, suggests that incarcerated mothers endure significant psychological distress during their sentences. This distress is argued to be further heightened by the scarcity of women's prison. For example, as women make up less than 5% of the prison population, there are only 12 sites in England and none in Wales (Dolan et al., 2019). This indicates that mothers sentenced to custody will likely be placed far away from their family if they do not live near one of these sites. This was also found to be the case in America as Hagan and Foster (2012) found that over half of the children with incarcerated mothers do not see their mothers during the entirety of their incarceration, as the distance makes visitation and sustained contact difficult. This would have a profound impact on the relationship between a mother and a child and could intensify feelings of guilt and anxiety prompted by lack of control within their own child's life. This further highlights the severity and complexity of issues that women face during incarceration. These findings demonstrate that punitive institutions insufficiently prioritise rehabilitation, leaving women's complex needs and underlying causes of offending unaddressed, thereby increasing the likelihood of recidivism. Overall, the literature indicates that the punitive model of incarceration disproportionately harms women in prisons, perpetuating sentencing disparities, exacerbating pre-existing vulnerabilities, and underscoring the urgent need for more holistic, rehabilitative alternatives.

3. The theoretical debates of holistic methods

Considering these persistent and interconnected harms, particularly those exacerbated by punitive imprisonment, this section now turns to research promoting holistic responses to female offending. These approaches are proposed either alongside existing custodial practices or as alternatives altogether, on the basis that they more effectively address the complex social, psychological, and economic factors influencing women's pathways into the criminal justice system (Sarraf, 2021).

A. The Emergence and Development Of Holistic Methods

There have been calls for a reform of the punitive incarceration model for many years. One early example of this can be seen in Andrews, Bonta and Hoge's 1990 publication of their risk-need-responsivity (RNR) model (Andrews et al., 2011). Within this article, they set out 'three general principles for effective offender rehabilitation' that aimed to move away from a reliance on punitive measures and introduce a more human-centred service delivery (Andrews et al., 2011, p.735). The risk principle gave instructions to match the level of programme intensity to the risk level of the offender, thereby keeping low-risk offenders out of intensive penal services (Andrews et al., 2011). The need principle asserted that criminogenic needs should be assessed and then specifically targeted in subsequent treatment (Andrews et al., 2011). Finally, responsivity stated that to enhance offenders' ability to learn and benefit from rehabilitative intervention, the prison service should correspond the style of the intervention to the offender's specific learning ability and style (Andrews et al., 2011). This shows a theory of incarceration that focuses on the well-being and specific needs of offenders, differing greatly from the focus of punitive models.

Building on this, calls emerged for research into and specific action to be taken to address the disparities women offenders were facing inside the criminal justice system. Bloom and Covington (1998) note that, although women constitute a much smaller proportion of the prison population and are less likely to commit violent offences than men, their contact with the CJS often becomes more extensive overtime once initial involvement occurs, through repeated arrests, prosecution, and custodial processing. They argue that the frequent dismissal of women's small representation in the CJS results in a failure to develop a diverse range of policies and services that address the 'specific problems of female offenders enmeshed in the system.' (Bloom and Covington, 1998, p.1). This highlights that gender-specific disparities are being overlooked within the punitive incarceration model, resulting in insufficiently developed support mechanisms to address the root causes of female offending. It also indicates that in the absence of such development, these disparities become cyclically

reinforced within women's experiences of the CJS. This underscores the argument that radical change is needed to effectively support them and eliminate these disparities. Bloom and Covington (1998) therefore call for the development of a sound theoretical, gender-sensitive approach to treatment that address the realities of women's lives and emphasise the need for further investigation into the successful features of such programmes to help establish criteria for future initiatives (Bloom and Covington, 1998). Their argument underscores that where offending is rooted in social inequalities, a punitive framework is not structurally capable of delivering meaningful support, reinforcing the need to examine alternative, holistic approaches.

B. Arguments for Holistic Methods Within Prisons

A key argument found for the adoption of an integrated, holistic approach within prisons, can be seen through the call for gender-sensitive programmes. A clear example of is through the work of De Cou (2002), who states that gender differences create implications within custodial systems for women as the traditional, male-centred institutions heavily rely on segregation and restraints (De Cou, 2002). She argues that this treatment is not appropriate for female offenders given their likely pasts of victimisation and deprivations (De Cou, 2002). This can also be seen through the work of O'Brien and Leem (2007) who state that among female prisoners there are high rates of 'victimisation by childhood sexual abuse and adult partner violence' (O'Brien and Leem, 2007, p.263). Therefore, De Cou (2002) calls for a reimagined treatment of incarcerated women with an emphasis on trauma and abuse management that addresses 'the results of both crime victimisation and crime perpetration' through a specific 'gender-sensitive curriculum' (p.98). Similarly, Barlow (2014), states that 'female offenders are not receiving rehabilitation that is relevant to their lives' if it is not gender-sensitive (p.26). However, De Cou (2002) asserts alongside this that there are integral elements of control within prisons that must remain intact to maintain security and safety. These measures include secure boundaries and regular head counts, methods for managing unrest, handling violence or threats toward staff, and maintaining enough control to ensure inmates comply

with officers' instructions (De Cou, 2002). Additionally, segregation, isolation and strip searchers should be used when necessary (De Cou, 2002). Therefore, this shows De Cou (2002) calling for a holistic approach to be taken when dealing with incarcerated women through a gender-sensitive programming as this acknowledges and treats the range of issues that female offenders face. However, it also illustrates clearly that this should take place within prisons in order to maintain safety.

Another specific call for the implementation of holistic methods can be seen through the argument that education within prisons can be used to more effectively combat the multitude of difficulties that incarcerated women face. For example, this is evident through the work of Davis (2001) who asserts that the education of women is vastly overlooked by prison administrators and correctional educators. This is because it was previously typical to assume that the same programmes that work for male inmates, such as those that mimic 'the old one room schoolhouse' will also work for women (Davis, 2001, p.79). Therefore, Davis (2001) argues that educational programmes and policies should be innovated with the 'unique and unmet needs of female offenders' at the heart of them (Davis, 2001, p.79). These include, substance and sexual abuse, low self-esteem and family issues (Davis, 2001).

They evidence this assumed insignificance and current ineffective treatment by stating that even though 73% of women in state prison were undoubtedly frequent drug users, only 15% received any treatment through 'state sponsored programs' (Davis, 2001, p.79). This shows that despite the clear confirmation of the issue of drug use among female offenders, no real effort was being exerted into rehabilitating and treating them. Therefore, Davis (2001) declares that 'mind (education), body (health issues), and soul (life skills)' must be addressed in prisons as part of the 'habilitative process' (p.80). This is also argued by Kubiak (2004) who states that a multi-service approach can more effectively address the substance abuse that contributes to female crime. For instance, she highlights the high prevalence of co-occurring mental health disorders and substance abuse among female offenders, an issue that significantly increases the likelihood of relapse and recidivism. She states that treating these difficulties is important in reducing recidivism, incarceration costs and 'reducing

family disintegration and financial dependency' and is especially necessary for women who 'have higher epidemiological rates of PTSD' and usually enter prison with more severe substance abuse disorders (SUD) (Kubiak, 2004, p.432 and p.426). Therefore, she highlights the necessity of screening for PTSD and integrated mental health and substance abuse treatment within the CJS (Kubiak, 2004). This shows Kubiak calling for a method that provides a particular focus to female offenders' vulnerabilities of substance abuse and trauma. This is supported by Ferguson, 2024, who argue that services aimed at treating the drug use of incarcerated women, must accurately reflect the reality of their lives. For example, Furguson (2024) argues that a multi-faceted holistic approach is necessary to effectively deal with incarcerated women with alcohol use disorders (AUD). She stresses the importance of this, stating that one of the negative impacts of AUD is that it can lead to a considerable number of women becoming involved in crime and subsequently incarcerated (Ferguson, 2024). In addition, she states that with the knowledge that women enter the CJS with trauma and are perceived by staff as particularly vulnerable, it is crucial to acknowledge that many are likely to return to similar circumstances upon release (Ferguson, 2024). Thus, she insists that interventions within prison must directly address this (Ferguson, 2024).

Another clear example of this can be seen through Lacey's (2007) argument that considering the rising numbers of women being incarcerated, rearrested, reconvicted, and returned to prison, it is essential for the prison system to explore programs that support women in breaking this cycle. She states that one way to achieve this is using art programmes within female institutions. She argues that this would be beneficial to both the women and the community as research has found that 'the arts are a medium for prevention, healing and empowerment' (Lacey, 2007, p.3). Additionally, she states that the best explanation for this comes from the fact that developing artistic skills demands perseverance, self-control and a sustained dedication over time (Lacey, 2007). Therefore, suggesting that these programmes should provide these women with the necessary tools and empowerment to deal with imprisonment and then life beyond. Taken together, these scholars present the argument that holistic prison programmes that address the extensive presence of trauma and substance abuse

prevalent in the lives of women in prison and provides them with empowerment will produce more successful treatment and rehabilitation.

C. Arguments for Holistic Methods Used as Alternatives to Prison

As aforementioned, Baroness Corston further built upon ideas of holistically supporting women involved in the CJS, while ultimately taking a more radical viewpoint that intervention needs to take place within the community (Corston, 2007). Her findings reflected those discussed in section one, ultimately asserting that 'there needs to be a fundamental re-thinking about the way in which services for this group of vulnerable women' are provided that must include both women who offend and those at risk of offending (Corston, 2007, p.2). Since then, further arguments for this approach have been explored, a clear one being that prisons are unsafe environments for women that create barriers for treatment. For example, Armstrong and Malloch (2024) argue that despite efforts being made, 'the psychological damage that prison inflicts far outweighs any good that in-prison therapy can do' (Armstrong and Malloch, 2024, p.390). They evidence this by asserting that women are especially vulnerable to abuse in prison, such as excessive strip searches, sexual assaults and having basic healthcare controlled (Armstrong and Malloch, 2024). For instance, until recently it was not unusual for pregnant prisoners to be handcuffed during medical appointments, and in some countries, even during birth (Armstrong and Malloch, 2024). This arguably reveals that security and control is consistently prioritised over the therapeutic and rehabilitative needs, and general well-being of women within prisons (Armstrong and Malloch, 2024). This is supported by the findings in the recent Time to Care report which state that prisons are ill-equipped to respond effectively to trauma, as factors such as 'the environment, the design and delivery of regimes, being locked in a cell for a long period of time, handcuffed, searched or forced into segregation, all act as barriers.' (HMIP, 2025, p.15).

Another clear argument that emerged from the literature on holistic alternatives to prison was the assertion that empowerment is a key feature of the rehabilitation of

female offenders. Hannah-Moffat (1995) outlines that in addition to structural inequality, female offenders 'lack self-esteem and as a result, they are believed to have little power to create or make choices (p.139). This is supported by Barlow (2014) who states that 'the general profile of a female offender is one who is disempowered' (p.16). This suggests that a lack of self-esteem may represent a central vulnerability of female offenders, acting as a barrier for rehabilitation, particularly where it undermines women's belief in their capacity for change. As such, empowerment should be a key objective of gender-sensitive initiatives, aimed at restoring autonomy and supporting positive choices (Barlow, 2014).

Financial empowerment is also argued to be pivotal in reducing recidivism. This is outlined by Ward (2003) who states that financially independent women are less likely to 'stay in abusive relationships, less likely to feel the need to turn to crime for money and in some cases, less likely to turn to drug use as a coping mechanism' (p.748). By incorporating social and financial empowerment into holistic, gender sensitive programmes, women may regain a sense of control over their lives and potentially disengage from crime. However, it is also argued that this is unlikely to occur inside prisons. Hannah-Moffat (1995) notes that Canadian prisons were frequently criticised for promoting dependency and infantilising behaviour among the women inside, something likely to occur in English and Welsh systems as well. Furthermore, she asserts that many of the rules within prison are 'administered in an arbitrary and humiliated way' (Hannah-Moffat, 1995, p.139). This portrays the prison environment as incredibly disempowering for women, suggesting that holistic programmes attempting to promote self-esteem would be very difficult to implement.

Other calls for holistic alternatives to prison, can be seen through the appeal for Women's Centres to be used to keep women out of prison who pose no threat to society. For example, after concluding that 'prison is not the right place for many damaged and disadvantaged women', Corston (2007 calls for the wider and more effective implementation of community solutions for non-violent female offenders. (p.69). These include Women's Centres that must 'recognise the impact that victimisation and isolation by disadvantage can have on a woman's circumstances

and behaviour' and the shame and stigma that many women face because of several life experiences (Corston, 2007, p.61). This suggests a redesigned system that is thoroughly gender-specific and approaches female offenders and those at risk of offending holistically. Furthermore, she included the call for an inter-departmental ministerial group, a Women's Commission, which she argues will provide a strong, visible representative for these women that will ensure that the range of issues mentioned in section one are effectively dealt with (Corston, 2007). Supporting this, Plechowicz (2015) also claims that the expansion of Women's Centres as an alternative to prison is necessary to bring out meaningful change. For example, she states that in contradiction to prisons, Women's Centres are primarily 'exclusively for women and staffed by women, in an attempt to provide a safe environment for those vulnerable individuals' (Plechowicz, 2015, p.124). Therefore, she argues that this manufactured atmosphere, enables the women to gain a sense of empowerment that helps build confidence, independence and self-worth, as aforementioned, enabling positive change and a reduction in reoffending. (Plechowicz, 2015). Arguably, this would also help address the separation of families as it would enable mothers to gain access to resources in their local area, making connections with their much easier to maintain (The Centre for Social Justice, 2018). This further proposes the argument that holistic approaches to female offending should be conducted as alternatives to prisons.

4. *Examples and Evaluation of Holistic Methods in Practice and The Challenges They Face*

This final section will introduce and evaluate examples of holistic methods inside and outside of prison, aiming to determine which approach most effectively provides positive outcomes for women and reduces recidivism, whilst also evaluating the implementation of community-based holistic initiatives. It will begin by assessing existing prison-based initiatives, which, despite some successes, are often short-lived programmes resulting in only temporary improvements. It will then provide and explore the alternatives to prison, finding that these tend to offer more successful outcomes for women as they foster a healing environment where a wide range of

initiatives are available. However, it also notes that the success of these alternatives can be limited by funding constraints or reliance on the CJS. Ultimately, this section concludes that while holistic alternatives provide better outcomes for women and society, more work is needed to ensure they are fully implemented and sustained.

A. Examples and Evaluation of Holistic Methods Inside the Prison

One example of the implementation of holistic methods in a penal environment can be seen through trauma-informed practice and care (Armstrong and Malloch, 2024). Covington (2003) describes the concept of trauma-informed services as those 'that have been created to provide assistance for problems other than trauma, but in which all practitioners have a shared knowledge base and/or understanding about trauma' (Covington, 2003, p.95). This suggests that these services foster an understanding of the impact of trauma, ensuring that it is integrated into all aspects of treatment to support rehabilitation (Auty et al., 2022). This indicates that this would be beneficial for female offenders as it provides a system where women should feel that their issues are understood and sympathised with, throughout all revenues and services. Additionally, Auty et al. (2022) states that trauma-informed settings aim to amplify 'feelings of safety and security' (Auty et al., 2022, p.720). This further indicates effectiveness for female offenders as it has been established that harsh punitive environments tend to trigger female offenders and obstruct effective treatment (HMIP, 2025). This is supported by MacEachern (2019) who states that trauma-informed services have several core factors: 'safety, trustworthiness, choice, collaboration, and empowerment' (MacEachern, 2019. p.39). This suggests that these services create a holistic framework within institutions where women are nurtured, listened to and have access to a multitude of treatment options.

However, there are scholars that argue that trauma-informed services are not as holistic in practice. For example, Jewkes et al. (2019) asserts that prisons are 'antithetical to building a sense of autonomy and empowerment' (p.8). This can also be seen through the rest of Auty et al's. (2022) research where they found that 58% of

prisoners at Duke Hill (a semi-open prison) reported that they disagreed or strongly disagreed that 'time is taken to understand my personal history in this prison' with some stating that staff and prison actually intensified their problems (Auty et al., 2022, p.425). Furthermore, they witnessed numerous instances of verbal abuse from staff towards the women, instances of women having to deal with 'extremely complex experiences' alone, and responses to self-harm that frequently evidenced a lack of empathy (Auty et al., 2022, p.726). This shows conduct that directly contradicts the aims and principles of trauma-informed practices (TIP), raising doubts about the extent to which they are genuinely able to inform practice (Jewkes, 2019). Moreover, Vaswani and Paul (2019) argue that as a result of working in a very intense environment, prison officers begin to depend on coping mechanisms such as 'detachment and depersonalisation' (p.518). This indicates that the training of staff to develop skills needed to implement TIP may be challenging within environments where distress and self-harm are so common (WIP, 2024). It can also be argued that this method of 'depersonalisation' will make developing healthy relationships with prisoners difficult (Vaswani and Paul, 2019, p.518). In fact, Crewe et al. (2017) found that women with significant pasts of interpersonal violence, likened experiences with some prison officers to that of an abusive relationship. This is concerning as Armstrong and Malloch (2024) assert that a key fundamental of TIP is the 'importance of relationships', suggesting that troubled relationships between women and staff could affect its delivery (p.398). Therefore, this further suggests that trauma-informed services may not be applicable in a custodial setting.

Another example of holistic methods within prisons can be seen through substance abuse treatments that also consider the range of vulnerabilities that female offenders experience. This is demonstrated in the work of De Cou (2002) where she discusses the implementation of holistic approaches within Hampden County Correctional Centre, a prison she notes where 90% of the female population have substance addictions and are trauma survivors. She states that the regime inside the prison is informed by a therapeutic model that is 'focused on the co-occurrence of addiction and trauma' as trauma is 'maximised whenever a person feels utterly helpless or powerless to control' (De Cou, 2002, p.120). This therefore recognises and attempts to

address co-occurring vulnerabilities that have been established heavily affect incarcerated women. Women are then given realistic choices they can make to impact their environment without eroding absolute institutional control at all (De Cou, 2002). For example, inmates are informed which 'activities or constructive behaviours will earn them an earlier release date' to encourage potentially hesitant, traumatised women to participate in programmes and make better choices (De Cou, 2002, p. 103). This shows an attempt to treat the prominent issues of mental illness, trauma and substance abuse. In addition, the prison introduced a gender-sensitive programme called women's V.O.I.C.E.S, which was designed to create empowerment with attention to 'safety, confidentiality' and each component having 'a written curriculum and pre and post-tests' (De Cou, 2002, p.105). This again is an example of a holistic approach that should improve outcomes for women, as it shows a clear understanding of the interlinked nature of women's vulnerabilities and attempts to provide the empowerment needed to address them.

Kubiak (2004) finds, similar success within her study of 17 women who underwent a cognitive behavioural treatment approach inside a correctional setting. She found that after the treatment period of 3 months, '53% no longer met criteria for PTSD, and at 6 weeks post release 70% did not meet criteria for an SUD'(substance use disorder) (Kubiak, 2004, p.426). She then states that this supports previous findings conducted by Brown et al. (1996) 'theory that inattention to PTSD may negate the success of substance abuse treatment' (Kubiak, 2004, p.430). This emphasises the importance of holistic methods as it suggests that some health initiatives and programmes will not be as successful without a target of the root cause and co-occurring issues. This also has an important relationship to recidivism rates as if substance initiatives are failing, the likelihood of recidivism will be higher (Kubiak, 2004). She encapsulates this when she states that 'attention to trauma-related disorders among incarcerated women may be pivotal in preventing relapse and as a consequence, recidivism' (Kubiak, 2004, p.430). Despite this being a small sample size, this provides useful information on how female offenders respond to holistic treatments and provides a key example of their utility within the prison setting, especially of an underexplored area at the time. However, despite these strengths, Kubiak does acknowledge that the analysis did

have limitations, such as a small sample size and 'the use of self-report measures' suggests that the study should be replicated (Kubiak, 2004, p.431).

Despite these examples of successful holistic programmes within the institution of prisons, there is also debate as to whether these initiatives are doing enough. For example, De Cou (2002) states that the gender-responsive regime implemented in Hampden County Correctional Centre was able to maintain the necessary security controls that all custodial settings have, by having flexibility in terms of segregation and isolation and reducing the use of invasive techniques (De Cou, 2002). However, this still upholds an environment that is likely to cause or trigger existing trauma for female offenders as there is no doubt that women are particularly vulnerable to abuse in these settings (Armstrong and Malloch, 2024). In addition, it is argued by Malloch, McIvor and Burgess (2014) that these initiatives, however well intended, will always be 'fundamentally constrained' as it has been reiterated 'over time and internationally, that prison has been repeatedly shown to be an unsafe place for women' (Malloch, McIvor and Burgess, 2014, p.397 and p.395). This could be exacerbated within a prison environment as the ability of prison guards to exert force legally could arguably mimic an abusive relationship, therefore potentially triggering or causing further trauma and mental illnesses. This would therefore act as a significant barrier to any holistic initiatives as it creates further issues that need to be dealt with instead of creating a space for incarcerated women to heal and grow.

Another holistic approach that aims to facilitate positive outcomes for incarcerated women is evident through educational programmes. For example, Davis (2001) evaluates the educational programmes at the Eddie Warrior Correctional Centre (EWCC) that enhance prison literacy programmes and help female inmates to transition back into society. These include, HIV Peer tutoring, programmes designed to address the 'alienation experienced by many of the women' by re-connecting them with their children, cognitive intervention programmes that help to promote positive thinking processes and college and life skills programmes (Davis, 2001, p.81). An example of one of the college and life skills programmes in practice is the cyclical curriculum, where individual learning modules allow staff to 'adapt the system to

meet the individual needs' of each offender, as identified through prior testing (Davis, 2001, p.82). Furthermore, the approach utilises rewards to aid motivation such as, 'certificates, special privileges and occasionally current movies' (Davis, 2001, p.82). This experience of self-made success was found by Davis (2001) to provide 'more self-esteem than any other programs' (p.81). These findings, alongside the other programmes offered by the EWCC, demonstrate an approach that acknowledges the range of challenges faced by incarcerated women and seeks to address them holistically.

This supported the argument that when delivered holistically, educational programmes within prisons can successfully promote desistance by encouraging empowerment and the development of life skills that can be transferred to the outside world (Davis, 2001). However, Davis (2001) also asserts that the pivotal factor in the success of the programmes is the nurturing attitude of the staff, that provided 'a climate of respect' (p.82). This climate allows for the holistic 12 step programme that instructs the staff on how to address the needs of its female inmates to be applied, thereby ensuring that the promotion of 'positive relationships' and the provision of 'a nurturing atmosphere' takes place (Davis, 2001, p.81). This suggests without nurturing attitudes from staff members, programmes of this nature will not produce similar outcomes. However, as previously discussed, this is not a common attitude found within similar institutions, raising concerns that these holistic programmes will yield success in most penal settings (Vaswani and Paul, 2019).

Another programme that the EWCC offers is the Tales for the Rising Moon programme (Davis, 2001). This is designed to reduce isolation by rebuilding connections between mothers and their children and does so by allowing prisoners to 'record a children's book and discuss it on audio tape and then mail the book and tape to their children' (Davis, 2001, p.80). This presents a strategy that aims to relieve some of the guilt and anxiety that mothers tend to feel while serving their sentences, by allowing mothers to still feel somewhat a part of their children's lives (Carlen, 1989). Building on this, Connellan et al., 2017 and Gillham and Wittkowski, 2015 explored the outcomes of Mother and Baby Units (MBUs). MBUs deliver inpatient psychiatric

care for both mother and child up to a year after childbirth through resources such as 'group and individual therapies: art, relaxation, behavioural, and mindfulness-based cognitive therapy' and more (Gillham and Wittkowski, 2015, p.462). Within their work, both Connellan et al. (2017) and Gillham and Wittkowski (2015) argue that MBUs positively improve outcomes for mothers behind bars. For example, after conducting a thematic analysis on 44 studies, Connellan et al. (207) found that in Salmon et al's. (2003) analysis of '1081 women in 8 MBUs in the UK', 78% were symptom-free of mental health issues by the time they were discharged (p.382). Very similarly, Gillham and Witkowski (2015) report that at the end of the programme 'around 70% [of women are] "symptom-free" or considerably improved' (p.461). Taken together, these findings suggest that MBUs provide the necessary treatment to relieve many of the pains that come with the separation of mothers and children.

However, it must also be considered that MBUs also face criticism. For example, Black et al. (2004) assert that if the mother is serving a long sentence, separation at around 18 months will inevitably occur. This suggests that for some women, such approaches offer only a temporary fix for deeply rooted traumatic issues. This emerging criticism of in-prison holistic methods is also reflected in Lacey's (2007) evaluation of the ArtSpring programme within a Florida prison. For example, she found that some of the respondents to her survey noted that despite enjoying the classes they felt that they were 'too short' with others revealing the difficulty of having to return to their cells once the class was finished (Lacey, 2007, p.9). This further suggests that the success of these programmes may simply offer temporary relief rather than full, holistic healing, especially when the rest of their experience in custody could be triggering further trauma (Armstrong and Malloch, 2024). This paired with Carlen's (1989) assertion that the most significant impact of the 'penal burden' on incarcerated women is the emotional distress caused by separation from their children (p.39), and the fact that this separation can lead to the loss of parental rights, suggests that the harm inflicted on mothers is so severe that a temporary remedy only benefitting new mothers in insufficient (Friedman et al., 2020).

Overall, when examined together, these examples of holistic methods within prisons reveal the argument that the inevitable punitive nature of incarceration clearly poses and creates barriers to any holistic approach that is attempted within the institutions. Although many of the innovations provide some relief for the challenges faced by incarcerated women, closer examination reveals a deeper issue: most programmes aim to alleviate harms that are either exacerbated by imprisonment, such as trauma, or created by institutional systems, such as family separation. This raises the argument that focusing on short-term relief, rather than transforming the structural conditions that contribute to women's involvement in the CJS and sustain institutional harm, potentially undermining the possibility of meaningful rehabilitation or reduced recidivism.

B. Examples and Evaluations of Holistic Alternatives to Prison

A clear recommendation that emerges from the calls for holistic alternatives to prison is the widespread implementation of Women's Centres (Plechowicz, 2015). One example of an implementation of this in England is the Asha Centre in Worcester, a voluntary organisation that 'offers a one-stop shop' for women (Roberts, 2011, p.93). Its overall objective is described by Gelsthorpe (2010) as linking isolated and disadvantaged women to 'resources that will help them improve their social and economic potential' (p.134). This is achieved through a multifaceted and multi-agency approach (Gelsthorpe, 2010). For example, on top of the probation service being utilised, women who need help outside of that are 'linked to agencies with relevant expertise' (Roberts, 2013, p.166). This therefore shows the centre acknowledging that female offenders are often entangled in a 'complex web of disadvantage' and making provisions to identify and address them, through the most relevant and therefore effective routes (Roberts, 2011, p.104). The centre also establishes a 'safe women only environment', where all staff, including those from outside agencies are women (Roberts, 2013, p.116). Furthermore, the centre provides provisions for mothers such as childcare facilities, a creche, and communal lunches (Roberts, 2013). When considered as a whole, this delivery shows the centre understanding female offenders'

struggles, along with the fact that each woman has individual complex traumas and needs that demand addressing. Plechowicz (2015) argues that this holistic approach contributes to successful rehabilitation outcomes for women, as it allows them to experience the impact of having someone believe in their capacity for change. The Centre's success is further evidenced through Roberts' (2013) findings that, 'women who served custodial sentences were reconvicted 14 percentage points more than those who completed the programme' (p.119). She also claimed that this divergence was likely to increase overtime, however a lack of more recent evaluations, leaves this uncertain and highlights the need for further research (Roberts, 2013). Overall, these successes suggest that women centres are well placed to promote positive change for women evidence through lower reoffending rates.

Other examples of holistic approaches within the community are evident in Scotland. For example, Women in Focus was introduced in 2009, to 'provide support to women subject to community-based court orders' in Southwest Scotland (Malloch et al., 2014, p. 399). Similarly to the Asha Centre, Women in Focus provided individualised practical and emotional support to help women address their personal challenges and comply with their court orders (Malloch et al., 2014). Additionally, 218 is an example of a Women's Centre operating and aiming to provide 'holistic care' in Scotland (Malloch et al., 2008, p.388). It equally provides support services for female offenders, serving as a 'diversion from prosecution and as an alternative to custody' where women can access provision for 'detoxification and support and outreach to health, social work or housing services' (Gelsthorpe 2010, pp.132/133). However, unlike the Asha Centre, 218 does not provide any childcare facilities, which are crucial in placing the needs of women at the heart of the facility (Gelsthorpe, 2010). This is significant as it shows a complete focus on the woman, a feature that is lacking within penal institutions (Malloch et al., 2014). Furthermore, when evaluated, it was found that 83% of the women interviewed expressed that their 'drug use and/or alcohol use had decreased or stopped… since they had engaged with the services' (Malloch et al., 2008, p.388). This is significant as they go state that 'reducing and/or ending substance use was considered an important way of reducing and/or ending offending behaviour'

(Malloch et al., 2008, p.388). Therefore, this similarly shows that this support promotes healing that reduces recidivism.

Despite these clear successes, it is also recognised that there are some limitations to approaches within the community. For example, Gelsthorpe (2010) asserts that although the Asha Centre experiences the advantages of being a voluntary-sector organisation, such as the ability to tailor to women's individualistic needs through freedom and flexibility, this constraint on funding can also critically restrict the advancement of the centre. However, Malloch et al. (2014) also asserts that this complete separation between community-based initiatives and the professional and semi-professional realm is necessary to avoid the continuation of 'the emphasis on punishment and social control' within these centres (p.405). Therefore, this suggests that to maintain the holistic nature of approaches within the community, they will suffer and encounter challenges without the help from guaranteed outside funding (Gelsthorpe, 2010). This is still a prevalent concern to this day as Armstrong and Malloch (2024) state that cuts in resources by local authorities are damaging the effectiveness of community initiatives.

Finally, concerns have also been made about the use of community provisions by courts. For example, Armstrong and Malloch (2024) declare that 'it seems likely that prisons will be relied on extensively by the courts' as community-based services are subject to greater scrutiny to demonstrate their effectiveness in a way prisons are not (p.404). However, previous research, such as Hedderman and Gunby (2013) and Malloch et al. (2008) suggest that one-stop shops (Women's Centres) were welcomed by sentencers, evidenced by interviews with sentencers and prosecutors that indicated that, 'once aware of 218, they made use of it and valued it as a resource' (Malloch et al., 2008, p.389). That said, the fact that Armstrong and Malloch's (2024) research is so recent, implies that Gunby (2013) and Malloch et al.'s (2008) findings may no longer fully reflect current perspectives and suggests that further exploration into the attitudes of community sentencing needs to take place. Other concerns come from the use of enforced conditional cautions. For example, Plechowicz (2009) and Hedderman et al. (2008) share concerns over this, stating that taking away the voluntary nature

will cause disengagement as it diminishes the sense of empowerment. However other scholars rebut this. For example, McDermott (2012) states that the female offenders she interviewed in her study would not have been aware of the Women's Centre near them if they had not been sent there and therefore, would not have engaged at all. Therefore, this suggests that enforced cautions may actually provide useful outreach and therefore more accessible support.

Ultimately, this research shows that holistic alternatives can effectively support the rehabilitation of female offenders, leading to reduced recidivism. This is achieved by creating an environment that fosters empowerment and builds trust, enabling the successful implementation of multi-agency, individualised support. However, to do so, guaranteed funding and a complete separation from the control of the CJS is needed. Additionally, while in-prison examples may alleviate some of the challenges faced by incarcerated women, they fail to address the broader issue of women being subjected to imprisonment, and its associated harms, when it may not be necessary in the first place.

5. Conclusion

Through an examination of existing literature, this paper aimed to explore holistic approaches to offending and evaluate their effectiveness at improving outcomes for female offenders. This was compared to the traditional punitive methods of incarceration. This includes the argument that holistic methods can and should be implemented within prisons, as well as the argument that initiatives are more effective when delivered as alternatives to imprisonment. This was to ensure that research and evaluations into female incarceration continues, and to provide recommendations for addressing the ongoing harm experienced by women in prison.

Through this examination of literature, this paper found that punitive methods of incarceration highlight and exacerbate key vulnerabilities experienced by female offenders, including sentencing issues, the over-criminalisation of the vulnerable, re-traumatisation and mental health, and separation and isolation from family.

Additionally, it was found that this punitive approach shows no real focus on rehabilitation and fails to address the root, individual causes of female offending. This was found to result in reoffending rates being higher than expected, with evidence suggesting that many women leave prison in the same position, if not in a worse state, than when they arrive.

Furthermore, during the research into calls for implementation of holistic methods, two emerging, distinct arguments emerged: the call for holistic methods to be applied within prisons, and the argument that these methods should be implemented as alternatives to incarceration. Upon critically analysing the existing literature on both, this paper found that while the implementation of any holistic methods provides some relief for incarcerated women, through initiatives such as gender-sensitive programmes, this does not address the root causes of why women needed this relief in the first place. Additionally, the paper found that holistic alternatives can be highly effective in promoting rehabilitation for female offenders, as evidenced by a decrease in recidivism. However, it is also essential to emphasise that these alternatives require guaranteed funding and complete control by voluntary sectors to ensure that no aspect of punitive methods is applied. Therefore, this paper builds on the existing literature that calls for the widespread adoption of holistic alternatives to prison for women.

However, before moving on to future recommendations, it is imperative to acknowledge and reflect on the limitations of the study. Due to time restraints and word limit, this paper could not explore every example of holistic methods applied inside and outside of prisons. Additionally, it could not explore how these applications might affect different demographic groups of women. It would therefore be beneficial to explore the specific outcomes of holistic methods on different ethnic groups of women, to ensure all women are receiving the same level of treatment. This paper also found a limited number of up-to-date evaluated examples of holistic methods outside of prisons in comparison to inside. Therefore, further research should focus conducting an empirical study of female offenders' experiences within a modern holistic alternative to prison.

From the findings of this research, it is recommended that approaches such as Women's Centres should be widely implemented across the country as alternatives to custody. This will ensure that women receive the treatment they need and make attempts to reverse the growing female prison population. Additionally, it is recommended that this implementation should be overlooked by a Women's Commission, as Corston (2007) suggested, to ensure best practice. Considering the recent announcement from the Ministry of Justice regarding the implementation of a Women's Justice Board in the spring of 2025, it is recommended that this be evaluated after one year of application.

Overall, this paper contributes to the field of female incarceration by highlighting a distinct divide in the existing literature and offering a clear evaluation of the effectiveness of both punitive and holistic approaches to female offending. It concludes that, with proper management and funding, holistic alternatives to prison are the most effective means of addressing female reoffending by fostering empowerment, building trust, and enabling the implementation of individualized support through multi-agency collaboration. However, for these initiatives to succeed, guaranteed funding and a complete separation from the control of the criminal justice system are crucial. While in-prison initiatives may alleviate some challenges faced by incarcerated women, they do not address the broader issue of unnecessary imprisonment and its associated harms.

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