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THE EDITORIAL BOARD
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FOREWORD BY ALASTAIR DA COSTA

As an alumnus of The School of Law at the University of Leeds, I am delighted to have been asked to write the Forward to this the second edition of the Leeds Student Law and Criminal Justice Review. The articles, written as final year dissertations and research questions devised by the authors themselves, cover a range of topics, highly relevant to key issues of social justice, mental health and fairness demonstrating a level of research skills of which the School of Law can be proud.

My time spent at the School of Law played an important part in shaping my career trajectory into business, social justice and education and I am pleased to find the themes of the five articles in this journal concerned with these issues, reflecting both the strength of the School's Research Centres and the abilities of us all to improve the status quo.

In her excellently argued article, Mollie Rigby presents a critical analysis of two methods of imposing liability on a parent company, and questioning which is more effective where the case has been brought by a tort claimant.

Tanya-Louise Saunders addresses the important issue of the "tsunami of mental distress" left in the wake of the Covid-19 pandemic and asks whether the State should be more proactive in its protection of mental health, assessing whether the law effectively safeguards but also demands the implementation of nature within urban environments in this timely and well-researched article.

Tackling the devastating issue of knife crime, Dan Stone takes an interesting new approach to assessing the effectiveness of legal approaches against knife crime offending, including criminal sentencing, use of civil orders and the implementation of stop and search tactics, which he suggests are – on their own – proving ineffective.

In his fascinating article on how the Covid-19 pandemic impacted illicit drug use patterns across Europe and North America, Alex Morant's uses critical library-based documentary analysis of empirical research with original theoretical contributions with the criminological literature, findings from which Alex suggests should help inform future drug policy research on how major crises can impact the illicit drugs trade.

And Rosa Rist uses empirical analysis of sentencing data from the Crown Court Sentencing Survey, to explores whether the sentencing of benefit fraud and tax fraud reflects class bias within the justice system, and concluding that further study of the matter is needed.

Thank you to the authors for their excellent articles on important current issues. They demonstrate not only the breadth and excellence of the various research methodologies but also a social conscience and an ability to communicate beyond the purely legal. I

congratulate the authors on this and it is something that the School of Law at Leeds, as one of the top 10 Law School's in the UK, should be proud of.

Thanks for the impressive quality of this journal must also go to the editorial board of postgraduate research students. Led by Managing Editor, Clare James, Assistant Managing Editors, Ana Navarro Veiga & Nina Herzog and editors, Saif Alkhamis, Damarie Kalonzo, Courtney Leader, Edmore Masendeke, Xingwei Li, Kevin Udungeri and Xinyu Xu; they have given considerable time to the task and the School and the authors are grateful to the editorial team for the commitment and skill they have shown in bringing this second edition of the journal to completion.

Thanks to Dr Colin Mackie who originally conceived the idea of the journal and who has continued to support the editorial team as they have worked on this second edition.

INTRODUCTION TO THE SECOND ISSUE

This is the second issue of the Student Law and Criminal Justice Review. This journal was the idea of Dr Colin Mackie, and over the last two years it has been developed by teams of PGRs within the School of Law at the University of Leeds

The board is fortunate to have access to such a high level of undergraduate and taught post-graduate research from which to select the papers included in the journal, including papers engaging with issue relating to the COVID-19 pandemic. This year for the first time, we include a paper from one of our taught postgraduate students. The papers selected are based on dissertations written by students and engage with a wide variety of topics, reflective of the research centers of the Law School: the Center for Criminal Justice Studies, the Centre for Law and Social Justice, and the Center for Business Law and Practice.

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

We would like to thank all those involved, including Colin Mackie for his advice and assistance and the Management Support staff in the School of Law who assisted with the administration necessary for the printing of the journal. Finally, we would like to thank Alastair Da Costa (LLB, Leeds 1987) for providing this issue's forward and Liam Kelly LLB, LLM, ACIArb (Barrister Deans Court Chambers, Leeds Alumnus) for his sponsorship, allowing us to print paper copies of this year's Review.

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

The Editorial Board March 2022

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Parent Company Liability For Tortious Wrongs: Is Duty of Care A More Effective Mechanism Than Corporate Veil Piercing?

Mollie Rigby

Abstract

This article critically analyses two methods of imposing liability on parent companies: corporate veil piercing and the finding of a direct duty of care. Ultimately it questions to what extent the latter is more effective than the former where the case has been brought by a tort claimant. In doing so, this article focuses primarily on the scope of each mechanism to determine the degree of adherence to the core company law principle of limited liability and the level of protection provided for tort claimants through imposing liability in deserving cases. A narrow scope provides for strong adherence to limited liability but little protection for tort claimants. Contrastingly, a broad scope provides for strong protection for tort claimants but undermines limited liability. As such, maintaining limited liability and protecting tort claimants are framed as two conflicting sides of the same coin, and given the relative importance of each, some degree of balance must be found. This article finds that, given the vulnerable nature of tort claimants paired with the undesirable incentive that limited liability provides for parent company engagement in hazardous activity, this balance should be tipped towards protecting tort claimants. Given that duty of care is found to cater for this more so than veil piercing, the former is found to be the more effective mechanism.

1. Introduction

Imposing liability on parent companies for the actions of their subsidiaries is a controversial endeavour. This is because company law dictates that a parent company[1] is a separate legal entity from its subsidiary and thus any debt or liability incurred by the subsidiary is not attributable to the parent. This is referred to as the principle of 'limited liability' and, given the economic benefits it confers on companies and wider society through its encouragement of investment, it is treated by many as a sacrosanct principle not to be interfered with.[2] However, such an arrangement may be undesirable where personal harm or loss has been caused to an individual (a tort claimant) by a subsidiary who is unable to provide compensation.[3] This is because the inability to attach liability to the parent company leaves the claimant unprotected. As such, the law recognises the

[1] Defined by the Companies Act 2006, s 1159 as a company that owns the majority share of another company – the subsidiary

[2] *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL)

[3] Phillip Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 Journal of Corporation Law 573

need to find a balance and may, in certain situations, circumvent the principle of limited liability and impose liability on the parent company for its subsidiary's actions.

This article critically analyses two mechanisms utilised by the court to impose such liability: corporate veil piercing and the finding of a direct duty of care. Veil piercing, a mechanism rooted in company law, allows the court to disregard the company's corporate form in order to hold its shareholders liable for the company's actions.[4] Contrastingly, the court may find that the parent company owed a direct duty of care to those harmed by the subsidiary and impose liability under tort law instead. The ultimate aim of the article is to question to what extent the imposition of a direct duty of care is a more effective mechanism of imposing liability than veil piercing. Here, 'effective' is assessed in relation to whether an appropriate balance is found between imposing liability to protect tort claimants and maintaining limited liability as far as possible.

This article adopts the following structure. Section one discusses the balance between maintaining limited liability and imposing liability to protect tort claimants. It questions where on the spectrum between complete maintenance of limited liability and complete protection of tort claimants an 'appropriate' balance may lie in the context of this article (where the defendant is a parent company, rather than an individual and where the claimant is a victim of tort). The findings in this section then aim to act as a backdrop on which the effectiveness of the two mechanisms can be assessed. Section two critically analyses the scope of veil piercing and questions the extent to which this mechanism provides enough protection for tort claimants in light of the findings in section one. Section three takes the same approach but instead critically analyses the scope of parent company duty of care to question whether the balance found under this mechanism is more or less analogous to that found to be necessary for an effective mechanism in section one. Section four takes a more practical approach. Here, the duty of care framework will be applied to the veil piercing case of *Adams v Cape*.[5] This, after discussing the effectiveness of both mechanisms in sections two and three, aims to substantiate the findings through a practical application.

1. Limited Liability, Parent Companies and Tort Creditors

A. Limited Liability

Given that limited liability was introduced in 1855[6] but parent companies emerged much later,[7] the traditional justifications for limited liability refer mainly to individual shareholders rather than corporate shareholders (i.e. parent companies). In limiting the

[4] Alan Dignam and Peter Oh, 'Disregarding the Salomon Principle: An Empirical Analysis, 1885–2014' (2018) 39 Oxford Journal of Legal Studies 16

[5] *Adams v Cape Industries Plc* [1990] Ch 433 (CA)

[6] Limited Liability Act 1855

[7] Peter Payne, 'The Emergence of the Large-Scale Company in Great Britain, 1870-1914' (1967) 20 Economic History Review 519

shareholders' liability to only the amount unpaid on their shares,[8] the doctrine shifts the financial burden of business failure onto creditors (those who have a financial claim against the company).[9] In doing so, the primary aim of the doctrine is to encourage investment in a number of ways.[10]

Firstly, and most importantly, limited liability encourages investment through the prevention of personal financial ruin in the event of business failure.[11] This encourages investment from those who may otherwise choose not to invest, for example those lacking investment expertise or less wealthy individuals.[12] A system of unlimited liability would mean that shareholders' personal wealth would be at stake in every investment, hugely curtailing commercial activity.

Secondly, limited liability reduces monitoring costs both in terms of shareholders monitoring company managers and shareholders monitoring the wealth of other shareholders.[13] Without the safety net of limited liability, shareholders would be required to undertake the burdensome role of monitoring managers closely, as poor management decisions could risk their personal wealth. This discourages investment as it becomes both more costly and taxing for individuals – especially in larger companies which would be even harder to monitor.[14] Further, without limited liability, shareholders would be jointly and severally liable for the company's debts.[15] This would incentivise individual shareholders to monitor the wealth and assets of other shareholders to ensure that they are not bearing a disproportionate amount of financial risk.[16] As such, limited liability allows for more cost-effective and convenient investment.[17]

Thirdly, without the need to monitor, limited liability allows individuals to acquire diversified portfolios as they can hold a small number of shares in numerous companies.[18] This encourages investment in larger, riskier projects/companies and

[8] Companies Act 2006, s 3(2); Insolvency Act 1986, s 74(2)(d)
[9] Practical Law, 'Creditor' (Thomson Reuters, 2021) <https://uk.practicallaw.thomsonreuters.com/95703910?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true> accessed 20th December 2020
[10] Frank Easterbrook and Daniel Fischel, 'Limited Liability and The Corporation' (1985) 52 The University of Chicago Law Review 89
[11] Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 Cambridge Journal of Economics 915, 917
[12] Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 The University of Toronto Law Journal 117
[13] Easterbrook and Fischel (n 10)
[14] Helen Anderson, 'Challenging the Limited Liability of Parent Companies: A Reform Agenda for Piercing the Corporate Veil' (2012) 22 Australian Accounting Review 129
[15] Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale Law Journal 1879
[16] Halpern, Trebilcock and Turnbull (n 12)
[17] William Bratton and Joseph McCahery, 'An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition' (1997) 54 Washington & Lee Law Review 629
[18] Easterbrook and Fischel (n 10)

enables investors to branch out into different areas which they may not otherwise have considered.[19] As risk can be balanced across the share portfolio, diversification allows for broadly positive outcomes even if not every venture is successful allowing companies to raise capital at lower costs.[20] Without diversification, many projects may be deemed too risky for investment.

The above considerations indicate that restrictions on limited liability would discourage investment, stifle business growth and lead to a reduction in commercial activity. This could have significant implications for the economy and society in general with a potential reduction in employment, wages and the availability of goods and services.[21] This indicates that restrictions on limited liability should be carefully justified.

B. Limited Liability and Parent Companies

When parent companies emerged, the doctrine of limited liability was extended with little debate.[22] Therefore, as the subsidiary's shareholder, the parent company is not responsible for any debts or liabilities that the subsidiary incurs. However, it can be questioned whether this extension was justified, this is something which the literature often fails to engage with.[23]

The first justification of limited liability cited above was that it prevents personal financial ruin. However, applying limited liability to corporate shareholders creates a dual layer of protection in this regard.[24] This is because the parent company benefits from limited liability in respect to the subsidiary, and shareholders of the parent benefit from limited liability in respect to the parent company.[25] As such, in the parent-subsidiary context, liability may be imposed to provide protection for creditors without necessarily undermining the rationale of limited liability as the personal assets of the shareholders of the parent would still remain protected. Therefore, it could be suggested that the justification of limited liability, in that it prevents personal financial ruin, holds less weight in the parent company context.

The benefits of decreased monitoring and diversification of portfolios are also more questionable where the shareholder is a parent company. As noted previously, the strength of both benefits rest in the notion that they allow a number of investments in

[19] Blumberg (n 3)
[20] Henry Manne, 'Our Two Corporation Systems: Law and Economic' (1967) 53 Virginia Law Review 259
[21] Anderson (n 14)
[22] Colin Mackie, 'A Tale of Unintended Consequence: Corporate Membership in Early UK Company Law' (2017) 17 Journal of Corporate Law Studies 1
[23] For example, Easterbrook and Fiscel provide perhaps the most thorough exploration of the rationale behind limited liability and whilst they refer to the parent-subsidiary context, they fail to engage with ***why*** parent companies should benefit from limited liability. See Easterbrook and Fischel (n 10); See also Halpern, Trebilcock and Turnbull (n 12); Bratton and McCahery (n 17)
[24] Marilyn Warren, 'Corporate Structures, the Veil and the Role of the Courts' (2016) 40 Melbourne University Law Review 657
[25] Ibid

many different ventures. However, a parent company will own at least the majority share in the subsidiary and in most cases, the subsidiary will be wholly owned by the parent (ie the parent is the only shareholder).[26] In such a case, the benefit of decreased monitoring of other shareholders is not relevant. Further, the benefit of decreased monitoring of managers is also less applicable. This is because in parent-subsidiary relationships management and ownership are naturally integrated, with the directors of the parent and the subsidiary often being the same individuals.[27] As such, the parent often has very real control over the subsidiary in a way in which an individual shareholder with a small stake in a large corporation would not.[28] Whilst it may not be fair to impose liability on individuals far-removed from decision making, this is not necessarily true of a parent company which manages the subsidiary and establishes its direction and policies.[29] It should be noted at this point, however, that where the parent is not the sole shareholder of the subsidiary, the benefit of decreased monitoring becomes more relevant as the parent may not be in complete control. However, as noted above, this is less common.

Given the above considerations, it seems that the justifications frequently recited for limited liability are less relevant where the shareholder is a parent company. As such, it is perhaps no surprise that the extension of limited liability to parent companies has been described as a 'historical accident'.[30] Overall therefore, it could be suggested that there is leeway for the balance to be shifted away from the maintenance of limited liability in the context of parent companies.

However, whilst this may be true, the benefits of applying limited liability to parent companies in relation to their subsidiaries cannot be overlooked.[31] For example, it encourages the parent to take commercial risks knowing that any losses incurred by the subsidiary can be minimised and thus the overall business is not negatively affected.[32] Therefore, without limited liability for parent companies many ventures, especially those of greater risk, may never be undertaken.[33]

As with individual shareholders, this stifling of commercial activity could have a negative impact on the economy and society. For example, with fewer willing investors companies will struggle to fund new ventures resulting in large-scale reduction in economic productivity leading to potentially decreased wages, fewer jobs and lower

[26] See for example, Sandra van der Laan and Graeme Dean, 'Corporate Groups in Australia: State of Play' (2010) 20 Australia Accounting Review 121; Joan Curhan, William Davidson, Rajan Suri, *Tracing the Multinationals: A Sourcebook on US-based Enterprises* (Ballinger Publishing 1977)
[27] Muchlinski (n 11)
[28] Kurt Strasser, 'Piercing the Veil in Corporate Groups' (2005) 37 Connecticut Law Review 637
[29] Blumberg (n 3)
[30] Ibid, 605
[31] Tom Hadden, 'Inside Corporate Groups' (1984) 12 International Journal of the Sociology of Law 271
[32] Mackie (n 22)
[33] Hadden (n 31)

living standards.[34] This shows that even though the traditional justifications do not necessarily translate to parent companies, limited liability can still play an important role which cannot be ignored when establishing an 'appropriate' balance.

Nevertheless, it must be borne in mind that applying limited liability to parent companies introduces significant risks which aren't necessarily present where the shareholder is an individual. Most notably, it can encourage the parent company to engage in extremely undesirable behaviour. This is because the subsidiary must operate in the interests of the shareholder (parent company),[35] yet the parent bears no responsibility for the subsidiary's actions, thus potentially facilitating opportunistic behaviour.[36] The removal of liability eliminates the need for rational business decisions[37] and can promote corporate irresponsibility and engagement in hazardous activities,[38] whilst providing an incentive to under-invest in precautions to prevent harm.[39] Examples of this could include mass environmental harm, like oil spills, or the use of harmful chemicals/materials in the workplace. Yet, any legitimate claims for compensation brought by those who are harmed can be defeated through underfunded/insolvent subsidiaries. This combination results in what Bradshaw refers to as a 'cocktail [which] is particularly toxic'.[40]

As such, it is important to question the extent to which the benefits of limited liability, in terms of economic investment, are outweighed by the costs related to such harmful activities.[41] Such considerations have led some scholars to argue for the abandonment of limited liability for parent companies.[42] Whilst this article does not argue as such (given that the economic benefits of limited liability cannot be disregarded), the corporate irresponsibility which it may promote lends weight to the idea that when balancing the maintenance of limited liability against the protection of tort creditors, it may be justified for limited liability to take more of a secondary role.

C. Limited Liability and Tort Creditors

It was noted at the outset that the benefits arising from limiting the liability of shareholders justifies the shift of this financial burden onto creditors. However, this generalisation of the term 'creditors' can be questioned on the basis that it ignores the

[34] Easterbrook and Fischel (n 10)
[35] Companies Act 2006, s 172(1)
[36] Paddy Ireland, 'Limited Liability, Shareholder Rights and The Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837
[37] David Campbell and Stephen Griffin, 'Enron and the End of Corporate Governance?' In Sorcha MacLeod, *Corporate Governance: Global Governance and the Question for Justice* (Hart Publishing 2006)
[38] Mackie, 'A Tale of Unintended Consequence: Corporate Membership in Early UK Company Law' (n 22)
[39] Hansmann and Kraakman (n 15)
[40] Carrie Bradshaw, 'Corporate Liability for Toxic Torts Abroad: Vedanta V Lungowe in the Supreme Court' (2020) 32 Journal of Environmental Law 139, 140
[41] Christopher Peterson, 'Piercing the Corporate Veil by Tort Creditors' (2017) 13 Journal of Business & Technology Law 63
[42] For example see Blumberg (n 3); Muchlinski (n 11)

unfavourable position of tort creditors.[43] This is because, they are involuntary creditors who did not intentionally expose themselves to the risk of harm and thus are unable to protect themselves.[44] Further, tort creditors have often suffered serious personal injuries, making them especially vulnerable.[45] Voluntary creditors, on the other hand, have chosen to interact with the company. Consequently, they can use their strong bargaining position to negotiate with the company to offset against the risk of loss.[46] For example, voluntary creditors can (amongst other things) seek retention of title clauses, assume charges over assets and request guarantees.
This essentially means that voluntary creditors are *ex ante* compensated for the risk they are exposed to as a result of limited liability.[47] Involuntary tort creditors do not have this luxury making them more vulnerable in the situation where their claims cannot be met due to the limited liability enjoyed by the parent company.[48] On this basis, the justification to impose liability in the context of tort creditors, when compared to voluntary creditors, is stronger given their clear lack of protection.

Nonetheless, Easterbrook and Fischel reject the notion of restricting limited liability for tort creditors as they believe that the company's insurance can satisfy tort claims.[49] In theory, this would be a utopic scenario as the economic benefits of limited liability could be maximised and any victims would receive compensation for harm. However, as Hansmann and Kraakman note this ignores the practical reality in that the existence of limited liability gives an incentive to under-provide in terms of insurance.[50] This argument holds weight considering a company need not incur the additional cost of insurance when financial risk is already covered by the doctrine of limited liability.

As a result of the vulnerable nature of involuntary tort creditors and the inadequacy of insurance as a solution, an appropriate balance between maintaining limited liability and protecting tort creditors should be tipped more towards protection.

2. Veil Piercing

The previous section found that an effective mechanism to impose liability on parent companies in the tort context should be weighted towards providing protection for the claimant rather than maintaining limited liability. This section explores the traditional method of imposing liability; veil piercing, and questions the extent to which it meets the 'tipped balance' found to be necessary in section one.

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[43] Warren (n 24)
[44] Phillip Lipton, 'The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective' (2014) 40 Monash University Law Review 452
[45] Warren (n 24)
[46] Anderson (n 14)
[47] Easterbrook and Fischel (n 10)
[48] Lipton (n 44)
[49] Ibid
[50] Hansmann and Kraakman (n 15)

A. The Court's Approach to Veil Piercing

Veil piercing allows the court to disregard the legal separation between the parent company and its subsidiary to impose liability on the former for the actions of the latter.[51] As such, the doctrine acts as a 'safety valve' for limited liability in order to protect the claims of creditors.[52]

Throughout its development, veil piercing has been vigorously criticised for its lack of clarity.[53] Easterbrook and Fischell have suggested that 'veil piercing seems to happen freakishly. Like lightening, it is rare, severe and unprincipled'.[54] Further, Millon asserted that the doctrine lacked coherence and thus was unpredictable.[55] This is because veil piercing has, for the most part, been premised on notably vague and abstract metaphors, for example where the company is a 'sham' or a 'façade.'[56] Although this lack of clarity is not necessarily admirable for a mechanism rooted in company law (which seeks to promote certainty), it cannot be ignored that these vague terms make veil piercing a potentially very effective mechanism.[57] This is because it confers discretion on judges, allowing them to consider the questionable extension of limited liability to parent companies and the vulnerable position of tort claimants.[58]

However, the effectiveness of veil piercing depends on the court's willingness to utilise the mechanism. From the early part of the 20th century up until 1978, the courts showed a willingness to pierce the veil,[59] as evident in several notable cases.[60] Perhaps the strongest advocate of veil piercing during this time was Lord Denning. In *Littlewoods v Inland Revenue* he expressed caution regarding the separate legal personality of companies and called for judicial flexibility to hold shareholders liable where necessary.[61] His most notable decision came in *DHN Food Distributors Ltd v Tower Hamlets* where he noted the unfavourable impact that limited liability has on claimants seeking compensation.[62] In the case itself, the corporate veil was disregarded and it was suggested that the parent company and its wholly owned subsidiary were to be treated

[51] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415
[52] Stephen Bainbridge, 'Abolishing LLC Veil Piercing' (2005) 2005 University of Illinois Law Review 77, 77
[53] Stephen Bainbridge, 'Abolishing Veil Piercing' (2001) 26 Journal of Corporation Law 479
[54] Easterbrook and Fischel (n 10), 89
[55] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305
[56] Hamiisi Nsubuga and Los Watkins, 'The Road to Prest v Petrodel: An Analysis of the UK Judicial Approach to the Corporate Veil - Part 1' (2020) 31 International Company and Commercial Law Review 547
[57] Ibid
[58] Ibid
[59] Thomas Cheng, 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines' (2011) 34 Boston College International & Comparative Law Review 329
[60] For example *Jones v Lipman* [1962] 1 WLR 832 (Ch D) and *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (CA)
[61] *Littlewoods Mail Order Stores v Inland Revenue Commissioners* [1969] 1 WLR 1241 (CA) [1254]
[62] *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852 (CA) [860]

as one economic entity for the purposes of imposing liability.[63] Lord Denning's approach is consistent with the findings in section one as it recognises that for veil piercing to be effective, maintaining limited liability should be seen as a lower priority than providing protection for creditors.

However, shortly after *DHN*, the court showed significant reluctance to pierce the corporate veil of parent companies. In *Woolfson v Strathclyde* (1978), Lord Denning's treatment of the companies as one entity in *DHN* was explicitly rejected[64] and the sanctity of the separate legal personality of parent companies in relation to their subsidiaries was restored.[65] According to Cheng, *Woolfson* signalled the beginning of the decline of veil piercing.[66] Strength can be found in this suggestion given that in the later case of *Adams v Cape*, the court again restricted the application of veil piercing.[67] Here, the court rejected the notion of justice as grounds to pierce the veil and held that using the corporate structure to economically benefit from a subsidiary whilst limiting any liability that may arise was permitted.[68] This illustrates a clear shift away from providing protection for creditors and instead shows the courts' determination to preserve the sanctity of limited liability thus failing to recognise the need for balance, hindering the effectiveness of veil piercing.

The courts' commitment to maintaining limited liability and the benefits it provides would perhaps be more defendable if not for the findings in Charles Mitchell's empirical analysis.[69] He found that in the rare circumstances where the courts were willing to pierce the veil, they were more likely to do so against individual shareholders than corporate shareholders.[70] This has been described as 'one of the most puzzling findings'[71] and it remains largely unexplained in the literature. Nonetheless, other empirical studies,[72] also found the same. This directly contradicts section one where it was found that the justifications for upholding limited liability are weaker where the shareholder is a parent company thus bringing the effectiveness of veil piercing into further doubt.

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[63] Ibid
[64] *Woolfson v Strathclyde Regional Council* [1978] 2 WLUK 113 (HL)
[65] Ernest Lim, 'Of 'Landmark' or 'Leading' Cases: Salomon's Challenge' (2014) 41 Journal of Law and Society 523
[66] Cheng (n 59)
[67] *Adams* (n 5)
[68] Ibid
[69] Charles Mitchell, 'Lifting the Corporate Veil: An Empirical Study' (1999) 3 Company Financial & Insolvency Law Review 15
[70] Ibid
[71] Dignam and Oh (n 4) 37
[72] For example see Robert Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 Cornell Law Review 1036; Ian Ramsay and David Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 Company and Securities Law Journal 250; Mohamed Khimji and Christopher Nicholls, 'Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study' (2015) 41 Queen's Law Journal 207; Dignam and Oh (n 4)

B. Prest v Petrodel

The general decline in the utilisation of veil piercing was confirmed in the case of *Prest v Petrodel*.[73] Although this was a family law case decided under trust law, the Supreme Court took the opportunity to thoroughly examine the veil piercing doctrine.[74] In an attempt to clarify the law, the judgement, led by Lord Sumption, laid down new requirements for veil piercing.[75]

The vague and subjective terms 'façade' and 'sham' which, as noted above, had been heavily criticised for their lack of clarity, were replaced with what Lord Sumption referred to as the principles of evasion and concealment.[76] The evasion principle refers to the situation whereby a company is interposed to evade an existing legal obligation or liability.[77] Concealment on the other hand involves interposing a company merely to conceal the identity of the real actors controlling the company.[78] According to Lord Sumption, only evasion would constitute grounds to pierce the corporate veil.[79]

Lord Sumption referred to evasion and concealment as 'distinct' principles,[80] however, this can be questioned. As noted by Hannigan, not only is concealment often present in evasion cases, the consequences of each are very similar making it difficult to differentiate between the two.[81] This difficulty is reflected in the judgement itself as Lord Neuberger and Lord Sumption disagreed on which category the previous case of *Gilford*[82] belonged to – with Lord Sumption stating it was an evasion case and Lord Neuberger convinced it was a concealment case.[83] However, despite the fact that some confusion regarding veil piercing remains,[84] on the whole *Prest* is thought to have broadly clarified the law.[85]

However, this clarity came at the cost of narrowing the scope of a doctrine already in decline. In *Prest*, veil piercing was confined to a remedy of last resort which could only be employed where other remedies, for example, under tort, statute or equity were not available.[86] Further, replacing the more abstract metaphors removes the judicial

[73] *Prest* (n 51)
[74] Ibid, [16] – [36]
[75] Ibid, [27] – [28]
[76] Ibid, [28]
[77] Ibid, [28]
[78] Ibid, [28]
[79] Ibid, [28]
[80] Ibid, [28]
[81] Brenda Hannigan, 'Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company' (2013) 50 Irish Jurist (NS) 11
[82] *Gilford Motor Co Ltd* (n 60)
[83] *Prest* (n 51), [29] (Lord Sumption), [70] (Lord Neuberger)
[84] Rian Matthews, 'Clarification of the Doctrine of Piercing the Corporate Veil' (2013) 28 Journal of International Banking Law and Regulation 516
[85] Ikuta Daisuke, 'The Legal Measures Against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler V Cape Plc and Thompson V Renwick Group Plc' (2017) 6 UCL Journal of Law and Jurisprudence 60
[86] *Prest* (n 51)

discretion enjoyed previously, hindering the future development of the law.[87] This was reflected in Lady Hale's judgement where she expressed caution with regard to restricting veil piercing to instances of evasion only.[88] Advocating a wider and more flexible approach,[89] she noted that evasion may be too under-inclusive to deal adequately with instances of corporate abuse.[90] Similar anxieties were echoed by Lord Mance[91] and Lord Clarke.[92] Given the discrepancies in the judgment, paired with the fact that the evasion principle was in fact *obiter*, it was questionable whether these new grounds for veil piercing would be applied in subsequent cases.[93] However, ten years after the decision and with no sign of change, it can be said with a relative degree of certainty that *Prest* (and the evasion principle) now represents the scope of veil piercing.[94]

C. Evasion and Tort Creditors

Having established the scope of veil piercing, this article will now assess how effective this is in providing protection for tort creditors. First and foremost, it must be noted that the evasion principle makes no distinction between involuntary tort creditors and voluntary creditors, the test for all creditors remains the same. Although previous veil piercing grounds did not make this distinction either, the courts could at least use their discretion under the vaguer and more abstract grounds to take account of this. Evidence of this can be seen in Dignam and Oh's empirical analysis which found that between 1885 and 2014, the court was most likely to pierce the corporate veil for tort creditors compared to any other creditor.[95] As such, the removal of judicial discretion in *Prest*, means that from 2013 onwards, veil piercing was no longer able to take into account the vulnerability of tort creditors and their requirement for more protection as found in section one.[96]

Not only does the evasion principle lack the discretion to assess the position of the claimant, the wording of the principle may in fact place tort creditors at a disadvantage to voluntary creditors. This is because, as noted above, an evasion of *existing* obligations is required.[97] Unlike in the case of voluntary creditors, where there is often a contract of obligations in place from the outset, tortious liability arises *after* harm is caused. As such, provided that the company restructures before a tortious claim arises the company

[87] Hamiisi Nsubuga and Los Watkins, 'The Road to Prest v Petrodel: An Analysis of the UK Judicial Approach to the Corporate Veil - Part 2: Post-Prest' (2020) 31 International Company and Commercial Law Review 597
[88] *Prest* (n 51)
[89] Alexander Schall, 'The New Law of Piercing the Corporate Veil in the UK' (2016) 13 European Company and Financial Law Review 549
[90] *Prest* (n 51)
[91] Ibid, at [100] Lord Mance suggested it was dangerous to foreclose all future situations into the categories of evasion and concealment
[92] Ibid, at [103] Lord Clarke argued against the adoption of concealment and evasion.
[93] Nsubuga and Watkins (n 56)
[94] Christopher Arvidsson, 'The Piercing Doctrine: Re-examining Evasion' (2019) 40 Company Lawyer 320
[95] Dignam and Oh (n 4)
[96] See section 1, subheading 'Limited Liability and Tort Creditors' and accompanying text.
[97] *Prest* (n 51)

cannot be held accountable for any harm caused.[98] This, of course, is hugely beneficial for parent companies as the financial damage of large tortious claims does not have to devastate an entire company. However, as warned in section one, it encourages the parent company to engage in hazardous activity through its subsidiaries whilst defeating legitimate claims for compensation through routinely liquidating these subsidiaries.[99] Further, it must be noted that much of the caselaw in this area concerns asbestos related harm.[100] Given that such harm takes a number of years to materialise, companies have the opportunity to restructure in order to quarantine years' worth of future liability.[101] The difficulty for tort claimants to establish a successful claim under the evasion principle again throws the effectiveness of veil piercing as a mechanism for imposing liability into significant doubt.

Although this conventional view (that evasion will rarely cover tortious claims) is widely accepted in the literature,[102] it can in fact be challenged. For example, Lo has boldly put forward an alternative interpretation of the evasion principle, which brings tort claims firmly within its scope.[103] He uses the case of *Adams v Cape*[104] to do so. In this case, the parent company restructured with the intention to defeat future claims of ex-employees who had been exposed to asbestos at work.[105] Lo suggests that although the parent company restructured in order to shield themselves from *future* liability, the obligation to take care and not to cause harm to employees was already *existing* at the time of restructuring.[106] Therefore, the parent company's liquidation of the subsidiary was in fact an evasion of their existing legal duty of care obligation.[107]

Some, albeit limited, judicial support can be found for Lo's argument in the case of *Rossendale v Hurstwood*,[108] which concerned liability for business rates. Here, Judge Hodge suggested that a parent company interposing another company to divest themselves of ongoing existing liability can fall within Lord Sumption's evasion principle.[109] Though this case failed, it did so on the basis that liability for business rates arise day-to-day.[110] However, unlike business rates, the obligation to take care can be seen, according to Arvidsson, as a true ongoing obligation thus bringing it within the scope of *Prest*.[111]

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[98] *Adams* (n 5)
[99] Bradshaw (n 40)
[100] For example see *Adams* (n 5); *Chandler v Cape Plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111, *Lubbe v Cape Plc* [2000] 1 WLR 1545 (HL); *Thompson v Renwick Group Plc* [2014] EWCA Civ 635, [2014] 5 WLUK 396
[101] Arvidsson (n 94)
[102] For example see Lipton (n 44); Daisuke (n 85)
[103] Stefan Lo, 'Piercing of The Corporate Veil for Evasion of Tort Obligations' (2017) 46 Common Law World Review 42
[104] *Adams* (n 5)
[105] Ibid
[106] Lo (n 103)
[107] Ibid
[108] *Rossendale BC v Hurstwood Properties Ltd* [2017] EWCA Civ 3641
[109] Ibid
[110] *Rossendale BC v Hurstwood Properties Ltd* [2019] EWCA Civ 364, [2019] 1 WLR 4567.
[111] Arvidsson (n 94)

Lo's work is virtually unexplored in the literature, which is surprising given that his argument has merit – it seems logical that one cannot incur liability for breach of an obligation if that obligation was not already existing before the liability arose. On the basis of this more liberal interpretation, veil piercing may be a more effective mechanism for the tort claimant than it first seemed.

However, the relevance of these theoretical arguments should not be over-emphasised as they are of no practical value to the tort claimant unless the courts employ the same interpretation. It has been speculated that due to different judicial approaches taken throughout the development of veil piercing, there is a possibility that a more flexible approach (like Lord Denning's) could return.[112] However, this seems unlikely. Firstly, if Lord Sumption intended evasion to be interpreted in the way in which Lo suggests, he likely would have made this clear in his judgement given the implications of such an interpretation.[113] Secondly, as shown earlier in this section, there has been a general decline in the court's willingness to pierce the veil, the scope was narrowed further in *Prest*[114] and thus expanding it again under a liberal interpretation would be unlikely.

3. Duty of Care

Having established the limitations of veil piercing, this section critically analyses the effectiveness of parent company duty of care as an alternative mechanism for imposing liability.

A. Company Law v Tort Law

Company law (veil piercing) and tort law (duty of care) are two fundamentally different areas of law. This is significant because the aims and values of each naturally have a bearing on the application and scope of each test. Broadly speaking, company law aims to promote business efficacy.[115] Given the economic benefits of limited liability explored in section one, it is considered to be a central principle in achieving this aim. This perhaps explains the court's reluctance to impose liability under veil piercing as they are essentially using a company law mechanism to undermine the central aim of company law.

[112] Cheng (n 59)
[113] Arvidsson (n 94)
[114] *Prest* (n 51)
[115] 'Company Law: Providing a Flexible Framework Which Allows Companies to Compete and Grow: Discussion Paper' (Department for Business, Innovation and Skills, 2012) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31649/12-560-company-law-flexible-framework-discussion-paper.pdf> accessed 1st February 2021

Contrastingly, tort law aims to deter wrongdoing, compensate deserving victims who have suffered harm or loss[116] and disincentivise risky behaviour.[117] This indicates that tort law provides an appetite to impose liability in deserving cases in a way in which company law does not. And, although limited liability is still relevant,[118] it can hold less weight as it is not central to the aims of tort law. This allows the court to 'skirt' around the principle of limited liability through the finding of a *direct* duty of care (between the parent company and the claimant) rather than riding roughshod over it by piercing the subsidiary's corporate veil.[119]

On this basis, the aims of tort law seem to align with section one as they lend themselves more towards providing protection rather than maintaining limited liability. Therefore, in theory at least, duty of care has the potential to be a more effective mechanism for imposing liability. Against this backdrop, the scope of duty of care will now be explored.

B. Duty of Care

Duty of care in tort law is a broad concept. Relationships giving rise to such a duty include, schoolteachers to pupils,[120] doctors to patients[121] and transport operators to passengers.[122] If a case does not fit into an established category, a duty can arise through satisfying the *Caparo v Dickman*[123] three-stage test or through the finding of a voluntary assumption of responsibility. In order to satisfy *Caparo*, the harm caused must have been reasonably foreseeable, there must be an appropriate degree of proximity between the claimant and defendant and it must be fair, just and reasonable to impose this duty on the defendant.[124] Assumption of responsibility requires a special relationship between the defendant and claimant,[125] whereby the defendant assumed the responsibility of conducting themselves with care and the claimant relied on this.[126] If a duty of care is established and it is found that this has been breached causing harm to the claimant then liability can be imposed.

The application of duty of care in the parent company context is a relatively recent development. A number of cases had alluded to the possibility that parent companies

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[116] Warren (n 24)
[117] Lipton (n 44)
[118] Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013) 76 The Modern Law Review 603
[119] William Day, 'Negligence and the Corporate Veil: Parent Companies' Duty of Care to Their Subsidiaries' Employees' (2014) 4 Lloyd's Maritime and Commercial Law Quarterly 454, 457
[120] *Carmarthenshire County Council v Lewis* [1955] AC 549 (HL)
[121] *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871 (HL)
[122] *Silverlink Trains Ltd v Collins-Williamson* [2009] EWCA Civ 850, [2009] 7 WLUK 879; *Fernquest v Swansea* [2011] EWCA Civ 1712, [2011] 12 WLUK 100
[123] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL)
[124] Ibid
[125] Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (n 118)
[126] Rachael Mulheron, *Principles of Tort Law* (Cambridge University Press, 1st ed, 2016)

may owe a direct duty of care to those harmed by subsidiaries.[127] However, it was not until 2012 in the case of *Chandler v Cape*[128] that the court explicitly did so, making it a very significant and influential decision.[129] Here, the claimant developed asbestosis after a period of working in the defendant's wholly owned subsidiary, which was no longer in existence.[130] The court imposed liability on the parent company by establishing a duty of care.

In doing so, it held that 'control' by the parent company over the subsidiary was the definitive factor.[131] The court also provided a four-part test to illustrate a situation whereby a parent company may be deemed to owe a duty of care:

> '(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.'[132]

The court seemed to suggest that if these requirements were met but the parent had failed to prevent harm then the requisite breach and causation elements needed to impose liability would also be satisfied.[133] Having established the considerations relevant to imposing liability through the finding of a duty of care, the scope of *Chandler* will now be explored to determine its effectiveness.

C. Analysis of Chandler v Cape

i) Control

As noted above, the definitive factor for a finding of liability is control by the parent over its subsidiary.[134] It is deemed to satisfy the 'proximity' element of *Caparo* which the court in *Chandler* believed to be the most important.[135] In *Chandler*, Arden LJ asserted that absolute control over the subsidiary was not necessary, 'relevant control' would suffice.[136] Further, merely the 'perception' of this relevant control was enough, actual

[127] *Connelly v RTZ Corp Plc* [1999] CLC 533 (QB); *Lubbe v Cape* (n 100); *Newton-Sealey v ArmorGroup Services Ltd* [2008] EWHC 233 (QB)
[128] *Chandler* (n 100)
[129] Ugljesa Grusic, 'Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation' (2015) 74 Cambridge Law Journal 30
[130] *Chandler* (n 100)
[131] Ibid
[132] Ibid, [80]
[133] Ibid
[134] Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (n 118)
[135] *Chandler* (n 100)
[136] Ibid, [46]

control was not necessary.[137] The court, however, did not elaborate on how much control was necessary to constitute 'relevant control.' This led to concerns that liability could be stretched too far because, due to the nature of vertically structured companies, some level of control by the parent over its subsidiary is inevitable.[138] This is welcomed from the perspective of providing protection for tort creditors and is far from the narrow grounds of veil piercing which rules out many tort claims. However, section one established that even though protection of tort creditors should be the priority, limited liability should be maintained as far as possible given its economic benefits. Without defining the boundaries of 'control' duty of care could fail to recognise this as it could be overinclusive, subjecting every parent company to liability.[139] On this basis, duty of care may be deemed no more effective than veil piercing.

Whilst this is true, the actual scope of *Chandler* is not as broad as first perceived. This is because the four factors laid out by Arden LJ were initially framed as non-exhaustive, merely an example of when a parent may be deemed to be in 'control'.[140] However, subsequent cases have been guided strongly by them,[141] and liability is yet to be established outside of these four requirements.[142] This suggests that the significant threat to limited liability first perceived due to lack of clarity has not materialised. Given that the four requirements seem to most accurately represent the scope of duty of care, it is important to now assess the level of protection they provide for tort claimants in order to determine whether duty of care is more effective than veil piercing.

ii) The *Chandler* Requirements

Same Business

Firstly, the business of the parent and subsidiary must be, in a relevant respect, the same.[143] This requirement recognises the integration and interdependence between the two companies.[144] As such, an interesting link can be drawn with Lord Denning's judgement in *DHN*[145] which was explored in section two. Here, it was noted that Lord Denning disregarded the legal separation between the parent and subsidiary, referring to them both as one entity given how closely they were operating.[146] This was forcefully rejected and heavily criticised in the company law context due to the undesirable effect

[137] Andrew Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary' (2012) 71 The Cambridge Law Journal 478

[138] David Kershaw, *Company Law in Context: Text and Materials* (Oxford University Press, 2nd ed, 2012)

[139] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771

[140] *Chandler* (n 100)

[141] For example see *Thompson* (n 100)

[142] Subsequent cases have alluded to the possibility that a duty of care may arise in other ways, for example see *Vedanta Resources Plc v Lungowe* [2019] UKSC 20, [2020] AC 1045, however this was *obiter* and thus not legally binding Chandler (n 100)

[143] *Chandler* (n 100)

[144] Veltrice Tan, 'The Corporate Veil: Will the Court Pierce the Veil on Grounds of Justice and Modern Business Realities' (2018)39 Company Lawyer 387

[145] *DHN Food Distributors Ltd* (n 62)

[146] Ibid

on limited liability, therefore, it is unusual to see a re-emergence in the tort law context. Perhaps such a requirement would be too broad to be the sole basis of liability (as Lord Denning was suggesting) but here it is qualified against the need to also satisfy the other requirements. As a result, there is more of a balance between protecting tort creditors whilst maintaining limited liability as far as possible.

Knowledge

The second and third requirements focus on the parent company's knowledge, namely superior knowledge of health and safety in that particular industry and knowledge of the subsidiaries unsafe practices. These knowledge requirements encapsulate the 'foreseeability of harm' requirement of *Caparo*[147] and seek to question whether the parent was better placed than the subsidiary to prevent such harm.[148] If so, liability may be imposed. Bypassing limited liability here seems justified given that the subsidiary had inferior knowledge to prevent harm relative to the parent. Such a requirement may also prevent parent companies from knowingly engaging in the excessively risky and hazardous behaviour warned of in section one. It must however be noted that the burden of proving such knowledge rests with the claimant.[149] This obstacle should not be overlooked[150] considering that such information may not be disclosed,[151] thus potentially hindering the finding of a duty of care. However, although this is the case, the evidence required under duty of care is less than that of veil piercing which seeks to ascertain the motives of the defendant rather than just the fact of knowledge.[152] Consequently, from the perspective of the claimant, duty of care remains preferable.

Reliance

The final requirement relates to reliance based primarily on the level of intervention by the parent company.[153] Interestingly, the intervention needed to satisfy this requirement need not be related to health and safety, intervention in general trading operations like financing and production could be enough for a parent company to be liable for personal injury.[154] Petrin takes issue with this, suggesting it is undesirable for parent companies to be liable for injury even though they had no connection to the health and safety of the subsidiary thus extending liability too far.[155] However, Petrin's argument is flawed in that he views the requirements in isolation from one another despite all having to be satisfied before liability is imposed.[156] Therefore, the preceding requirements of business

[147] Daisuke (n 85)
[148] Madeleine Conway, 'A New Duty of Care - Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains' (2015) 40 Queen's Law Journal 741
[149] Warren (n 24)
[150] Ibid
[151] Ibid
[152] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 Washington and Lee Law Review 1769
[153] *Chandler* (n 100)
[154] Ibid
[155] Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (n 118)
[156] *Chandler* (n 100)

integration and knowledge provide a check on this broader interpretation of reliance which Petrin fails to acknowledge.

Further, the claimant need not rely on the parent company, it is enough if the subsidiary did.[157] This is unusual as when considering a duty of care from the parent to the claimant, the subsidiary is a third party. Derivative reliance in such a way is rarely accepted in this context and the courts did not elaborate as to why this extension was made.[158] Nonetheless, this flexible approach to reliance is welcomed in terms of the protection of tort creditors, without derivative reliance it would be difficult for any claim to succeed. This is because in reality, it would be unlikely for a claimant, for example, an employee, to 'rely' on a parent company. Most often, employees have no interactions with the parent company. This again shows the court's appetite to provide protection for tort claimants and thus the effectiveness of duty of care as a mechanism of imposing liability.

On the basis of the above considerations, providing protection for tort claimants seems to be a priority for the court. This is evident given that the test is based on the loose notion of control, as well as the court's willingness to treat the parent and subsidiary as one business and the flexible approach regarding reliance. Nonetheless, the existence of clear requirements provides somewhat of a check on imposing liability meaning that the limited liability of parent companies is maintained where the damage caused is too remote.[159] This can be seen in the case of *Thompson v Renwick*[160] where although the court showed sympathy towards the claimant, suggesting 'the conditions in which Mr Thompson was expected to work are really quite shocking and should be a cause for shame', the claim failed as the *Chandler* requirements were not satisfied.[161] This shows that the court will not impose a duty of care merely because justice requires it, there must be enough evidence to justify interference with limited liability.[162] Given that protection of tort creditors is a priority, but limited liability is maintained as far as possible, the balance struck between the two under duty of care aligns closely with that found necessary for an effective mechanism in section one.

iii) Preventative Function

Not only does duty of care provide a good level of protection, the test laid out in *Chandler* also provides an important preventative function. This is because the threat of liability encourages companies to improve health and safety standards in subsidiaries which can reduce the number of accidents/injuries that occur.[163] Whilst this could lead to the potential retraction from more lucrative, risky investment which is undesirable from an

[157] Ibid
[158] Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (n 118)
[159] Petrin and Choudhury, 'Group Company Liability' (n 139)
[160] *Thompson* (n 100)
[161] Ibid, [1]
[162] Tan (n 144)
[163] Peter Yeoh, 'A Parent Company's Liability for A Subsidiary's Actions' (2012) 33 Business Law Review 206

economic perspective, the improvement of health and safety is of paramount importance and should be prioritised. Improvement of health and safety is not such a pressing factor under the narrower scope of veil piercing as the strong adherence to limited liability means that parent companies are fairly comfortable in the knowledge that liability would rarely ensue.

On the other hand, it has been suggested that the four requirements laid out in *Chandler* may in fact incentivise parent companies to completely step back from the subsidiary's health and safety matters in order to prevent a finding of liability.[164] Theoretically this argument holds weight – with such clear, fact-based requirements, parent companies can *ex ante* shield themselves from liability. For example non-trading (holding) companies who do not establish group policies on health and safety may fall outside the scope of *Chandler*[165] given that it is harder to argue that they are the same business[166] and harder to prove the requisite knowledge[167] and reliance. Consequently these types of companies can still benefit from the subsidiary and use it to engage in the risky/hazardous activity noted in section one, yet liability would be hard to establish.

Whilst such arguments hold weight in theory, in practice their strength is questionable. This is because, often insurance companies demand disclosure of group policies, as do institutional investors before they are willing to invest and group policies are often needed to secure licenses for operations and trading.[168] Therefore, it seems that the issue of misguided incentives has been overstated in the literature[169] and in practice, given the commercial need for group-wide policies, the requirements in *Chandler* will likely improve health and safety standards in a way in which veil piercing does not.

D. Recent Developments

The courts have again shown a willingness to provide a remedy for tort claimants in two recent cases, *Vedanta*[170] and *Okpabi*.[171] Both cases were brought by non-UK citizens against UK-domiciled parent companies for environmental damage caused by foreign subsidiaries.[172] In suggesting that a duty of care may exist, the court seemingly added an extra-territorial element to *Chandler*.[173] And, as the claimants in these cases were members of the local community, the decisions also indicate that parent company duty of care

[164] Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (n 118)
[165] James Goudkamp, 'Duties of Care and Corporate Groups' (2017) 133 Law Quarterly Review 560
[166] Day (n 119)
[167] Goudkamp (n 165)
[168] Tara Van Ho, 'Vedanta Resources Plc and Another v. Lungowe and Others' (2020) 114 The American Journal of International Law 110
[169] Ibid
[170] *Vedanta* (n 142)
[171] *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294
[172] *Vedanta* (n 142); *Okpabi* (n 171)
[173] Colin Mackie, 'Corporate Groups, Common Officers and the Relevance of 'Capacity' in Questions of Knowledge Attribution' (2020) 20 The Journal of Corporate Law Studies 1 Tan (n 144)

extends beyond employees to anyone harmed by the subsidiary's actions.[174] As such, they have been considered very promising developments in this area of law.[175]

However, it must be noted that both cases were brought on jurisdictional grounds (i.e. whether the UK was the correct place to sue the parent company)[176] and consequently comments as to duty of care are *obiter* and not legally binding. Nonetheless, they signify the courts' appetite to provide a remedy for tort claimants in deserving cases as claims will not be limited due to the location of the subsidiary or the status of the claimant. This illustrates the effectiveness of duty of care given that the court values the protection of tort creditors over the maintenance of limited liability.

4. Case Study

The previous section found, based on theoretical analysis, that duty of care is a more effective mechanism of imposing liability than veil piercing as it seems to provide a greater level of protection for tort creditors. This section aims to test these findings through a practical application of the duty of care framework to a previous veil piercing case (*Adams v Cape*).[177] Given that *Adams* came to the court before parent company duty of care was established, it provides the perfect opportunity to compare the actual outcome of the case under veil piercing with a theoretical outcome under duty of care.

A. Adams v Cape

Adams v Cape[178] concerned a parent company ('Cape') who was involved in the production of asbestos. The company's North American Asbestos Corporation ('NAAC') subsidiary was responsible for distributing asbestos throughout the USA. In the 1970s Cape became the target of litigation for American claimants who had suffered injuries after exposure to asbestos distributed by NAAC. The claimants argued that NAAC and Cape should have warned of the dangers of asbestos.[179] In 1975 in response to the increasing litigation, Cape undertook large-scale restructuring in an attempt to shield itself from liability. This involved transferring NAAC's shares to a newly incorporated company (CIOL). Later, NAAC was fully liquidated and replaced by another company (AMC), the shares of which were held by an individual on behalf of CIOL.[180]

The claimants invited the court to pierce the corporate veil, arguing that AMC was a 'sham' replacement of NAAC intended to disguise Cape's presence in the USA so that it could avoid liability whilst continuing harmful trade. The court, however, held that the

[174] Tan (n 144)
[175] Marilyn Croser, Martyn Day, Mariette Van Huistee, 'Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2020) 5 Business and Human Rights Journal 130
[176] *Vedanta* (n 142); *Okpabi* (n 171)
[177] *Adams* (n 5)
[178] Ibid
[179] Ibid
[180] Ibid

corporate form was permitted to be used in such a way, refusing to pierce the veil and leaving the claimants without a remedy. The court questioned the morality of such a judgement but ultimately felt bound to maintain the separate legal personality of the companies as well as limited liability.[181] This restructuring was described as one of the most successful escapes from liability in history.[182] The remainder of this section questions whether the claimants would have had an arguable case under duty of care.

B. Duty of Care (Application of *Chandler v Cape*)

Here, we are asking whether Cape owed a direct duty of care to those harmed by NAAC. It should be noted at this point that the claimants are not employees of the subsidiary (unlike in *Chandler*).[183] Although this decreased relational proximity may make it more difficult to establish a duty,[184] the courts have shown significant judicial receptivity to expand *Chandler* in this way.[185] As such, this is not significantly detrimental and therefore, the four requirements can now be considered.

1) Is the business of Cape and NAAC, in a relevant respect, the same?

This requirement relates to the similarity between the operations of the two companies as well as their interdependence.[186] Here, NAAC's business concerned only asbestos. Cape's business, however, was more diversified, with the asbestos-related division being only one of four.[187] Despite this, Cape's asbestos-related division was considered the 'linchpin' of the business[188] and therefore it seems reasonable to suggest that in terms of operations, the businesses were, in the *relevant* respect, the same. It would be useful to know whether Cape was an operating company actively involved in the asbestos trade or merely a holding company. It has been suggested that the latter may make it more difficult to argue that the business of both companies are the same[189] albeit not impossible.[190]

In terms of the interdependence between the two companies, NAAC was not only a wholly owned subsidiary of Cape, but also such a fundamental part of the group that Cape likely could not survive without it.[191] Such considerations were deemed by the court

[181] Ibid
[182] Andrea Boggio, 'Linking Corporate Power to Corporate Structures' (2012) 22 Social & Legal Studies 107
[183] *Chandler* (n 100)
[184] Goudkamp (n 165)
[185] See section three, subheading 'Recent Developments' and accompanying text
[186] Tan (n 144)
[187] Geoffrey Tweedale and Laurie Flynn, 'Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for A Toxic Hazard, 1950–2004' (2007) 8 Enterprise & Society 268
[188] Ibid, 273
[189] Goudkamp (n 165)
[190] *Vedanta* (n 142)
[191] Tweedale and Flynn, 'Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for A Toxic Hazard, 1950–2004' (n 187)

in *Vedanta*[192] and *Okpabi*[193] to suggest the parent and subsidiary were the same business. Not only this, the companies portrayed themselves publicly as one – Cape referred to NAAC as 'our Chicago office' and NAAC referred to Cape as 'our London office'.[194]

Despite this, the defendants in *Adams* asserted that NAAC was an entirely separate business.[195] Strength can be found in this statement given that NAAC had its own creditors and debtors, its own pension scheme, its own employees and its own offices.[196] NAAC also had the ability to enter into contracts without Cape's approval.[197] Whilst this does suggest some independence from Cape, it is likely not enough to preclude liability – subsidiaries are usually responsible for their day-to-day management and some distance from the parent company is part of the inherent nature of vertically structured corporate groups. Thus, the main question is whether there is *enough* distance to suggest they are not the same business. Arden LJ in *Chandler* suggested that subsequent events may give retrospective insight into answering such questions.[198] We know that Cape restructured with the sole intention of distancing itself from NAAC – this was made explicit in the case and was accepted by both parties and the court.[199] Therefore, it would be reasonable to infer that they were closely connected beforehand.

On the basis of the above considerations, it seems reasonable to suggest that this first requirement is satisfied.

2) Did Cape have superior knowledge/resources in relation to health and safety in the asbestos industry?

Cape's resources clearly outweighed that of NAAC. Cape employed a group-wide medical researcher who was responsible for investigating the relationship between asbestos and asbestos-related diseases and then reporting back to Cape.[200] Such an appointment held huge weight towards the finding of sufficient knowledge in *Chandler*.[201]

Not only this, Cape had the benefit of its other subsidiaries which gave them a direct insight into the dangers of asbestos. For example, deaths in Cape's London plant led to

[192] *Vedanta* (n 142)
[193] *Okpabi* (n 171)
[194] *Adams* (n 5)
[195] Ibid
[196] Ibid
[197] Ibid
[198] *Chandler* (n 100)
[199] *Adams* (n 5)
[200] Jock McCulloch and Geoffrey Tweedale, 'Double Standards: The Multinational Asbestos Industry and Asbestos-Related Disease in South Africa' (2004) 34 International Journal of Health Services 663
[201] *Chandler* (n 100)

the first medical definition of asbestosis.[202] Further, the first cases of mesothelioma occurred around Cape's South African asbestos mines.[203] Such knowledge and resources enabled Cape to contribute to the formulation of the world's first asbestos regulations.[204] Consequently, there is little doubt that during the relevant period, Cape had significant knowledge of the health and safety risks of asbestos.

Whether this knowledge was *superior* to that of NAAC is perhaps more difficult to ascertain as it depends on the communications between the two companies for which there is little evidence. However, it does seem that Cape in general, lacked transparency regarding the risks of asbestos. Cape refused to disclose the risks to shareholders and employees.[205] Further, to the public, the company explicitly denied that asbestos led to mesothelioma, despite knowing otherwise.[206] This may be due to the profitability of the asbestos industry,[207] with asbestos widely regarded as a 'miracle mineral' at the time.[208] Given this strong commercial incentive, it seems logical, albeit cynical, to suggest that NAAC, like Cape's stakeholders, was not fully aware of the risks in order for the business to continue efficiently. Therefore this, would make Cape better placed than NAAC to have protected the claimants.

3) Did Cape know that NAAC's practices were unsafe?

Perhaps the biggest obstacle to the claimant here is the fact that NAAC was based in the USA and Cape in the UK. As such, it may be legitimate for Cape to claim that they were unaware of NAAC's unsafe practices. However, as noted in section three, lack of geographical proximity did not prevent the courts finding an arguable case for a duty of care in both *Vedanta*[209] and *Okpabi*[210] showing that, although this may weaken the claim slightly, it is not significantly detrimental.

Further, there are a number of facts which indicate that Cape was aware of NAAC's practices, the strongest of which is the role of Dr Gaze. Gaze, who was a director of both Cape and NAAC, was responsible for health and safety throughout the group.[211] This can

[202] McCulloch and Tweedale, 'Double Standards: The Multinational Asbestos Industry and Asbestos-Related Disease in South Africa' (n 200)
[203] Tweedale and Flynn, 'Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for A Toxic Hazard, 1950–2004' (n 187)
[204] Morris Greenberg, 'Cape Asbestos, Barking, Health and Environment: 1928-1946' (2003) 43 American Journal of Industrial Medicine 109
[205] McCulloch and Tweedale, 'Double Standards: The Multinational Asbestos Industry and Asbestos-Related Disease in South Africa' (n 200)
[206] Ibid
[207] Lee Moerman, Sandra van der Laan and David Campbell, 'A Tale of Two Asbestos Giants: Corporate Reports as (Auto)Biography' (2013) 56 Business History 975
[208] Michelle J White, 'Asbestos and The Future of Mass Torts' (2004) 18 Journal of Economic Perspectives 183, 183
[209] *Vedanta* (n 142)
[210] *Okpabi* (n 171)
[211] *Adams* (n 5)

be contrasted with the case of *Thompson v Renwick*,[212] where the appointment of a health a safety director to the subsidiary alone was insufficient to prove knowledge. Given the group-wide responsibilities of Dr Gaze compared with the subsidiary-only responsibilities of the director in *Thompson*, *Thompson* can be distinguished.

Not only this, Gaze had visited the factories where the claimants were exposed to asbestos.[213] There he found workers handling it with no safety precautions.[214] In his testimony, Gaze stated that he had discussed NAAC's unsafe practices with Cape and recommended placing warning labels on bags of asbestos to notify others of the danger, but no action was taken.[215] Moreover, NAAC was not merely acquired by Cape – it was created by Cape with the clear purpose of distributing asbestos. Although this is not as strong as in *Chandler* (where the parent previously operated the subsidiary before the subsidiary acquired the business from the parent) it nonetheless indicates Cape's knowledge of the unsafe practices at NAAC.

On balance, despite the lack of geographical proximity, it seems clear that Cape was aware of the harm that NAAC's practices were causing.

4) Did Cape know/foresee that NAAC would rely on Cape's expertise?
As noted in section three,[216] to establish reliance it seems that there must be a pattern of the parent intervening in the operations of the subsidiary, this intervention need not be related to health and safety.[217] In terms of financial intervention, Cape controlled NAAC's expenditure, determined the dividends permitted and controlled the borrowing of the company.[218] However, following *Thompson*[219] it is clear that the intervention must be more than would be expected from parent companies and it is questionable whether the above facts would be enough. If, for example, Cape provided financial support to NAAC, as in *Vedanta*,[220] the claim would be stronger, however this is not known.

Intervention can, however, be proven through the implementation of policies and it seems as though Cape's interference in this regard was more than would be expected from a parent company. It has been suggested by Griffin that Cape 'controlled the reigns of its 'animal''[221] and strength can be found in this given that all of NAAC's policy

[212] *Thompson* (n 100)
[213] Tweedale and Flynn, 'Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for A Toxic Hazard, 1950–2004' (n 187)
[214] Ibid
[215] Ibid
[216] See section 3, subheading 'Reliance' and accompanying text
[217] *Chandler* (n 100)
[218] *Adams* (n 5)
[219] *Thompson* (n 100)
[220] *Vedanta* (n 142)
[221] Stephen Griffin, 'Holding Companies and Subsidiaries – The Corporate Veil' (1991) 12 Company Lawyer 16, 18

decisions and its commercial direction were determined by Cape.[222] Further, the court in *Adams* conceded that Cape could and did enforce its power to control NAAC.[223] This seems to suggest that policies were both compulsory and tailored to NAAC which in *Okpabi* was argued to be the making of a strong duty of care claim.[224]

It would be useful to know the extent to which Cape ensured such policies were followed, for example whether it undertook careful monitoring, as this would likely strengthen the claim further as noted in *Vedanta*.[225] Although such information would be useful, it seems that even on the facts available, NAAC would 'bow' to Cape's intervention (as in *Chandler*)[226] and thus there is sufficient reliance for this requirement to be met.

Given the control, knowledge, interference and harm caused by Cape, it seems that in this instance, sidestepping limited liability to provide protection for tort creditors would be justified. However, as noted above, veil piercing was unable to do so. This reinforces the findings in section two which suggested that, under veil piercing, the value of limited liability is placed too high, hindering its effectiveness as a mechanism to impose liability. Contrastingly, through the application of the *Chandler* requirements it seems that there is definitely an arguable case that Cape owed the claimants a duty of care and through not taking any action they breached this duty causing harm. Although there is not yet precedent for a parent company owing a duty to non-employees where the subsidiary is based abroad, there is judicial receptivity to expand duty of care in this way when the opportunity arises.[227] If the facts of *Adams* were altered in this regard (i.e. NAAC was based in the UK and the claimants were employees) a duty would be found with much more certainty as it is more analogous to *Chandler*.[228] Importantly though, even with such changes, the claimants would still likely have no protection under veil piercing, given its narrow scope. This corresponds with the findings in section three which suggested that duty of care is notably more effective than veil piercing as, although liability is not always imposed, the protection of tort creditors remains the priority.

Conclusion

On the basis of the findings throughout this article, it is concluded that parent company duty of care is a significantly more effective mechanism for imposing liability than veil piercing, in the context of tort claimants.

[222] Ibid
[223] *Adams* (n 5)
[224] *Okpabi* (n 171)
[225] *Vedanta* (n 142)
[226] *Chandler* (n 100), [75]
[227] See section three, subheading 'Recent Developments' and accompanying text
[228] *Chandler* (n 100)

Section one was used as the foundational basis for this conclusion. Here it was found that although limited liability does confer economic benefits on parent companies, the traditional rationale for the principle is not as strong when compared to individual shareholders. Not only this, it found that tort creditors are more vulnerable than voluntary creditors and thus require more protection under the law. As such whilst an effective mechanism for imposing liability must recognise the importance of limited liability, ultimately, providing protection for tort creditors should be prioritised.

Veil piercing was found in section two to be flawed in this regard as the evasion principle was deemed too narrow in scope to provide sufficient protection for tort creditors. And, although on a more liberal interpretation, the evasion principle could be more effective, such an interpretation is unlikely to be employed by the court given their increasing reluctance to pierce the corporate veil in recent years. As such, veil piercing adheres too strongly to maintaining limited liability to be an effective mechanism.

Contrastingly, section three found that duty of care strikes a balance more analogous with that found to be necessary in section one. Through analysis of the scope of *Chandler*, it was found that protection of tort creditors is a priority for the court, but the imposition of liability is qualified through the need to satisfy clear requirements, thus showing the residual importance of maintaining limited liability. This, paired with the limitations of veil piercing, indicates that duty of care is a significantly more effective mechanism for imposing liability. Section four reinforced this finding where tort victims who failed to impose liability on a parent company through veil piercing were found to have a much stronger case under duty of care.

It should be noted that parent company duty of care is a relatively new mechanism for imposing liability which is in its early stages of development – the area requires further research and attention which is expected in the coming years. Nonetheless, duty of care remains an incredibly positive and welcomed alternative to veil piercing given that it provides the court with the legal apparatus to circumvent limited liability to provide protection for vulnerable claimants.

Proactive Not Reactive: The Case for Mental Ill-Health Prevention. To What Extent Does the Law Protect Urban Nature as A Safeguard For Mental Health?

Tanya-Louise Saunders

Abstract

The COVID-19 pandemic has left in its wake a tsunami of mental distress. This has been exacerbated by the State's inability to foster an environment which promotes individuals' resilience in the face of adversity. With the view that the State should be more proactive in its protection of mental health, this paper aims to assess whether the law effectively safeguards but also demands the implementation of nature within urban environments. This will be achieved through assessment of vulnerability theory in relation to mental wellbeing and the shortcomings of existing mental health protections, particularly within urban planning and the protection of urban green. Subsequently, a statutory provision mandating mental health considerations within all decision-making concerning nature will be recommended, thus promoting the foundations for a proactive system which pre-emptively and holistically protects mental health. This article will argue that until the law and its institutions recognise the mental wellbeing value in protecting nature, it will continue to contribute to a system which predominantly manages the mental health epidemic rather than solving it, acting reactively not proactively.

1. Introduction

"The fault-lines in British society have been starkly disclosed … To "build back better" in the long aftermath of COVID-19, we need to create the social and material environments that not only address the causes of mental ill health but also enhance the capabilities of all citizens to create lives of meaning and purpose for themselves."[1]

This statement from Nikolas Rose and his colleagues represents a necessary and meaningful call to action. A call which demands the need to cultivate a resilient society and greater recognition of an inescapable dimension of human existence: mental health. A review of recent national lockdowns found that there have been several adverse mental

[1] Nikolas Rose, Nick Manning, Richard Bentall *et al,* 'The Social Underpinnings of Mental Distress in the Time of COVID-19 – Time For Urgent Action' (2020) Wellcome Open Research <https://doi.org/10.12688/wellcomeopenres.16123.1> accessed 27 October 2020 5

wellbeing consequences of COVID-19 quarantine caused by inadequate access to nature and a lack of social connection.[2] More concerningly, mental distress is now the second largest source of burden of disease in England, each year costing an estimated £105 billion[3], with stress, anxiety and depression alone causing the loss of 17.9 million working days.[4] Despite progress in the way mental health is being viewed, these statistics disclose something inherently wrong in our society and stress the need for a serious systemic change in the way in which we create our laws, and in how they are applied.

This global mental health epidemic is by no means a novel issue. However, the pandemic has shone a stark light on the failings of the state to cultivate a society which enables individuals to be resilient. This revelation demonstrates the need for the holistic framework to be developed in this paper, as well as institutions that act proactively by providing resources to prevent mental distress; the key to which lies in recognition of the influenceable nature of mental wellbeing and the malleability of individuals to their environment. The aim of this paper is to highlight the cruciality of progressing the law from its present reactive agenda, into a system which is proactive, and thus preventative. As Rose has suggested, it is less productive to label the mental health epidemic as a burden than to acknowledge it as the price to be paid for the kind of societies that we have built for ourselves.[5] However, by acknowledging universal mental health vulnerability, as this paper aims to do, Bielby highlights how if fluctuating mental health becomes *a fact of life* it allows for the start of a debate surrounding responsibilities towards others in law.[6]

Both Rose's and Bielby's analyses are incredibly insightful in their acknowledgement of the undivorceable nature of mental health from deeper structural influences. However, their identification of what is wrong is more fully developed than their explanation of what needs to be done. Therefore, this article is distinguished from other academic works in its attempt to both outline the broader issue of mental distress prevention as well as provide a focused assessment of part of our legal and political framework that can be used practically to 'build back better' and address the wider concern.

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[2] Samantha K Brooks, 'The Psychological Impact of Quarantine and How to Reduce It: A Rapid Review of the Evidence' (2020) The Lancet <https://doi.org/10.1016/S0140-6736(20)30460-8> accessed 3 November 2020, 918

[3] Mental Health Taskforce, 'The Five Year Forward View for Mental Health' (Centre for Mental Health, 2016) < https://www.centreformentalhealth.org.uk/sites/default/files/2018-09/CentreforMentalHealth_Mental_health_problems_in_the_workplace.pdf> accessed 3 November 2020, 6

[4] Health and Safety Executive, 'Work-related stress, anxiety or depression statistics in Great Britain, 2020' (4 November 2020) < https://www.hse.gov.uk/statistics/causdis/stress.pdf> accessed 5 November 2020, 2

[5] Rose *et al*, (n 1) 4; Nikolas Rose, *Our Psychiatric Future* (Polity Press, 2019); Nikolas Rose 'Mental Illness: Five Hard Questions' (*Youtube*, 2013) < https://www.youtube.com/watch?v=KxI6DmbEKQg> accessed 27 October 2020

[6] Phillip Bielby, 'Not 'Us' And 'Them': Towards A Normative Legal Theory Of Mental Health Vulnerability' (2018) 15 International Journal of Law in Context 51, 56

The foundations to this discussion will be laid out in part two which outlines the concepts of vulnerability, resilience, and wellbeing through a mental health lens as the underpinning legal theory in this paper. This seeks to set the grounds on which the significance of state responsibility is founded and to provide a critical test in order to assess the adequacy of the law. Part three will then discuss England's current approach to protecting mental health, and how this should be extended through broader recognition of the factors that impact on mental health and the positive mental health benefits that can be afforded by nature within our cities. Part four will address the challenges presented by current law and policy that act as a barrier to safeguarding urban nature and its positive mental health benefits. This will be assessed both within urban planning policy and law and through the recent case of *R (Dillner) v Sheffield City Council and Amey,*[7] concerning urban nature outside the scope of planning. Finally, part five will consolidate the information discussed and suggest a way in which the power of the law can be utilised to be more responsive to mental health vulnerability and therefore cultivate a framework which is both restorative and preventative. This paper concludes that the law does have the ability to drive positive change within the realm of mental health, despite its intangibility, if it can begin to consider the mental health impacts of all decision-making.

2. *Advocating for a Proactive State*

To provide a normative framework grounding a demand for a responsive state to prevent mental distress, it is necessary to first outline vulnerability theory. This will demonstrate our collective dependency on the mechanisms and institutions provided by law.

A. Vulnerability Theory

Martha Fineman's vulnerability theory redefines the conception of a 'responsive' state by rejecting the traditional equal protection model which guides much legal theory and policy. Instead, she uses the notion of our inherent and universal vulnerability and its connection with substantive inequalities in our society to explain the role of law.[8] Equal protection is based on the premise that all human beings are alike and should have access to the same rights, whilst also providing protection to minorities who experience discrimination.[9] Initially, this might appear ideal, however, Fineman rightly highlights the reductionism in this conception of equality. This conception fails to protect against particularly entrenched discriminations, such as economic and social wellbeing,[10] which are thus excluded from serious judicial scrutiny.

The model focuses on individuals and their actions, leaving aspects of the system beyond inquiry as though outside of the law's capacity. Therefore, legal theory is formulated

[7] *R. (on the application of Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin) QB
[8] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale JL & Feminism 1, 8-19
[9] Ibid
[10] Fineman (n8) 3

around the 'liberal subject', defined by Fineman as 'self-interested individuals with the capacity to manipulate and manage their independently acquired and overlapping resources.'[11] This idea is premised on the rights to autonomy and liberty, and the legal notion of contract which views individuals as sufficiently capable to assess and rationalize options and therefore responsible for their actions.[12] Fineman, however, critiques this conception of the legal subject, convincingly characterising it as a 'radically individualistic mischaracterization of what it means to be human.'[13] Contrastingly, vulnerability theory recognises that individual failure is not simply a consequence of personal irresponsibility, but also the broader context in which individuals find themselves.[14] Therefore, this approach presents a framework which is far more representative of human life.

Recently, discourse surrounding vulnerability's relevance in legal theory and for directing law and policy has grown exponentially.[15] Critics suggest that the commonplace meaning of the term 'vulnerability' should be replaced within legal theoretical discussion due to its narrow connotation of comparative weakness, often attributed to certain groups of individuals.[16] However, others suggest that vulnerability should be construed as an inherent and shared propensity in each of us to harm, despite all our differences.[17] At various points in the life-course all individuals are dependent, and even when they are not, they are open to instances which may make them dependent. As such, there is essentially no such thing as invulnerability.[18] This is because of our physical embodiment which leaves us susceptible to potentially devastating events, and our social embedment in various environments,[19] the latter which, as will become clear, is particularly relevant to this thesis. Despite the understanding of vulnerability as a predisposition to harm having been doubted,[20] the concept should be viewed less as a

[11] Fineman (n8) 10
[12] Fineman, (n8) 10
[13] Martha Albertson Fineman, 'Vulnerability And Inevitable Inequality' (2017) 1 Oslo Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087441> accessed 11 November 2020, 22
[14]Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251; see also Fineman 'The Vulnerable Subject: Anchoring Equality in the Human Condition'(n 8), 21
[15] ibid; Vulnerability in relation to dignity see: Mary Neal et al, "Not Gods but Animals': Human Dignity and Vulnerable Subjecthood' (2012) 33 Liverpool Law Review <https://link.springer.com/article/10.1007/s10991-012-9124-6> accessed 12 November 2020, and in relation to caring: Jonathon Herring, *Caring and the Law* (Oxford: Hart Publishing 2013)
[16] Fineman, 'The Vulnerable Subject and the Responsive State' (n 14) 17
[17] E.g., Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 8) 12; Bielby (n 6) 53
[18] Fineman, 'The Vulnerable Subject and the Responsive State' (n 14), 31
[19] ibid; See also: Martha Albertson Fineman, 'Equality And Difference - The Restrained State' (2015) Emory Legal Studies Research Paper No 15-348, SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591689> accessed 11 November 2020, 103-4
[20] Bielby (n 6) 4; See also: Erinn C. Gilson, The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice (New York: Routledge 2016), 8

negative encumbrance. Instead, it should be viewed as socially transformative,[21] by uniting individuals and thus cultivating a system of compassion and community.[22]

B. The Importance of Resilience

Universal vulnerability is more practically understood and better applied with regards to the concept of resilience. This concept refers to the capability to mitigate the challenges of everyday life, which varies from individual to individual depending on their circumstances and life experiences. Therefore, this concept refutes the criticism that the universal nature of vulnerability renders it 'too nebulous to be meaningful'[23] as the theory recognises the fact that we are all situated within different settings and have varying resources at our disposal.[24] Such resources, or 'assets',[25] are provided for by the state through its institutions and provide individuals with coping mechanisms or advantages to withstand life challenges. Therefore, a poor quality or quantity of assets means a greater chance that an individual's best interests are threatened, heightening their lived experience of their inherent vulnerability. These limited resources lead to a diminished resilience to withstand personal challenges.[26] Therefore, the contingency of resilience on the support cultivated by the state feeds into the justification for a system which is more pre-emptive in its political, social and legal response to vulnerability.[27] The broader question which will be narrowly assessed in this article, is whether the law effectively protects vulnerability by mediating against possible constraints on individuals' resilience.[28]

C. Framing Vulnerability in Mental Health and Notions of Wellbeing

More specific to this thesis, is the psychological dimension of vulnerability, our mental health. Although vulnerability discourse has been dominated by its physical dimension, this bias must be overcome to paint a complete picture of human existence.[29] To understand precisely what it is that the state is responsible for protecting, it is important

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[21] ibid

[22] Erinn C. Gilson, The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice (New York: Routledge 2016), 4

[23] Carol Levine et al, 'The Limitations of 'Vulnerability' as a Protection for Human Research Participants' (2004) 4 American Journal of Bioethics 44, 46; See a similar critique in Anthony Wrigley, 'An Eliminativist Approach to Vulnerability, (2015) 29 Bioethics 478, 482

[24] Fineman, 'The Vulnerable Subject and the Responsive State' (n 14) 31; Fineman, 'Equality and Difference - The Restrained State' (n 19) 109: 'varied and unique at the individual level'

[25] Peadar Kirby, *Vulnerability and Violence: The Impact of Globalisation* (London: Pluto Press 2006), 55

[26] Michael Dunn, Isabel CH Clare & Anthony J Holland, 'To Empower or to Protect? Constructing the "Vulnerable Adult' in English law and Public Policy' (2008) 28 Legal Studies 234, 245-246

[27] Bielby (n 6) 4; Fineman, 'The Vulnerable Subject and the Responsive State' (n 14) 32, Wendy Rogers, Catriona Mackenzie & Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5 International Journal of Feminist Approaches to Bioethics 11, 23; Mianna Lotz, Steve Matthews & Bernadette Tobin, 'Vulnerability and Resilience: A Critical Nexus' (2016) 37 Theoretical Medicine and Bioethics 45, 57-58

[28] Fineman, 'Vulnerability and Inevitable Inequality' (n 13) 18-19

[29] Maksymilian Del Mar, 'Relational Jurisprudence: Vulnerability Between Fact and Value' (2012) 2 Law and Method <https://doi.org/10.5553/ReM/221225082012002002005> accessed 4th December 2020, 74

to define what is meant by 'good' mental health. When separated from medicalised ideas such as 'disease', which we intend to do here, there is little consensus on what good mental health actually means.[30] For the purposes of this paper, the World Health Organisation's (WHO) definition is adopted, namely that mental health is 'a state of well-being in which every individual realizes his or her own potential, can cope with the normal stress of life, can work productively and fruitfully, and is able to make a contribution to her or his community'.[31] This definition represents a subjective-evaluative experience of psychological well-being which also affirms the UK Mental Health Foundation's components of good mental health,[32] which include the ability to feel, express and manage a range of emotions and form and maintain good relationships.[33] Furthermore, this definition of mental health draws parallels with the broad concept of wellbeing and the growing recognition and popularity of the state duty to promote it.

As with mental health, wellbeing has been discussed widely and its definition contested,[34] increasingly so with greater understandings of its importance. Since the assertion by the WHO in 1946 that 'health is not mere absence of diseases but a state of wellbeing,'[35] the concept of wellbeing has been separated from traditional notions of and affiliation with health,[36] contributing to the 'de-medicalisation' of mental health overall;[37] a process which is vital to achieve a state which values the importance of preventing poor mental health rather than simply moderating it. Copious discussion surrounding the concept of psychological wellbeing now means that 'wellbeing science' is, as Adler terms it, 'ripe' enough to be used to effectively inform public policy.[38]

Varying academic discourse and popular use of the word 'wellbeing' has led to confusion as to how it can be appropriately defined, as well as inadvertently feeding into 'the

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[30] Bielby (n 6) 54.
[31] World Health Organization (WHO) 'Mental health: A State of Wellbeing' (WHO, 2014) <http://www.who.int/features/factfiles/mental_health/en/> accessed 14 December 2020
[32] Bielby (n 6) 6
[33] Mental Health Foundation, *What Is Good Mental Health?* (Mental Health.org, 2021) < https://www.mentalhealth.org.uk/your-mental-health/about-mental-health/what-good-mental-health> accessed 4 February 2021
[34] Rachel Dodge, Annette P. Daly, Jan Huyton, Lalage D. Sanders, 'The Challenge of Defining Wellbeing' (2012) 2 International Journal of Wellbeing <https://www.internationaljournalofwellbeing.org/index.php/ijow/article/view/89/238> accessed 1 February 2021, 222-223
[35] World Health Organization (WHO). Constitution. Geneva: WHO 1946
[36] Allan McNaught 'Defining Wellbeing' in Anneyce Knight & Allan McNaught, *Understanding Wellbeing: An Introduction for Students and Practitioners of Health and Social care* (Banbury: Lantern Publishing 2011) 7-23
[37] June Stratham & Elaine Chase, 'Childhood Wellbeing - A Brief Overview' (2010) Loughborough: Childhood Wellbeing Research Centre < https://www.researchgate.net/publication/242676811_Childhood_Wellbeing_A_Brief_Overview> accessed 5 February 2021
[38] Alejandro Adler and Martin E. P. Seligman, 'Using Wellbeing for Public Policy: Theory, Measurement and Recommendations' (2016) 6 International Journal of Wellbeing 1, 35

dominant theme of individualisation of health and wellbeing.'[39] Historically the concept has been linked to notions of 'flourishing,'[40] 'the good life,'[41] 'life satisfaction,'[42] and 'happiness,'[43] to name just a few. Although this indicates a welcome move away from considering wellbeing as not merely 'an absence of disease and dysfunction' in individuals,[44] the issue with confining wellbeing to a unitary idea, results in an omission of other equally important factors of human wellbeing.[45] As well as this, there has been a dominant focus in literature on subjective wellbeing,[46] which feeds into the notion of the individualised autonomous liberal subject and is removed from the reality of actual human experience. Subjective wellbeing is concerned with how individuals internally evaluate their feelings and thoughts in relation to their wellbeing.[47] This conception has been doubted for its impracticality for contributing to changes in law and policy, as well as from the viewpoint that intrinsic value provides only one domain of wellbeing.[48]

Aristotle's concept of eudaemonia, which is often translated as meaning 'well-being', extends the subjective, affective evaluation of wellbeing by suggesting that the route to happiness is by living a life of virtue, i.e., living authentically,[49] as well as being 'sufficiently equipped with external goods…throughout a complete life.'[50] This intertwines the contributing relationship between one's subjective view of themselves and the objective influence of external factors, which can be moderated by the state through legal mechanisms concerning wellbeing. By accepting a model of mental wellbeing based on this eudemonic principle we are better placed to discuss the state's duty to promote optimal wellbeing and mental health.

Therefore, a framework of mental wellbeing which concerns both subjective *and* objective wellbeing is instead preferred to effectively establish the role and duties of the state in providing institutions and assets to support mental wellbeing. Indeed, many

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[39] Matthew Fisher, 'A Theory of Public Wellbeing' (2019) 1 BMC Public Health 19, 1283-1283 <https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186%2Fs12889-019-7626-z.pdf> accessed 28 January 2021, 2

[40] Corey L.M. Keyes, 'The Mental Health Continuum: from Languishing to Flourishing in Life' (2002) 43 Journal of Health and Social Behavior 207, 208

[41] Carl R Rogers, *On Becoming A Person* (Boston: Houghton Mifflin Company 1961) 185-192

[42] Ed Diener & Eunkook Suh 'Measuring Quality of Life: Economic, Social, and Subjective Indicators' (1997) 40 Social Indicators Research, 200

[43] Norman M. Bradburn, *The Structure of Psychological Well-Being* (Chicago: Aldine Publishing Company 1969), 6. See also: Elizabeth L Pollard & Patrice D. Lee 'Child Well-Being: A Systematic Review of the Literature' (2003) 61 Social Indicators Research, 9-78

[44] Stephen Joseph & Alex Wood, 'Assessment of Positive Functioning in Clinical Psychology: Theoretical and Practical Issues' (2010) 30 Clinical Psychology Review 830, 831

[45] Marie J.C. Forgeard et al, 'Doing the Right thing: Measuring Wellbeing for Public Policy' (2011) 1 International Journal of Wellbeing <https://doi.org/10.5502/ijw.v1i.15> accessed 18 December 2020

[46] Dodge et al (n 34) 224

[47] Adler and Seligman (n 38) 6

[48] ibid

[49] Adler and Seligman (n 38) 5

[50] Aristotle, *Nicomachean Ethics* (T. Irwin, Trans.) (Indianapolis, IN: Hackett. 1985) Book 1 Chapter 10

academics now believe that wellbeing is a multi-dimensional construct.[51] For example, McNaught's construction of wellbeing is desirable because it broadens wellbeing beyond individual subjectivity to recognise the interactivity between one's psychological state and family, community, environment and society more widely.[52] This viewpoint recognises how objective elements such as the built environment psychologically impact individuals' ability to thrive and build resilience from a hedonic wellbeing dimension.[53] This acknowledges the powerful role of the state, outlined under vulnerability theory, to provide resources or cultivate skills in order to maintain wellbeing. It also diverts the concept of wellbeing from playing into individualistic notions and upholds the reality that humans are not naturally autonomous and self-directed beings.

This is complemented by Dodge *et al's* characterisation of wellbeing as the balance point between an individual's resource pool and the challenges they are presented with,[54] Hendry and Kleop's lifespan development model,[55] which discusses the interaction of resources and life challenges, and Cummins theory of individuals' homeostasis defence in the face of challenges, which as a model demonstrates the effect of individuals' inner ability to maintain their set point of wellbeing.[56] Furthermore, this corresponds with Bielby's account of mental health as psychosocial,[57] which acknowledges the complex interaction between social and psychological factors, as well as aligning with the United Nations report on the right to health which recognises the centrality of psychosocial influences.[58]

D. The Role of the State

The preceding discussion of mental vulnerability and wellbeing has provided a normative framework on which the state's role to prevent poor mental wellbeing is premised. This preventative duty is already enshrined in the National Health Service (NHS) Act 2006. This lays down the duty to promote a health service which is driven by the aim of 'secur[ing] improvement…in the… mental health of the people of England' as well as 'the…*prevention*…of…mental illness.[59] Additionally, the Care Act 2014

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[51] For example, Ed Diener & Eunkook Suh (n 42)
[52] McNaught (n 36) 7-23
[53] Vincent La Placa, Allan McNaught & Anneyce Knight, 'Discourse on Wellbeing in Research and Practice' (2013) 3 International Journal of Wellbeing <10.5502/ijw.v3i1.7> accessed 2 February 2021, 117
[54] Dodge et al (n 34) 230
[55] Dodge et al (n 34) 229
[56] Robert A. Cummins, 'Subjective Wellbeing, Homeostatically Protected Mood and Depression: A Synthesis' (2010) 11 Journal of Happiness Studies, 1-17
[57] Bielby (n 6) 63
[58] United Nations General Assembly, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (2017) A/HRC/35/21 (New York: United Nations) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/076/04/PDF/G1707604.pdf?OpenElement>accessed 25 October 2020 [13], [19]-[20]
[59] National Health Service (NHS) Act 2006 s 1, (*emphasis added*)

emphasises 'the importance of preventing or delaying' the need for care, thereby encapsulating authorities' duties to promote individuals' mental and emotional wellbeing .[60]

However, as will be evidenced in the following sections, the law's framework is still predominantly reactive. Nothing indicates this alarming reality more, or emphasises the importance of the state's role better, than the global COVID-19 pandemic which has both indicated the fragility of our physical existence and challenged everyone's mental health vulnerability.[61] This has revealed the failings of the state to cultivate systems of resources that can be drawn upon in difficult times. Some academics have rightly stated how the effects of COVID-19 were 'entirely predictable'.[62] Nevertheless, this global challenge on our universal vulnerability can be used positively as a force to drive forward the importance of a legal framework that protects, rather than manages, vulnerability.[63]

Del Mar advocates for this proactive state role and outlines the critical potential of vulnerability theory to analyse the suitability of the law.[64] In order to do this, he suggests a threefold test, namely: (1) assessing the kinds of vulnerability that the law currently regards as worthy of protection; (2) identifying the ways in which the law and institutions can be more responsive to the emergence of new kinds of vulnerability; and (3) ascertaining instances where the law itself creates or exacerbates vulnerabilities.[65] Del Mar's test will be utilised throughout the rest of this paper to critically analyse the provision of environmental assets, looking at how individuals' positions in relation to the built or natural environment has an impact on their mental health. It will also consider the law's role in harnessing the potential positive influence of this correlative relationship. The COVID-19 pandemic emphasises the importance of this specific discussion, as lockdown confinements have impacted individuals with less access to the natural environment far worse.[66] This contemporary example highlights how vulnerability can be utilised as a 'heuristic device',[67] to cultivate a legal system which is both proactive and responsive to its citizens' mental health needs.

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[60] Care Act 2014, s 1(3)(c)
[61] Brooks et al (n 2)
[62] Rose *et al*, 'The Social Underpinnings of Mental Distress In the Time of COVID-19 – Time For Urgent Action' (n 1)
[63] Del Mar (n 29) 76
[64] ibid
[65] Del Mar (n 29) 73
[66] Nickolas Rose *et al*, 'Impacts of Social Isolation Among Disadvantaged and Vulnerable Groups During Public Health Crises' (2020) Economic and Social Research Council < https://www.careknowledge.com/media/47410/3563-social-isolation-2-cs-v3.pdf> accessed 11 November 2020
[67] Martha Albertson Fineman, *'Vulnerability, resilience, and LGBT youth'* (2014) 23 Temple Political and Civil Rights Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434246 > accessed 17 November 2020, 9

3. Mental Health Protection and Nature

Having established vulnerability theory as a lens to underpin the framework being developed, this article will now focus on the importance of the promotion of wellbeing to discuss instead the prevention of mental distress. Discussion from this viewpoint better suits the central argument of this paper that the State can be more proactive to preserve good mental health. As such, this section seeks to establish the importance of extending preventative policy and law-making into how we build and manage our physical environment. It will do so by assessing the current approach to mental distress prevention by using the first stage of Del Mar's test to assess those vulnerabilities the law currently protects. It will then consider how mental health protection is integrated within planning law specifically, before considering the mental wellbeing benefits of nature as a resilience-building asset. This intends to set the context for viewing the protection of urban nature as a practical mechanism to be used by the State to build a multidisciplinary approach that proactively addresses mental distress.

A. Mental Health Protection in England

Primarily, the Mental Health Act 1983 embodies the reactive framework that presently dominates the governance of mental wellbeing and the approach this paper seeks to counter. As one of the primary legislative acts governing mental health in the UK, it is designed to allow for the detention and treatment of individuals against their wishes and is therefore constructed to act *ex-post* to control those experiencing the most severely heightened levels of vulnerability. Although a recent White Paper review by the Department of Health and Social Care (DHSC) may see positive improvement of the act,[68] an in-depth analysis of its shortcomings is beyond the scope of this paper. Instead, focus is directed towards the adequacy of mechanisms in place which operate *ex-ante* and provide for the prevention of mental distress.

The adoption and development of such mechanisms has increased significantly within recent years, inciting the beginning of a shift from reaction to prevention. The importance of mental health is enshrined in the Health and Social Care Act 2012 (hereafter the 2012 Act) which explicitly provides for 'parity of esteem' to achieve equal recognition with physical health; a commitment reinforced by the NHS's constitution,[69] which must be followed per the NHS Act 2006.[70] The Care Act 2014 also recognises that well-being relates to both mental and emotional wellbeing as well as physical.[71] The Government's recent *Advancing Our Health* publication indicates the shift in attitude towards

[68] Department of Health and Social Care, 'Reforming the Mental Health Act' (CP 355, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951398/mental-health-act-white-paper-web-accessible.pdf> accessed 5 January 2021

[69] Department of Health and Social Care, 'The NHS Constitution for England'(www.gov.uk, 2021) <https://www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england#principles-that-guide-the-nhs> accessed 7 January 2021

[70] National Health Service Act 2006, part III, s 1(b)(1)

[71] The Care Act 2014, s 1(2)(b)

prevention, supported by the NHS's Long-Term Plan,[72] chapter two of which is dedicated to the prevention of ill-health and health inequalities.[73] This change is necessary considering that only 5% of public funding on health goes towards prevention, translating to £101 billion a year treating disease versus £8 billion preventing it.[74]

However, despite this increase in recognition of the importance of mental health and preventing poor mental health, there remains a rhetoric of individual responsibility and focus on physical health which feeds into the narrative of individualisation.[75] For example, the NHS's prevention focus looks predominantly at obesity, alcohol abuse and smoking.[76] Whilst the importance of self-management should not be undermined, this evidences a restrictive approach to prevention which focuses on the discouragement of individual behaviours, therefore feeding into the arguably unrealistic notion of the individualised liberal subject within mental health. Furthermore, the focus remains on combatting the physical consequences of a poor mental state rather than recognising the causes of it. Therefore, although recognition of autonomy is important and valuable, a different focus is required to direct duties and funding towards addressing the systemic and structural contributors to poor mental health.

This can be done by affording greater focus to expanding preventative commitments and obligations beyond healthcare to foster a universal cross-sector approach for promoting mental health. A progressive development is that the UK is committed to the United Nation's 17 Sustainable Development Goals (SDG), all of which have health at their core, and within which is the duty to "ensure healthy lives and promote well-being for all,"[77] through *prevention*, treatment, and promotion of wellbeing. [78] However, the policy paper for the UK's action to meet this indicates a heavy reliance on healthcare only. The recently published COVID-19 action recovery plan emphasises the need for a cross-governmental approach and universal solutions to protect communities,[79] and England's Mental Health strategy, 'No Health without Mental Health' recognises the need to account for

[72] Department of Health and Social Care, *Advancing Our Health: Prevention in the 2020s* (Green Paper, CP 110, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819766/advancing-our-health-prevention-in-the-2020s-accessible.pdf> accessed 15 January 2021

[73] NHS, 'The NHS Long Term Plan' (NHS, 2019) <https://www.longtermplan.nhs.uk/online-version/> accessed 30 January, chapter 2

[74] Department of Health and Social Care, (n 70) 61

[75] Fisher (n 39), 2

[76] NHS, 'The NHS Long Term Plan' (n 73)

[77] Department of Economic and Social Affairs, 'Sustainable Development Goals' (United Nations, 2018) <https://sdgs.un.org/goals> accessed 25 November 2020, Goal 3.

[78] (emphasis added), World Health Organisation, 'Sustainable Development Goals' (WHO, 2021) < https://www.who.int/health-topics/sustainable-development-goals#tab=tab_2> accessed 25 November 2020, Goal 3 targets.

[79] Department of Health & Social Care, 'COVID-19 Mental Health and Wellbeing Recovery Action Plan' (gov.uk, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973936/covid-19-mental-health-and-wellbeing-recovery-action-plan.pdf> accessed 15 April 2021

individuals' environments,[80] albeit without going into detail about how to do so beyond healthcare provision. Indeed, Thompson argues that an analysis based on vulnerability theory mandates that the entire environment we live in, both social and physical, is assessed.[81]

Determinants of mental health are now widely evidenced to have far less to do with the healthcare system and lifestyle choices than with social determinants. These are defined as 'the conditions in which people are born, grow, live, work and age…' and account for 30-55% of health outcomes.[82] And so, it is appropriate that both public health and other areas of legislation attend to the environmental and social contributors to health. This requires inventive and holistic efforts through collaboration across sectors to create a framework that is truly proactive and protective of mental health.

B. Integrating Mental Health Within Urban Planning

Since over 50% of the global populace lives in an urban environment, potentially rising to three-quarters by 2050,[83] how urban towns and cities are constructed has a significant impact on a large majority of our societies. Research has found that both the positive and negative effects of the urban environment on mental health occur through four mechanisms, namely: through physiological stressors; social networks and support; the symbolic effects of architecture and planning and finally through the planning process itself.[84] At the core of these mechanisms lies how cities and infrastructure are developed. Therefore, this paper focuses on how urban planning law may be constructed to increase the resilience of the population. This coincides with the WHO's recommendation which lists 'urban planning for healthy behaviours' as one of the actions to improve the health of people living in cities.[85] Since a cross-sectoral approach has been concluded as necessary for mental distress prevention, the integration of health within planning decision-making will now be assessed.

Although responsibilities towards health and wellbeing are directly inserted into the National Planning Policy Framework (NPPF) and subsequent National Planning Policy

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[80] Department of Health & Social Care, 'No Health Without Mental Health: A Cross-Government Outcomes Strategy' (gov.uk, 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/138253/dh_124058.pdf> accessed 16 March 2021

[81] Michael A Thompson, 'Bioethics & Vulnerability: Recasting the Objects of Ethical Concern' (2018) Emory Law Journal 1207, 1220

[82] World Health Organisation, 'Social Determinants of Mental Health' (www.who.int, 2014) <https://apps.who.int/iris/bitstream/handle/10665/112828/9789241506809_eng.pdf;jsessionid=D8D9DA76CA5D0C9149DEE3ACB34CAE7E?sequence=1> accessed 25 November 2020, 16

[83] O Gruebner, M.A Rapp and M Adli et al, 'Cities and Mental Health' (2017) 114 Dtsch Arzebl Int <http://doi.org/10.3238/arztebl.2017.0121> accessed 17 February 2021, 121

[84] Gong *et al*, 'A Systemic Review of the Relationship Between Objective Measurements of the Urban Environment and Psychological Distress' (2016) 96 Environment International, 48

[85] World Health Organisation, 'Urban Health' (who.int, 2021) <https://www.who.int/health-topics/urban-health> accessed 13 March 2021

Guidance (NPPG),[86] from which planning policy within England is predominantly based, recognition of a duty to consider mental health specifically is weak. The NPPF must be considered when preparing development plans,[87] and the NPPG adds greater context to this and should therefore be used in tandem Within the former, there is an obligation under paragraph 8 relating to supporting healthy communities by promoting and considering wellbeing needs, and under paragraph 25 local planners and health commissioners are required to co-operate.[88] This is a nod to the duty to co-operate, enshrined under section 33A of the Planning and Compulsory Purchase Act 2004,[89] in relation to the planning of sustainable development. This requires local authorities and councils to collaborate with bodies such as the NHS Commission board in the development of local plans. These provisions signify an attempt within governance to integrate health within planning and so promote a multi-disciplinary approach.

However, the NPPF only gives reference to mental health within 'disability', which under the Equality Act includes mental impairment;[90] therefore, consideration of universal mental health is limited. As has been outlined, understandings of universal vulnerability view everyone as susceptible to periods of mental distress. Therefore, it is arguably reductionist to only consider mental health within considerations of disability. Overall, mental health is far more than a small category of impairments legally. By not explicitly mentioning mental health as its own stand-alone consideration, mental health generally is able to slip through the gaps of protection.

Furthermore, attempts to integrate health within planning through health representatives and data are often not successful. The 2012 Act requires local authorities to appoint a Director of Public Health and a Health and Wellbeing board to address the determinants of health.[91] These are informed by statutorily required Joint Strategic Needs Assessments (JSNA) and Joint Health and Wellbeing Strategies (JHWS),[92] to aid the construction of local development plans and to improve the health and wellbeing of local communities by laying out duties to be followed by local authorities. Through these mechanisms, Health and Wellbeing boards can exercise their leadership across wider determinants of health, i.e., the protection of nature within development. However, very few developers have ever heard of the JSNA,[93] due to ineffective communication from local councils, and

[86] Ministry of Housing, Communities & Local Government, 'Planning Practice Guidance' (gov.uk, 2019) <https://www.gov.uk/government/collections/planning-practice-guidance> accessed 20 March
[87] Ministry of Housing, Communities & Local Government, 'National Planning Policy Framework' (gov.uk,2021)<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005759/NPPF_July_2021.pdf> accessed 20 March, [2]
[88] 'National Planning Policy Framework' (n 88) [8] and [25]
[89] Planning and Compulsory Purchase Act 2004, s 33A. Inserted by Localism Act 2011, s 110
[90] Equality Act 2010, s6(1)
[91] Health and Social Care Act 2012, s 30 and s 194 respectively
[92] ibid s192 and s 193 respectively
[93]Local Government Association, 'Developing Healthier Places' (2018) <https://www.local.gov.uk/sites/default/files/documents/22%2018%20Developing%20healthier%20places_06.pdf> accessed 3 April 2021

so do not use the data from it in practice. Furthermore, the Town and Country Planning Association has claimed that ''health partners' are not proactive enough' and 'many of the tools they use are passive and may not be fit for purpose.'[94]

Moreover, the contrasting systems within which public health practitioners and planners operate results in ineffective collaboration. Generally, planners operate within strict statutory guidelines whereas public health operates through more broadly articulated aims.[95] This complicates joint working and as such, integrating the differing priorities between public health and planning remains a challenge. Therefore, instead of relying on the collaboration of teams, an alternative and more direct means for preventing mental distress is required.

C. Nature as a Resilience-Building Asset

The provision of nature as a resilience-building tool would provide a practical way of preventing mental distress. For the purposes of this paper, nature is taken to mean those aspects of the physical world that are not human nor created by humans, and even more specifically, it refers to vegetation. As a society we find ourselves increasingly surrounded by man-made, artificial environments, 'walled inside and divorced from nature.'[96] This has exposed humans to a new vulnerability aptly coined by Louv as 'nature-deficit disorder,'[97] which manifests itself in mental ill-being. Therefore, increased urbanicity feeds into the mental health epidemic. Nature within the urban environment provides a relieving effect and can be a mechanism used to alleviate the effects of urbanicity. Recognition of this fact has grown exponentially, with the Government now investing in nature-based social prescribing as a way of preventing and tackling mental distress.[98] However, as evidenced, more universal solutions outside the public health sector are required to create a truly preventative system. The protection of nature for its mental health benefits may be an effective means of achieving this.

Greener environments are associated with reduced experiences of stress, depression, and anxiety. It is well known that cities 'jar the nerves' in that their fast-paced and noisy

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[94] Town and Country Planning Association, 'Reflecting On Creating Healthy Places – Views From a TCPA Roundtable' (TCPA, 2017) <https://www.tcpa.org.uk/Handlers/Download.ashx?IDMF=ac05c82b-a996-4de8-b8f6-7cdb351e48f1> accessed 3 April 2021, 312

[95] Laurence Carmichael et al, 'Reuniting the Evidence Base for Health and Planning' (*University of the West of England*, 2016)
<https://www2.uwe.ac.uk/faculties/FET/Research/WHO/ESRC%20Seminar%20Series/LC_KL_DS_TT_TF.pdf> accessed 10 April 2021

[96] Roger N Walsh, 'Lifestyle and Mental Health' (2011) 66(American Psychologist 579, 584

[97] Richard Louv, *Last Child in the Woods: Saving Our Children from Nature Deficit Disorder* (Atlantic Books, 2005). In Walsh (n 97), 584

[98] Department of Health & Social Care, COVID-19 Mental Health and Wellbeing Recovery Action Plan (2021)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973936/covid-19-mental-health-and-wellbeing-recovery-action-plan.pdf> accessed 15 April 2021

character is stress-inducing.[99] Research now evidences how urban nature can buffer this effect. For example, driving on roads in natural settings as opposed to urban-dominant settings has been found to reduce stress and increase future ability to cope with stress.[100] Moreover, increased time surrounded by nature reduces urban citizens' mental fatigue and irritability whilst simultaneously improving concentration and focus.[101] This therapeutic and protective effect of vegetation could have significant economic benefits, for example Cox suggests that if basic levels of vegetation were met nationally this would "contribute toward an annual saving of up to £0.5 billion and £2.6 billion per year of depression and anxiety alone."[102] This demonstrates the great potential of nature as a resilience-building asset and a way to reduce NHS spending on mental ill-being.

Additionally, nature contributes to mental health by providing individuals with a sense of purpose and community. As seen, factors that contribute to wellbeing are the ability to contribute to the community and 'living a life of virtue'.[103] Accordingly, urban green increases social connection through encouraging changed behaviours by providing outdoor space to connect with people, providing volunteering projects in local natural areas and increasing green exercise. Furthermore, influence over the implementation of nature in the community provides a sense of purpose which improves mental health, and there is a correlation between environmental aesthetic and mental wellness.[104]This highlights the value of nature as an empowering, not just protective, force.

Finally, the resilience-building effect of nature is evident through evidence of its ability to mediate socio-economic inequalities. The WHO's 2014 report evidences that mental disorders "are distributed according to a gradient of economic disadvantage across society."[105] Since there is a widely proven correlation between low socio-economic areas and poor access to nature, this links to Fineman's vulnerability literature emphasising the impact of social determinativeness on resilience. However, living near green space has been seen to decrease the adverse effect of poverty on individuals' health,[106] therefore demonstrating the effectiveness of nature as a simple asset to reduce health inequalities and build emotional resilience.

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[99] Des Fitzgerald, Nikolas Rose, Ilina Singh, 'Living Well in the Neuropolis' (2016) 64 Sociological Review 221, 223

[100] Russell et al, 'Humans and Nature: How Knowing and Experiencing Nature Affect Well-being' (2013) 38 Annual Review Environment and Resources 473, 480-481

[101] Wildlife Trusts, 'A Nature and Wellbeing Act: A Green Paper from the Wildlife Trusts and the RSPB' (Wildlife Trust, 2014) < https://www.wildlifetrusts.org/sites/default/files/2018-09/green%20paper%20nature_and_wellbeing_act_full_final.pdf> accessed 16 February 2021

[102] David T.C. Cox et al, 'Doses of Neighbourhood Nature: The Benefits for Mental Health of Living with Nature' (2017) 67 Bioscience 147, 152

[103] Aristotle (n 50)

[104] H.F. Guite, C Clarke and G Ackrill, 'The Impact of the Physical and Urban Environment on Mental Well-being' (2006) 120 Public Health, 1123

[105] World Health Organisation, 'Urban Health' (n 86) 16

[106] Michael Marmot, 'Fair Society, Healthy Lives (The Marmot Review)' (InstituteofHealthEquity.org, 2010) <https://www.instituteofhealthequity.org/resources-reports/fair-society-healthy-lives-the-marmot-review/fair-society-healthy-lives-full-report-pdf.pdf> accessed 17 February, 80

Considering these mental health benefits, law and policy can then be fashioned accordingly in order to mandate the protection and implementation of nature in our everyday environments, and to challenge a rhetoric of individualisation. The law currently relies too heavily on public health bodies and their integration within other sectors. The implementation and protection of nature by law as a resilience-building asset provides a practical means to extend mental health protection through a cross-sector approach.

4. How Well Does the Law Protect Urban Nature?

With the view that the preservation of nature is a practical way for the State to proactively and holistically promote mental health, this section address the third stage of Del Mar's test by indicating how its inadequate protection of nature means the law itself exacerbates individuals' mental health vulnerability.[107] It considers the adequacy of the law's protection of nature within the urban environment by outlining the incumbrances of the legal system in safeguarding urban nature within planning law. Secondly, the case of *R (Dillner) v Sheffield City Council and Amey is discussed,*[108] demonstrating the barriers within the law to protecting nature outside the scope of planning.

A. Protection within Planning Law and Policy

Firstly, despite official acknowledgement of the importance of green infrastructure (GI) within planning law and policy, this is incongruous with the level of protection seen in practice. GI is defined as "…a network of multifunctional green space, urban and rural, which is capable of delivering a wide range of environmental and quality of life benefits for local communities."[109] This includes parks, woodland, trees along roads, playing fields, allotments, as well as features such as green roofs and walls. GI concerns the incorporation of nature within human-dominated landscapes (i.e., cities) and therefore use of the term refers to 'nature' but within the context of urban development. GI has been directly inserted into the NPPG which contains a chapter dedicated to enhancing the natural environment and states that the purpose of planning is to achieve sustainable development.[110]

Sustainable development means incorporating preventative measures to cultivate and preserve a resilient society,[111] and this is achieved largely by implementing GI within development. Following the Town and Country Planning Act 1990 (hereafter the 1990

[107] Del Mar (n 29)
[108] *R v Sheffield City Council* (n 7)
[109] 'National Planning Policy Framework' (n 88) 67
[110] 'National Planning Policy Framework' (n 88)
[111] World Commission on Environment and Development (WCED), 'Our Common Future' (Sustainable Development, 1987) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 25 April 2021

Act), local planning authorities create their own local development plans (LDP) using both the NPPF and NPPG and are also encouraged to consider GI within development, since these plans must be justified, effective, positively prepared and consistent with national policy.[112] This all indicates provision within law and policy for the importance of GI and the need to meet SDG 11 to make cities inclusive, safe, resilient and sustainable.[113] Considering this, Jerome *et al* are correct to assume that the "advocacy argument [for GI] has largely been won."[114] However, despite calls within national policy for the incorporation of GI, this is yet to be represented in practice.[115] This is due to systemic barriers which have made the realisation of GI slow and since decisions do not need to strictly follow plans developed by policy.[116]

Firstly, GI is still viewed predominantly as 'nice to have', rather than as critical infrastructure, and therefore it is not prioritised in the creation of LDPs.[117] Since planning policy in England operates as a two-tier system, it relies heavily on local authorities using the NPPF to develop LDPs which prioritise the enhancement of the natural environment. Many fail to do this, resulting in a high level of variation between plans. The primary reason for this is the financial climate which means local governments struggle to prioritise and maintain nature, leading to GI being de-valued.[118] Sinnett *et al* suggest coining GI as 'critical' as a possible solution to this.[119] It is not enough to create broad policies labelling GI implementation as a broad goal without attaching certain responsibility. To make GI critical would be to afford it the same status as other physical land and would under greater obligation, gain greater local priority in how it is funded and delivered. This is crucial to enabling an urban planning system which reduces risk and enhances resilience, for it is one thing providing for protection of nature within guidance and another thing ensuring its application in practice.

Secondly, central to planning law is the 'effective use of land',[120] which in practice presents a conflict between the protection of GI and the provision of new housing. The NPPF demonstrates a rhetoric which prioritises the provision of housing as an effective

[112] Planning and Compulsory Purchase Act 2004, s 20 (emphasis added)
[113] Department of Economic and Social Affairs (n 77), Goal 11
[114] Gemma Jerome, Danielle Sinnett, Sarah Burgess, Thomas Calvert and Roger Mortlock, *'A Framework For Assessing the Quality of Green Infrastructure in the Built Environment in the UK'* (2019) 40 Urban Forestry and Urban Greening 174, 174
[115] Fisher et al, "It's On the Nice to Have Pile'" Potential Principles to Improve the Implementation of Socially Inclusive Green Infrastructure' (2020) 50 Ambio <https://doi.org/10.1007/s13280-020-01372-2> accessed 21 March 2021, 1574 – 1586
[116] Planning and Compulsory Purchase Act 2004, s 38(6)
[117] Fisher et al (n 115) 1575
[118] Danielle Sinnett, Tom Calvert and Nick Smith, 'Do Built Environment Assessment Systems Include High Quality Green Infrastructure?' in: *Planning Cities with Nature: Theories Strategies and Methods* (Springer Nature Switzerland AG, 2019) <https://link.springer.com/content/pdf/10.1007%2F978-3-030-01866-5.pdf> accessed 10 March 2021, 169-186.
[119] ibid.
[120] 'National Planning Policy Framework' (n 87)

use of land. It finds effective use to be 'meeting the need for homes' and promotes 'a flexible approach in applying policies and guidance' 'when considering applications for housing.'[121] The demand for housing is used as a justification or leverage against planning authorities to escape GI commitments[122]. Therefore, on the rare occasion local authorities try to prioritise GI despite low budgets, they are often unsuccessful in their attempts due to competing interests.

For example, the recent Housing and Planning Act, epitomising the national movement to build homes, allows housing schemes to be forced though the planning system.[123] Therefore, the land-use narrative compels the development of predominantly grey infrastructure, negating any legitimate attempts to provide for GI within policy. As a result, cities lack nature in favour of crammed housing, which within the locked-down COVID-19 world contributed to a 'tsunami of mental health problems'.[124] What is needed is a recognition that regeneration of our cities requires preservation of nature to be more than a valued consideration. This requires a reconsideration within policy of what constitutes 'effective' use of land, and as Sinnett *et al* argue, the requirement of a set 'benchmark' for GI.[125] This would ensure that the prioritisation of considerations like housing development does not mean GI is neglected, as well as protecting against the 'evaporation' of existing GI, as further development occurs. How such a benchmark would be achieved however, is a barrier, as the way that nature is valued, especially with regard to mental health, is often harder to define economically and many of its values take time to reveal their full effect.

Ultimately, this uncovers the final barrier to be addressed, the confliction between short- and long-term action and gain which overall inhibits the fruition of GI's value. It is not simply that short term goals, such as the provision of housing as seen, are prioritised. Planning governance also does not provide for the effective long-term maintenance of GI. It is part of the value of nature that it lives, breathes, changes, and inevitably dies. This is a fact that many countries' policies struggle or neglect to respond to. For example, in Melbourne, Australia's most sustainable city, there are planning regulations which mandate the inclusion of trees in development, yet none that protect existing trees from being removed.[126] The same can be said for England where, despite the existence of Tree Preservation Orders,[127] and Conservation Areas,[128] which seek to protect existing trees

[121] 'National Planning Policy Framework' (n 87) [117] and [123(c)]
[122] Fisher et al (n 115)
[123] Housing and Planning Act 2016, Part I and VI.
[124] Rose *et al*, 'The Social Underpinnings of Mental Distress in the Time of COVID-19 – Time For Urgent Action' (n 1) 1
[125] Danielle Sinnett, Tom Calvert and Nick Smith (n 119)
[126] Adriana Zuniga-Teran et al, 'Challenges of mainstreaming green infrastructure in built environment professions' (2020) 63(4) Journal of Environmental Planning and Management <https://www.tandfonline.com/doi/pdf/10.1080/09640568.2019.1605890> 718
[127] Covered within the Town and Country Planning Act 1990, Part VIII
[128] Town and Country Planning Act 1990, s 211 – local authority must be notified of work on trees 6 weeks before it is carried out

from being cut down or otherwise damaged, regulations for protecting trees are easily circumvented,[129] and many are not given protection at all. This leads to the evaporation which Sinnett *et al* warn against[130]. As well as provision for the inclusion of GI, provision for sustained maintenance of GI is therefore a necessity.

The way in which maintenance is funded, however, reflects the lack of priority afforded to GI. When assessing the funding sources for maintenance, the majority stem from local authorities, tax, or voluntary maintenance from the community itself. Local authorities struggle with financial limitations which leads to less prioritisation for GI. Furthermore, maintenance money directly from central government is instead directed towards the maintenance of highways and buildings[131]. Redirecting this funding towards GI would both help upkeep current GI as well as encourage the implementation of more. These challenges are ultimately deep-rooted, and many of them are also echoed in the protection of GI outside the scope of planning regulations, as will now be discussed.

B. Protection Outside Planning Law

Consideration of GI does not always fall within the scope of planning. This is evident in the case of *R (Dillner) v Sheffield City Council* (SCC) *and Amey,*[132] where the felling of trees did not fall within the meaning of development under the 1990 Act and was therefore not a planning issue.[133] In *Dillner*, SCC entered into a £2 million contract with Amey for the felling of 200 trees per annum, as part of a 25-year programme of highway maintenance. This led to the felling of 5,474 highway trees, many of which the authority admitted were healthy, prompting a challenge by local residents regarding the legality of such action.[134] Whilst Gilbart J, deciding the case, was willing to be helpful, it is clear from the case that the law was not effectively equipped to deal with this situation and was therefore ultimately against the local residents. How so will now be assessed by addressing broad concerns about the way the legal system values the urban environment as well as mental health. These are firstly, the way that GI is valued and how this effects the judicial balancing exercise and secondly, how other duties are given primacy over those regarding mental health.

Firstly, *Dillner* prompts us to consider how judges balance competing interests in situations where mental health is a vested interest but is unquantifiable. To gain support, GI is often valued for those benefits that are objectively measurable and tangible. In *Dillner* therefore the only real consideration of the trees' value was their attractiveness,

[129] See exceptions in Town and Country Planning Act 1990, s 198(7)
[130] Sinnett, Calvert and Smith (n 119)
[131] Houses of Parliament, 'Urban Green Infrastructure'(November 2013) POSTnote 448 < https://researchbriefings.files.parliament.uk/documents/POST-PN-448/POST-PN-448.pdf> accessed 2 April 2021
[132] *R. v Sheffield City Council* (n 7)
[133] Town and Country Planning Act 1990, s 55(1)
[134] Led by David Dillner

stating that "the loss of a tree may be seen as regrettable in *visual* terms".[135] Value premised on the aesthetic fortifies the idea that because it is easier to attach value on the physical this is what obtains greater importance and protection within the law. This is problematic because the attractiveness of our environment, whilst it impacts mental health, is only one factor. In competition for limited funding, this makes it hard for GI to ever be prioritised.

Another approach which may have been taken is affording the trees a commercial value based on their wellbeing benefits.[136] Stressing the economic worth of the trees based on this approach, both encourages effective action in defence of nature and provides the court with something tangible to balance competing interests against. This approach would have been benefitted from in *Dillner*, where emphasis was placed on Sheffield's financial detriment in the aftermath of Britain's deindustrialisation,[137] therefore finances were important to contextualise the basis for SCC's decision. Contrastingly, attaching such surface level value to GI, whether financial or aesthetic, arguably diminishes GI's value beyond this.[138] A way to quantify the value of nature within judicial balancing beyond this is necessary, as care must be taken to not dispel the real causes of wellbeing in our society in favour of economic efficiency.

There appears to be good grounds for arguing that *Dillner* did not afford enough weight to evidence of attachment to the trees as indication of their wellbeing value. In *SCC v Fairhall,*[139] many of the citizens ignored the outcome of *Dillner* and continued to protest the felling. This should have clearly indicated the value that the citizens assigned to the trees and the emotional distress caused by the removal, yet Males J continued to grant injunctions against the protestors. One witness in *Dillner* drew attention to how the trees weren't valued as community assets.[140] The relational value of nature is that it provides meaning and purpose to one's life.[141] As discussed, community involvement and influence over one's surroundings is a significant contributor to wellbeing. Yet, the decision in *Fairhall* demonstrates how the consideration given to citizens' rights to have control over their environment was minimal.

This also conflicts with the duty under the Care Act which indicates 'the importance of the individuals participating' by providing 'the…support necessary to enable the individual to participate.'[142] This raises the question as to whether the law should provide

[135] *R. v Sheffield City Council* (n 7) [2]
[136] Russell et al (n 101)
[137] *R. v Sheffield City Council* (n 7) [1]
[138] Sinnett *et al* (n 119)
[139] *Sheffield City Council v Fairhall and others* [2017] EWHC 2121 QB
[140] *R. v Sheffield City Council* (n 7) [137]
[141] Adler and Seligman (n 38)
[142] The Care Act 2014, s 1

'rights of nature',[143] to acknowledge the relationship between human mental wellbeing and urban green therefore providing a more substantial personal claim in these situations. In the words of Gilbart J, it would be wrong 'to seek to balance real or supposed advantages against encroachments upon public rights'.[144] By creating a public right to nature this would have given the citizens greater legitimacy to their argument on the basis of the inherent value they placed in the trees.

Finally, the use of competing duties to justify the felling in *Dillner* evidences both the predominance of tangible interests over intangible, as well as the primacy of duties to physical wellbeing over mental wellbeing. Just as funding is prioritised to maintain highways over GI, the SCC's duty to maintain the highway in *Dillner* was prioritised over its duty to preserve trees. Under the Forestry Act a licence is required to fell trees.[145] On the surface, this appears to be a substantial safeguard in protecting nature. However, there are several exceptions to this requirement, including where felling "is in compliance with any obligation imposed by or under an Act of Parliament",[146] and does not require a licence. SCC argued that section 41 of the Highways Act, the duty to maintain the highway,[147] satisfied this exception. The limits of this duty were held by Gilbart J to "not extend to maintaining or retaining the trees growing within it",[148] and *Goodes v East Sussex CC* established that a highway need only be 'reasonably passable'.[149]

This low threshold mirrors the narrative displayed within planning, focusing on more short-term solutions, and neglecting the appropriate maintenance of nature. Furthermore, the lack of defence to this duty on the basis that the "works…would disturb a tree or trees that were attractive or otherwise valuable,"[150] reinforces societal bias towards tangible interests. This somewhat explains SCC's actions considering their responsibility to take reasonable care of highway users' safety. *Yetkin v Newham* established that where an authority plants or retains a tree which causes an obstruction, it is liable in damages for injuries as a result. [151] Although responsibility must be placed on an authority, a complete lack of defence causes over-felling, as seen here, to prevent future claims. This reinforces how the law is loaded in favour of certain tangible interests by focusing on quantifiable risks and therefore lacks the effective mechanisms to give weight to the unquantifiable yet significant mental health well-being benefits that trees bring to urban communities.

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[143] For a deeper consideration of 'rights to nature', specifically towards trees, see: Alyse Bertenthal, 'Standing Up for Trees: Rethinking Representation in A Multispecies Context' (2020) 32 Law & Literature 355

[144] *R. v Sheffield City Council* (n 7) [26]. Per *Denaby & Cadeby Main Collieries Ltd v Anson* [1911] 1 K.B. 171 CA (Moulton LJ)

[145] The Forestry Act 1967, s 9

[146] The Forestry Act 1967, s 9(4)(b)

[147] The Highways Act 1980

[148] *R. v Sheffield City Council* (n 7) [163]

[149] *Goodes v East Sussex CC* [2000] 1W.L.R. 1356 HL

[150] *R. v Sheffield City Council* (n 7) [160]

[151] *Yetkin v Newham LBC* [2010] EWCA Civ 776 [2011] QB 827 at [33] (Smith LJ)

Moreover, Gilbart J's narrow consideration of the Equality Act in relation to individuals' wellbeing disappointingly showcases how parity of esteem still struggles to gain traction within judicial decision-making. Regarding the duty to make reasonable adjustments under the Act, the judge failed to address the fact that 'disability' refers to both physical *and* mental impairments which have a 'substantial' and 'long-term' negative effect.[152] Alongside the consideration of the Equality Act in this way, the failure to consider the local authority's duty to wellbeing under the Care Act also epitomises the prioritisation of physical health over mental health. This should have been a crucial concern since the Act mandates that well-being be at the centre of all the local authority does, and it provides a better understanding of the universality of mental health and emotional wellbeing outside more extreme understandings of mental disability. The neglect of this consideration again comes down to the intangibility of mental well-being and its difficulty to measure, alongside the relatively recent recognition of the importance of mental health. Therefore, because the law is still ill-placed to recognise urban nature's importance as a safeguard of mental health, it continues to fail to protect it in favour of more tangible concerns.

It is worth noting that the competing duty justifications have since been queried by the Forestry Commission.[153] They questioned whether the express provision for Amey to fell 200 trees annually indicates a contractual rather than statutory duty, therefore requiring a licence. This argument was not explored in the proceedings, potentially due to a lack of concrete evidence,[154] however this indicates a possible immoral basis of cutting corners for SCC's decision which the Judge, respectfully, should have explored further. It is also noteworthy that the community would have had no power to challenge on this ground, and the forestry commission, the relevant prosecuting authority, were not prepared to act. This reinforces the need for certain rights to nature, so that where institutions are reluctant to defend GI, directly affected citizens themselves will have more power to challenge decisions themselves.

5. Recommendations Moving Forward

Discussion in the preceding chapters has focused on the former and latter questions in Del Mar's vulnerability assessment,[155] demonstrating those vulnerabilities presently protected by law and how lack of nature protection exacerbates mental health vulnerability. This section seeks to complete an assessment under Del Mar's test by

[152] The Equality Act 2010, s 1
[153] Forestry Commission, 'Sheffield Tree Felling Investigation' (*Forestry Commission,* 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818610/190705_Sheffield_Report.pdf> accessed 25 February 2021
[154] *R (Grundy Excavations) v Forestry Commission* [2003] EWHC Admin 272: Forestry Act 1967, s 17 requires that the prosecution must prove that the accused felled the trees
[155] Del Mar (n 29)

addressing how the law can be more responsive to the new kind of vulnerability evidenced - the effect of increased urbanicity on mental wellbeing. It will do so by suggesting how current provisions can be modified within law and addressing recent developments which emphasise the pressing need for change.

A. Connecting Nature and Mental Health

The integration of mental health and wellbeing with urban planning requires greater statutory acknowledgement to be more successful. The Wildlife Trusts and RSPB suggested the enactment of a Nature and Wellbeing Act to realise the link between them within governance. [156] Although this paper does not advocate for a stand-alone act, many of the recommendations within the paper offer useful guidance for change. Ultimately, the recommendations recognise that our planning system is outdated, and considering the COVID-19 pandemic this is even more evident. Integrated changes within the system would be more appropriate due to the acknowledgement that wide-scale changes are "unlikely within the current context of ever-decreasing local finances."[157] It is proposed that this can be done through legislative adoption of a Health in All Policies approach (HiAP) within governance. This aims to include health improvement within the assessment of all policies,[158] and consequently would enable the translation of understandings of health benefits within planning into practice, thereby improving the protection of nature and considerations of mental health.

At the essence of this is recognising health and wellbeing as an input to, rather than an outcome of, development. Whilst there are many ways to realise this, due to limited words this article recommends that the modification of currently used impact assessments would enable greater proactivity within policy. The relevant impact assessments currently in place which seek to integrate public health and planning are the statutorily driven Environmental Impact Assessments (EIA) and, secondly, Health Impact Assessments (HIA).

Firstly, EIAs are a useful tool, however they should be modified if they are to work as a preventative mechanism. The purpose of EIAs is to ensure full knowledge of the environmental implications of projects before planning permission is granted. They are desirable because their use is obliged by statute,[159] and their origins are derived from public health considerations of the negative health implications of new developments. EIAs therefore have the potential to refer to the need for greater GI, the importance of which was demonstrated in section 3. However, Fisher *et al* note that a barrier to their

[156] Wildlife Trusts, 'A Nature and Wellbeing Act: A Green Paper from the Wildlife Trusts and the RSPB' (2014) < https://www.wildlifetrusts.org/sites/default/files/2018-09/green%20paper%20nature_and_wellbeing_act_full_final.pdf> accessed 16 February 2021

[157] Carmichael et al (n 95) 463

[158] World Health Organisation, 'Health in All Policies: Framework for Country Action' (www.who.int, 2014) <https://www.who.int/healthpromotion/frameworkforcountryaction/en/> accessed 25 March 2021

[159] Town and Country Planning (Environmental Impact Assessment) Regulations 2017

success is that, whilst both consider health, they are exclusively impact-driven.[160] This means that the reduction of negative health-impacts is viewed as an outcome rather than a considering factor, thereby reactively testing the meeting of objectives which feeds into an undesirable 'tick-box' approach.[161] This leads to only development which has green intervention at the forefront making a connection with health. Therefore this paper advocates for Fisher *et al's* vision of a more problem-driven approach in which the causal effects between GI and health are established within EIAs, enabling them to be more proactive.[162]

This suggests the need for a review of EIAs to see better planning for nature. Revisions should involve changing the assessment's approach so that environmental, and health, considerations are front-loaded within the development process to provide for the incorporation of the health benefits of nature. This recommendation echoes the suggestion by the Wildlife Trusts paper to structure decisions around nature rather than fitting it in post-development. [163] Contrastingly, part four evidenced that not every decision which has a substantial effect on GI within cities falls within the scope of planning, therefore requiring an EIA. Additionally, even where it does, the threshold test for the requirement of EIAs often means authorities are able to evade the need for one, indicating a serious limitation. A broader solution is required to guarantee the consideration of mental health within all decision-making.

This is where statutorily mandating HIAs has the potential to be a more targeted and successful assessment in achieving the integration of mental health within urban planning. HIAs aim to fill the gap in practice left by EIAs around the consideration of health and wellbeing by assessing the health impacts of policies, plans and projects, including the improvement of mental health. As such, their use helps local authorities meet their duty under the 2012 Act to improve the health of local people. [164] However, although they have been used for several decades in the UK, HIAs often only come within EIAs and are a non-statutory and voluntary exercise.[165] Their use wholly relies on local plan's own policies, with a tendency to be used simply as guidelines. Therefore, this paper recommends that the use of a HIA is made a stand-alone, statutory obligation for all new development.

Whilst the WHO warns against permitting a separate HIA derived solely from "the universally accepted significance of health" for fears of fragmentation between impact assessments, this paper is of the view that the failure of our present framework to protect urban green as a safeguard of mental health is enough to demonstrate how a stand-alone

[160] Thomas B. Fischer et al, 'Consideration of Urban Green Space in Impact Assessment for Health' (2018) 36(1) Impact Assessment and Project Appraisal <https://doi.org/10.1080/14615517.2017.1364021> accessed 14 April 2021
[161] Fischer et al (n 160)
[162] Fischer et al (n 160)
[163] Wildlife Trusts (n 156)
[164] Health and Social Care Act 2012
[165] Fischer et al (n 161)

HIA offers "a comparative advantage in terms of societal benefits."[166] Through a legislative duty to carry out HIAs this would better enable council planning teams to reject plans that do not go far enough to promote health and wellbeing (i.e., through implementation of GI), therefore acting proactively in the facilitation of an environment that protects mental health. Although HIAs include mental health, this may also be extended to caveat the legal duty to conduct a HIA with a duty to carry out a separate Mental Wellbeing Impact Assessment[167] (MWIA) for development, like HIAs, but with a specific focus on mental health. At present, these are a voluntary exercise which, although the policy environment encourages the use of, are therefore not obligatory to carry out. Making them so would be a sure-fire way to ensure the parity of mental health within health considerations.

B. A Necessary Call to Action

Contrastingly, more recent progress evidences a step away from recognising the importance of health considerations within planning. This is evident in the Government's recent 'Planning for the Future' white paper which looks to uphaul the planning system.[168] Although this official recognition of the outdatedness of planning law and policy is long overdue, many of the recommendations for change appear to feed into the narrative of short-term gain and the prioritisation of rapid housing development. Despite some positive commitments such as tree-lining all new streets, the recommended abolishment of EIAs and the concept of growth zones, which would allow automatic approval of new developments in certain areas, leaves a question mark over how nature will be considered. Although still in their early stages, these suggestions feed into the dominant narrative of nature being pitted against economic development. The Government's wish to build back better and faster,[169] although potentially well-founded, runs the risk of satisfying immediate targets at the detriment to nature and well-being. This reflects negatively on the future of health and well-being considerations within planning and makes the focus of this article, which advocates for a proactive and integrated approach to mental health, even more pressing.

6. Conclusion

Through utilisation of Del Mar's vulnerability assessment this article has assessed the laws adequacy in proactively protecting mental health. This has revealed the

[166] WHO, 'Integrating Health in Urban and Territorial Planning: A Sourcebook Notes' (WHO.int, 2020) < https://www.who.int/publications/i/item/9789240003170> accessed 5 April, 57

[167] National MWIA Collaborative, 'Mental Well-Being Impact Assessment: A Toolkit for Well-Being' (q.health.org, 2011) <https://q.health.org.uk/document/mental-wellbeing-impact-assessment-a-toolkit-for-wellbeing/> accessed 22 March 2021

[168] Ministry of Housing, Communities & Local Government, 'Planning for the Future' (White Paper, 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958420/MHCLG-Planning-Consultation.pdf> accessed 20 March 2021

[169] ibid

disappointing reality that our legal framework and institutions are inadequately cultivated and are therefore unable to act resiliently to the contemporary needs of society through continuous marginalisation of mental health. Rather than enhancing citizens' capabilities, as Rose suggested is a vital component of social and material environments,[170] the law lacks initiative in building individuals' resilience, thereby exacerbating vulnerability.

Initially, this paper established the need for a proactive state. Through discussion of Fineman's vulnerability theory, the universality and inherent nature of our dependency on others was revealed. The scope of vulnerability and its contingency on individuals' resilience was then narrowed to be understood with regards to mental health, through recognition that this is an area largely neglected within academic discourse. In response to understandings of vulnerability this discussion established the State's role as provider of resilience-building assets. Del Mar's vulnerability assessment was therefore outlined as an effective tool to be used to structurally assess the law's adequacy in doing so. [171]

The way in which the law currently protects mental health vulnerability was then assessed and this established that current mental distress prevention is too narrowly focused on individual responsibility and the public health sector. Since health determinants are influenced by other societal influences, it is necessary that health be factored into other sectoral policies; concluding that a cross-sectoral approach within law and policy is required to successfully protect mental health. Due to increased urbanicity and the novel mental health vulnerability this has created, the protection of nature was found to provide an effective tool for the State to inadvertently protect mental health in a multidisciplinary way.

The protection of nature in the urban environment by the law is deficit despite nature, or 'green infrastructure' in the context of urban development, having largely been recognised within policy. Discussion of the challenges presented by the law within and outside planning illustrated that nature is still poorly prioritised. The main reason for this was that the law is more maturely constructed to afford protection to tangible and quantifiable interests, which considerations of mental health struggle to fall within. By not affording the appropriate protection to nature, the law itself wasconsidered to exacerbate mental health vulnerability.

The final part of Del Mar's assessment was considered and used to demonstrate the ways in which the law can be more responsive to the understanding of mental health vulnerability. Whilst it was accepted that there are many ways to do so, in response to the mental impacts of urban environments, an efficient way would be to make HIAs, and within them MWIAs, a statutory obligation for all development. Further, EIAs should be modified to front-load mental health considerations rather than assessing if they have

[170] Rose et al, 'The Social Underpinnings of Mental Distress In the Time of COVID-19 – Time For Urgent Action' (n 1)
[171] Del Mar (n 29)

been met ex-post development. Ultimately, it was concluded that the law has the capability to proactively prevent mental distress if it begins to recognise it as an important and obligatory consideration within decision-making; until then decisions run the risk of worsening collective mental health.

Overall, this paper argues for the pressing need to promote mental health proactively and holistically. It builds on existing understandings of vulnerability and academic considerations of the influence of urban environments to provide a novel contribution suggesting how the law can recognise the integral connection between 'people' and 'place'[172] within prevention strategy. The cracks in society have been so highlighted by the COVID-19 pandemic that they can no longer be ignored. If the 2020s are to truly be a decade of prevention[173], the way to 'build back better' is in recognising the State's responsibility to develop a legal system which allows for such.

[172] WHO, 'Integrating Health in Urban and Territorial Planning: A Sourcebook Notes' (n 171)
[173] Department of Health and Social Care, 'Reforming the Mental Health Act' (n 69)

To what extent can legal means provide adequate remedies against knife crime offending?

Dan Stone

Abstract

The past decade has seen an exponential increase in rates of knife crime offending in England and Wales. Successive government responses have been largely based on a utilisation and expansion of the law to identify and punish offenders with little regard for the circumstances leading to such high levels of crime. Whilst a significant amount of current literature focuses on the importance of a shift to a public health approach, much of this does not include a sufficient assessment of the legal measures they reject. Over the course of three sections this paper seeks to examine the effectiveness of legal approaches against knife crime in relation to criminal sentencing, the use of civil orders, and the implementation of stop and search tactics. With reference to both current and historical research and policy, and with the benefit of hindsight, the progressively punitive development of the law as a response to knife crime offending is shown to be ineffective and increasingly counterproductive. This necessitates the suggestion of various changes to the aforementioned legal approaches in order to shift reliance away from its coercive force and toward a greater focus on the community and the offender. These improvements appear promising but ultimately limited, demonstrating that legal means alone are unlikely to provide an adequate remedy to rates of knife crime offending, or provide the necessary legal foundation lacking in many of the existing proposals to tackle knife crime.

1. *Introduction*

Knife crime presents a pervasive problem in English and Welsh society, regularly providing alarming headlines[1] and widespread cause for concern. Though it is difficult to form direct comparisons of knife offending rates with other countries due to a number of differences including variations in crime recording, statutory offences, and information sharing, levels of this type of crime remain continually high,[2] prompting calls

[1] Chris Slater, 'Teenager killed in stabbing horror, police launch murder investigation' Manchester Evening News (Manchester, 4 May 2021) <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/murder-probe-boy-15-dies-20519599> accessed 5 May 2021.

[2] Nicholas Stripe, 'Crime in England and Wales: year ending September 2020 (Office for National Statistics, 03 February 2021)

for various solutions, including those implemented at a legislative level. As a result, whilst the media and select politicians may exaggerate and capitalise on the public concerns of knife offending, it is not an issue that can readily be ignored. The difficulties in accurately assessing the extent of knife crime in England and Wales are compounded by the failure to form a definitional consensus on what should be recorded; though it logically includes *any* offence committed with the inclusion of a knife, many forces will only record knife possession, robbery, threats to kill, and assault with injury as specific knife crime offences. A holistic view of offending across these two countries is also limited by complications in the Greater Manchester Police Force's crime recording which has led their figures to be excluded from data for underreporting.[3] As such, analysis of rates of offending and the impact of various measures contained within this paper are limited to those made publicly available, typically possession and threats made with knives. Where this crime escalates into serious violence and murder, the offences would extend beyond those broadly considered as knife crime where the legal considerations change considerably and thus will not explicitly be considered in this context.

Emergent criminal justice research has developed around an understanding of knife crime as a public health problem,[4] rather than a criminal one. This includes suggestions that, whilst offenders must be held accountable, the arbitrary imposition of punitive measures which have comprised the majority of successive governments' responses do little to reduce and prevent the commission of this type of crime. Such a view frequently includes an almost complete rejection, implicit or otherwise, of legal approaches without sufficient assessment of their shortfalls, or how they might otherwise be utilised to better assist in a reduction in offending. The contributions of the legal system will be evaluated through an exploration of various disciplines: the criminal justice system by development of novel knife offences and stricter sentencing; the utilisation of civil mechanisms to control suspected knife offenders; and the contentious practice of stop and search to detect knife carriage on the street. Such an evaluation will reveal that, whilst there exist countless shortfalls inherent to the current implementation of legal means against knife offending, they present unrealised potential previously disregarded by public health proponents. This will not entail a rejection of such approaches, but instead show that they need necessarily operate in conjunction with each other to deal with the wide range of offenders and circumstances. The result is an informed and realistic understanding of knife offending, which cannot solely be resolved through coercive legal measures, accepting limitations in the power of the criminal justice system and beyond to independently provide adequate remedies.

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2020 > accessed 12 April 2021.

[3] Nicholas Stripe, 'The nature of violent crime in England and Wales: Year ending March 2020' (Office for National Statistics, 25 February 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/thenatureofviolentcrimeinenglandandwales/yearendingmarch2020> accessed 12 April 2021.

[4] Simon Harding, 'Getting to the Point? Reframing Narratives on Knife Crime' (2020) 20 Youth Justice 31; Juliette Astrup, 'Knife Crime: Where's the Public Health Approach?' (2019) 92 Community Practitioner 14

2. *Punitive populist approaches to knife offending*

The dogmatic determination of governments to pursue a strict approach to knife crime offending, described by Squires as 'punitive populism',[5] has historically focused on tougher sentencing and guaranteed incarceration. Such a tactic was identified by Ashworth,[6] as a means to quell growing concerns in the media[7] and public[8] of undue leniency in the judiciary's attitude toward knife crime sentencing. The 'punitive populist' approach provides a useful opportunity to explore how an expansion of the criminal justice system is being implemented specifically against knife crime. This will be examined by reference to two major areas where it is most clearly exhibited. The first of these is the creation of new offences unique to knife crime, namely in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012,[9] which created an aggravated offence to threaten with a blade. Empirical evidence and exploration of alternative existing charges will show this method to be largely redundant and demonstrative of governments' misguided priorities in relation to knife crime.

The second area relates to arguably one of the most powerful enforcement mechanisms of the criminal justice system: the ability to punish offenders. This mechanism was provided by the Home Office as the primary justification for the aforementioned LASPO provisions, to ensure 'robust punishments and reduce the level of reoffending.'[10] This can be viewed as a continuation of the strict approach laid out in the Home Office's 'Tackling Knives and Serious Youth Violence Action Plan'[11] which sought to deliver upon such a promise through the introduction of longer, and mandatory minimum, custodial sentences. Whilst purported motivations of sentencing in criminal justice vary from rehabilitation to public protection, it will be shown through the Court of Appeal

[5] Peter Squires, 'The knife crime 'epidemic' and British politics' (2009) 4 British Politics 127, 129

[6] Andrew Ashworth, 'Prisons, Proportionality and Recent Penal History' (2017) 80 Modern Law Review 473, 479

[7] Jamie Doward, 'Courts going too easy on knife crime' The Guardian (England, 14 December 2008) < https://www.theguardian.com/uk/2008/dec/14/knife-crime-policy-sentencing> accessed 05 March 2021

[8] Nicola Marsh, 'Public knowledge and confidence in the criminal justice system and sentencing' (Sentencing Council, August 2019) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf> accessed 06 May 2021

[9] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 142

[10] Jillian Kay, 'Sentencing and Criminal Justice Components of the Legal Aid, Sentencing and Punishment of Offenders Bill' (Ministry of Justice, 14 November 2011) < https://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/ia-sentencing-punishment-laspo.pdf> accessed 07 May 2021

[11] Liz Ward, Sian Nicholas and Maria Willoughby, 'An assessment of the Tackling Knives and Serious Youth Violence Action Programme (TKAP) Phase II' (*Home Office*, May 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/116544/horr53-report.pdf> accessed 07 May 2021

judgment of *R v Povey*[12] and the resultant policy changes that knife crime sentencing has been expanded for the primary purpose of deterrence. This will provide a significant metric by which such an approach will be deemed inadequate, with reference to crime statistics and an exploration of the motivations of knife crime offenders. This will reveal conflicting academic accounts and the need for further research, but ultimately the shortcomings of both short and long custodial sentences will suggest that, at least through incarceration, the criminal justice system is ill-equipped to provide an effective remedy to both new and recidivist knife offenders. In turn, the reliance on coercive means of the criminal justice system against what is increasingly being understood as a public health problem[13] will be implicitly questioned.

A. Unique knife offences

Prior to 2012 there existed two main statutes detailing knife crime offences: the Prevention of Crime Act 1953[14] and the Criminal Justice Act 1988[15] which made it illegal for a person to carry an offensive weapon and a bladed article in public respectively. Minor amendments expanded these to cover locations such as schools.[16] It was not until the passage of LASPO that an aggravated offence of threatening with a blade was created. Whilst initially a seemingly sensible move to recognise higher culpability knife crime offenders, it soon becomes clear that the charge is misused[17] and underutilised, comprising only sixteen convictions in the year following its enactment, rising to a mere 4% of proven knife offences in 2019.[18] This is unlikely due to some rarity of its commission, considering the 13% increase in 'threats to kill' offences involving sharp instruments from 2019 to 2020- amounting to almost 1,300 offences,[19] rather than fewer than one thousand prosecuted in the same year. This fairly closely reflects the findings of the longitudinal analysis of the Offending, Crime and Justice Survey in which around 10% of respondents admitted to using knives for threats,[20] suggesting a promising level of accuracy. It is unclear why this charge is not prosecuted as frequently as the crime surveys suggest it should be, but a logical explanation is due to the difficulty of satisfying all required elements. The wording of the statute requires proof of a defendant's intention

[12] [2008] EWCA Crim 1261

[13] Dinesh Sethi, Karen Hughes, Mark Bellis et al., 'European Report of preventing violence and knife crime among young people' (World Health Organisation 2010)

[14] Prevention of Crime Act 1953, s 1

[15] Criminal Justice Act 1988 (CJA 1988), s 139

[16] CJA 1988, s 139AA

[17] 'Man spared jail term for swinging a machete at a householder after being challenged about his 'suspicious behaviour' in Kineton' Leamington Courier (Leamington, 11 August 2020) <https://www.leamingtoncourier.co.uk/news/crime/man-spared-jail-term-swinging-machete-householder-after-being-challenged-about-his-suspicious-behaviour-kineton-2938547> accessed 02 February 2021

[18] 'Knife and offensive weapon sentencing statistics: year ending March 2020' (Ministry of Justice, 10 September 2020) < https://www.gov.uk/government/statistics/knife-and-offensive-weapon-sentencing-statistics-year-ending-march-2020> accessed 09 January 2021

[19] Stripe (n 2)

[20] Debbie Wilson, Clare Sharp, and Alison Patterson, 'Young People and Crime: Findings from the 2005 Offending, Crime and Justice Survey' (Statistical Bulletin Home Office 2006)

to threaten[21] in such a way that there is an immediate risk of 'serious physical harm' (tantamount to GBH).[22] Proving intent in this way is, as Parsons notes, notoriously difficult.[23] The requirements in satisfying this charge and the relative rarity of its use raise questions as to the effectiveness of the creation of new offences unique to knife crime.

Furthermore, even if the relative obscurity of the LASPO amendments were relieved through appropriate frequency and success of charging, research suggests that they would likely have little impact on actual rates of offending. As Wright notes, 'potential offenders are unlikely to be aware of modifications to sentencing policies, thus diminishing any deterrent effect,'[24] suggesting a further limitation to the creation of new offences. This apparent redundancy is exacerbated by the existence of longstanding alternatives with which an individual using knives to threaten may be charged. One way in which to do this would be to charge knife possession concurrently with 'threats to kill' under the Offences against the Person Act (OATPA) 1861,[25] where the presence of a knife would satisfy the highest culpability requirements,[26] and thereby assist in proving the necessary perceived intent by the victim. Actual intent to kill need not be proven.[27] OATPA charges would constitute the most serious of threats made with knives, with this reflected in the sentencing (four years up to ten).[28] Where the threat may not pertain to murder, Section 4 of the Public Order Act 1986 'fear or provocation of violence' would be suitable. Use of these alternative statutes would reduce default reliance on simple possession charges where the LASPO requirements cannot be satisfied, upholding fair labelling standards,[29] in addition to allowing the varying severity of offenders' actions to be more accurately and fairly represented in sentencing. It would seem more logical to effectively enforce the existing laws than to create new ones. The low charge rates and issues inherent to the LASPO offences suggest the development of unique knife offences

[21] 'Offensive Weapons, Knives, Bladed and Pointed Articles' (*Crown Prosecution Service*, 17 November 2020) <https://www.cps.gov.uk/legal-guidance/offensive-weapons-knives-bladed-and-pointed-articles#:~:text=Section%20139AA%20of%20the%20CJA,harm%20to%20that%20other%20person> accessed 01 January 2021

[22] 'Offensive Weapons, Knife Crime Practical Guidance' (*Crown Prosecution Service*, 10 September 2020) <https://www.cps.gov.uk/legal-guidance/offensive-weapons-knife-crime-practical-guidance> accessed 08 January 2021

[23] Simon Parsons, 'Intention in criminal law: why is it so hard to find?' (2000) Mountbatten Journal of Legal Studies 4(1-2) 5, 10

[24] Valerie Wright, 'Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment' [2010] *The Sentencing Project* <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf> accessed 10 March 2021

[25] Offences Against the Person Act 1861 (OATPA 1861), s 16

[26] 'Threats to kill', (Sentencing Guidelines, 01 October 2018) < https://www.sentencingcouncil.org.uk/offences/crown-court/item/threats-to-kill/> accessed 10 March 2020

[27] 'Offences against the Person, incorporating the Charging Standard' (*Crown Prosecution Service*, 06 January 2020) < https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard> accessed 10 March 2020

[28] OATPA 1861 (n 25)

[29] Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 The Cambridge Law Journal 85, 85.

merely shifts the burden, proving a short-sighted implementation of the criminal law of little use against knife crime offending.

B. Judicial attitudes to knife crime

Regardless of which offence a defendant is accused of, the renewed focus on a reduced use of cautions and other out of court disposals renders it highly likely that they will find themselves in court with a case to answer. The courts play a fundamental role in the criminal justice process by deciding appropriate sentences for offenders. In the context of knife crime, the court system has recently found itself blamed,[30] for handing down what around 70% of the British public believe to be 'too lenient' sentences,[31] which undermines the ability of public bodies to tackle knife crime effectively. It is necessary to determine whether there is any merit to such claims which, if true, would represent an opportunity for reform to allow the criminal law to be utilised more effectively against this type of offending. Through reference to two landmark Court of Appeal judgments it will become evident that whilst the attitude of the courts has changed, the judiciary's current position cannot reasonably be blamed for the failure in reducing rates of crime.

A group of cases relating to knife possession brought before the Court of Appeal in *R v Povey* was used by Judge LCJ to clarify the court's disapproval of knife crime, now realised to be reaching 'epidemic proportions.'[32] *Povey* contained an explicit divergence from a previous ruling in *R v Poulton* and *Celaire,* in which Rose LJ stressed the importance of a defendant's intention in relation to knife possession.[33] Only if there were a combination of 'dangerous circumstances' and 'actual use of the weapon to threaten or cause fear,' would an individual likely satisfy the custody threshold.[34] Whilst a measured approach such as this arguably makes undue criminalisation of non-violent citizens without malicious intent less likely, it is understandable how some may incorrectly identify the rhetoric as indicative of an opportunity for defendants to exploit the flexibility afforded to judges at trial. The court, therefore, capitalised on the opportunity presented by *Povey* to distinguish this guidance as contemporarily suitable, but outdated given the development of current 'grave conditions.'[35] The Lord Chief Justice advocated a somewhat activist approach, for the judiciary to 'do what they can to help reduce… and eradicate [knife crime],'[36] this further entailed a strong recommendation to magistrates and the Sentencing Guidelines Council that sentences 'should normally be applied at the most severe end.'[37] The practical effect of this advice was ensuring that a court's primary sentencing principles are the reduction of these offences by passing deterrent sentences.

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[30] Mark White, 'Knife crime fight being 'undermined' by 'inconsistent and lenient' sentences' Sky News (England, 18 December 2018) <https://news.sky.com/story/knife-crime-fight-being-undermined-by-inconsistent-and-lenient-sentences-11585248> accessed 13 March 2020.
[31] Marsh (n 8)
[32] *Povey* (n 12) [5] (Judge CJ)
[33] [2002] EWCA Crim 2487
[34] ibid 27
[35] *Povey* (n 12)
[36] ibid
[37] *Povey* (n 12) [5]

Questionable though this deterrent motivation will subsequently be revealed to be, it is difficult to argue that the judiciary represents a particular 'weak point' in the criminal justice process either in rhetoric or in sentencing. Judges are, after all, limited by statute in the sentences they can prescribe and such a perception is more likely the result, as Hough et al. concluded, of the public's mistaken underestimation of sentencing severity.[38]

C. Sentencing increases and mandatory minimums

The Court of Appeal in *Povey* made no specific request for an increase in sentencing provisions, merely for the existing guidelines to be administered at the highest end. Regardless, Parliament has sought, in a drastic extension of the sentiment in *Povey*, to compel the courts to administer strict mandatory minimum custodial sentences for those convicted of knife crime offences. This manifests in the use of a 'two strike law' for offenders convicted more than once of weapon possession offences,[39] and an immediate custodial sentence for anyone convicted of threats made with weapons.[40] The mandatory minimum for both is six months' imprisonment for adults, and four months' Detention and Training Order (DTO) for under-18s. However, as the Sentencing Council notes, the guidelines give the highest sentences, which are up to four years, for those threatening with knives— meaning sentences for these offences will always be higher than six months.[41] Though no doubt a societal problem, it is difficult to argue that simple knife possession satisfies the culpability and harm requirements to justify such long prison sentences.

Arbitrarily tough minimums such as these appear contrary to sentencing principles which place particular importance on proportionate sentences that are 'commensurate to the seriousness of the offence.'[42] As Beyleveld notes, where a sentence is issued beyond this standard with the aims of preventing would-be offenders from engaging in similar conduct, the effect is considered to be one of 'marginal general deterrence.'[43] This operates on the assumption, described by Ashworth, that 'fear of enhanced consequences will reduce the incidence of this crime.'[44] Such a divergence from basic sentencing principles is described in the relevant guidelines as appropriate in 'exceptional circumstances' where 'prevalence should influence sentencing levels. The pivotal issue…

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[38] Mike Hough, Ben Bradford, et al., 'Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales' (Ministry of Justice, 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/230186/Attitudes_to_Sentencing_and_Trust_in_Justice__web_.pdf> accessed 13 March 2020

[39] Criminal Justice and Courts Act 2015, s 28

[40] Legal Aid, Sentencing and Punishment of Offenders Act, s 142

[41] Sentencing Guidelines (n 26) 9

[42] Overarching Principles: Seriousness (Sentencing Guidelines Council 2004)

[43] Deryck Beyleveld, 'Identifying, Explaining and Predicting Deterrence' (1979) 19 British Journal of Criminology 205, 214

[44] Andrew Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' (2018) 7 Criminal Law Review564, 567

will be the harm being caused to the community.'[45] Such a situation amounts to what Kramo describes as evidence of 'legislatures who have used [mandatory sentences] to target specific criminal activity perceived as contributing to wider societal problems.'[46] Nonetheless, such a tactic may only be justified where it proves to be effective— lest it simply amounts to punishment for punishment's sake at the expense of proportionality and fairness. It therefore becomes necessary to assess the effectiveness of this shift to an increasingly punitive utilisation of sentencing in relation to knife crime offences.

Despite complaints from Squires that the lack of high-quality data on specific 'illegal knife possession offences' complicates the ability to ascertain the success of sentencing policies on levels of crime, [47] it remains possible with regard to an overall assessment of the tactic's success against knife crimes collectively. Sentencing data from the Ministry of Justice displays an apparent failure of the expansion of custodial sentences.[48] Despite lengthier and more frequent custodial sentences being handed down since 2010, the number of proven offences reached an all-time high in 2018. 72% of those dealt with by police had no previous convictions and, thus, were 'first time offenders.'[49] In an approach focused so heavily on the deterrence of crime, where 'considerable emphasis has been placed on the deterrent effect of increasing the likelihood both of prosecution and of the imposition of a (longer) custodial sentence,' the figures do not support the method and cannot be justified on a crime control basis. [50]

Whilst sentencing data can only prove that when sentences go up, a reduction in crime does not follow, such an outcome is supported by existing research and was— ultimately— entirely predictable. The majority of conventional literature on sentencing has concluded that 'zero tolerance' approaches focused primarily on punishment through extensive incarceration are ineffective at preventing both new,[51] and recidivist offenders,[52] from committing violent offences, including knife crime. This appears to be accepted by government despite policy introductions to the contrary, with MPs admitting by reference to a separate bill that 'harsher sentencing tends to be associated with limited

[45] Sentencing Guidelines (n 26) 9
[46] Yvonne Kramo, 'Are there persuasive reasons for having mandatory minimum sentences for crime(s) other than murder?' in Ciara Dangerfield (ed) *The New Collection* (New College, Oxford 2012) 41
[47] Squires (n 5) 6
[48] 'Knife and Offensive Weapon sentencing statistics year ending March 2020' (*Ministry of Justice*, 10 September 2020) <https://www.gov.uk/government/statistics/knife-and-offensive-weapon-sentencing-statistics-year-ending-march-2020> accessed 09 January 2020
[49] ibid
[50] '*Sentencing Guidelines in England and Wales: An Evolutionary Approach*' (Sentencing Commission Working Group 2008)
[51] Mark Lipsey and David Wilson, 'Effective Intervention for Serious Juvenile Offenders' in Rolf Loeber and David Farrington (eds) *Serious and Violent Juvenile Offenders: Risk Factors and Successful Interventions* (Thousand Oaks, CA: Sage)
[52] Paul Gendreau and Claire Goggin, 'The Effect of Prison Sentences on Recidivism' (Public Works and Government Service 1999) 2

or no general deterrent effect,'[53] a view seemingly held since at least 1990 with the passage of the Criminal Justice Act 1991 which 'largely rejected deterrence as a core aim of sentencing… whilst restricting unnecessary use of custody.'[54]

D. Areas for research

Whilst important, it is of limited use to simply identify the clear lack of positive effect that longer sentences have. In order to apply these findings to effect meaningful reform to criminal justice approaches to knife crime, it is necessary to ascertain *why* its expansion thus far has resulted in failure. Research into this is limited and would benefit from further study. Many of the findings necessarily rely on self-report, which presents its own issues with bias and sample considerations, but these may be minimised by experienced researchers. The All Party Parliamentary Group (APPG) on Knife Crime serves as an example of this. They found that many young people view prison as a safer alternative to their home situations,[55] which would explain in some part why longer sentences are ineffective as a deterrent. They further identified that 'exposure to other criminals can mean prison serves as a training ground for higher levels of criminality',[56] which logically acts as a contributory factor to the growing rates of recidivism in knife crime offenders. However, the sample was small (only twenty-six), and generalisation of these findings without further research would be largely speculative.

Nagin suggests that apprehension among offenders of certain punishment rather than 'the severity of the legal consequence' provides a more convincing deterrent.[57] This would go some way to explaining why the introduction of mandatory minimums and longer sentences showed no comparable improvement to rates of knife crime over existing sentencing guidelines. However, this seems incompatible with propositions that knife crime offenders act largely on impulse without regard for consequences,[58] and would not appear to be supported by any meaningful reduction in knife crime commission following policy changes to limit the use of cautions and ensure prosecution.[59] Furthermore, the negligible impact of varying sentencing severity precludes a return to shorter custodial sentences which have been 'consistently associated with higher rates of proven reoffending,'[60] and have garnered historically low support

[53] See Hansard, 'Pets: Theft Question for Ministry of Justice' (19 February 2021) <https://questions-statements.parliament.uk/written-questions/detail/2021-02-19/155490> accessed 03 May 2021.
[54] Tim Newburn, '"Tough on Crime": Penal Policy in England and Wales' (2007) Crime and Justice 36(1) 425, 470
[55] 'Young people's perspectives on knife crime' (*All Party Parliamentary Group on Knife Crime*, 2019) <https://www.barnardos.org.uk/sites/default/files/uploads/APPG%20on%20Knife%20crime%20-%20Young%20people%27s%20perspective%20August%202019.pdf> accessed 12 January 2021
[56] ibid 13
[57] Daniel Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 Crime and Justice 199, 202.
[58] Sara Haylock et al., 'Risk Factors Associated with knife-crime in United Kingdom among young people aged 10-24 years: a systematic review' (2020) BMC Public Health 20:1451 14
[59] 'Technical Guide to Knife and Offensive Weapon Sentencing' (*Ministry of Justice* 2019)
[60] Aidan Mews, *The impact of short custodial sentences, community orders and suspended sentence orders on re-offending* (Ministry of Justice 2015)

amongst the public.[61] Ultimately, contradictory findings in the motivations of knife crime offenders only confirm what Nagin himself admits, that there exist 'major theoretical and related empirical gaps' in research relating to the specific impact of the coercive means of the criminal justice system on the decision to commit violent crime. [62]

It is difficult to convincingly argue that the expanded criminalisation of knife offences was legitimately predicated on little more than an appeasement of the public in response to waning confidence in the judicial system. The empirical and theoretical evidence does not support such an expansion and the government has previously admitted this. Long custodial sentences have no effective reduction on rates of crime. Short custodial sentences draw the public's ire and have been linked to uniquely high rates of recidivism upon release. Whilst the need for further qualitative research into the effects of sentencing on offenders has been shown, it is reasonable to conclude that incarceration as a response to knife crime (especially low-level possession charges) does not provide an adequate remedy. Given that custodial sentencing comprises the most powerful mechanism of the criminal justice system, questions arise regarding its ability to provide an effective solution at all.

3. *Civil Orders as a Means of Knife Crime Control*

The evident failure of the criminal justice system to exercise any significant reduction in rates of knife crime in either new or recidivist offenders through the increased use of both long and short custodial sentences raises questions regarding the suitability of a reliance on purely coercive means to control criminal behaviour. General assumptions in support of punitive sentencing depend on the importance placed on the right to personal liberty enshrined in conventional jurisprudence, and the deterrent effect of its removal. A.V. Dicey wrote that, unless 'to stand trial, or because he has been duly convicted of some offence', an individual should 'not be subjected to imprisonment, arrest, or other physical coercion.'[63] Increased custodial sentencing, whilst ineffective, does not act contrary to such a theory as it follows conviction beyond reasonable doubt and, at the time in which these words were written, existed as one of the only practical legal mechanisms through which to deal with offending.[64] However, recent years have seen the application and scope of civil means being expanded to provide an avenue for authorities to intervene and restrict undesirable behaviour prior to its escalation and without the involvement of a criminal trial.

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[61] 'Mandatory knife jail terms backed' *BBC News* (London, 12 January 2009) <http://news.bbc.co.uk/panorama/hi/front_page/newsid_7818000/7818856.stm> accessed 12 December 2020

[62] *Nagin* (n 57) 202

[63] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edition, London: Macmillan, 1959) 207

[64] Constitution Committee, *Serious Crime Bill (second report)* (HL 2006-07, 18-I)

This has manifested through the introduction of various civil injunctions and orders under various names and pretexts, but which all operate in fundamentally the same way. Once suspicion has been formed upon an individual by a relevant authority, an order is applied for to the appropriate body which enables a range of restrictions to be imposed and backed by criminal sanctions with the purported intention of preventing behaviour and associations believed to act in the furtherance of violent crime and gang activity. The suitability of applying civil orders as a means of controlling serious violent crime will be considered alongside numerous issues inherent to their use in such a way. This includes concerns regarding the lower standard of proof required for an order, breach of which creates an avenue for criminalisation and two years' imprisonment. Such an avenue will be further explored in relation to the purposely broad statutory provisions through which individuals may be identified as members of gangs necessary for the application of many orders. The combined result of these issues is, as Burney notes, that civil orders have become a means to pre-empt prosecution and criminalise the behaviours and activities of vulnerable groups,[65] an incursion into the civil law of the punitive motivations seen in knife crime sentencing which ultimately preclude the measure from providing an effective opportunity for meaningful early intervention. In their current form, civil orders will be shown as procedurally and practically inappropriate, ineffective, and ultimately inadequate in dealing with knife crime offending.

Many civil orders are named as if to alleviate particular social problems. Knife Crime Prevention Orders (KCPOs) are an example of this but, owing to their recent introduction on a trial basis in London, little pertinent case law or success data is available.[66] Given the inherent similarities between the majority of these orders, almost any would provide a convenient proxy through which to assess the tactic as a whole. However, Civil Gang Injunctions (CGIs) have been the subject of much research,[67] and were previously deployed alongside Criminal Behaviour Orders,[68] to tackle much of the same offending as KCPOs. Their similarities both highlight the redundancy of each new order and outline the suitability of such a comparison. Both KCPOs and CGIs may be applied for without conviction,[69] and applications need only prove on the civil balance of probabilities that respondents have engaged in "gang-related violence" or have carried knives on at least two occasions,[70] both orders enable the same wide-ranging restrictions on civil liberties,[71] and both were— at their inception— touted as a solution to target members of gangs.[72]

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[65] Elizabeth Burney, *Making People Behave: Anti-Social Behaviour, Politics and Policy* (2nd edn, Willan Publishing 2006) 95
[66] Offensive Weapons Act 2019 (OWA 2019) pt II
[67] Policing and Crime Act 2009 (PCA 2009) s 34
[68] Anti-Social Behaviour, Crime and Policing Act 2014, s 22
[69] OWA 2019, s 14
[70] PCA 2009, s34(2); OWA 2019, s 14(3)
[71] PCA 2009, s35(2-3); OWA, s 21(2)
[72] 'Home Secretary announces new police powers to deal with knife crime' (*Home Office* 2019) <https://www.gov.uk/government/news/home-secretary-announces-new-police-powers-to-deal-with-knife-crime> accessed 09 January 2021

A. Applicability Concerns

Regarding the legal legitimacy of the application of such orders to prevent criminal behaviour, existing case law is provided in relation to the long-standing Anti-Social Behaviour Orders (ASBOs) introduced under the now repealed s.1 Crime and Disorder Act 1998. This extends not only to KCPOs, but all civil orders. Gilbert[73] reminds us that in consideration of ASBOs in *R v Boness*,[74] the Court of Appeal indicated a reluctance 'to impose an order which prohibited a person from committing an act that was already a specified criminal offence.'[75] The use of any of these orders against knife crime offences becomes questionable where an included condition prohibits behaviour considered in aid of such crimes, such as restrictions on ownership and possession of bladed articles in a public place, as has been seen in practice.[76] Under various existing statutes it is already an offence to carry a blade in public without valid justification, rendering an additional order against such activity unnecessary.[77] Such a point was raised by former MP Vernon Coaker during debate regarding the Offensive Weapons Bill to introduce KCPOs,[78] but received no clear nor satisfactory response. An order of any description requiring the respondent to not carry a knife is, in light of *Boness*, entirely pointless in regulating the possession of blades on the street. This does not necessarily render all discussion surrounding the use of these orders in the context of knife crime completely irrelevant, however. There continues to exist, contrary to the court's suggestions, evidence of authorities using them in a knife crime prevention capacity. Furthermore, prohibition of criminal behaviour is not the sole requirement provided for by civil orders- many of the restrictions would not fall foul of *Boness* and are instead aimed at preventing gang association and activity believed to be linked to violent knife crime. As such, *Boness* does not appear to completely preclude civil orders from being used to tackle knife crime and their discussion remains relevant.

The view held by Gilbert in his analysis of *Boness* that Anti-Social Behaviour Injunctions (ASBIs) would provide a preferable alternative to KCPO enforcement is, perhaps, the most sensible compromise allowed for by statute at this time.[79] He argues use of the injunction in a way which would prove compatible with the spirit of Hooper LJ's insistence that prohibitive orders 'should be aimed at preventing specific acts which give rise to criminal conduct… rather than mimicking existing law.'[80] The wording of the Anti-Social Behaviour, Crime and Policing Act which introduced ASBIs refers to behaviour

[73] Graham Gilbert, 'Knife Crime Prevention Orders' (3PB Barristers, 7 February 2019) <https://www.3pb.co.uk/content/uploads/Knife-Crime-Prevention-Orders-Graham-Gilbert-7-2-19.pdf> accessed 06 December 2020

[74] [2005] EWCA Crim 2395

[75] ibid [35] (Hooper LJ)

[76] 'Met secures gang injunction against known gang member in Islington' (*Met News*, 03 February 2021) <https://news.met.police.uk/news/met-secures-gang-injunction-against-known-gang-member-in-islington-417017> accessed 10 February 2021

[77] Criminal Justice Act 1988, s 139; Prevention of Crime Act 1953, s 1

[78] HC Deb 4 February 2019, vol 654, cols 27-9

[79] Anti-Social Behaviour, Crime and Policing Act 2014 (ASBCPA), s 1

[80] *Boness* (n 74) [31]

'that has caused, or is likely to cause harassment, alarm or distress,'[81] under which, he argues, carrying knives would invariably fall. This is true to an extent, as the wording does not require any particular victim— so it can be assumed that the orders would also apply to those who conceal blades about their person where the general public would not even be aware that they were armed. The Act also refers to mere threat of engagement in such behaviour as sufficient to satisfy the order, so they may be applied proactively before harms can occur.[82] However, he fails to question the premise that these orders are necessary and useful against knife crime in the first place, overstating the influence of social media and gang affiliation as primary precursors to carrying knives. The use of ASBIs is an interesting consideration, but one ultimately reliant on a flawed assumption which exaggerates the impact of these factors on the decisions of young people to carry knives on the street— as will later be explored. Therefore, whilst Gilbert's technical argument is true: ASBIs are capable of everything KCPOs would be without the need for further legislation, he fails to consider why *any* form of injunction with these terms is needed at all.

B. Standards of proof

A major concern inherent to the majority of civil orders, KCPOs included, is the lack of certainty and safeguards for those they are imposed upon. A primary cause for this concern stems from the standards of proof required to issue them. Following the ruling in Birmingh*am City Council v Shafi*,[83] in which the Court of Appeal clarified limitations on local council powers to impose restrictions through civil orders on those perceived to be engaged in criminal activity,[84] the Policing and Crime Act (PCA) 2009 was passed. Section 34 of this Act was designed to circumvent the procedural issues of remedying criminal activity through purely civil means,[85] a central issue in *Shafi*. Under Section 34 of the PCA, there are only two conditions that applicants must meet in seeking a CGI— these are that the court must be satisfied on the 'balance of probabilities'[86] that the respondent has 'engaged in, encouraged or assisted gang-related violence' and that an injunction is necessary to prevent such behaviour.[87] Similar terms are reflected in the OWA for KCPOs.[88] This reliance on the lower standard of proof is questionable for a number of reasons which make them inappropriate for use against suspected knife crime offenders without conviction.

The first of these reasons is due to the potential consequences of breaching the order. These are generally custodial sentences of one year on summary conviction,[89] and two

[81] ASBCPA 2014, s 2(1)(a)
[82] ASBCPA 2014, s 1(2)
[83] [2008] EWCA Civ 1186
[84] Under the Local Government Act 1972, s 222
[85] Joint Committee on Human Rights, Legislative Scrutiny: Policing and Crime Bill (2008-09, HL 68, HC 395) 75-80
[86] Policing and Crime Act 2009 (PCA 2009), s 34(2)
[87] PCA 2009, s 34(3)
[88] OWA 2019, s 14(3)
[89] OWA 2019, s 29(2)(a)

years on indictment for contempt of court,[90] with suggestions of a separate criminal offence for breach of new civil orders.[91] Whilst it is true that per *Dean v Dean* the criminal standard of beyond reasonable doubt is required to obtain such sentences, [92] this arguably remains too weak a safeguard considering the prosecution need only prove that a defendant *did* breach any condition of an order which itself was made on the civil standard. This is, therefore, more an administrative exercise than any robust defence of the rule of law. The result is that civil orders become quasi-criminal in their restrictions but subjected to far less oversight. *Birmingham City Council v James* saw the court reject an argument based around this low standard of proof for CGIs,[93] assuming instead the intention of Parliament as providing a remedy in response to the prior ruling of *Shafi*, so that local authorities were more easily able to seek action against a 'particular kind of mischief,'[94] without consideration of whether a different order ought to have been applied for instead. This appears a rather weak argument, and the distinction between ASBOs and CGIs (and therefore other orders) has not been made clear enough to soundly draw acceptable justifications to the differences in their administration.

Hence, whilst it may well have been Parliament's intention to make restrictive orders easier to obtain, they should not so readily disregard the jurisprudence of previous court rulings. *Shafi* showed that CGIs are 'in identical or near identical terms' to ASBOs,[95] so the two should not so readily be separated. Given their similarity in practical terms, much of the same criticism applies to both, most damningly that found in *R. (McCann) v Manchester Crown Court* where the House of Lords considered the standard of proof for ASBOs.[96] The court affirmed the view expressed prior in *B v Chief Constable of Avon and Somerset Constabulary* that,[97] 'given the seriousness of matters involved', fairness required a 'heightened civil standard' of proof, which amounted to being virtually 'indistinguishable from the criminal standard' and, as such, 'beyond reasonable doubt' ought to apply to the application of ASBOs.[98] Given the failure of any court or Home Secretary to convincingly evidence any clear practical or legal distinction between ASBOs and any other orders, this standard necessarily need extend to all equally. The House of Lords Constitution Committee agrees with such an assessment, arguing that 'gang-related violence injunctions are… with the most serious consequences' and therefore 'minimum considerations of due process should require the criminal standard of proof.'[99] As McBride cautions, though, the practical issues of requiring this 'heightened standard of proof' in civil cases would be tantamount to a widespread adoption of beyond

[90] OWA 2019, s 29(2)(b)
[91] Consultation on Serious Violence Reduction Orders (Home Office 2021)
[92] [1987] 1 FLR 517 (CA)
[93] [2013] EWCA Civ 552
[94] ibid [13] (Moore-Bick LJ)
[95] *Shafi* (n 83) [51] (Rix LJ)
[96] [2002] UKHL 39, [3] (Lord Steyn)
[97] [2001] 1 WLR 340, 354
[98] *McCann* (n 96) [31]
[99] Constitution Committee, *Policing and Crime Bill* (HL 2008-09, 128-I)

reasonable doubt— which risks proving largely unattainable in many civil proceedings.[100] This is ultimately, therefore, another question for Parliament.

C. Gang membership and knife crime commission

The 'gang-related violence' referred to by the Constitution Committee is often blamed in media and government for the incitement and commission of knife crime attacks, as well as the recruitment of young people,[101] to commit offences on behalf of criminal enterprise.[102] The Home Office claims that gang activity accounted for a 36% rise in recorded knife crime in 2018,[103] with this being blamed for the increase in murders of children up to age 15 between 2016 and 2018.[104] Knives and blades are often described as the weapons of choice. These findings would serve to suggest that the use of civil orders against those suspected of regularly carrying knives but who have not yet been convicted, with the aims of preservation of life and public safety, is appropriate and necessary. The figures are, however, misleading. In their own statistics, the Home Office accepts that the rise in recorded crime is likely due to improved police reporting,[105] and thus a link between gang membership and knife carrying cannot reasonably be relied upon. Such a view is supported by former Metropolitan Police Commissioner Sir Bernard Hogan-Howe, who estimated that around 75% of recorded knife crime is not gang-related, but instead a means of self-protection and a desire for status.[106] Further evidence questioning this link comes from the Mayor's Office for Policing and Crime (MOPAC) which found only 5% of knife crime to be gang related in 2016,[107] with evidential reviews of the Met Police's Gang Matrix by Amnesty International[108] and Stopwatch[109] finding few solid links between the two. Furthermore, McVie's longitudinal study conducted in Edinburgh found little evidence of strong links between gang membership and knife-carrying.[110] She

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[100] Emma McBride, 'Is the Civil 'Higher Standard of Proof' a Coherent Concept?' (2009) 8 Law, Probability and Risk 323, 351

[101] Ben Quinn, 'County lines drugs blamed for Kent's big rise in knife crime' *The Guardian* (Kent, 2019) <https://www.theguardian.com/uk-news/2019/mar/10/county-lines-drugs-kent-knife-crime-rise-cuts> accessed 13 December 2020

[102] Nicole Winchester, 'Knife Crime: Policy and Causes' (House of Lords Library Briefing, 21 May 2019)

[103] *Serious Violence Strategy* (Home Office 2018)

[104] Tom Kirchmaier and Carmen Villa Llera, 'Murders in London' [2018] <https://www.researchgate.net/publication/326318802_Murders_in_London> accessed 21 December 2020

[105] Jennifer Brown, 'Serious violence and knife crime: Law enforcement and early intervention' [2020] < https://commonslibrary.parliament.uk/serious-violence-and-knife-crime-law-enforcement-and-early-intervention/> accessed 13 December 2020

[106] Nadia Khomami, 'Most London knife crime no longer gang related, police say' *The Guardian* (London, 2016) <https://www.theguardian.com/uk-news/2016/oct/13/most-london-knife-no-longer-gang-related-police-say> accessed 14 December 2020

[107] *The London Knife Crime Strategy* (Greater London Authority 2017).

[108] 'Trapped in the Matrix: Secrecy, Stigma, and Bias in the Met's Gangs Database' (Amnesty UK, 2018)

[109] Patrick Williams, 'Being matrixed: The (Over)policing of Gang Suspects in London' (Stopwatch, London 2018) <www.stop-watch.org/uploads/documents/Being_Matrixed.pdf> accessed 04 January 2021

[110] Susan McVie, 'Gang Membership and Knife Carrying: Findings from the Edinburgh Study of Youth Transitions and Crime' [2010] Edinburgh: Scottish Government Social Research

instead discovered different risk factors between the two behaviours, with poverty a more likely indicator than gang membership, where a perceived need for self-defence and a lack of parental support result in knife carrying. The difference in these factors suggests rather clearly that gang membership does not directly inform the decision for individuals to carry knives. On the contrary, Djikstra et al. concluded that 'weapon carrying… might be an indirect response to threats in the environment,'[111] supporting McVie's explanation of a lack of security on the street and suggesting that the relationship between gangs and knives is more complicated than the Home Office presents.

It is abundantly clear that the evidence does not support the use of the gang justification to increase the use of civil orders and the severity of the conditions associated with them. If it is accepted that actual gang membership presents weak correlations with knife crime offending, then it becomes evident that the government has expanded the definition of what constitutes a 'gang' to allow the application of these orders against a broader class of respondents. The definition of 'gang' is found in s34 Policing and Crime Act 2009, as amended by the Serious Crime Act 2015:

'(5) For the purposes of this section, something is "gang-related" if it occurs in the course of, or is otherwise related to, the activities of a group that—

> (a) consists of at least three people, and
>
> (b) has one or more characteristics that enable its members to be identified by others as a group.'

The original definition prior to amendment was considered by frontline workers 'unduly restrictive' (as it contained reference to gang emblems, colours, etc.) and 'fail[ed] to reflect the true nature of how gangs operate.'[112] Both of these statements may be true — but Parliament sought an overcorrection which has left the law with an incredibly vague definition,[113] allowing authorities to find gang relations where a reasonable person might otherwise struggle to. It is also true that the definition of 'gang' has been contested by academics for years,[114] and is admitted by the Crown Prosecution Service (CPS) to lack a 'precise definition' existing only to enable injunctions to be sought.[115] There exists little doubt that this is an affront to fair labelling, and of possible negative effect to an individual's fair trial, to be incorrectly labelled a member of a gang — to designate such

[111] Jan Kornelis Dijkstra, Siegwart Lindenberg, Rene Veenstra, et al., 'Influence and Selection Processes in Weapon Carrying during Adolescence: the Roles of Status, Aggression and Vulnerability' (2010) 48 American Society of Criminology 187, 208

[112] *Civil Gang Injunctions Impact Assessment* (Home Office and Ministry of Justice 2014); *Fact sheet: Gang Injunctions* (Home Office 2015)

[113] Anthony Gunter and I Joseph, *What's a Gang and What's Race Got to Do With It*? (Runnymede Trust 2011) 122

[114] Jane Wood and Emma Alleyne, 'Street gang theory and research: Where are we now and where do we go from here?' (2010) 15 Aggression and Violent Behaviour 100-111

[115] *Gang related offences- decision making* (Crown Prosecution Service, 2017)

a label so freely serves only to further the expansion of criminal possibilities. If the original definition proved 'unduly restrictive,' the current one seems unduly lenient and, given the complications[116] and implausibility[117] of an academic consensus on the definition, it seems more suitable to simply leave the question of a defendant's or respondent's gang affiliation to be decided by the courts on the facts of the case. Given the impact of punishments against alleged gang members, this solution appears fairest as it accounts for the subjective and 'fluid' nature of these organisations,[118] and would ensure unaffiliated citizens do not find themselves wrongly further criminalised.

D. Civil order success data

It becomes questionable in light of the limited verifiable link between knives and gangs to propose the use of civil orders as a way to reduce the number of knives being carried, either through imprisonment of suspected gang members breaching order conditions, or by imposing bans on owning knives as part of these conditions. In such a context, civil orders may be better examined as a means to otherwise reduce the prevalence of *any* kind of gang activity, the associated fear of which has been shown to inform unaffiliated citizens' decisions to carry knives. Such an approach is reliant on the success of these orders in the reduction of gang activity— evidence for which can be found in a study by Carr et al. into the use of gang injunctions in Merseyside.[119] As the area with the highest rates of knife crime in England and Wales outside of London, and a population representative of many metropolitan locations around the country, the results and application of Carr's study are unlikely to be confounded by regional or populational variables. On first inspection the results appear promising. The individual offending counts of all individuals issued with CGIs in the Merseyside study dropped by 70% in the following three years, and the severity of those offences still committed according to the Cambridge Crime Harm Index, which attempts to quantify societal damage of crime,[120] dropped by 61%.[121]

This promise is, however, ephemeral, and reliant on data fraught with issues likely to undermine confidence in the efficacy of civil order use. Carr relies upon a small sample size of only thirty-six individuals which makes it hard to generalise and apply the findings to a wider group— especially considering estimates of gang membership in the

[116] Peter Traynor, 'Closing the 'security gap': Young people, 'street life' and knife crime' (PhD thesis, University of Leeds 2016) 162
[117] Hannah Smithson et al., '*Gang Member: Who Says? Definitional and Structural Issues*' in Finn-Aage Esbensen and Cheryl Maxson (eds*), Youth Gangs in International Perspective: Results from the Eurogang Program of Research* (Springer, London 2010) 53
[118] Rob White, 'Disputed Definitions and Fluid Identities: The Limitations of Social Profiling in Relation to Ethnic Youth Gangs' (2008) 8 Youth Justice 149, 154
[119] Richard Carr, Molly Slowthower and John Parkinson, 'Do Gang Injunctions Reduce Violent Crime? Four Tests in Merseyside, UK' (2017) 1 Cambridge Journal of Evidence-Based Policing 195
[120] Lawrence Sherman et al., 'The Cambridge Crime Harm Index: Measuring Total Harm from Crime Based on Sentencing Guidelines' (2016) 10 Policing: A Journal of Policing and Practice 171, 173.
[121] Carr, Slowthower and Parkinson (n 119) 203

UK range from 30,000 upwards.[122] Furthermore, studies of CGI success in the United States where they have been used since the 1980s have concluded that CGIs cause 'negligible reduction in crime post issuance,'[123] only a modest reduction of 5%,[124] and even in one case a 'significant increase in violent crime… after issuance of an injunction.'[125] Whilst not directly pertaining to England and Wales, these studies serve as an important indicator of CGIs' unlikely long term success, with the government's own review returning unsatisfactory and inconclusive results.[126]

It is clear through legislation and rulings requiring proof only on the balance of probabilities, and the adoption of a purposely vague gang definition that Parliament, and to some extent the courts, have sought to expand the use of civil orders as a crime control method by making their application far easier. It is also clear, through empirical evidence and longitudinal studies, that such behaviour cannot be justified on the grounds of any success of such an approach. The Youth Violence Commission wrote that civil orders 'exemplif[y] the absence of an evidence-informed and joined-up approach' which 'did not receive the level of consultation, parliamentary scrutiny, or impact assessment appropriate for legislation with such wide-reaching potential.'[127] This is true, but they also exemplify the insistence of government to reject alternatives and continue down a path of undue criminalisation and suspicion. The development of civil orders and injunctions into some hybridised quasi-criminal measure is entirely misjudged and brings into focus both the moral and legal considerations of using the law to intervene before crime has actually been committed. Certainly, they prove that civil orders cannot provide a suitable solution to knife crime offending in their current state, and that any modifications to address their numerous shortcomings would render them largely indistinguishable from criminal measures.

4. Stop and Search in a Knife Crime Context

Consideration of both criminal sentencing and civil orders has led to the conclusion that crime control methods predicated on warrantless early intervention and marginal general deterrence provide inadequate recourse for knife crime prevention. This was shown to largely be a result of an unjustifiable undermining of due process and a flagrant

[122] Trevor Bennett, 'Gang Membership, Drugs and Crime in the UK' (2004) 44 British Journal of Criminology 305, 305

[123] Cheryl Maxson and Theresa Allen, 'An evaluation of the city of Inglewood's youth firearms violence initiative' [1997] Los Angeles: Social Science Research Institute, University of Southern California

[124] Jeffrey Grogger, 'The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County.' (2002) 45 Journal of Law and Economics 69

[125] False Premise, False Promise: The Blythe Street Gang Injunction and Its Aftermath (ACLU Foundation 1997)

[126] *Review of the Operation of Injunctions to Prevent Gang-Related Violence* (Home Office 2014)

[127] Keir Irwin-Rogers, Abhinay Muthoo and Luke Billingham, 'Youth Violence Commission Final Report.' [2020] YV Commission < http://oro.open.ac.uk/72094/1/Youth%20Violence%20Commission%20Final%20Report%20July%202020.pdf> accessed 01 April 2021

misunderstanding of knife offenders' motivations which preclude a punitive legal approach. However, despite the failures of civil orders to do so, it remains an unfortunate necessity for authorities to be able to detect knife carriage in individuals prior to the commission of violent crime. This has more commonly involved the use of discretionary powers provided by the Police and Criminal Evidence Act (PACE) 1984 which allow police to stop and search individuals against whom they have formed reasonable suspicion.[128] Section 140 of the Criminal Justice Act 1988 extended PACE powers to include searches for those carrying knives (contrary to s.139 of the same Act). The Knives Act 1997,[129] similarly amended the Criminal Justice and Public Order Act 1994 to allow stops requiring no suspicion at all in areas where there is a heightened threat of violence (including suspected knife carriage)[130]— referred to colloquially as 'Section 60 stops'. Miller identified several ways in which stop and search might assist in a reduction of crime, all of which demonstrate the apparent suitability of using such a tactic against knife crime in particular.[131] These include the detection of offences committed or about to be committed (e.g. planned robberies with blades, which account for around 44% of recorded knife crime[132]), incapacitation of prolific offenders (close to a quarter detected are recidivist carriers[133]), and deterrence from the apprehension of being caught with prohibited items.

Whilst theoretically promising for the detection and subsequent reduction of knife crime offending, it is unfortunately well-established in practice that such a tactic produces remarkably few successful finds of knives or offensive weapons (recorded collectively).[134] The Supreme Court admitted that certain stops might breach Article 8 rights to a private life but can be justified for the protection of the public.[135] Such a defence cannot be claimed when rates of finds are so low that the use of the tactic is disproportionate to its benefit. Explanations as to why stop and search has failed to produce expected results are varied but will ultimately be shown to be a result of its disproportionate application against underprivileged groups with a weak or non-existent formation of suspicion. This contributes significantly to the poor relationship between police and communities in which knife crime is most prevalent, with the resultant effect of limiting cooperation and information sharing. This has the cyclical effect of reducing effective stops and thusly contributes further to the animosity felt toward police. Understanding the necessity for a balance between community relations and effective enforcement, stop and search will be shown to have potential dependent on a number of alterations. This includes a repeal of

[128] Police and Criminal Evidence Act 1984, s 1
[129] Knives Act 1997, s 8
[130] Criminal Justice and Public Order Act 1994, s 60
[131] Joel Miller, Nick Bland, Paul Quinton, *The Impact of Stops and Searches on Crime and the Community* (Paper 127 Police Research Series, Home Office 2000).
[132] Esme Kirk-Wade and Grahame Allen, 'Knife Crime Statistics' (*Home Office*, 06 October 2020). <https://commonslibrary.parliament.uk/research-briefings/sn04304/> accessed 05 April 2021
[133] Laura Bailey, Vincent Harinam, Barak Ariel, 'Victims, Offenders and Victim-Offender Overlaps of Knife Crime: A Social Network Analysis Approach Using Police Records' [2020] 15 PLoS ONE 9
[134] *Kirk-Wade and Allen* (n 132)
[135] *R (Roberts) v Commissioner of the Police and Metropolis* [2015] UKSC 79 [3]

suspicionless Section 60 stops, recruitment of police from within these communities, and a mandatory adoption of the Home Office's 'Best Use of Stop and Search' scheme to increase accountability to the public. With an implementation of these changes, stop and search has the potential to move from a controversial and ineffective exhibition of 'law and order' credentials to a more useful tool to detect and ultimately reduce knife crime offending.

A. Problems with stop and search and knife crime

Stop and search is described as an investigatory power with the purposes of crime detection and prevention regarding 'specific individuals at specific times.'[136] Previously limited solely to searches for drugs and firearms, legislation has subsequently been expanded to enable further powers to search for evidence of crime. With regard to knives, the relevant powers are found in Section One of PACE 1984 and Section 60 of the CJPOA 1994. Section One PACE stops comprise 97% of those conducted in England and Wales, but only 13% produce evidence sufficient for an offensive weapons arrests.[137] Though this appears inordinately poor it amounted to just over ten thousand arrests for possession of offensive weapons, suggesting some amount of merit to the tactic. However, for Section 60 searches which require no reasonable suspicion at all, fewer than 2% of searches found any knives or offensive weapons, leading to only 187 arrests. This is particularly alarming considering Section 60 should only apply where there is a specific threat of violence, characteristic of which would be an increased presence of weapons.

Though the success rate for both Section One PACE and Section 60 CJPOA searches are alarmingly low, the difference between them suggests that it is intelligence-based suspicion which increases the likelihood of successful searches rather than entirely indiscriminate stops described by some as 'fishing expeditions.'[138] This is further supported by a review of the findings of the Tackling Knives Action Programme, which shows that an increase in the frequency of searches does not correlate with an increase in successful finds.[139] Such outcomes are well-established in the literature and have been for well over a decade. A ten-year longitudinal study into the effectiveness of stop and search in London concluded that the effect is likely to be 'marginal at best,'[140] correlating with very slightly lower rates of crime described as 'weak and inconsistent.'[141] Applied to knives, Brookman and Maguire noted in their 2003 report for the Home Office that finds resulting from stop and searches are 'surprisingly low, and suggest that police actions

[136] Rebekah Delsol and Michael Shiner, 'Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales' (2006) 14 Critical Criminology 241, 243
[137] Kirk-Wade and Allen (n 132)
[138] Lizzie Dearden, '*Stop and Searches without suspicion soar 425% in London police crackdown*' The Independent (London, 04 June 2019) <https://www.independent.co.uk/news/uk/crime/stop-search-police-london-met-section-60-race-a8943931.html> accessed 08 April 2021
[139] Liz Ward and Alana Diamond, *Tackling Knives Action Programme (TKAP) Phase I: Overview of Key Trends from a Monitoring Program* (Research Report, Home Office 2009)
[140] Matteo Tiratelli, Paul Quinton and Ben Bradford, 'Does Stop and Search Deter Crime? Evidence from Ten Years of London-wide Data' (2018) 58 The British Journal of Criminology 1212, 1224
[141] ibid 1213

alone are unlikely to have a huge impact on the carrying of knives.'[142] The government's later review of Operation Blunt II, which involved increased use of stop and search, concluded 'no discernible crime-reducing effects,'[143] particularly in relation to Section 60 searches which they admit have low arrest rates compared with other types of searches. It is partially this 'inefficiency at producing arrests,'[144] that has led scholars to suggest careful consideration of their use in light of their propensity to impact community confidence in both the tactic and the police themselves. These findings suggest that reform of the tactic should be focused on the collection of quality intelligence to inform successful stops.

The harm of such an inordinate rate of unsuccessful stops must not be ignored. Identified by the Independent Police Complaints Commission as 'the leading cause of tension between young people and the police,'[145] the damage done extends far beyond mild annoyance and waste of both police and citizens' time. Furthermore, police stops, under different powers,[146] were identified in the Scarman Report as one of the primary catalysts for the 1981 Brixton Riots.[147] Little appears to have changed in recent years, with opposition to stop and search of key concern to the 'Black Lives Matter' movement, which continues to gain support in England and Wales in response to perceived policing failings as a result of institutional racism in the force.[148] In a tactic which legally relies on intelligence,[149] and explicitly prohibits personal factors from informing a stop,[150] cooperation from members within the community being policed is essential as it provides key information that would otherwise likely not be ascertained.[151] It is unlikely, as Keeling confirmed in his review of stop and search in disadvantaged neighbourhoods, that individuals in these areas will freely provide information to the police, with this problem made worse as a unsuccessful stops (characterised by no further action)

[142] Mike Maguire and Fiona Brookman, 'Reducing Homicide: A Review of the Possibilities' (Online Report 01/03, Home Office 2003) 34
[143] Rhydian McCandless, Andy Feist, James Allan and Nick Morgan, 'Do initiatives involving substantial increases in stop and search reduce crime? Assessing the impact of Operation BLUNT 2' (Home Office 2016) 3
[144] Ben Bradford, 'Assessing the impact of stop and search powers on individuals and communities', in Rebekah Delsol and Michael Shiner (eds), *Stop and Search* (Palgrave Macmillan 2010)
[145] IPCC submission to the Police and Crime Committee (13 September 2013)
[146] Metropolitan Police Act 1839, s 66
[147] Ian Law, 'The Scarman Report' in John Stone, Rutledge Dennis, Polly Rizova, Anthony Smith, and Xiaoshuo Hou (eds), *The Wiley Blackwell Encyclopaedia of Race, Ethnicity, and Nationalism* (Vol. 5 John Wiley & Sons 2016)
[148] Roger Grimshaw, 'Institutional Racism in the Police: How Entrenched Has it Become?' (Centre for Crime and Justice Studies, 13 July 2020) <https://www.crimeandjustice.org.uk/resources/institutional-racism-police-how-entrenched-has-it-become> accessed 01 May 2021
[149] *Revised code of practice for the exercise by: Police Officers of Statutory Powers of stop and search (Police and Criminal Evidence Act 1984 - Code A)* (Home Office, 2014)
[150] Equality Act 2010, s 149
[151] Martin Innes, 'Policing uncertainty: countering terror through community intelligence and democratic policing' (2006) 605 Annals of the American Academy of Political and Social Science 222, 230

increase.[152] Thus, the continued use of stop and search in its present form is unlikely to yield voluntary information sharing. However, this reluctance is unlikely to be due to particular opposition to the use of the tactic in theory; 71% of those surveyed agreed that, contingent on correct usage, stop and search has the potential to operate effectively within these communities.[153] Were this the case, the perceived legitimacy of the police would, as Jordan studied,[154] likely increase — leading to more effective policing and information sharing, allowing for the identification and removal of prolific offenders. The resultant increased confidence in the police through a reform of the tactic has the potential to confer additional benefits in the reduction of knife carriage. As previously explored in relation to civil orders, the primary motivator for knife carriers is a perceived necessity for self-defence, largely due to a failure by police to provide effective public protection.[155] Effective use of stop and search predicated on community intelligence would provide an opportunity to remove the most dangerous offenders, and thus remove the impetus for regular citizens to carry.

B. Proposed solutions

There is little doubt that a reduction in wanton searches would improve community relations and research suggests that this improvement would lead to increased cooperation within the community, which in turn would lead to more effective intelligence-based stops. Such cooperation would foster information sharing with the police, which ordinarily relies on Covert Human Intelligence Sources (CHISs).[156] This method of intelligence gathering requires some form of trading relationship between the police and informant,[157] amounting to payments of just under £1 million from the Metropolitan Police alone in 2018/2019.[158] If the use of intelligence sources were increased in communities where knife crime is prevalent, the cost would increase exponentially and become prohibitive. Furthermore, Harfield identified risks of 'using members of the community to report covertly' as 'undermin[ing]… not only individual social relationships but also the relationship between community and police,'[159] suggesting the use of covert operatives in this way would likely contribute similarly to the breakdown in community relations as the current use of stop and search does. The

[152] Peter Keeling, 'No Respect: Young BAME men, the police and stop and search' (Criminal Justice Alliance, 2018) 8
[153] ibid 21
[154] Peter Jordan, 'Effective policing strategies for reducing crime' in Peter Goldblatt and Chris Lewis (eds), *Reducing Offending: An assessment of research evidence on ways of dealing with offending behaviour* (London: Home Office 1998)
[155] McVie (n 110) 6
[156] Martin Innes and Colin Roberts, 'Community Intelligence in the Policing of Community Safety' in Tom Williamson (ed), *The Handbook of Knowledge Based Policing: Current Conceptions and Future Directions* (Wiley 2008)
[157] Martin Innes and James Sheptycki, 'From detection to disruption: some consequences of intelligence-led crime control in the UK' (2004) 14 International Criminal Justice Review 3
[158] *Freedom of Information Request Reference No.: 01.FOI.19.011366* (Metropolitan Police 2019)
[159] Clive Harfield, 'Police Informers and Professional Ethics' (2012) 31 Criminal Justice Ethics 73, 75

use of covert intelligence sources within the communities to inform effective stop and searches is, therefore, neither realistic nor preferable.

The alternative is certainly not, as Rory Stewart MP claimed during a Parliamentary debate regarding effective policing of knife crime, conferring increased surveillance powers on the government nor installing plain clothed officers in 'knife crime hotspots.'[160] Both of these represent a predictable outcome of further increasing tension and reducing trust within the communities they are deployed, having the opposite intended effect to increasing engagement and information sharing with the police.[161] The government already has exceptionally broad powers under both RIPA[162] and IPA[163] legislation to monitor offenders, but this has shown to demonstrate little actual impact while further alienating offenders.[164] Furthermore, expansion of these powers to identify and disrupt county lines gang operations, which is the primary justification offered by Stewart, continues to exaggerate the relationship between gang membership and knife crime offending. Mass surveillance of the kind provided for by RIPA and similar legislation also undermines the requirements of reasonable suspicion,[165] through widespread collection of data and is more likely to further damage community relations.[166]

C. Useful changes to stop and search

It has been shown that utilising covert informants within communities with high rates of knife crime to identify those regularly carrying, or at risk of doing so, would be both prohibitively expensive and counterproductive in building trust with the community. Propositions of increased surveillance and covert policing are likely to exhibit the same effects on trust, in addition to likely offering little benefit against knife crime offenders due both to the lack of gang connection and the often spontaneous nature of the crime. It must then be considered how stop and search could be better informed to improve on the low rates of detection, thus reducing the number of blades and recidivist offenders on the street— with the additional benefit of improving community perception of police. Knife crime has a 'benefit', not present in many other offences such as the supply of drugs, that there exists no demand for it and therefore limited opposition to its removal. The failure to tackle the problem on the street is one largely of the police's own doing through unacceptable formation of suspicion and targeting of innocent citizens. There are multiple useful changes to stop and search which would reduce these issues.

[160] HC Deb 25 March 2019, vol 657, cols 36-42
[161] Christopher Nathan, 'Liability to Deception and Manipulation: The Ethics of Undercover Policing' (2016) 34 Journal of Applied Philosophy 370
[162] Regulation of Investigatory Powers Act 2000, pt II
[163] Investigatory Powers Act 2016, ss 15-60
[164] Valerie Forrester and Tim Read, 'GPS Knife Crime Tagging: Interim Evaluation Report' (MOPAC 2020)
[165] Constitution Committee, Surveillance: Citizens and the State (2008-9, HL 18-I) 112-117
[166] Innes and Sheptycki (n 157)

The first of these would be a change to police recruitment practices. Though the government has pushed for increased diversity by requiring mandatory hiring quotas of BAME officers,[167] research suggests that this fundamentally misses the point. Whilst it is true that statistics suggest black citizens are around nine times more likely to be stopped than their white counterparts,[168] further inspection reveals that ethnicity is not as strong an informer as the media portrays.[169] As such, arbitrary hiring quotas are unlikely to have considerable impact on the unsuccessful rates of stop and search presumed to be informed by racial bias.[170] As Waddington cautioned, unjust stops are not limited to minority ethnic communities;[171] referencing several studies which found that individuals in low-income neighbourhoods were targeted more,[172] with black citizens less likely to be stopped than white Irish individuals within the same area.[173] It is more likely that social exclusion and economic deprivation, as identified by the Commons Home Affairs Committee,[174] inform this overrepresentation. Traynor notes that 'studies on knife crime have similarly suggested that ethnicity per se is not the issue,',[175] rather once a multitude of factors including education, housing,[176] and location,[177] are accounted for, 'ethnicity has a negligible impact on behaviours related to knife carrying.'[178] Hence, whilst a push for a more diverse police force is a start, it appears more performative than effective. Police should instead be recruited specifically from within the communities they serve, as they are likely to have better relationships with those around them in addition to a more intimate knowledge of the area and likely offenders.[179]

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[167] Vikram Dodd, 'Met Police Told 40% of recruits must be from BAME backgrounds' *The Guardian* (London, 13 Nov 2020) <https://www.theguardian.com/uk-news/2020/nov/13/met-police-told-40-of-recruits-must-be-from-bame-backgrounds> accessed 14 November 2020

[168] Wendy Williams, *Disproportionate Use of Police Powers* (HMICFRS 2021)

[169] Vikram Dodd, 'Young black males in London 19 times more likely to be stopped and *searched'' The Guardian* (London, 3 Dec 2020) <https://www.theguardian.com/law/2020/dec/03/young-black-males-in-london-19-times-more-likely-to-be-stopped-and-searched>; Marta Santivañez, 'Stop and Search disproportionately affects black people in South West London' *SW Londoner* (London 26 April 2021) <https://www.swlondoner.co.uk/news/26042021-stop-and-search-disproportionately-affects-black-people-in-south-west-london/> accessed 06 May 2021

[170] Lara Vomfell and Neil Stewart, 'Officer Bias, Over-Patrolling and Ethnic Disparities in Stop and Search' (2021) 5 Nature Human Behaviour 566

[171] Peter Adam James Waddington, 'In Proportion: Race, and Police Stop and Search' (2004) 44 British Journal of Criminology 889

[172] Joel Miller, *Profiling Populations Available for Stops and Searches* (Police Research Series 131 Home Office 2000)

[173] Jayne Mooney and Jock Young, Social Exclusion and Criminal Justice: Ethnic Minorities and Stop and Search in North London (University of North London 1999) 11

[174] Home Affairs Committee, *Young Black People and the Criminal Justice System* (HC 2006-07, 181- I).

[175] Traynor (n 116) 41

[176] Carlene Firmin, Richard Turner, Theo Gavrielides, 'Empowering Young People Through Human Rights Values: Fighting the Knife Culture' (Esmee Fairburn Foundation 2016) 19

[177] Judith Aldridge and Juan Medina, 'Youth Gangs in an English City: Social Exclusion, Drugs and Violence: Full Research Report' (ESRC End of Award Report, 2007) 21

[178] Traynor (n 116) 41

[179] Innes and Roberts (n 156)

Another positive change would be a mandatory adoption of the 'Best Use of Stop and Search' scheme formulated by the Home Office in 2014 as a response to concerns regarding police use of the tactic.[180] The scheme contains several potentially useful features which increase police accountability to the public, including provisions for greater detailing of stop outcomes, the ability for laypeople to accompany officers and view their stops, and improved community complaints procedures which require forces to explain their use of the tactic. These all appear positive movements toward increasing transparency and accountability but given the findings that six forces continued to fail to comply with at least one of the requirements of the scheme,[181] it becomes necessary to mandate its adoption under threat of penalty to ensure that it is followed.

The BUSS scheme also contains provisions to reduce the negative impact of suspicionless stops under s.60 CJPOA, including raising the rank required to authorise s.60, employing it only where serious violence is reasonably believed to take place, and limiting the initial duration of an order from 24 to 15 hours. This has not, however, had the expected effect of reducing the frequency of stops under this power, increasing from 3,816 in the year the BUSS scheme was introduced to just over 18,000 in 2019/2020, only 255 of which produced finds of offensive weapons.[182] The increased use in this timeframe is particularly concerning as it coincides with various lockdowns implemented against COVID-19 where far fewer people would have been present in public places. It is clear that the BUSS has had little impact on the use of the tactic and that the requisites included in the scheme have not improved rates of detection, rather they have reduced overall. This is not a result of limited uptake of the scheme, as all forces were found to be compliant with the modifications to s.60.[183] The overall failure of the tactic to significantly detect those carrying knives, in addition to the harm to community trust in police, necessitates a repeal of this ultimately useless and unjustifiable tactic. It is important that this is not replaced, as the government's intention appears to be,[184] with Serious Violence Reduction Orders (SVROs) applied to those convicted of knife offences to enable police to stop them without reasonable suspicion,[185] even in areas where a s.60 notice is not in effect. Due to their inherent similarity, the use of SVROs would logically produce the same issues seen in s.60.

Whilst the current rates of detection are unacceptably low, this has been shown to be largely due to a lack of effective information gathering on the part of the police, exacerbated significantly by the breakdown in community relations as a result of ineffective stops. It has been shown that this need not be the case, public opposition to the tactic— when used correctly— is low. It was, therefore, the collection of intelligence which was shown to need reform as police failures to successfully form suspicion

[180] *Best Use of Stop and Search Scheme* (Home Office 2014)
[181] *Best Use of Stop and Search (BUSS) Scheme: The Findings of an HMIC Revisit* (HMIC 2016)
[182] John Flately, 'Stop and Search Data Tables 2019/2020' (Home Office 2020)
[183] Home Office (n 180) 13
[184] *Serious Violence Reduction Orders Consultation Outcome* (Home Office 2020)
[185] Introduced as part of the Police, Crime, Sentencing and Courts Bill 2021 on the basis of a targeted pilot

significantly reduce the successful find rates of knives and offensive weapons. Government claims of increased surveillance powers and the use of undercover officers or covert operatives within the community have been shown to likely prove both unsuccessful and equally as damaging as the current use of stop and search; so, too, were the use of Section 60 stops and the proposed introduction of SVROs to allow suspicionless searches. The logical solution is shown to be an adoption of means to improve trust and boost perceived police legitimacy in currently over-police communities which, in turn, would lead to greater intelligence sharing and an increase in successful stops. This has been demonstrated to be of fundamental importance in the detection of knives and knife carriers in the streets, in order to intervene prior to the escalation to serious violence. Therefore, whilst a strict imposition of stop and search through purely legal means has been shown to be limited, if applied in conjunction with an understanding of community policing, the benefits would likely outweigh the harm.

5. Conclusion

This paper has examined the approaches by governments since the start of the decade and, in doing so, identified a sharp focus on the development of legal mechanisms to serve a 'law and order' agenda. Where some previous research was unable to sufficiently assess the impact of these policies due to their contemporary infancy, it has now been possible. This revealed that the punitive shift was unjustifiable through an argument of effective crime control, as rates of knife offending have continued to climb. This made it apparent that such policies were designed with an appeasement of the oft-mistaken public, at the detriment of effective deterrence, rehabilitation, and crime prevention which formed the most common justifications. Whilst it should not be assumed that the motivations of government were inherently malicious, it has been shown through reference to Home Office reports and elements of statutory provisions that they were aware such policies would prove ineffective in their purported goals. However, some of the measures, such as increasing custodial sentencing frequency and duration, the encroachment of the criminal justice system into the civil law, and the introduction of unique knife offences were shown to be almost entirely without merit.

There were few modifications which would have contributed significant improvements to listed approaches. Regarding civil orders these included clarifications on the potential class of respondents for civil orders and an adoption of the higher standard of proof in the interests of preserving the rule of law and protecting due process. However, these were also shown to likely entail complicated legal modifications which rendered them a question for either the Supreme Court or, more likely, the legislature. Changes to stop and search and police practice appeared to be the most promising modification to existing legal tactics, creating a diverse service more representative of the community likely to lead to increased intelligence-gathering, effective stops, and increased police legitimacy. Owing to the current societal damage caused by the tactic, these were shown to be of

primary importance and, arguably, the easiest to implement with the fewest inadvertent repercussions.

Multiple areas for further research were identified, including a qualitative study in knife offender motivations. Whilst preliminary findings suggest poverty and austerity to be a major contributing factor, this was unable to explain the disparity in offenders' reactions to varying prison sentences. Furthermore, it would be useful to assess whether the impact of targeted use of civil orders has much the same impact stop and search does, given the similar ways in which they individuals they are applied against are identified. As with much of the earlier research, study into this has been limited by their novelty – particularly true of Knife Crime Prevention Orders and Serious Violence Reduction Orders which both existed only a trial basis during the time of writing. The likely outcome of these has been theorised as predictably poor, based off similar measures employed in the past, but a qualitative review of the findings would confirm this and, ideally, end the use of such tactics against not only knife crime, but offending in general.

Ultimately, those small elements of disparate legal approaches which proved promising in the detection and reduction of knife crime offending did so due to their focus on the community, the individual offender, and the circumstances which informed crime. As a result, legal means were shown to only be suitable in certain situations and should be employed in conjunction with approaches focused on identifying and assisting those vulnerable to the commission of crime, without the constant threat of coercive prison sentences. Legal means alone have, therefore, been shown to only be able to assist other methods and cannot provide the entire solution to knife crime offending.

COVID-19 and Illegal Drugs: A Critical Analysis of Demand and Supply

Alex Morant

Abstract

This paper seeks to examine how the COVID-19 pandemic has impacted patterns of illicit drug use across Europe and North America, and how this may be explained by changes in the demand and supply for illicit drugs during the pandemic. In addition, this paper examines these disruptions within the context of key criminological theories, particularly rational choice theory and routine activities theory. These aims were explored through a critical library-based documentary analysis of empirical research during the pandemic, along with original theoretical contributions within the criminological literature. From this critical analysis, this paper argues that it was a mixture of demand-side factors, such as reduced social opportunities, and supply-side disruptions, at both the street-level and international trafficking-level, due to strict lockdowns, which may explain the overall reduction in illicit drug use during the first three to four months of the pandemic. This paper also emphasises the relevancy of key criminological theories in explaining these changes, as COVID-19 restrictions significantly increased the risks associated with the illicit drugs trade during the pandemic. These findings outline the versatility of criminological theories in explaining how the illicit drugs trade can be impacted by unprecedented global crises, such as the COVID-19 pandemic. Moreover, these findings should help inform future drug policy research on how major crises can impact the illicit drugs trade.

1. Introduction

COVID-19 was officially declared a global pandemic in March 2020. The pandemic has had a substantial impact upon almost all aspects of social life (Gili et al, 2021). The introduction of strict 'lockdown' rules, along with the devastating health and economic consequences of the pandemic, have negatively impacted the mental health of billions of people across the globe (Benschop et al, 2021). Indeed, previous research suggests that during major global crises, such as the 2008 global economic recession, many people use illicit drugs as a means to cope with the psychological distress caused by the disaster (Zolopa et al, 2021). However, the existing research during the COVID-19 pandemic suggests the opposite trend, as academic and governmental research studies reported an overall reduction in illicit drug use across Europe and North America during the first 3-4 months of the pandemic (EMCDDA, 2020a; UNODC, 2021; Manthey et al, 2021; Farhoudian et al, 2021).

However, several researchers did report certain variations in these trends, with greater reductions in the use of 'party drugs' like cocaine and MDMA, in comparison to 'relaxing'

drugs, such as cannabis, which were the least affected (EMCDDA, 2020a; Palamar et al, 2020; Skumlien and Lawn, 2020). Although researchers have posited several reasons for these reductions in illicit drug use, there has been relatively little research which has examined these reasons in detail. Whilst some claim that these reductions were caused by an overall decline in the demand for illicit substances (Palamar et al, 2020; Gili et al, 2021; Ali et al, 2021), others claim that it was the reduced availability of illicit drugs, through pandemic-related supply disruptions, which reduced overall consumption rates (EMCDDA, 2020a; UNODC, 2021; Price et al, 2021).

A. Research Scope

To critically analyse these trends, this paper seeks to examine the reasons why illicit drug use declined across Europe and North America during the first lockdown period (March-July 2020). This will be achieved by analysing both the demand- and supply-side factors which may be able to explain the reported reductions in illegal drug use. In doing so, this paper will engage with relevant criminological theories, including rational choice and routine activities approaches. These theories will be used to help explain these changes, particularly in terms of the supply-side disruptions to the illicit drugs trade during the pandemic.

Given the novelty of the COVID-19 pandemic, it is perhaps unsurprising that the existing research on illicit drug use during the pandemic remains in its infancy (Gaume et al, 2021; Langfield et al, 2021). Although there is a growing body of research into the effects of the pandemic on individual illicit drug use, there are relatively few studies which have conducted an in-depth analysis of the causes behind these trends, particularly in relation to supply and demand (Langfield et al, 2021). Instead, these studies have largely speculated the causes of these disruptions, without engaging with empirical research during previous disasters and the current pandemic. Moreover, only a handful of these studies have attempted to explain these changes within the context of key criminological theories. One notable exception is Langfield et al (2021), who briefly used routine activities theory (see Cohen and Felson, 1979) to explain the behaviour of drug market participants during Australian lockdowns. However, their analyses failed to fully consider how several criminological theories can intersect and explain those possible supply-disruptions.

Therefore, this paper adds to this growing literature by examining how demand and supply disruptions during the pandemic can explain the initial reduction in illicit drug use. It also aims to expand our criminological knowledge during major disasters by examining these disruptions within the context of relevant criminological theories. Giommoni (2020) has profusely criticised the application of existing criminological theories to the unprecedented disruptions created by the virus, as he argued that these theories were not designed to explain the illicit drugs trade during a global pandemic. This paper, however, will refute these claims, as it will demonstrate the relevancy and versatility of these criminological theories in explaining the behaviour of drug market

participants during the pandemic. Therefore, this paper will advance the use of these theories through their successful application to the unprecedented COVID-19 pandemic.

B. Research Aims and Objectives

As stated, this paper seeks to explain why illicit drug use declined during the first lockdown period. Therefore, this paper will aim to answer two research questions. Firstly, it will address the causes behind the overall reduction in illicit drug use across Europe and North America in the first 3-4 months of the COVID-19 pandemic. Secondly, it will discuss how criminological theory be used to explain these disruptions in relation to the supply of illicit drugs during the pandemic.

To answer these research questions, this paper undertook a critical library-based document analysis. This involved an analysis of a variety of primary sources containing existing empirical research on the patterns of illicit drug use during the pandemic. These sources included both academic and governmental research studies, such as peer-reviewed journal articles, published research reports, and large-scale governmental reports. In addition in consideration of the second research question, this paper will engage with original theoretical contributions within criminology, with a particular focus on rational choice (Clarke and Cornish, 1985) and routine activities perspectives (Cohen and Felson, 1979), along with several key drug policy research approaches, including risks and prices theory (Reuter and Kleiman, 1986).

Through this critical analysis, this paper will provide further insight into how global crises, including the COVID-19 pandemic, can impact the illicit drugs trade through demand and supply reduction. Moreover, this paper will also advance existing criminological theories to explain drugs-related crime during an unprecedented situation like the current crisis. Taken together, this paper hopes to better inform future drug policy, not just during global crises, but during normal times as well. Therefore, this paper may be a valuable contribution to the existing criminological literature regarding the illicit drugs trade.

This paper is split into two broad parts focusing on the demand and supply impacts emanating from the COVID-19 pandemic and its associated restrictions. The next section will examine the current empirical evidence (at the time of writing) on the trends in illicit drug use across Europe and North America during the first 3-4 months of the COVID-19 pandemic. It will also critically analyse the demand-side factors, including reduced social opportunities, which may explain these overall reductions in illicit drug use. Sections three and four, will then focus on the supply-side factors which may better explain these reductions with sections three focusing primarily on the disruptions to street-level retail drug markets, through an application of rational choice and routine activities perspectives. These theories will be used to explain how the opportunity and risks associated with street-level drug dealing have been impacted by the pandemic and its associated restrictions. Section four by contrast, will focus primarily upon the disruptions to the drugs trade at the international trafficking-level, because of the pandemic-related

travel restrictions. This section will be rooted within the context of rational choice theory, along with 'risks and prices' and the 'balloon effect'.
This paper will argue that it was a mixture of both demand reductions and supply-side disruptions which caused the overall decline in illicit drug use during the pandemic. It will also conclude by offering a rebuttal to Giommoni's (2020) claims, as it will emphasise the relevancy and versatility of certain criminological theories in understanding the effects of the pandemic on the illicit drugs trade. It will also suggest that more empirical testing of these theories is necessary to further advance their explanatory power.

2. COVID-19 and the Demand for Illicit Drugs

The COVID-19 pandemic has impacted almost every aspect of our lives, with wide-reaching health, social and economic consequences. These negative outcomes have had significant negative effects on the mental health of millions across the globe (Richter, 2020). Given that there is a relationship between mental health and illicit drug use, particularly amongst vulnerable groups, there is reason to be concerned about possible widespread increases in illicit drug use during the pandemic. Previous research demonstrates that major crises, including the 2008 global economic recession, can significantly increase rates of harmful substance use (Zolopa et al, 2021). However, the available evidence suggests that there was a marked decline in overall drug use during the pandemic across Europe. This research considers the first three months of the pandemic (EMCDDA, 2020a). To explore these trends, this section will examine the available research on patterns of illicit drug use during the first months of the pandemic (March-July 2020). This section will then critically analyse the demand-side factors which may be able to explain why illicit drug use declined during the pandemic, before concluding with a discussion on the importance of supply-side factors, a theme which will be further delineated in the following sections.

A. 'Big Events' and Illicit Drug Use

As with other major crises, the COVID-19 pandemic may be conceptualised as a 'big event'. These 'big events' are typically defined as large-scale "environmental, economic, and other major disruptions that create social instability" (Zolopa et al, 2021, p.2). These big events can include both natural and manmade disasters which create significant societal disruptions, including economic recessions, hurricanes, terrorist attacks, and of course, pandemics (Kopak and van Brown, 2020; Zolopa et al, 2021). Research suggests that these major disasters can often trigger significant mental health problems, which may be coupled with a greater use of harmful substances (Bruguera et al, 2018; Zolopa et al, 2021). For example, research in the US suggests that rates of harmful substance abuse can increase significantly during major storms and hurricanes (Dunlap et al, 2007; Rohrback et al, 2009; McCann-Pineo et al, 2021). Similarly, researchers have also found a correlation between economic recessions and heightened illicit drug use (Nagelhout et al, 2017; Zolopa et al, 2021), with 58.3% of survey respondents reporting an increased use of illicit drugs during economic recessions occurring across Europe in 2015 and 2016

(Bruguera et al, 2018). Whilst these studies are not necessarily representative of all disasters, they do suggest that 'big events' can increase the risk of heightened substance use, particularly amongst vulnerable groups (Zolopa et al, 2021).

Given the correlation between psychological distress and illicit drug use, it is perhaps unsurprising that substance misuse typically heightens during these disasters (Nagelhout et al, 2017; Rantis et al, 2021). For many, harmful substances may be used as a coping mechanism during times of serious psychological distress caused by the 'big event.' (McCann-Pineo et al, 2021). For others, illicit drugs may be used during these crises to relieve any boredom resulting from unemployment and increased leisure time (Dunlap et al, 2007; Bruguera et al, 2018). However, these outcomes can often lead to riskier and more problematic illicit drug use, which may disproportionately impact vulnerable groups (Dunlap et al, 2007; Rohrbach et al, 2009). From a public health standpoint, therefore, it is necessary to understand the full effects of these 'big events', including the COVID-19 pandemic, on patterns of illicit drug use (Ali et al, 2021).

B. COVID-19 and Illicit Drug Use

Given the similarities between these major disasters and the current pandemic, it could be expected that rates of illicit drug use would increase during lockdown, as people struggled to cope with the devastating health, social, economic, and psychological distress created by the virus (Zolopa et al, 2021). However, whilst there is some overlap between these big events and the current crisis, particularly in terms of their social and economic consequences, those previous disasters can hardly compare to the sheer magnitude of the current crisis (Martínez-Vélez et al, 2021; Zolopa et al, 2021). In fact, the growing body of empirical research during the pandemic suggests that rather than an increase, there was an overall decline in illicit drug use across Europe and North America during the first months of the pandemic (EMCDDA, 2020a; Gili et al, 2021; Price et al, 2021). However, these trends were not homogeneous, and some studies reported varying increases in the use of alcohol, tobacco, cannabis and benzodiazepines (EMCDDA, 2020a; Farhoudian et al, 2021; Gili et al, 2021). Therefore, it is imperative that the growing empirical research on the trends in illicit drug use during the first lockdown period across Europe and North America is examined in more detail.

C. Drug Use During Lockdown

Although the available research remains in its infancy, there are several academic and governmental studies which have analysed the trends in illicit drug use during the pandemic. According to a European-wide mixed-methods survey by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), there was an overall reduction in the use of illicit drugs during the first three months of the pandemic. However, this survey did report greater reductions in the use of cocaine and MDMA, in comparison to cannabis, which appeared to be the least affected illegal drug used during lockdown (EMCDDA, 2020a).

Similar findings were reported by Manthey et al (2021), whose European survey of over 36,000 respondents found that of those who reported a change in their illicit drug use, the majority reported a decrease in their individual consumption. Moreover, several smaller-scale European studies have also reported similar reductions, with evidence in Greece (Rantis et al, 2021) and the Netherlands (Benschop et al, 2021). A global survey of medical professionals in 177 countries reported similar reductions in illicit drug use, with 31% of countries reporting reductions in the use of opiates, 29% reporting reductions in amphetamines, and 29% reporting reductions in cocaine use. However, the survey also found that several countries reported no significant changes in drug use (Farhoudian et al, 2021). In New York, Palamar et al (2020) found that 78.6% and 71.1% of electronic dance music partygoers reported a reduction in their use of cocaine and ecstasy, respectively. In Mexico, Martínez-Vélez et al (2021) reported heterogenous declines in the use of alcohol, tobacco, and illicit tranquilisers. In Australia, Peacock et al (2020) found that 75% of survey respondents who reported a change in their use of ecstasy/MDMA, and related drugs, reported an overall reduction in use.

Despite the difficulties in employing alternative research methods during social distancing, these studies have been criticised for their overreliance on online surveys. According to Palamar and Acosta (2020), this overreliance on online surveys during the pandemic is problematic, as respondents may give untrustworthy responses which may skew any apparent patterns in illicit drug use. In response, several empirical studies have attempted to analyse these trends using more unique methods. For example, Gili et al (2021) used hair sample analysis to compare the trends in drug use before, during and after the first lockdown in Italy, finding that the use of heroin, cocaine, MDMA and cannabis declined significantly during the pandemic, before increasing to pre-pandemic levels by September 2020. Alternatively, Been et al (2021) used wastewater-based epidemiology across several European cities, finding heterogenous reductions in the use of several illicit substances compared to the previous five years. Therefore, despite the possible limitations of online surveys during the pandemic, it appears that the overall reported reductions in illicit drug use during the first lockdowns were real marked declines in the use of illicit substances.

Whilst there is substantial evidence in support of this reduction, there is also evidence that these reductions were not homogenous. Indeed, several studies have reported a heightened use of certain 'relaxing drugs', including alcohol, tobacco, cannabis and benzodiazepines (EMCDDA, 2020a; van Laar et al, 2020; Farhoudian et al, 2021). For example, van Laar et al (2020) found that 41.3% of Dutch cannabis users reported an increased use of cannabis during lockdown. However, these increases may be merely reflecting the legal status of these substances, as alcohol and tobacco are more freely available than illicit drugs (EMCDDA, 2020a). Nevertheless, several empirical studies have also reported no change, or even an increase, in the use of illicit drugs during lockdown (Gaume et al, 2021; Aldridge et al, 2021; Ali et al, 2021). For example, 57% and 52% of respondents in a UK-based survey reported an overall increase in the use of illicit substances during April and May 2020, respectively (Crew, 2020a, 2020b). This suggests

that although the balance of evidence implies an overall reduction in drug use, these trends were highly dynamic and varied across different contexts and drug categories. Therefore, despite the considerable evidence in support of a reduction in illegal drug use, it is important not to overstate these trends across all contexts.

D. Reductions in Demand

Unlike previous 'big events', illicit drug use during the pandemic appeared to decline across several drug categories across Europe and North America. According to Zolopa et al (2021), any variations in illicit drug use during major disasters may be explained by changes in demand. Whilst demand for illicit drugs typically increases during previous disasters, including Hurricane Katrina and the 2008 global recession, it appears that demand for illicit drugs declined during the pandemic for a number of reasons (Dunlap et al, 2007; Zolopa et al, 2021).

Unlike previous disasters, one of the most unique characteristics of the COVID-19 pandemic relates to the almost complete disruptions it has created in relation to social life (Langfield et al, 2021). The introduction of strict lockdown restrictions, including home confinement and the closure of the night-time economy, has almost completely blocked the usual social opportunities for people to consume illicit substances (Palamar et al, 2020; Gili et al, 2021; Ali et al, 2021; Manthey et al, 2021). Indeed, the closure of nightclubs and the cancellation of festivals may explain the substantial reductions in the use of 'party drugs', including MDMA and cocaine, as these drugs are typically consumed in these settings (EMCDDA, 2020a; Price et al, 2021). Similarly, restrictions on social gatherings may also explain the reductions in the use of cannabis and other harmful substances, as users could no longer meet with their friends to socialise and consume these illicit drugs together (Richter, 2020). In fact, a lack of social opportunities was cited as the primary reason for the reductions in illicit drug use for 65.3% of Dutch respondents in Benschop et al's (2021) survey. This suggests that one unintended side effect of the COVID-19-related lockdown restrictions is that it removed the social opportunities for individuals to consume drugs, which in turn, may explain the overall reductions in illicit drug use.

Reduced opportunities alone, however, cannot fully account for these reductions, as they cannot explain why the use of other substances, including alcohol and benzodiazepines, increased during the pandemic (EMCDDA, 2020a; Farhoudian et al, 2021). For many drug users, the financial uncertainty, along with higher unemployment rates during the pandemic, meant that they could no longer afford to fund their habits (EMCDDA, 2020a). Consequently, many drug users switched to cheaper substances, including alcohol and tobacco (EMCDDA, 2020a; Skumlien and Lawn, 2020; Peacock et al, 2020; Ali et al, 2021). This may explain the heterogeneous increases in the use of 'relaxing' substances, including alcohol and benzodiazepines, as these substances do not necessarily require any specific social opportunities for their use. Instead, users may consume these drugs alone in the comfort of their own home (Skumlien and Lawn, 2020; Palamar et al, 2020).

Therefore, reductions in the demand for illicit drugs, resulting from reduced social opportunities, along with economic uncertainty, may explain why people reduced their overall consumption of illicit substances. This may also explain the reported increases in certain licit substances, such as alcohol (Skumlien and Lawn, 2020; Gili et al, 2021). This emphasises the importance of demand-side factors in explaining the shifts in illicit drug use during the pandemic. Thus, reductions in demand, facilitated by lockdown restrictions and the loss of income, can adequately explain the overall reductions in illicit drug use across Europe and North America during the first lockdown.

E. The Importance of Supply

Focusing solely on demand, however, is too simplistic, as it ignores the ambiguous relationship between drug demand and supply (Nadelmann, 1985). Consequently, we cannot freely assume that the reductions in drug use during the pandemic were solely the result of reductions in demand. Instead, several studies reported that there was a reduced availability of illicit drugs, with 58% of Canadian drug users reporting difficulties in procuring illicit substances (Ali et al, 2021). Similarly, one-third of respondents in the EMCDDA's (2020a) survey reported that a lack of access was the primary reason for their reduction in the use of illicit drugs. This suggests that rather than a reduction in demand, illicit drug use may have declined due to a reduced availability of illicit substances during lockdown. Subsequently, it is necessary to examine this relationship between supply and demand during the pandemic. Therefore, the two following sections will analyse the supply-side disruptions which may have reduced the availability of illegal drugs during lockdown. The next section will examine the street-level disruptions which may have reduced the availability of illicit drugs during the pandemic.

3. Street-level Supply Disruptions

Given that demand-side factors can only partly explain the overall reductions in illicit drug use during the first lockdown, it is also necessary to examine any supply-side disruptions. Strict lockdown rules, introduced to prevent the spread of COVID-19, are likely to have significantly disrupted open-air street drug markets. Essentially, these restrictions are likely to have removed the opportunity for street-level drug dealers to solicit potential customers in public spaces (EMCDDA, 2020a; Langfield et al, 2021). This section will examine how the COVID-19 pandemic, and its associated restrictions, has interrupted the supply of illicit drugs through street-level disruptions. by engaging with criminological theories which may explain how street-level drug dealers were affected by the pandemic and its associated restrictions.

A. Crime as Opportunity

Within criminology, there is a sizeable body of literature which focuses primarily upon 'criminal opportunities' (Felson and Clarke, 1998; Birkbeck and LaFree, 2011). Instead of individual dispositions, this body of work assumes that crime is the product of certain situational factors which increase the likelihood that an individual will commit crime

(Mayhew et al, 1976; Felson and Clarke, 1998). Although there are different approaches within this body of criminology, this paper will focus primarily on 'rational choice theory' and 'routine activities theory' (Clarke and Felson, 2004).

Rational choice theory (RCT) may be described as a micro-level theory which focuses on the decision-making processes of individuals and potential offenders (Clarke and Cornish, 1985). In essence, the theory assumes that individuals are rational decision-makers who weigh up the costs and benefits of offending, before choosing the course of action which maximises their utilities (Cornish and Clarke, 1986). Here, crime is a purposeful activity which is committed to benefit an individual in some way, such as through monetary benefits or status (Clarke and Felson, 2004). However, whilst offenders are rational in their decision-making processes, the theory posits that individuals are limited in the choices they can make, suggesting that offenders only have a 'bounded' rationality (Clarke and Felson, 2004). Indeed, in the words of Marcus Felson (1986), 'people make choices, but they cannot choose the choices available to them' (p.119).

Often described as the theoretical sibling of RCT, routine activities theory (RAT) can be summarised as a macro-level approach which examines criminal opportunities through the daily routine activities of offenders and victims (Cohen and Felson, 1979; Jacques and Wright, 2011). Here, criminal opportunities are created by the convergence, in space and time, of motivated offenders, suitable targets, and incapable guardianship (Cohen and Felson, 1979). The theory assumes that any changes in the routine activities of any one of these elements can have drastic impacts on crime rates. For example, Cohen and Felson (1979) argued that the sustained rise in crime rates after WWII can be explained by the substantial increase in employment rates. With more people outside of the home, rates of direct-contact predatory violations, including violence and property crime, increased exponentially due to the greater convergences in the daily routines of motivated offenders and suitable targets.

Taken together, both RCT and RAT assume that criminal opportunities are essential in the commission of crime (Felson and Clarke, 1998). Although they were developed to explain crime more generally, both theories are compatible with the illicit drugs trade, particularly in explaining the behaviour of street-level drug market participants (Eck, 1995; Piza and Sytsma, 2016). These theories suggest that street-level drug dealing is a rational choice made by drug sellers (motivated offenders) and drug buyers (suitable targets), who often converge in open spaces in the absence of capable guardianship (Piza and Sytsma, 2016). However, despite the obvious applicability of these theories with the illicit drugs trade, Giommoni (2020) criticises the application of these theories to the ongoing COVID-19 pandemic. Specifically, he argues that existing criminological theories are incompatible with the COVID-19 pandemic, as they were not designed to explain crime during an unprecedented global pandemic. Instead, Giommoni (2020) argues that new theories should be developed which can better explain drugs-related crime during the pandemic. However, this paper argues that existing criminological

theories can be powerful tools in explaining the impacts of the pandemic on street-level drug dealing (Langfield et al, 2021).

B. Situational Determinants of Street-Level Drug Markets

As with crime, street-level drug markets are not randomly distributed. Instead, drug markets concentrate within certain ecologically advantageous 'hotspots' (St. Jean, 2007). According to Weisburd and Green (1995), 46% of drugs-related arrests in Jersey City, New Jersey, were concentrated in only 4.4% of street segments. This suggests that drug markets concentrate in only a small percentage of locations. Subsequently, several researchers have attempted to examine the situational determinants which increase the likelihood that a drug market will be established.

In order to identify where these drug markets situate, Eck (1995) developed a 'general model of the geography of illicit drugs retail markets'. According to this model, drug dealers face an ongoing conflict between ensuring 'access' to their market, whilst also providing 'security'. Eck (1995) suggests that drug dealers typically respond to this conflict in two separate ways. He argued that some dealers may respond by forming a closed 'social network' model, where drugs are only sold to known associates within a secretive closed network. However, despite strengthening the security of their illicit market, these networks do limit access; thus, reducing their potential profitability.
Alternatively, drug sellers may respond through the 'routine activities' model, where dealers solicit strangers in open-air public spaces. Whilst security in these markets is partially diminished, these markets do allow drug dealers to maximise their sales by soliciting potential customers during their legitimate routine activities. However, to maximise their sales, drug dealers must choose locations which are likely to contain a large pool of potential customers, whilst also limiting the risk of detection by concealing their own routine activities (Eck, 1995; St. Jean, 2007). Therefore, it is necessary to examine the environmental characteristics which make some locations more ecologically advantageous for illicit drug markets (St. Jean, 2007).

Whilst these markets are highly complex, one of the biggest predictors of open-air drug market activity is locations which have a high volume of pedestrian traffic (Eck, 1995; St. Jean, 2007). Likewise, drug dealers will typically locate their markets "along arterial routes and near nodes of high legitimate activities" (Eck, 1995, p.76). For street-level drug dealers, these locations can maximise their potential sales, whilst also camouflaging their illicit activities (St. Jean, 2007). According to RAT, these locations facilitate the convergence of both drug sellers and buyers in locations which are shielded from capable guardianship (Cohen and Felson, 1979; Eck, 1995). However, simply locating a drug market in busy locations is not enough for a successful drug market, as dealers must choose locations where there is a higher demand for illicit drugs (St. Jean, 2007).

Subsequently, several criminologists have sought to explore which locations are at a higher risk of drug market activity. According to this research, alcohol-related establishments, including pubs, nightclubs, liquor stores and hotels, are perhaps the most

ecologically advantageous drug market locations. Indeed, McCord and Ratcliffe (2007) found that the majority of drug-related arrests in Philadelphia concentrate within 400 metres of 'beer establishments.' Similar findings were found by Sytsma et al (2021) in their observations of CCTV footage in Newark, New Jersey. In Amsterdam, Bernasco and Jacques' (2015) systematic observations of the Red-Light District illustrated how drug dealers would typically solicit customers around bars, pubs, and nightclubs. However, in subsequent interviews, they found that choosing these locations was an automated element of their rational decision-making processes.

For drug dealers, alcohol-related establishments are particularly advantageous due to the overlap between alcohol and illicit drugs, as this can facilitate the greater convergence in the routine activities of both drug dealers and buyers (McCord and Ratcliffe, 2007; Onat et al, 2018; Best et al, 2000). However, it is important not to overstate this relationship, as several researchers have found no correlation between alcohol establishments and illicit drug market activity (Barnum et al, 2016; Onat et al, 2018). For Barnum et al (2016), alcohol establishments may even be ecologically disadvantageous, as the greater presence of security guards and the police can increase capable guardianship around these locations. Subsequently, we need to remain cautious in identifying the ecological advantages of alcohol-related locations in predicting drug markets.

Nevertheless, research suggests that similarly ecologically advantageous locations may also include transportation hubs (including bus stops and train stations), grocery stores, retail stores, restaurants, coffee shops and drug treatment centres (McCord and Ratcliffe, 2007; Barnum et al, 2016; Onat et al, 2018; Sytsma et al, 2021). Along with facilitating the convergence between drug sellers and buyers through greater access, these locations can also provide drug market participants with a legitimate context, which can camouflage their illicit activities (Eck, 1995; Piza and Sytsma, 2016). Consequently, these locations may adequately resolve the conflict between access and security (Eck, 1995). Whilst these locations do not always predict successful drug markets, they are some of the most ecologically advantageous locations for open-air drug dealers (McCord and Ratcliffe, 2007; St. Jean, 2007). Therefore, as informed by RCT and RAT, drug dealers are rational decision-makers who situate their markets in geographical locations which will maximise their potential utilities (Eck, 1995; St. Jean, 2007).

C. COVID-19 and the Ecological (Dis)advantages of Drug Markets

Despite the ecological advantageous properties of these locations, the COVID-19 pandemic, along with its associated restrictions, are likely to have considerably disrupted open-air drug markets (Namli, 2021). The introduction of strict lockdown rules, including stay-at-home orders, along with the closure of the retail and hospitality industries, are likely to have significantly disrupted the routine activities of drug market participants (Eligh, 2020; Gaume et al, 2021). Indeed, following the first week of the first UK national lockdown, the Google COVID-19 mobility reports outlined a three-quarter reduction in pedestrian mobility around retail and recreational venues (Halford et al, 2020). This reduction in mobility, along with the closure of major sectors of society, is likely to have

significantly reduced the opportunities for drug dealers to solicit customers in open-air drug markets. To investigate these disruptions further, it is necessary to examine the causal processes which may explain these reductions in street-level supply.

As predicted by RAT, strict lockdown measures are likely to have removed the opportunities for drug market participants to meet in open-air markets (Namli, 2021). The widely introduced stay-at-home orders are likely to have significantly interrupted the routine activities of both drug sellers and drug buyers, which reduces the likelihood that they will converge in open spaces (Cohen and Felson, 1979; Langfield et al, 2021). In addition, the closure of the night-time economy has also completely disrupted the routine activities of potential drug buyers; thus, rendering alcohol-related establishments ecologically disadvantageous, as drug market participants are unlikely to converge in these locations (Langfield et al, 2021). As suggested, the removal of just one of the basic elements of RAT can be enough to completely remove criminal opportunities (Cohen and Felson, 1979). Therefore, the reduced availability of illicit drugs may be explained by the interruptions to the daily routine activities of drug dealers and buyers in the geographical locations which predict drug market activity.

Whilst the pandemic-related restrictions did reduce the opportunities for illicit drug dealing, they did not eradicate them completely. Instead, for the drug dealers who continued to operate in open-air markets, the lockdown restrictions appear to have significantly increased the risks of illicit drug dealing (Langfield et al, 2021). Indeed, the reductions in mobility around geographically advantageous locations are likely to have increased the visibility of illicit drug markets, as drug dealers can no longer use legitimate activities to shield their illicit ones (Piza and Sytsma, 2016; Langfield et al, 2021). This increased risk may have been exacerbated by the changes in the daily routines of the police. Given the drastic reductions in almost all crime rates (Halford et al, 2020), the police's attention quickly shifted away from their usual routine activities towards enforcing street-level COVID-19 restrictions (Halford et al, 2020; Langfield et al, 2021). As the police focused their attention on street-level infractions, the risk of detection increased significantly for open-air illicit drug dealers. This may explain why Langfield et al (2021) found a 3% and 19% increase in sell/supply/trafficking offences in Queensland, Australia, in April and May 2020, respectively. Given that drug dealers are highly rational decision-makers, the increased risk, along with the reduced rewards of open-air illicit drug dealing, significantly reduced the likelihood that drug dealers would continue to operate in public spaces (Cornish and Clarke, 1986; Johnson and Natarajan, 1995; Langfield et al, 2021).

Although there is some evidence to suggest that some drug sellers responded to those heightened risks by forming closed 'social network' drug markets, these markets do restrict access to illicit drugs, which in turn, may also explain the overall reductions in illicit drug consumption (Eck, 1995; Namli, 2021). Therefore, the pandemic-related restrictions appeared to reduce the overall supply of illicit drugs through a heightened risk of street-level drug dealing (Langfield et al, 2021). This emphasises the importance

of RCT in explaining the rational behaviour of illicit drug sellers during the early months of the pandemic.

In addition to increasing the risk of detection, it may also be argued that the pandemic-related restrictions have also reduced the risks of detection. Indeed, the removal of pedestrians from public places can facilitate those illicit transactions, as the pandemic-related restrictions seemingly "reduced passive surveillance and guardianship" (Langfield et al, 2021, p.349). By removing capable guardianship from the 'crime triangle', RAT would predict that there was a reduced risk of detection from the people who would normally report these markets to the police. Consequently, as well as increasing the risks associated with illicit drug dealing, the COVID-19 restrictions may have also inadvertently reduced those risks (Langfield et al, 2021). This suggests that the application of RAT to the COVID-19 pandemic is a highly complex undertaking, as the pandemic-related changes to the routine activities of drug market participants can manifest itself in different ways. Consequently, we must question the applicability of these theories during this unprecedented global pandemic (Giommoni, 2020).

D. COVID-19 and Open-Air Illicit Drug Markets

Overall, the COVID-19 pandemic has clearly had a considerable impact on open-air drug markets during the first national lockdowns, particularly in terms of risk and opportunity (Barratt and Aldridge, 2020; EMCDDA, 2020a; UNODC, 2020; Langfield et al, 2021; Scherbaum et al, 2021). The introduction of stringent lockdown rules, including home confinement and the closure of certain industries, have significantly disrupted open-air drug markets by reshaping the daily routine activities of drug market participants. By disrupting these routine activities, illicit drug dealers could no longer solicit customers in their usual ecologically advantageous drug dealing locations, such as bars and nightclubs (Cohen and Felson, 1979; Eck, 1995; Barratt and Aldridge, 2020).

Moreover, the risks associated with selling drugs in open-spaces increased significantly, as drug dealers became more visible to the police (Langfield et al, 2021). This caused many drug dealers to transform their marketplaces into closed social networks, which significantly reduced the number of potential sales a drug dealer can make (Eck, 1995; Namli, 2021). This suggests that the reported reductions in overall drug use during the early months of the pandemic can be explained by the disruptions to the supply of illicit drugs at the street-level. This outlines the importance of criminological theory, with a particular emphasis on RCT and RAT, in explaining the street-level disruptions to the illicit drugs trade. It counters Giommoni (2020) argument, understating the versatility of criminological theory in explaining drug offending during the COVID-19 pandemic. Instead, both RCT and RAT appear to be powerful theoretical tools in explaining the behaviour of drug market participants during lockdown.

However, whilst there is some evidence to suggest that drug buyers struggled to source illicit drugs (Peacock et al, 2020; Farhoudian et al, 2021), several researchers found that drug users reported no difficulties in procuring them (see Namli, 2021; Aldridge et al,

2021; Gaume et al, 2021). For example, 80% of German drug users reported no reductions in the availability of heroin, cocaine and cannabis (Scherbaum et al, 2021). Whilst this is not to refute the above discussions, it does suggest that the risks and opportunities associated with street-level drug markets varied significantly across different contexts. Therefore, street-level supply disruptions cannot fully account for the reductions in illicit drug use during the pandemic. Consequently, it is necessary to investigate how the illicit drugs trade has been disrupted at the international level.

4. International-level Supply Disruptions:

Whilst there have been significant disruptions at the street-level, the COVID-19 pandemic has also created considerable interruptions to the international supply of illicit drugs (UNODC, 2021). Essentially, the introduction of stringent travel restrictions may have created significant problems for organised crime groups (OCGs) to smuggle drugs undetected across international borders (UNODC, 2021). Thus, it may be hypothesised that these pandemic-related travel restrictions have reduced the supply of illicit drugs through a heightened risk of detection, which may explain the reported reductions in illicit drug use (Barratt and Aldridge, 2020; Gomis, 2020). To discuss these disruptions, this section will analyse how the pandemic has impacted the illicit drugs trade at the international trafficking-level. The section will critically engage with several criminological theories, including rational choice theory (RCT) (Cornish and Clarke, 1986), 'risks and prices' (Reuter and Kleiman, 1986), and the 'balloon effect' (Reuter, 2014), and in doing so will again rebut Giommoni's (2020) rejection of the applicability of existing criminological theory to the COVID-19 pandemic.

A. International Drug Trafficking

Whilst organised crime, including international drugs trafficking, is not a new phenomenon, it has certainly been fuelled by globalisation (Keh and Farrell, 1997; Jenner, 2011). Technological advancements, global trading agreements, and quicker transportation infrastructures have been catalysts for a flourishing international drugs trade, where illicit substances can be smuggled across borders with a relatively low risk of detection (Keh and Farrell, 1997; Basu, 2013). Indeed, as asserted by routine activities theory (RAT), it is the greater flow of legitimate trade across borders which has fuelled this enterprise, as licit goods are typically exploited by traffickers to camouflage their illicit shipments (Farrell, 1998).

Whilst drug trafficking can include upper-level activities such as cultivation and manufacture (Natarajan, 2019), there is considerable evidence to suggest that these activities have largely continued unabated during the pandemic (Eligh, 2020; UNODC, 2021). Therefore, this section will focus solely on the smuggling of illicit drugs across international borders. Despite representing a crucial stage in the illicit drugs trade, the criminological literature on upper-level drugs trafficking is not as extensive as one would imagine, perhaps due to the highly covert nature of OCGs (Desroches, 2007; Natarajan,

2019). Therefore, more research in this field is necessary to better understand how drug traffickers respond to major supply chain disruptions (Desroches, 2007).

B. COVID-19 and International Drugs Trafficking

Overall, there are a number of different ways in which the pandemic has impacted the international trafficking of illicit drugs, from changes in the routine activities of people and trade to the increased risks of trafficking drugs by air (UNODC, 2021). According to RAT, the international drugs trade relies heavily upon the steady flow of people and trade across international borders, as these routine activities can be used by OCGs to conceal its illegitimate operations (Keh and Farrell, 1997; Farrell, 1998). However, these routine activities were fundamentally disrupted from the outset of the pandemic, as countries across the globe quickly closed their borders to prevent the spread of COVID-19 (Palamar et al, 2021; EMCDDA, 2020b, 2020c, 2021; UNODC, 2021). This caused a significant reduction in the movement of people and trade across international borders (UNODC, 2021; Scherbaum et al, 2021). As traffickers rely on the steady flow of people and trade, these restrictions significantly impeded the ability of OCGs to smuggle drugs across borders (UNODC, 2020, 2021; Me et al, 2020). Therefore, it may be argued that these travel restrictions, introduced to prevent the spread of COVID-19, reduced the supply of illicit drugs by blocking the opportunities for illicit drugs to enter Europe.

Despite these overall disruptions, it is important to note that the pandemic-related travel restrictions have had a varying effect on different substances (EMCDDA and Europol, 2020). Indeed, traffickers typically use different routes and modes of transportation, all carrying different levels of risk, for different types of drugs (Farrell et al, 1996; EMCDDA and Europol, 2020). For example, given that approximately 80% of cocaine seizures are detected in relation to air travel (Farrell et al, 1996), it is likely that the 70% reduction in air passengers between March and April 2020, may have almost completely disrupted the flow of cocaine smuggled from South America to Europe (UNODC, 2021). This may explain why cocaine was reported as one of the most affected illicit substances in terms of use during the first lockdown (EMCDDA, 2020a; Palamar et al, 2020). Therefore, whilst the pandemic has clearly disrupted the opportunities for all drug traffickers to smuggle drugs into Europe, through a shift in the routine activities of people and trade, it has had a greater effect on certain drugs, such as cocaine (UNODC, 2021).

Whilst RAT can explain how the opportunities for international drugs trafficking were impeded by the pandemic, it cannot explain the micro-level behaviour of drug traffickers (Clarke and Felson, 2004). As described in the previous section, RCT is a micro-level theory which focuses on individual offender decision-making processes (Cornish and Clarke, 1986). According to Cornish and Clarke (2012), organised criminals are highly sophisticated and rational decision-makers, who actively respond to any changes to the risks and rewards of their organised operations. Whilst international drugs trafficking is intrinsically a highly risky operation, the pandemic appears to have only exacerbated those risks. Indeed, the reductions in the movement of people and trade, along with more

stringent border controls, has only increased the visibility of international drug traffickers and mules (UNODC, 2020, 2021; Me et al, 2020; EMCDDA, 2020c; EMCDDA, 2021).

This suggests that the pandemic-related travel restrictions considerably increased the risks of detection and interception (UNODC, 2021). Given that drug traffickers are highly rational decision-makers, the increased risks of detection may outweigh any potential rewards of trafficking illicit drugs (Cornish and Clarke, 2012). However, this is likely to have variably impacted different drug traffickers, as South American cocaine traffickers are likely to have faced a considerably heightened risk of detection in comparison to heroin smugglers, for example. Here, the latter were able to mitigate their risks by exploiting the intra-EU trading agreements which permitted the flow of trade across Europe by lorry during the pandemic (UNODC, 2020, 2021). Nevertheless, the overall heightened risks of detection during the pandemic may have caused OCGs to reduce or even cease their trafficking operations, as the increased risks may have outweighed any potential rewards (Cornish and Clarke, 2012). Thus, RCT may be used to explain how traffickers responded to the increased risks of detection caused by the pandemic-related shifts in the routine activities of people and trade.

As highly rational decision makers, traffickers would be expected to cease their operations (Cornish and Clarke, 1986, 2012; UNODC, 2021). However, although drug shortages were reported in several empirical studies, others found that respondents reported no difficulties in procuring illicit drugs (see Namli, 2021; Gaume et al, 2021). This suggests that despite the considerably heightened risks associated with international drugs trafficking, illicit drugs continued to flow into Europe and North America (UNODC, 2021). Consequently, it would be wrong to assume that drug traffickers responded to the increased risks of detection by completely ceasing their operations, as empirical evidence suggests that drugs continued to flow across borders (Namli, 2021). Therefore, RCT alone cannot fully explain the behaviour of drug traffickers during the pandemic, as traffickers appeared to remain resilient and continued their operations (EMCDDA, 2020a).

As posited by RCT, offenders will typically weigh up the relevant risks and rewards of committing crime (Clarke and Cornish, 1985). However, given that the risks appeared to outweigh the rewards of trafficking drugs during lockdown, traffickers may have responded by increasing those potential rewards. One way in which drug market participants may respond to a heightened risk is by increasing the final retail price of their products (Reuter and Kleiman, 1986). Indeed, there have been several reports of increased retail prices for illicit drugs across Europe during the first months of the COVID-19 pandemic (Aldridge et al, 2021; Ali et al, 2021; Me et al, 2020; EMCDDA and Europol, 2020; EMCDDA, 2020a; UNODC, 2021). For example, Farhoudian et al's (2021) global survey found that the retail price of cocaine, cannabis and opiates increased in 28%, 39% and 37% of the 177 countries, respectively. In real terms, several European countries reported an increased retail price of more than 20% for several illicit substances, including cannabis (EMCDDA and Europol, 2020). Whilst this may be merely reflecting those

changes in supply and demand, Reuter and Kleiman (1986) argue that price data can be a useful metric in determining the risks associated with illicit drugs trafficking. Therefore, Reuter and Kleiman's (1986) 'risks and prices' theory may be useful in explaining how traffickers responded to the heightened risks during the early months of the pandemic.

Essentially, 'risks and prices' theory assumes that the price of illicit drugs can be an important indicator of the levels of risk associated with the drugs trade. The theory argues that drug traffickers will typically package these risks as an additional 'cost' of their illicit business, which must be paid for by the final consumer through a 'compensation tax' (Reuter and Kleiman, 1986; Caulkins and Reuter, 2010). When understood within the context of COVID-19, risks and prices would assume that traffickers responded to the increased risk of detection by increasing the final retail price of their illicit drugs (Reuter and Kleiman, 1986). For traffickers, increasing the retail price of illicit drugs, often mediated by reducing the purity or weight of drugs, can offset any additional risks by increasing the potential rewards associated with drugs smuggling (Reuter and Kleiman, 1986). Given that traffickers are highly rational decision-makers, the 'risks and prices' model, used in conjunction with RCT, can be useful in explaining how traffickers responded to the increased risks of trafficking drugs during lockdown.

However, despite the obvious utility of risks and prices in explaining the increased price of illicit drugs (adjusted for purity) during the pandemic, Reuter and Kleiman (1986) do concede that any changes in risk at the international level are likely to have only modest effects on the final retail price of illicit drugs. Instead, they argue that street-level risk is much more influential in determining price. Similarly, the theory may also be criticised for ignoring how other factors, such as drug shortages, can also determine the price of illicit drugs (Caulkins, 2007; Aldridge et al, 2021). Furthermore, these price increases during the pandemic were not homogeneous, as many users reported no change in the price or (perceived) purity of drugs purchased during the first lockdown (Namli, 2021; Gaume et al, 2021). Thus, whilst risks and prices is useful in explaining how traffickers responded to the increased risk during the pandemic, there are conceptual limitations which inhibits the theory's explanatory power.

In addition to increasing their prices, traffickers may also respond to increased risk through displacement (Reuter, 2014). As rational decision-makers, offenders may reduce their (perceived) risks of detection by displacing their criminal activities "to other targets, times, places, or types of crime" (Cornish and Clarke, 1987, p.934). Within the context of the COVID-19 pandemic, there is considerable evidence which suggests that traffickers displaced their operations to reduce their risks of detection. Most notably, there are several reports that South American drug traffickers switched from their usual air routes to less risky sea-based routes (Me et al, 2020; UNODC, 2021; EMCDDA, 2021). Indeed, drugs seizure data suggests that during the second quarter of 2020, there was a significant reduction in air-related drug seizures, along with a substantial increase in drug seizures at European sea ports, particularly for cocaine (EMCDDA, 2021; UNODC, 2021).

For these traffickers, those sea-based routes became much more attractive, as they allowed them to continue smuggling drugs into Europe by exploiting the trading agreements which permitted the flow of trade by sea during the pandemic. This allowed South American traffickers to avoid the heightened risks along air-based routes, whilst also allowing them to further reduce their risks by concealing their illicit goods (UNODC, 2020; EMCDDA and Europol, 2020). Therefore, rather than completely ceasing their operations, drug traffickers appeared to respond to the additional risk during lockdown by displacing their operations along less riskier routes (UNODC, 2020, 2021).

Whilst this may appear to be a unique response to the COVID-19-related restrictions, displacement is a reported response by drug traffickers to intensified law enforcement efforts (Mora, 1996). As postulated by the 'balloon effect', strengthened law enforcement pressures along one route can lead traffickers to divert their operations along newer routes to reduce risk (Mora, 1996; Reuter, 2014). Although research on the balloon effect is limited, there are several case studies which provide some support for the theory (Friesendorf, 2005). For example, Mora's (1996) analyses of 1990s US interdiction policy demonstrated how intensified law enforcement pressure in the Andean region led traffickers to displace their operations to Brazil and the Southern Cone. Similarly, Seccombe (1995) demonstrated how greater partnerships between US and Pakistan law enforcement agencies in the early 1990s was a catalyst for the growth of the Afghanistan heroin industry. Whilst both of these studies focus explicitly on displacement resulting from intensified law enforcement, the balloon effect does appear to be consistent with the patterns of displacement observed during the pandemic. Indeed, the increased risks of smuggling drugs by air and land borders during the pandemic led traffickers to displace their operations along newer, less risky maritime routes (EMCDDA and Europol, 2020). As outlined by RCT, traffickers appeared to displace their operations to reduce the additional risks of interception along their usual trafficking routes, which allowed them to reduce their risk and maximise their utilities (UNODC, 2021; Clarke and Cornish, 1985).

Despite the obvious utility of the balloon effect in explaining the increase in maritime trafficking routes during the pandemic, it is important to note that even before lockdown, there was an increasing shift towards the use of maritime and waterway routes to traffic drugs into Europe (UNODC, 2021). Whilst this is not to discredit the explanatory power of the balloon effect during the pandemic, it does question the claim of causality (UNODC, 2021; Reuter, 2014). Moreover, the balloon effect fails to acknowledge how increased risks along one trafficking route may spill over onto other routes, due to the perceived uncertainty and potential risks along these new routes (Windle and Farrell, 2012). Therefore, despite the obvious parallels between the balloon effect and the patterns of displacement observed in Europe, it is important to remain critical of the balloon effect in implying causality (Reuter, 2014).

C. The Resilience of International Drugs Traffickers

This section has provided a critical analysis of how the pandemic has impacted the illicit drugs trade at the international-level. As corroborated by a number of academic and governmental studies, traffickers were faced with a considerably heightened risk of detection due to the international restrictions on travel (UNODC, 2021). Informed by RCT, this section has examined how traffickers responded to heightened risk by increasing the final retail price of illicit drugs and displacing their trafficking operations, in order to reduce their perceived risks and increase their potential rewards (UNODC, 2021). This demonstrates the resilience of the international drugs trade, as despite the significantly heightened risk of detection, drug traffickers continued to smuggle drugs into Europe and North America (Bouchard, 2007; UNODC, 2021). However, this may lead to a rather worrying conclusion, as it suggests that interdiction policy will do very little in severing the international supply of illicit drugs (Bouchard, 2007; UNODC, 2021).

This section has also demonstrated the versatility of criminological theory in explaining the behaviour of international drug traffickers in response to the increased risk of detection during the COVID-19 pandemic. As highly rational decision-makers, drug traffickers responded to these heightened risks by adapting their illicit operations to reduce their risks of detection (UNODC, 2021). Through the successful application of these theories, this chapter has provided a further rebuttal to Giommoni's (2020) contention that existing criminological theory cannot be applied to the unique and unprecedented circumstances created by the pandemic. Instead, the discussion has demonstrated the usefulness of rational choice approaches in explaining the adaptive responses of drug traffickers to heightened risks of detection. Therefore, whilst the disruptions to international drugs trafficking during the pandemic cannot fully account for the reduced use of illicit drugs during the first lockdown, they may be useful in understanding why there were reports of drug shortages across Europe (EMCDDA, 2021).

5. Conclusion

This paper has sought to critically analyse how the COVID-19 pandemic has impacted the illicit drugs trade, from the consumption of illicit substances to the international trafficking of illicit drugs. Through a critical library-based analysis, it has analysed how the pandemic has affected both the demand and supply for illicit drugs (EMCDDA, 2020a; UNODC, 2021; Manthey et al, 2021; Farhoudian et al, 2021). This paper concludes that the reported reductions in illicit drug use were triggered by the introduction of strict lockdown rules, which indirectly reduced the demand for illicit drugs by removing the social opportunities for people to use these drugs. In addition, these lockdown rules have also impacted the supply of illicit drugs, by reducing the opportunities for, and increasing the risks of, both street-level drug dealing and international drugs trafficking. It therefore argues, that it was a mixture of both demand reductions, along with supply disruptions, resulting from the pandemic-related restrictions, which caused the overall reductions in

illicit drug use across Europe and North America during the first lockdown period in 2020.

In relation to demand, this article argues that stay-at-home orders, along with the closure of the night-time economy, reduced the social opportunities for people to take illicit drugs. However, thinking about demand alone is too simplistic, as it ignores the ambiguous relationship between demand and availability/supply (Nadelmann, 1985). Lockdown rules restricted access to illicit substances, as street-level drug retail markets were faced with significantly reduced opportunities to solicit customers in open-air spaces. In Global travel restrictions, introduced to prevent the spread of COVID-19, has severely impacted the operations of international drug traffickers, who faced a considerably heightened risk of detection. However, organised crime groups appeared to remain resilient and quickly adapted by displacing their operations in order to ensure a steady flow of illicit drugs entered Europe and North America (EMCDDA, 2020a).

Within these discussions, this article has also emphasised the explanatory power of key criminological theories, including rational choice and routine activities theories, providing a rebuttal to Giommoni's (2020) claims regarding the inapplicability of existing criminological theory to the unprecedented situation created by the pandemic. This article has demonstrated the versatility of these theories in explaining social phenomena, such as drugs-related crime, during a global pandemic. Whilst there were conceptual limitations in the application of these theories and approaches, they have been further advanced by successfully applying them to the drug's trade during the COVID-19 pandemic. Further empirical testing of these theories during the pandemic is critical in order to further our understandings of drug supply and demand during this global crisis.

In terms of policy, it is hoped that this analysis will help better inform experts and policymakers in the field of the illicit drugs trade, which may better help reduce the demand and supply for illicit drugs. However, given that drug markets are incredibly resilient to supply-side interventions (Bouchard, 2007), policymakers may need to develop new policies which may better reduce the consumption of illicit drugs, both during and after major crises (Chang et al, 2020).

6. *Reference*

Aldride, J., Garius, L., Spicer, J., Harris, M., Moore, K. and Eastwood. N. 2021. *Drugs in the Time of COVID: The UK Drug Market Response to Lockdown Restrictions.* [Online]. London: Release. [Accessed 3 March 2021]. Available from: https://www.release.org.uk/sites/default/files/pdf/publications/Release%20COVID%20Survey%20Interim%20Findings%20final.pdf

Ali, F., Russel, C., Nafeh, F., Rehm, J., LeBlanc, S. and Elton-Marshall, T. 2021. Changes in Substance Supply and Use Characteristics Among People Who Use Drugs (PWUD)

During the COVID-19 Global Pandemic: A National Qualitative Assessment in Canada. *The International Journal of Drug Policy.* **93**, article no: 103237 [no pagination]
Barnum, J. D., Campbell, W. L., Trocchio, S., Caplan, J. M. and Kennedy, L. W. 2016. Examining the Environmental Characteristics of Drug Dealing Locations. *Crime and Delinquency.* **63**(13), pp.1731-1756.
Barratt, M. J. and Aldridge, J. 2020. No Magic Pocket: Buying and Selling on Drug Cryptomarkets in Response to the COVID-19 Pandemic and Social Restrictions. *The International Journal of Drug Policy.* **83**, article no: 102894 [no pagination]
Basu, G. 2013. The Role of Transnational Smuggling Operations in Illicit Supply Chains. *Journal of Transportation Security.* **6**(4), pp.315-328.
Been, F., Emke, E., Matias, J., Baz-Lomba, J. A., Boogaerts, T., Castiglioni, S., Campos-Mañas, M., Celma, A., Covaci, A., de Voogt, P., Hernández, F., Kasprzyk-Hordern, B., Laak, T., Reid, M., Salgueiro-González, N., Steenbeek, R., van Nuijs, A. L. N., Zuccato, E. and Bijlsma, L. 2021. Changes in Drug Use in European Cities During Early COVID-19 Lockdowns – A Snapshot from Wastewater Analysis. *Environmental International.* **153**, article no: 106540 [no pagination]
Benschop, A., van Bakkum, F. and Noijen, J. 2021. Changing Patterns of Substance Use During the Coronavirus Pandemic: Self-Reported Use of Tobacco, Alcohol, Cannabis, and Other Drugs. *Frontiers in Psychiatry.* **12**, article no: 633551 [no pagination]
Bernasco, W. and Jacques, S. 2015. Where Do Dealers Solicit Customers and Sell Them Drugs? A Micro-Level Multiple Method Study. *Journal of Contemporary Criminal Justice*. **31**(4), pp.376-408.
Best, D., Rawaf, S., Roley, J., Floyd, K., Manning, V. and Strang, J. 2000. Drinking and Smoking as Concurrent Predictors of Illicit Drug Use and Positive Drug Attitudes in Adolescents. *Drug and Alcohol Dependence*. **60**(3), pp.319-321.
Birkbeck, C. and LaFree, G. 1993. The Situational Analysis of Crime and Deviance. *Annual Review of Sociology.* **19,** pp.113-137.
Bouchard, M. 2007. On the Resilience of Illegal Drug Markets. *Global Crime.* **8**(4), pp.325-344.
Bruguera, P., Reynolds. J., Gilvarry, E., Braddick, F., Veettil, M., Anderson, P., Mielecka-Kubien, Z., Kaner, E. and Gual, A. 2018. How Does Economic Recession Affect Substance Use? A Reality Check with Clients of Drug Treatment Centres. *The Journal of Mental Health Policy and Economics.* **21**, pp.11-16.
Caulkins, J. P. 2007. Price and Purity Analysis for Illicit Drug: Data and Conceptual Issues. *Drug and Alcohol Dependence.* **90**, pp.S61-S68.
Caulkins, J. P. and Reuter, P. 2010. How Drug Enforcement Affects Drug Prices. *Crime and Justice.* **39**, pp.213-271.
Chang, J., Agliata, J. and Guarinieri, M. 2020. COVID-19 – Enacting a 'New Normal' for People Who Use Drugs. *The International Journal of Drug Policy.* **83**, article no: 102832 [no pagination]
Clarke, R. V. and Cornish, D. B. 1985. Modeling Offenders' Decisions: A Framework for Research and Policy. *Crime and Justice.* **6**, pp.147-185.

Clarke, R. V. and Felson, M. 2004. Introduction: Criminology, Routine Activity, and Rational Choice. In: Clarke, R. V. and Felson, M. eds. *Routine Activity and Rational Choice*. New Brunswick, NJ: Transaction Publishers, pp.1-14.
Cohen, L. E. and Felson, M. 1979. Social Change and Crime Rate Trends: A Routine Activity Approach. *American Sociological Review*. **44**(4), pp.588-608.
Cornish, D. B. and Clarke, R. V. G. 1986. Introduction. In: Cornish, D. B. and Clarke, R. V. G. eds. *The Reasoning Criminal: Rational Choice Perspectives on Offending*. New York: Springer-Verlag, pp.1-14.
Cornish, D. B. and Clarke, R. V. G. 1987. Understanding Crime Displacement: An Application of Rational Choice Theory. *Criminology*. **25**(4), pp.933-948.
Cornish, D. B. and Clarke, R. V. G. 2012. Analyzing Organized Crimes. In: Piquero, A. R. and Tibbets, S. G. eds. *Rational Choice and Criminal Behavior: Recent Research and Future Challenges.* New York: Routledge, pp.41-64.
Crew. 2020a. *COVID-19 Drug Market Survey Summary: Month 1 – April 2020.* [Online]. Edinburgh: Crew. [Accessed 6 June 2021]. Available from: https://www.crew.scot/wp-content/uploads/2020/05/Crew-COVID-19-Drugs-Market-Survey-Month-1-Summary-April-2020.pdf
Crew. 2020b. *COVID-19 Drug Market Survey Summary: Month 2 – May 2020.* [Online]. Edinburgh: Crew. [Accessed 6 June 2021]. Available from: https://www.crew.scot/wp-content/uploads/2020/06/Crew-COVID-19-Drugs-Market-Survey-Month-2-Summary-May-2020.pdf
Desroches, F. 2007. Research on Upper Level Drug Trafficking: A Review. *Journal of Drug Issues.* **37**(4), pp.827-844.
Dunlap, E., Johnson, B. D. and Morse, E. 2007. Illicit Drug Markets Among New Orleans Evacuees Before and Soon After Hurricane Katrina. *Journal of Drug Issues.* **37**(4), pp.981-1006.
Eck, J. E. 1995. A General Model of the Geography of Illicit Retail Marketplaces. In: Eck, J. E. and Weisburd, D. L. eds. *Crime and Place: Crime Prevention Studies.* Monsey, NY: Criminal Justice Press, pp.67-94.
Eligh, J. 2020. *Crisis and Opportunity: Impacts of the Coronavirus Pandemic on Illicit Drug Markets.* [Online]. Geneva: The Global Initiative Against Organized Crime. [Accessed 3 March 2021]. Available from: https://globalinitiative.net/wp-content/uploads/2020/05/Crisis-and-Opportunity-Jason-Eligh-GITOC.pdf
European Monitoring Centre for Drugs and Drug Addiction and Europol. 2020. *EU Drug Markets: Impact of COVID-19 on Patterns of Drug Use and Drug-Related Harms in Europe.* [Online]. Luxembourg: Publications Office of the European Union. [Accessed 25 February 2021]. Available from: https://www.emcdda.europa.eu/system/files/publications/13097/EU-Drug-Markets_Covid19-impact_final.pdf
European Monitoring Centre for Drugs and Drug Addiction. 2020a. *Impact of COVID-19 on Patterns of Drug Use and Drug-Related Harms in Europe.* [Online]. Lisbon: Publications Office of the European Union. [Accessed 17 February 2021]. Available from: https://www.emcdda.europa.eu/system/files/publications/13130/EMCDDA-Trendspotter-Covid-19-Wave-2_1.pdf

European Monitoring Centre for Drugs and Drug Addiction. 2020b. *EMCDDA Special Report: COVID-19 and Drugs: Drug Supply Via Darknet Markets.* [Online]. Lisbon: EMCDDA. [Accessed 19 February 2021]. Available from: https://www.emcdda.europa.eu/system/files/publications/13042/EMCDDA-report_COVID19-darknet-final.pdf

European Monitoring Centre for Drugs and Drug Addiction. 2020c. *European Drug Report 2020: Trends and Developments.* [Online]. Luxembourg: Publications Office of the European Union. [Accessed 19 February 2021]. Available from: https://www.emcdda.europa.eu/system/files/publications/13236/TDAT20001ENN_web.pdf

European Monitoring Centre for Drugs and Drug Addiction. 2021. *European Drug Report 2021: Trends and Developments*. [Online]. Luxembourg: Publications Office of the European Union. [Accessed 11 August 2021]. Available from: https://www.emcdda.europa.eu/system/files/publications/13838/TDAT21001ENN.pdf

Farhoudian, A., Radfar, S. R., Ardabili, H. M., Rafei, P., Ebrahimi, M., Zonoozi, A. K., De Jong, C. A. J., Vahidi, M., Yunesian, M., Kouimtsidis, C., Arunogiri, S., Hansen, H., Brady, K. T., ISAM Global Survey Consortium (ISAM-GSC), Potenza, M. N., Baldacchino, A. M. and Ekhtiari, H. 2021. A Global Survey on Changes in the Supply, Price, and Use of Illicit Drugs and Alcohol, and Related Complications During the 2020 COVID-19 Pandemic. *Frontiers in Psychiatry.* **12**, article no: 646206 [no pagination]

Farrell, G. 1998. Routine Activities and Drug Trafficking: The Case of the Netherlands. *The International Journal of Drug Policy.* **9**, pp.21-32.

Farrell, G., Mansur, K. and Tullis, M. 1996. Cocaine and Heroin in Europe 1983-93: A Cross-national Comparison of Trafficking and Prices. *British Journal of Criminology.* **36**(2), pp.255-281.

Felson, M. 1986. Linking Criminal Choices, Routine Activities, Informal Control, and Criminal Outcomes. In: Clarke, R. V. and Felson, M. eds. *Routine Activity and Rational Choice*. New Brunswick, NJ: Transaction Publishers, pp.119-128.

Felson, M. and Clarke, R. V. 1998. *Opportunity Makes the Thief: Practical Theory for Crime Prevention.* Policy Research Series Paper 98. London: Home Office.

Friesendorf, C. 2005. Squeezing the Balloon? United States Air Interdiction and the Restructuring of the South American Drug Industry in the 1990s. *Crime, Law & Social Change.* **44**, pp.35-78.

Gaume, J., Schmutz, E., Daeppen, J. and Zobel, F. 2021. Evolution of the Illegal Substances Market and Substance Users' Social Situation and Health during the COVID-19 Pandemic. *International Journal of Environmental Research and Public Health.* **18**(9), article no: 4960 [no pagination]

Gili, A., Bacci, M., Aroni, K., Nicoletti, A., Gambelunghe, A., Mercurio, I. and Gambelunghe, C. 2021. Changes in Drug Use Patterns During the COVID-19 Pandemic in Italy: Monitoring a Vulnerable Group by Hair Analysis. *International Journal of Environmental Research and Public Health.* **18**(4), article no: 1967 [no pagination]

Giommoni, L. 2020. Why We Should All Be More Careful in Drawing Conclusions About How COVID-19 is Changing Drug Markets. *International Journal of Drug Policy.* **83**, article no: 102834 [no pagination]
Gomis, B. 2020. *How the Illicit Drug Trade is Adapting to the Coronavirus Pandemic.* [Online]. [Accessed 28 April 2021]. Available from: https://www.worldpoliticsreview.com/articles/28696/how-the-illicit-drug-trade-is-adapting-to-the-coronavirus-pandemic
Halford, E., Dixon, A., Farrell, G., Malleson, N. and Tilley, N. 2020. Crime and Coronavirus: Social Distancing, Lockdown, and the Mobility Elasticity of Crime. *Crime Science.* **9**(11), pp.1-12.
Jacques, S. and Wright, R. 2011. Informal Control and Illicit Drug Trade. *Criminology.* **49**(3), pp.729-765.
Jenner, M. S. 2011. International Drug Trafficking: A Global Problem with a Domestic Solution. *Indiana Journal of Global Legal Studies.* **18**(2), pp.901-927.
Johnson, B. D. and Natarajan, M. 1995. Strategies to Avoid Arrest: Crack Sellers' Response to Intensified Policing. *American Journal of Police.* **14**(3/4), pp.49-69.
Keh, D. and Farrell, G. 1997. Trafficking Drugs in the Global Village. *Journal of Transnational Organized Crime*. **3**(2), pp.90-110.
Kopak, A. M. and Van Brown, B. 2020. Substance Use in the Life Cycle of a Disaster: A Research Agenda and Methodological Considerations. *American Behavioral Scientist.* **64**(8), pp.1095-1110.
Langfield, C. T., Payne, J. L. and Makkai, T. 2021. Drug Offence Detection During the Pandemic: An ARIMA Analysis of Rates and Regional Differences in Queensland, Australia. *Journal of Criminology.* **54**(3), pp.344-364.
Manthey, J., Kilian, C., Carr, S., Bartak, M., Bloomfield, K., Braddick, F., Gual, A., Neufeld, M., O'Donnell, A., Petruzelka, B., Rogalewicz, V., Rossow, I., Schulte, B. and Rehm, J. 2021. Use of Alcohol, Tobacco, Cannabis, and Other Substances During the First Wave of the SARS-CoV-2 Pandemic in Europe: A Survey on 36,000 European Substance Users. *Substance Abuse Treatment, Prevention and Policy.* **16**, article no: 36 [no pagination]
Martínez-Vélez, N. A., Tiburcio, M., Rey, G. M., Velázquez, J. A. V., Arroyo-Belmonte, M., Sánchez-Hernández, G. Y. and Fernández-Torres, M. 2021. Psychoative Substance Use and its Relationship to Stress, Emotional State, Depressive Symptomatology, and Perceived Threat During the COVID-19 Pandemic in Mexico. *Frontiers in Public Health.* **9**, article no: 709410 [no pagination]
Mayhew, P., Clarke R. V. G., Sturman, A. and Hough J. M. 1976. *Crime as opportunity*. Home Office Research Study No. 34. London: HMSO.
McCann-Pineo, M., Taioli, E. and Schwartz, R. M. 2021. Exposure to Hurricane Sandy and Risk of Opioid Abuse. *Substance Use & Misuse.* **56**(8), pp.1241-1245.
McCord, E. S. and Ratcliffe, J. H. 2007. A Micro-Spatial Analysis of the Demographic and Criminogenic Environment of Drug Markets in Philadelphia. *Australian & New Zealand Journal of Criminology.* **40**, pp.43-63.
Me, A., Zeiler, I. and Garcia Yi, J. 2020. *COVID-19 and the Drug Supply Chain: From Production and Trafficking to Use.* [Online] Vienna: UNODC Research and Trend Analysis Branch. [Accessed 13 February 2021]. Available from:

https://www.unodc.org/documents/data-and-analysis/covid/Covid-19-and-drug-supply-chain-Mai2020.pdf
Mora, F. O. 1996. Victims of the Balloon Effect: Drug Trafficking and U.S. Policy in Brazil and the Southern Cone of Latin America. *The Journal of Social, Political, and Economic Studies.* **21**(2), pp.115-140.
Murdoch, D. 2020. *The Next Once-a-Century Pandemic is Coming Sooner Than You Think – But COVID-19 Can Help Us Get Ready*. [Online]. [Accessed 28 August 2021]. Available from: https://theconversation.com/the-next-once-a-century-pandemic-is-coming-sooner-than-you-think-but-covid-19-can-help-us-get-ready-139976
Nadelmann, E. A. 1985. International Drug Trafficking and U.S. Foreign Policy. *Washington Quarterly*. **8**(4), pp.85-104.
Nagelhout, G. E., Hummel, K., de Goeij, M. C. M., de Vries, H., Kaner, E. and Lemmens, P. 2017. How Economic Recessions and Unemployment Affect Illegal Drug Use: A Systematic Realist Literature Review. *The International Journal of Drug Policy*. **44**, pp.69-83.
Namli, U. 2021. Behavioral Changes Among Street Level Drug Trafficking Organizations and the Fluctuation in Drug Prices Before and During the COVID-19 Pandemic. *American Journal of Qualitative Research*. **5**, pp.1-22.
Natarajan, M. 2019. Drug Trafficking. In: Natarajan, M. ed. *International and Transnational Crime and Justice*. 2nd ed. Cambridge: Cambridge University Press, pp. 5-11.
Onat, I., Akca, D. and Bastug, M. F. 2018. Risk Terrains of Illicit Drug Activities in Durham Region, Ontario. *Canadian Journal of Criminology and Criminal Justice*. **60**(4), pp.537-565.
Palamar, J. J. and Acosta, P. 2020. On the Efficacy of Online Drug Surveys During the Time of COVID-19. *Substance Abuse*. **41**(3), pp.283-285.
Palamar, J. J., Le, A. and Acosta, P. 2020. Shifts in Drug Use Behavior Among Electronic Dance Music Partygoers in New York During COVID-19 Social Distancing. *Substance Use & Misuse*. **56**(2), pp.238-244.
Palamar, J. J., Le, A., Carr, T. H. and Cottler, L. B. 2021. Shifts in Drug Seizures in the United States During the COVID-19 Pandemic. *Drug and Alcohol Dependence*. **221**, article no: 108580 [no pagination]
Peacock, A., Price, O., Dietze, P., Bruno, R., Salom, C., Lenton, S., Swanton, R., Uporova, J., Karlsson, A., Chan, R., Gibbs, D., Grigg, J., Daly, C., Hall, C., Wilson, T., Degenhardt, L. and Farrell, M. 2020. *Impacts of COVID-19 and Associated Restrictions on People Who Use Illicit Stimulants in Australia: Findings from the Ecstasy and Related Drugs Reporting System 2020*. [Online]. Sydney: National Drug and Alcohol Research Centre, UNSW Sydney. [Accessed 23 April 2021]. Available from: https://ndarc.med.unsw.edu.au/sites/default/files/ndarc/resources/COVID%20EDRS%20bulletin_National_20200917.pdf
Piza, E. L. and Sytsma, V. A. 2016. Exploring the Defensive Actions of Drug Sellers in Open-Air Markets: A Systematic Social Observation. *The Journal of Research in Crime and Delinquency*. **53**, pp.36-65.
Price, O., Man, N., Bruno, R., Dietze, P., Salom, C., Lenton, S., Grigg, J., Gibbs, D., Wilson, T., Degenhardt, L., Chan, R., Thomas, N. and Peacock, A. 2021. [Forthcoming]. Changes in Illicit Drug Use and Markets with the COVID-19 Pandemic and Associated Restrictions: Findings from the Ecstasy and Related Drugs Reporting System, 2016-2020.

Addiction. [Online]. [Accessed 15 August 2021]. Available from: https://onlinelibrary.wiley.com/doi/pdfdirect/10.1111/add.15620
Rantis, K., Panagiotidis, P., Parlapani, E., Holeva, V., Tsapakis, E. M. and Diakogiannis, I. 2021. Substance Use During the COVID-19 Pandemic in Greece. *Journal of Substance Use*. Pp.1-8.
Reuter, P. 2014. The Mobility of Drug Trafficking. In: Collins, J. ed. *Ending the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy*. [Online]. London, UK: LSE IDEAS. [Accessed 12 April 2021]. Available from: https://www.lse.ac.uk/ideas/Assets/Documents/reports/LSE-IDEAS-Ending-the-Drug-Wars.pdf
Reuter, P. and Kleiman, M. A. R. 1986. Risks and Prices: An Economic Analysis of Drug Enforcement. *Crime and Justice*. **7**, pp.289-340.
Richter, L. 2020. The Effects of the COVID-19 Pandemic on the Risk of Youth Substance Use. *Journal of Adolescent Health*. **67**(4), pp.467-468.
Rohrback, L. A., Grana, R., Vemberg, E., Sussman, S. and Sun, P. 2009. Impact of Hurricane Rita on Adolescent Substance Use. *Psychiatry*. **72**(3), pp.222-237.
Scherbaum, N., Bonnet, U., Hafermann, H., Schifano, F., Bender, S., Gigoleit, T., Kuhn, J., Nyhuis, P., Preuss, U. W., Reymann, G., Schneider, U., Shibata, J. and Specka, M. 2021. Availability of Illegal Drugs During the COVID-19 Pandemic in Western Germany. *Frontiers in Psychiatry*. **12**, article no: 648273 [no pagination]
Seccombe, R. 1995. Squeezing the balloon: international drugs policy. *Drug and Alcohol Review*. **14**(3), pp.311-316.
Skumlien, M. and Lawn, W. 2020. *How has COVID-19 Changed the Use of Illegal Drugs? An Overview of the Results So Far*. [Online]. [Accessed 13 May 2021]. Available from: https://www.addiction-ssa.org/how-has-covid-19-changed-the-use-of-illegal-drugs-an-overview-of-the-results-so-far/
St. Jean, P. K. B. 2007. *Pockets of Crime: Broken Windows, Collective Efficacy, and the Criminal Point of View*. Chicago: The University of Chicago Press.
Sytsma, V. A., Connealy, N. and Piza, E. L. 2021. Environmental Predictors of a Drug Offender Crime Script: A Systematic Social Observation of Google Street View Images and CCTV Footage. *Crime & Delinquency*. **67**, pp.27-57.
United Nations Office on Drugs and Crime. 2020. *World Drug Report 2020: Executive Summary*. [Online]. Vienna: United Nations Publication. [Accessed 12 February 2021]. Available from: https://wdr.unodc.org/wdr2020/field/WDR20_BOOKLET_1.pdf
United Nations Office on Drugs and Crime. 2021. *World Drug Report 2021: Covid-19 and Drugs: Impact and Outlook*. [Online]. Vienna: United Nations Publication. [Accessed 12 August 2021]. Available from: https://www.unodc.org/res/wdr2021/field/WDR21_Booklet_5.pdf
van Laar, M. W., Oomen, P. E., van Miltenburg, C. J. A., Vercoulen, E., Freeman, T. P. and Hall, W. D. 2020. Cannabis and COVID-19: Reasons for Concern. *Frontiers in Psychiatry*. **11**, article no: 601653 [no pagination]
Weisburd, D. and Green, L. 1995. Policing Drug Hot Spots: The Jersey City Drug Market. *Analysis Experiment*. **12**(4), pp.711-736.

Windle, J. and Farrell, G. 2012. Popping the Balloon Effect: Assessing Drug Law Enforcement in Terms of Displacement, Diffusion, and the Containment Hypothesis. *Substance Use & Misuse*. **47**(8-9), pp.868-876.
Zolopa, C., Hoj, S., Bruneau, J., Meeson, J., Minoyan, N., Raynault, M., Makerenko, I. and Larney, S. 2021. A Rapid Review of the Impacts of "Big Events" on Risks, Harms, and Service Delivery Among People Who Use Drugs: Implications for Responding to COVID-19. *The International Journal of Drug Policy.* **92**, article no: 103127 [no pagination]

Greed vs. Need: Does the Sentencing of Tax and Benefit Fraud at the Crown Court in England and Wales Represent Differential Treatment of Classes by the Criminal Justice System?

Rosa Rist

Abstract

It is well established that social class is a significant determinant of the advantages and challenges a person faces throughout life. Coming from a lower social class places individuals at a fundamental disadvantage in many aspects. Distinctions between the portrayal of benefit fraud and tax fraud, committed by the lower and upper class respectively, provides a clear example of how society views and subsequently treats different classes. However, criminological research has often failed to expand on the evidently distinct treatment of the two offences, to look at how such a bias might also be reflected within judicial sentencing. Preserving the neutrality of the judiciary is a key element of proportional sentencing and as such, is crucial to a fair and equitable justice system.

Using empirical analysis of sentencing data from the Crown Court Sentencing Survey, this paper explores whether the sentencing of benefit fraud and tax fraud reflects class bias within the justice system. Unlike other research, a substantive approach is taken to assessing the equality of sentencing, by comparing data against the individual guidelines for each offence. Analysis focuses on three key areas: immediate custody rate, sentence length and extenuating factors. Contrary to previous findings, the results show that tax fraud yields a higher rate of imprisonment than benefit fraud that is consistent with the guidelines. Although there is some evidence of the favourable treatment of tax fraudsters through judicial discretion, these findings are inconclusive and require further exploration. Notably, this research is faced with a small sample of tax fraud cases compared to benefit fraud. Based on previous research and the findings of this study, it is concluded that this likely reflects failures of the system to adequately pursue less serious cases of tax compliance. Therefore, further research is needed to investigate the reasons behind this disparity.

1.Introduction

A prolific fraudster once likened the criminal law to a "cobweb", explaining that: "it's made for flies and the smaller kinds of insects so to speak, but lets the big bumblebees break through" (Drew cited in Sutherland, 1940, p.9). This statement, that highlights the immunity of powerful upper-class defendants to the consequences of the law, is a view that is widely acknowledged and agreed upon by criminologists. Social class plays a

significant role in the advantaging and disadvantaging of those from different backgrounds, particularly when it intersects with other factors, for example race and gender (Block and Corona, 2014).

Class inequality is inherent in society and the structural institutions that operate within it and the criminal justice system (CJS) is no exception. Over 60 years ago, Sutherland (1940) called attention to the gross overrepresentation of the lower class that existed in prisons. Many decades on little has changed; those of a lower socio-economic status (SES) remain vastly overrepresented in penal populations, with the so-called "war on crime" looking more like a "war on poverty" (Sim, 2009, p.118).

Individuals of a lower social class, who find themselves in the position of having to rely on the welfare state, have long been portrayed by media and political narratives as the "undeserving poor" (Cook, 1989, p.406). With the expansion of the welfare state has come a heightened focus on scrutinising the people who rely on it, to try and catch those who attempt to cheat the system. One only has to type 'benefit fraud cheats' into google to get an idea of their commonplace depiction by the media (e.g. Ellicott, 2011; Chorley, 2013; Gye, 2019). Additionally, 2014 saw the introduction of new sentencing guidelines aimed at serving benefit frauds tougher sentences. Keir Starmer, the then head of the Crown Prosecution Service (CPS) stated: "it is vital that we take a tough stance on … [benefit] fraud and I am determined to see a clampdown on those who flout the system" (The Guardian, 2013).

The Department for Work and Pensions (DWP) (2021) states that in 2020, somewhere around 22 million people, or a third of the UK population, were claiming benefits. A recent investigation by Privacy International determined that "excessive surveillance" is used on welfare recipients to uncover fraudulent activity (Marsh, 2021). Moreover, a harrowing report revealed that at least 69 suicides over a six-year period were related to invasive and relentless investigations undertaken by the DWP (Butler, 2020). The guidance for DWP staff explicitly encourages the gathering of digital video content on benefit recipients who are suspected of fraud, in order to aid prosecution (Marsh, 2021). Based on this, it could be reasonably assumed that benefit fraud is rampant throughout the UK, representing an imminent and significant threat to the public purse. However, recent figures show that the amount lost to welfare fraud is a drop in the ocean compared to higher level white-collar fraud offences, such as income tax fraud (TaxWatch, 2021).

Consequently, it might be supposed that tax fraud receives equal if not greater attention, considering that it results in a financial loss nine times larger (TaxWatch, 2021). Nevertheless, since 2010 the UK has seen 23 times as many prosecutions for benefit fraud compared to tax fraud, a disparity facilitated by the greater manpower and resources dedicated to the investigation of benefit compliance (TaxWatch, 2021). The evident class connotations of each of the offences raise serious concerns regarding the equality of the justice system in its treatment of different classes.

Fairness, consistency, and proportionality are key components of the English and Welsh justice system. Accordingly, sentencing guidelines aim to impose these values on judges when carrying out their sentencing duties (Sentencing Council, 2021b). The Coroners and Justice Act (2009) places a legal obligation on judges to follow the guidelines in sentencing. Ostensibly, these guidelines establish stringent regulations on the flexibility of sentencing, ensuring the consistent and proportional application of the law to offences of differing severity. As such, the letter of the guidelines accords with the relative severity of tax fraud over benefit fraud. However, as will be explored throughout this paper, broad sentencing ranges, alongside a substantial degree of judicial discretion within the guidelines, grants judges considerable autonomy when sentencing (Roberts, 2013). For many scholars this raises concern over the potential for judges to impose personal prejudice when sentencing, thus threatening the principle of proportionality (Roberts, 2013; Bennett et al., 2016). Given wider media and political discourses surrounding benefits and taxation, the evident class-related properties of each offence and the overwhelmingly upper-class composition of the judiciary, the equality in sentencing of the two offences warrants further examination (Social Mobility Commission and Sutton Trust, 2019).

This research explores class bias within sentencing through the analysis of two crimes characteristic of opposing classes. It examines the sentencing of tax and benefit fraud by Crown Court judges in England and Wales by looking at three sentencing factors: immediate custody rate, sentence length and the application of aggravating and mitigating factors. Over time, the imposition of more rigorous sentencing guidance has made class prejudice at the sentencing stage of the justice process less apparent. Therefore, this study takes into account the broader context of the sentencing guidelines and the severity of the different offences. With the aim of uncovering any substantive differences in sentencing, it interprets individual findings against the guidance for each offence, to measure how far judges depart from the guidelines when exercising discretion.

In Section 2, following this brief introduction, the current literature relating to the topic will be reviewed. This will examine how research into the relationship between class and sentencing has evolved over time. The section will conclude that there is a large gap in the existing literature around benefit and tax fraud. Section 3 will briefly discuss the data that was employed for this study, before explaining the methodological approach and the reasons why it was chosen. The process of data analysis will also be described alongside the overall benefits and limitations of the methodology. The results of the empirical study will then be presented in Section 4. Finally, Section 5 will discuss the results, setting them against the background of the research question. It will use the sentencing guidelines to draw conclusions regarding any substantive differences in sentencing, as well as discussion of any shortcomings in the overall findings. The section will finish by returning to the established gap in the previous research, as discussed in Section 2, assessing whether this current study has succeeded in bridging it. It will also

look at the implications the findings yield for wider policy, and the potential for future research to expand on the knowledge that has been gained.

2. Background

This section will discuss the background behind class and sentencing before examining the differential treatment of benefit and tax fraud by the CJS. It will explore how concern over class inequality in sentencing has evolved over time, addressing the methodological weaknesses of previous studies and the impact of the introduction of sentencing guidelines. Furthermore, it will assess individual literature on benefit and tax fraud and their disparate treatment throughout different discourses. This review will conclude that despite widespread and evident distinctions in the way in which benefit and tax frauds are represented and treated, the extent to which this inequality is present within judicial sentencing remains a topic that is significantly under-researched.

A. White Collar Crime

In the mid-20th century, it was remarked upon by Sutherland (1940) that the upper class made up less than two percent of those in prison, leading him to loosely devise the concept of white-collar crime. White-collar crime is a nebulous term within criminology, despite being commonly used. Levi and Lord (2017, p.3) criticise its early definition for being "clouded in various ambiguities". Nevertheless, the fundamental notions that underpin the concept are widely understood amongst criminologists. For the purpose of this paper, white-collar crime is defined as a financially motivated crime, executed by someone of a high socio-economic status or social class. One of Sutherland's (1940) most compelling arguments puts forward the greater financial and societal impact of white-collar crime compared to blue-collar offences that are typical of the lower class. Such offences include activities like theft, prostitution, drug use and assault. This view is now well supported throughout subsequent literature (Cook, 1989; White and Velden, 1995; Marriott, 2013; Levi and Lord, 2017).

B. Class and Sentencing

The negligence of the justice system in investigating and prosecuting white-collar crime means that when it comes to studying sentencing there is often an absence of sufficient data (Hagan et al., 1980). Nevertheless, in the mid-late 20th century concerns over unprecedented judicial discretion, combined with a lack of regulation, sparked significant interest from criminologists (Wheeler et al., 1982). Prominent conflict criminologists, Chambliss and Seidman (1971) proposed that the most serious penalties will be handed to defendants of the lower class. Similarly, Turk (1966) suggested that those of a lower class were more likely to be regarded as inherently criminal and consequently given harsher sentences compared to those from the middle-upper class. However, such submissions came under criticism from scholars such as Chiricos and Waldo (1975) for making strong assertions without the support of empirical evidence.

That being said, data from several empirical studies supports the existence of a negative relationship between SES and sentence severity (Kalven, 1969; Hagan et al., 1980; Bennett et al., 2016). For example, Kalven (1969) studied 238 first degree murder cases that revealed strong economic bias from jurors in the sentencing of blue and white-collar offenders. His analysis suggested that the former were just under nine times more likely to be sentenced to the death penalty than the latter (Kalven, 1969). Kalven (1969) proposed one explanation for this: that a defendant's lower-class status automatically equates to an aggravating factor, while being upper class is viewed as mitigating. Conversely, several studies found no evidence of an association between SES and sentencing, with a handful yielding a positive relationship between the two (Chiricos and Waldo, 1975; Wheeler et al., 1982). Chiricos and Waldo (1975) used a large sample of 10,488 inmates across 17 different offences, revealing no correlation between sentence length and SES. The authors challenged the widely held view of an inverse relationship between class and sentencing, calling into question the theses of conflict criminologists, such as Chambliss and Seidman (1971), and many class related criminological submissions in general (Chiricos and Waldo, 1975).

D'Alessio and Stolzenberg (1993) stated that differing conclusions produced by studies regarding SES and sentencing could be accounted for by a range of methodological limitations. One such example was that most studies on class and sentencing have measured class as dichotomous, representing the common Marxist perspective on society (D'Alessio and Stolzenberg, 1993). In contrast, Chiricos and Waldo (1975) relied on a continuous scale to analyse defendant SES that does not draw distinctions between classes.

Not only do different methods produce disparate findings but Hopkins (1977) also identified a major drawback of a continuous approach. He noted that judges, and people in general, are often ignorant of small distinctions in the SES of those in a completely different class to their own (Hopkins, 1977). Hopkins (1977) theorised that judges subconsciously categorised defendants into two groups. Firstly, offenders from a similar background and class to the judge, who the judge could relate to and who were not regarded as being fundamentally criminal (Hopkins, 1977). Secondly, offenders who the judge could not relate to, as they were from a separate background and class and therefore regarded as being inherently criminal (Hopkins, 1977). Based on these assumptions, he argued that upper-class sentencers were unable to discern between slight variations in the SES of defendants they could not relate to (Hopkins, 1977). Therefore, measuring SES continuously will not uncover meaningful differences in the way judges treat defendants of varying lower SES; they are unlikely to be able to draw distinctions between those at the bottom of the lower class and those in the lower-middle class (Hopkins, 1977). This theory is further supported by the long-standing upper-class composition of the judiciary (Cook, 1989; Social Mobility Commission and Sutton Trust, 2019).

Other studies, that have contradicted the premise of a negative relationship between SES and sentencing, have taken a more cautious approach to drawing firm conclusions from their findings. Wheeler et al. (1982) observed a positive relationship between SES and sentence severity, at the same time acknowledging the timeliness of their study in the trail of Watergate. Watergate was a high profile political white-collar scandal that resulted in a renewed focus from crime agencies on white-collar crime and heightened sentences for offenders. Similarly, Greenberg (1977) noted the timing of Chiricos and Waldo's (1975) study in line with some high-profile political events and movements. He argued that, mindful of such events, the state would be keen to be perceived as enforcing formal justice on white-collar offenders, particularly in visible domains such as sentencing (Greenberg, 1977).

C. Sentencing Guidelines

The late 20th century saw the introduction of sentencing guidelines in response to growing concern surrounding the lack of consistency and guidance in sentencing. In the UK from 1998 to 2009, a series of acts and changes led to the eventual establishment of the Sentencing Council (Sentencing Council, 2021a). England and Wales now have one of the most comprehensive sets of definitive guidelines, covering nearly every offence (Roberts, 2013). The Sentencing Council is an independent body responsible for drawing up and publishing guidelines for sentencing which courts are obliged to adhere to (Sentencing Council, 2020). The guidelines aim to encourage consistent and equitable sentences while preserving the independence of the judiciary (Sentencing Council, 2020). The sentencing code establishes that judges must adhere to guidelines for the offence they are sentencing unless "it is contrary to the interests of justice to do so" (Sentencing Council, 2021c).

However, while the Coroners and Justice Act (2009) places a legal duty on courts to adhere to sentencing guidelines and the ranges within them, a wide scope of judicial discretion is still permitted (Roberts, 2013). Roberts (2013) noted that the obligation on sentencers to sentence within guideline ranges applied to the broader overall offence range, rather than the specific category ranges. For example, the general offence of fraud has an overall offence range of discharge to eight years in custody (Sentencing Council, 2014). Even if a defendant was being charged with the most serious category of the offence of conspiracy to defraud, a sentence of 12 months in custody would still be in compliance with the guidelines, despite a specific category range with a minimum of five years. This, some scholars would argue, allows for a level of divergence within sentencing that is far too flexible (Roberts, 2013). Therefore, analysis of how close to the top and the bottom of sentencing ranges judges sentence, can reveal a lot about the substantive differential treatment of offenders.

In a recent study by Bennett et al. (2016), the authors asserted that there is evidence of resistance amongst judges in America to white-collar fraud sentencing guidelines. On initial analysis of sentencing data, the authors detected a large disparity between the minimum sentence enforced by the guidelines and the average sentences being handed

out (Bennett et al., 2016). They suggested that judges are retaining some empathy with upper-class offenders, who they can relate to, and are consequently under-sentencing them (Bennett et al., 2016). This is supported by Hopkins' (1977) earlier assertion in respect of how judges distinguish between the SES of defendants.

Bennett et al. (2016) carried out an empirical study of 240 judges' sentencing of fraud cases using a simulated sentencing task. The most significant finding revealed that 56.5 percent of all the judges surveyed sentence at the precise bottom of the designated guideline range (Bennett et al., 2016). The results support the thesis that judges appear to maintain a level of affinity with upper-class defendants when sentencing and thus are less willing to condemn them to harsher punishments. While the findings of the study are persuasive, the validity of the results could have been improved had it used actual sentencing data or court observations, as opposed to a simulated sentencing task. The main disadvantage of this method is that judges may dedicate less time and attentiveness to such tasks, as they do not carry the same responsibility and weight of real sentencing (Pina-Sánchez and Linacre, 2013). It is acknowledged that the reverse could also be true, where judges are more diligent in the study because they are aware that their sentencing practices are being assessed (Pina-Sánchez and Linacre, 2013). The potential impact of social desirability bias in simulated studies should also be noted, whereby judges are mindful of their social obligation to sentence white-collar criminals more harshly, especially when under observation.

Much of the research on class and sentencing has focused on identifying a direct relationship between offender SES and sentence severity, be that sentence outcome or sentence length (e.g. Chiricos and Waldo, 1975; Hagan et al., 1980; Wheeler et al., 1982; Bennett et al., 2016). As a result, researchers have often failed to account for the impact of mitigating and aggravating factors, which should be an important consideration when assessing equality of treatment in sentencing. Extenuating circumstances are a component of sentencing that permit considerable discretion from judges. It is asserted by Roberts (2013, p.19) that they present "a clear threat to ordinal proportionality". The principle of ordinal proportionality presumes that offences of varying severity receive sentences that correspond to their seriousness (Roberts, 2013). While equal sentences for different offenders of different classes may represent formal equal treatment, this would only be true equality if the defendants had committed the same offence and were just as culpable as one another (Greenberg, 1977). As Greenberg (1977) pointed out, given the individuality of each offence and offender, it is unlikely that this is often the case. A more comprehensive study into class bias would therefore look at factors such as offence severity and the application of extenuating circumstances to defendants of different classes. Further analysis such as this may reveal substantive differences in the way in which offenders are treated, that would not initially be recognized by simple analysis of SES and sentence outcome.

Another key limitation of many of the studies reviewed so far is that they have either knowingly or inadvertently limited their analysis to one class (Hopkins, 1977). Therefore,

rather than measuring inter-class differences they have in fact measured intra-class differences. Namely, both Wheeler et al. (1982) and Bennett et al. (2016) confined their samples to white-collar fraud cases most likely committed by upper-class offenders. Meanwhile, Chiricos and Waldo (1975) predominantly limited their study to the lower class, by choosing to measure blue-collar offences such as murder and robbery. As previously discussed, this type of criminality is not characteristic of the upper class. Because of this, it is the difference in sentencing of lower-class offenders that Chiricos and Waldo (1975) were assessing. According to Hopkins (1977), it is therefore almost inevitable that they discovered no notable differences in their study. Furthermore, the fact that Chiricos and Waldo (1975) found no significant relationship when measuring lower-class offending would fit with Hopkins' (1977) previously mentioned theory, that judges cannot distinguish between small variations in classes different to their own.

D. Benefit Fraud and Tax Fraud

Benefit and tax fraud are two types of financial fraud that are theoretically similar crimes, with the former typical of the lower class and the latter of the upper class. They have clear class connotations, whereby to commit tax fraud you must be wealthy enough to be paying tax. On the other hand, to carry out benefit fraud someone needs to be impoverished enough to be entitled to benefit payments. Both types of fraud involve loss of money to the state, financial gain to the offender and are non-physical or non-violent in nature (Marriott, 2013). Their fundamental differences lie in the contexts in which they are carried out and their motivations (White and Velden, 1995).

Welfare fraud is a subsistence-based crime, often motivated by a need to supplement inadequate incomes and welfare payments in order to survive (White and Velden, 1995; Cook, 1997; Marston and Walsh, 2008). By contrast, tax fraud is not typically motivated by the need for survival, but rather by greed and the "augmentation of existing personal wealth" (White and Velden, 1995, p.54). One of the most significant distinctions between the two types of fraud is the level of financial harm. As mentioned in the introduction, from 2018 to 2019 it is estimated that the amount lost to tax fraud was nine times greater than to benefit fraud (TaxWatch, 2021). Furthermore, greater financial loss to the state means greater reverberations for wider society. The impact on society is something that Sutherland (1940) suggests is arguably the most damaging consequence of white-collar crimes such as tax fraud. Considering these factors, benefit fraud is evidently the lesser crime both morally and culpably. Tax fraud is therefore widely regarded, by both sentencing guidelines and scholars, as being worthy of more severe punishment (Cook, 1989; White and Velden, 1995; Marriott, 2013). Nevertheless, media and political discourses alongside research from previous studies, suggests that benefit fraud is the more heavily investigated and prosecuted of the two crimes (White and Velden, 1995; Marston and Walsh, 2008; Marriott, 2013).

Despite the conspicuous differential treatment of the two offences, criminologists appear to have somewhat neglected analysis of benefit and tax fraud when investigating class differences in sentencing. Previous sections have identified that scholarship on class and

sentencing has predominantly focused on comparing white and blue-collar offending. While such comparisons have been useful, they have faced several methodological weaknesses due to the lack of homogeneity between the two types of offending (Hopkins, 1977). Of the limited research that is available on benefit and tax fraud the majority has been undertaken in Australia and New Zealand, focusing on social security fraud. Work by Cook (1989; 1997), comparing the two types of fraud in the UK, stands almost by itself in this regard. Nevertheless, the UK and Australasia share many similarities in their welfare and tax systems and therefore the research is sufficiently applicable to a UK context.

White and Velden (1995) touched upon the two types of fraud when examining the overall relationship between class and crime in Australia. They assert that social security fraud is a comparatively insignificant crime to tax fraud and highlight how an uncompromising welfare state, alongside capitalist policies, drive welfare recipients to subsistence-based crime (White and Velden, 1995). This, they argued, results in an irrational and disproportionate fear of a lower-class crime epidemic, exacerbated by the need to regulate the problem through stringently monitoring the lives of welfare recipients (Cook, 1989; 1997; White and Velden, 1995). White and Velden (1995, p.66) described this as the "implicit criminalisation of the target market", evident in the large amounts of resources siphoned into detecting and uncovering cases of social security fraud across Australia. This is supported by Marriott's (2013) study of offending in Australia and New Zealand, which revealed higher rates of investigation, prosecution and custodial sentencing for welfare fraud compared to tax fraud. The situation appears similar in the UK, where a recent report found that benefit frauds were 23 times more likely to be investigated than tax frauds (TaxWatch, 2021). Furthermore, it was found that HMRC policy explicitly reserves criminal investigation for only the most serious of tax fraud cases that warrant serious sentences (TaxWatch, 2021). This same policy is apparent in analysis of tax investigations in both Australia and New Zealand (Marriott, 2013).

Marston and Walsh (2008, p.287) also examined social security fraud in Australia, accusing damaging media and political narratives of generating a "moral panic" surrounding the topic. Marriott (2013) supported this idea, noting that criminalisation is not exclusive to those who defraud the welfare system but more generally targets those who just receive welfare payments. Marston and Walsh (2008) carried out a small empirical study in which they examined the demographics and sentencing of social security fraud cases in two magistrate courts over a seven-month period. A total of 80 cases were heard by six different magistrates and Marston and Walsh (2008) accepted that the small scale of their study may hinder the conclusiveness of their results. Nonetheless, their principal finding revealed an 84 percent conviction rate which the authors regard as high. However, this might have been a more persuasive claim had they compared it with rates for other offences, such as tax fraud (Marston and Walsh, 2008). Another notable finding is that one defendant gained as little as $162 from the offence, underpinning the argument that welfare fraud is, for the most part, a subsistence-fuelled crime resulting in relatively little financial harm (White and Velden, 1995; Marston and

Walsh, 2008). Tunley (2010) noted that although the vast majority of benefit fraudsters are motivated by need, in some instances this can turn to greed when opportunity presents itself. Nevertheless, he maintained the general view that; "impoverished benefit claimants, experiencing long-term welfare dependency, frequently [perceive] fraud to be their only option" (Tunley, 2010, p.314).

As mentioned, Cook (1989) undertook one of the only studies to directly compare responses to tax and benefit fraud in the UK. It is now well established from a variety of literature and studies that upper-class judges are more empathetic when sentencing upper-class defendants, resulting in more lenient sentences (Hopkins, 1977; Cook, 1989; Bennett et al., 2016). Cook's (1989) work supports this, with her findings pointing to a close relationship between how severe one perceives a crime to be and how strongly one associates with the wrongdoer. According to Cook (1989), this explains the tolerant treatment of tax evaders by judges and politicians and the far less tolerant treatment of benefit frauds (Cook, 1989).

When examining sentencing, Cook (1989) set out to observe benefit and tax fraud prosecutions at a single magistrate's court. However, she encountered a large disparity in cases with relatively few tax fraud convictions. She reiterated an earlier point by Wheeler et al. (1982), suggesting that class bias occurring earlier on in the criminal justice system filters out upper-class tax frauds, leaving large variations in conviction rates compared to benefit frauds (Cook, 1989). As indicated previously, this presented some challenges when studying sentencing data, especially when there are large differences in sample sizes that hinder comparability (Hagan et al., 1980). Cook (1989) chose to supplement her small sample of tax fraud cases by directly contacting people who had been investigated for potential tax fraud. One problem with this method is informality, given many of the interviewees are either people known to the author personally or through a friend. Considering the concealed nature of tax fraud, alongside potential feelings of guilt or shame from offenders regarding their crimes, interviewees may be reluctant to answer honestly, particularly where they have a personal relationship with the interviewer.

One of Cook's (1989) most significant findings revealed that 1984 saw eight times as many welfare fraud offenders jailed compared to tax frauds. Cook (1989) drew upon the significance of mitigating factors in lessening sentences for tax frauds. As discussed, this is something previous studies into class and sentencing have failed to do. Cook (1989, p.389) observed that the risk of "loss of status" is often regarded by judges as a mitigating factor. This has emerged as a common theme amongst the reviewed literature on white-collar crime, with several studies postulating that judges are often split between a moral obligation to punish white-collar offenders and a sense that the repercussions of conviction will suffice (Cook, 1989; Levi, 2010; Bennett et al, 2016). Levi (2010) pointed out that the same argument cannot be applied to benefit frauds, who typically have little social standing to lose. Consequently, benefit frauds' low socio-economic status appears to place them at an inherent disadvantage in sentencing (Cook, 1989).

There is a strong consensus amongst the reviewed literature that serious sanctions and conviction are reserved for only the most severe cases of white-collar crime (Greenberg, 1977; Wheeler et al., 1982; Cook, 1989; Levi, 2010). Levi (2010) stated that in 2006, while there were long and severe sentences for some high-profile VAT cases, overall conviction rates remained remarkably low (Levi, 2010). Furthermore, this is despite tax fraud cases growing significantly in coverage and profile in the UK media during that time (Levi, 2010). This finding is supported by a more recent report that found that while custodial rates for tax fraud seem high, the significantly larger quantity of those convicted of benefit fraud means that overall, more welfare offenders are imprisoned (TaxWatch, 2021). Levi (2010) cautioned that there is risk of being misled by data suggesting longer custodial sentences for white-collar fraud cases. He stated that such data does not mean that more convictions are occurring but rather that those cases that are being convicted are larger, more serious cases, involving greater amounts of money and therefore receiving longer sentences (Levi, 2010). This is a vital consideration when assessing equality in sentencing.

Cook's (1989) study indicated some strong evidence of class bias within the treatment of benefit and tax frauds by the justice system. However, Cook (1989) emphasized that differential treatment is a complex problem that cannot be rooted solely in class. The author argued that the acceptance of tax evasion as a tolerable crime is embedded in existing aversions to what are seen as high rates of taxation, wrongfully imposed on those who work hardest in society (Cook, 1989; 1997). In her later work she suggested that tax evasion is even commended in some narratives for demonstrating initiative and resourcefulness (Cook, 1997). Not only do the upper-class judiciary already relate to upper-class offenders on a class level, but such an affinity may be strengthened when these offenders are guilty of tax offences, given pre-existing negative attitudes towards taxes (Cook, 1989). Cook (1989) pointed out that it is not uncommon for the upper class to harbour unfavourable feelings towards taxation, and it is unlikely that judges make an exception. Consequently, they may see tax fraud as a more understandable and acceptable crime, heightening their feelings of empathy for the defendants. On the other hand, judges typically have little in common with lower-class benefit recipients and are unlikely to understand or relate to the rationales and motivations that drive people to commit benefit fraud. Overall Cook (1989) was confident that class had a consequential role in the treatment and sentencing of offenders and that her findings regarding tax and benefit fraud "indicate gross social inequality" within the criminal justice system (Cook, 1989, p.392).

E. Summary

Past research on class and sentencing suffer from a range of limitations that have produced inconclusive or diverse findings. Nevertheless, current literature presents a widely recurring theory that points to upper-class, white-collar offenders being under-sentenced, while their lower-class equivalents are over-sentenced. More recently, the discussed literature has indicated that this theory is applicable to the treatment of benefit fraud and tax fraud, despite evidence that demonstrates the greater cost of tax fraud to

both the public purse and society. A key explanation presented throughout the literature attests to the greater empathy judges feel for tax offenders, owing both to the typical class of the offender and potential compassion for their crime. Understanding whether judges are exercising their discretion to an excessive degree and in a way that reflects their personal class bias when sentencing, is vital for ensuring fairness in justice.

Examination of the sentencing of benefit and tax fraud therefore presents the perfect premise for such an investigation, with the clear class connotations of the two offences overcoming the weaknesses of previous studies. However, the area remains largely untouched by empirical analysis in the UK, with Cook's (1989) solitary work into the topic now over 30 years old and carried out before the introduction of sentencing guidelines. There therefore remains a significant gap in the current research for a study that empirically analyses the sentencing of benefit and tax fraud against the definitive guidelines for each offence. Furthermore, accounting for specific sentencing factors that might indicate judicial bias. Thus, the focus of this dissertation is to assess whether the sentencing of benefit and tax fraud reflects the substantive differential treatment of classes by the justice system, in the context of the Crown Court sentencing guidelines. The following section outlines the methodology adopted in order to answer the research question.

3. Empirical Study

This section will introduce the methodology used to investigate the equality of the sentencing of benefit and tax frauds by the Crown Court. It will discuss the methodological approach to answering the research question and explore the reasons why it was chosen. The data used from the CCSS will also be considered, assessing any limitations to the data set and methodology, before explaining the process of data analysis.

Data analysis was split into three areas of sentencing. These factors for analysis were selected based upon key themes and ideas that emerged from the previous research discussed in Section 1, they are:

1) Immediate Custody Rate
2) Custodial Sentence Length
3) Mitigating and Aggravating Factors

A. Data and Methodological Approach

Given that the aim of this research was to establish quantifiable, significant differences in sentencing, a quantitative approach was chosen to analyse secondary data from the CCSS. Quantitative analysis allows broad data sets like the CCSS to be analysed, relationships between two variables to be statistically tested and wider conclusions to be drawn from samples (Bryman, 2012). It was therefore a suitable approach for assessing

the relationship between class and sentencing severity. Interviews with judges would have aided in understanding the rationale behind judicial decision making, however, this was beyond the scope of this study.

Secondary data was selected over primary data collection for a number of reasons. Firstly, the process of gathering primary data is often time-consuming and work-intensive, producing small sample sizes. Secondly, the CCSS already provided an extensive source of all the data necessary to undertake the research. Pina-Sánchez and Linacre (2013, p.1119) describe the survey as an "unprecedented" tool in the study of equality in sentencing, allowing for a more comprehensive analysis than has formerly been achievable. In addition to this, it was important to consider the effort that had already gone into producing the CCSS for this exact type of research. To not utilise such a thorough and applicable set of data would be counter-intuitive (Bryman, 2012). Furthermore, the data set used, alongside the method of quantitative analysis, makes the study and its findings both reliable and reproducible. Finally, as addressed in the previous section, other data collection methods that involved judges being aware of the research may have been subject to social desirability bias. This would have been a particular problem when assessing the equity of sentencing, given the obligation judges may feel to appear to be sentencing fairly.

The CCSS is a handwritten, paper-based survey that covered a five-year period from 2010 to 2015 and was carried out by the Sentencing Council, to enable it to "monitor the operation and effect of its sentencing guidelines" (Coroners and Justice Act, 2009). It was intended to be completed by judges for every sentence handed out for a principal offence at the Crown Court over this time. The survey gathered extensive data including offence type, outcome, sentence length and factors that might influence the final sentence given, such as aggravating and mitigating factors. The CCSS used different forms for different offence types, with both benefit and tax fraud collected under the 'fraud, bribery and money laundering' form. Before October 2014, both fraud offences were instead recorded under the 'theft, dishonesty and fraud' form. However, data collected under this form did not contain the necessary elements needed for analysis. Therefore, this research covers the period of October 2014 to March 2015, when the survey was terminated.

The 'fraud, bribery and money laundering' data set for October 2014 to March 2015, contained 1203 cases, of which 234 were benefit fraud and 46 were tax fraud. This included cases that were sentenced under the benefit and revenue fraud guidelines and cases that were sentenced under other guidelines. This is because in some cases the 'guideline used' factor was not completed by the judge, or a different fraud guideline was recorded. The reason for this is not entirely clear, however it is likely that it was down to data recording inconsistency on the part of the sentencer, or other unknown data quality issues. **Figure 1** shows the sample sizes for tax and benefit fraud within the overall 'fraud, bribery and money laundering' data set.

B. Data and Methodological Considerations

Due to the handwritten nature of the survey, the Sentencing Council recognizes limitations caused by the transition from old to new guidelines for benefit and tax fraud (Office of the Sentencing Council, 2015). Delays in removing old forms from distribution and issuing new ones meant that some fraud cases, heard in the Crown Court during the period this study covers, were completed using the incorrect form (Office of the Sentencing Council, 2015). This means that some offences of benefit and tax fraud may have been excluded from this study, although it is likely that these were minimal in proportion to the overall cases. Nevertheless, given the already small sample size of tax fraud cases, there is the potential that even a handful of missing cases could impact the validity of the findings.

The Sentencing Council (2015) states the overall response rate to the CCSS in 2014 to be 64 percent, although it recognizes that this differs between Crown Courts, with just under a quarter having a response rate of less than 50 percent. This could suggest participant fatigue amongst some judges. The possible implications of a significant non-response rate should be addressed, such as the potential for non-response bias that may affect the representativeness of the study (Pina-Sánchez and Linacre, 2013). This supposes that those judges who have not responded to the CCSS are categorically different to those who have. However, as addressed below, quality assurance tests demonstrate the representativeness of the survey responses.

It is recognized that there is a large variation in sample sizes for tax and benefit fraud. One possible contributor to the small sample size for tax fraud is the relatively short period that this study covers, which is six months. To ensure the quality of the data from the CCSS, the council matched it with cases from the Ministry of Justice (MOJ) database, which keeps a record of all sentences passed at the Crown Court (Office of the Sentencing Council, 2015). The council concluded that any inconsistencies in the data were slight, although it should be noted that the second largest discrepancy was found in sentences completed under the 'theft dishonesty and fraud form' that were used for this study (Office of the Sentencing Council, 2015). Nevertheless, this difference was still minor at just 1.4 percent (Office of Sentencing Council, 2015). Overall, the report concludes that the sample of cases from the survey is altogether representative of the caseload seen by the Crown Court in the same period (Office of the Sentencing Council, 2015). This indicates that the sample of tax and benefit fraud cases used for this study is sufficiently reflective of national level sentences. Therefore, the discrepancy in sample sizes is illustrative of the proportion of cases heard at the Crown Court during this time and should not impact the generalisability of the data.

C. Data Analysis

Immediate Custody Rate

There were five possible variables for sentencing outcomes within the fraud data set. These were: discharge, fine, community order, suspended sentence order and immediate custody. Considering the relative severity of tax fraud compared to benefit fraud, that is established in the sentencing guidelines, there were very few cases of tax fraud sentenced

to lesser disposals than a suspended sentence order. Immediate custody rate was therefore compared against the rate of all other sentencing outcomes combined. One drawback of this method is that it does not account for the continuity of sentencing outcomes. By dichotomizing the different sentence types, any significant differences in sentencing rates for other sanctions are precluded from analysis (Greenberg, 1977). Nevertheless, immediate custody is the most severe sanction that a defendant can receive and the decision to sentence someone to prison is not taken lightly by judges. Analysis of immediate custody rates can therefore still reveal significant findings regarding differential treatment by judges in sentencing. The chi-square test of independence was used to assess if the difference in immediate custody rates for benefit and tax fraud were statistically significant. The alpha level was set at $P < .05$.

Custodial Sentence Length

To ensure a more comprehensive analysis, this study also compared and analysed the lengths of immediate custodial sentences for tax and benefit fraud. As observed in Section 2, previous studies into class and sentencing have often chosen to either exclusively measure custodial sentence rates or sentence lengths. For a more extensive investigation this study analysed both factors. As Wheeler et al. (1982, p.652) state, the decision process that determines sentence length is "qualitatively different" to the original decision that determines whether someone should be sent to custody. Furthermore, the degree of judicial discretion is far greater when determining sentence length as opposed to sentence type (Roberts, 2013). Previous studies, such as the one undertaken by Bennett et al. (2016), have found that judges regularly use their discretion to sentence white-collar offenders at the bottom of sentence length ranges. Analysis of custodial sentence lengths as a separate variable can therefore reveal valuable findings regarding judicial bias within sentencing.

Within the CCSS, data for sentence lengths of benefit and tax fraud were recorded under ten categories of sentence ranges. For a more straightforward analysis and comparison with the sentencing guidelines, these were regrouped into three broader categories of sentence ranges. These were: Up to 12 months, /Over 12 months and less than 4 years / 4 years and up to 10 years. As well as recording the count and percentage rate for each one, the running total percentage was also recorded.

Mitigating and Aggravating Factors

The adjustment of a sentence length within an offence range, as mentioned in the previous section, is influenced by a range of factors. One such factor that this research sought to investigate is the application of mitigating and aggravating factors. The previous section has explained that the application of extenuating factors is an area of sentencing which retains a large degree of judicial freedom (Roberts, 2013). Such factors can significantly reduce or increase a defendant's sentence at the judge's discretion. Section 2 has established that benefit and tax fraud are two offences that differ significantly in severity, and this is reflected accordingly by the sentencing guidelines. Given the legal obligation of sentencers to sentence within the guidelines, similar or

harsher sentences for tax frauds should be expected. Therefore, measuring the difference in the rate at which these factors are applied to offenders of the two offences can reveal substantive differences in treatment (Greenberg, 1977).

On that account, the prevalence of cases of benefit and tax fraud with mitigating and aggravating factors applied was analysed. Cases where a factor was present were recorded, alongside the percentage rate of the total cases processed for each offence. In the case of aggravating factors, it was noted that one factor (whether a defendant has a previous relevant conviction) was a statutory factor. This means that sentencers are obliged to apply it by law and it therefore does not reflect judicial discretion. Accordingly, this factor was omitted from the analysis.

As well as analysing the overall mitigating factor rate, two mitigating factors, that of 'good character/exemplary conduct' and 'remorse,' were also analysed individually. Previous literature theorised that upper-class white-collar offenders, such as tax frauds, are often disregarded as being inherently criminal and instead considered as good-natured, reputable citizens who have made a mistake (Sutherland, 1940; Cook, 1989; Levi, 2010; Bennett et al, 2016). Personal mitigating factors, such the above-mentioned, reflect this viewpoint to an extent and therefore analysing their individual prevalence can support or oppose this theory. The chi-square test of independence was carried out to determine if there was a significant difference between cases of benefit and tax fraud with mitigating and aggravating factors. The alpha level was $P < .05$.

This section has described the data, methodology and forms of analysis used to answer the research question. In the section that follows the results of the empirical study are presented.

4. Results

A. Immediate Custody Rate

Null hypothesis: There is no significant difference between the immediate custody rate for benefit fraud and tax fraud.

Alternative hypothesis: There is a significant difference between the immediate custody rate for benefit fraud and tax fraud.

The results of the chi-square test showed that there is a significant association between immediate custody rate and offence type; (X^2 (1, N = 280) = 10.24, P = .001). The P-value is significant at < .05 and therefore the alternative hypothesis can be accepted.

Figure 1: Table to show immediate custody rates and other outcome rates for benefit fraud and tax fraud

		Benefit Fraud	Tax Fraud
Immediate Custody	Count	42	18
	% of total	17.95%	39.13%
Other Outcome	Count	192	28
	% of total	82.05%	60.87%
Total	Count	234	46
	% of total	100%	100%

B. Custodial Sentence Length

Figure 2: Table showing custodial sentence lengths for benefit fraud and tax fraud

		Benefit Fraud	Tax Fraud
Up to 12 months	Count	29	9
	% of total	69.05%	50%
	Running %	69.05%	50%
Over 12 months & less than 4 years	Count	10	7
	% of total	23.81%	38.89%
	Running %	92.86%	88.89%
4 years & up to 10 years	Count	3	2
	% of total	7.14%	11.11%
	Running %	100%	100%
Total	Count	42	18

Alternative hypothesis: There is a significant difference between custodial sentence lengths for benefit fraud and tax fraud.

Null hypothesis: There is no significant difference between custodial sentence lengths for benefit fraud and tax fraud.

Figure 2 shows no significant difference between custodial sentence lengths for benefit fraud and tax fraud.

C. Mitigating and Aggravating Factors

Mitigating Factors

Null Hypothesis: There is no significant difference between mitigating factor rates for cases of benefit fraud and tax fraud.

Alternative Hypothesis: There is a significant difference between mitigating factor rates for cases of benefit fraud and tax fraud.

The results of the chi-square test showed that there is no significant association between mitigating factor rate and offence type (X^2 (1, N = 280) = 2.29, P = .13). Therefore, the alternative hypothesis can be rejected, and the null hypothesis accepted.

Figure 3: Table showing the prevalence of cases of benefit fraud and tax fraud with mitigating and aggravating factors

		Benefit Fraud	Tax Fraud
Cases with mitigating factors applied	Count	195	34
	% of total cases processed	83.33%	73.91%
Cases with aggravating factors applied	Count	99	5
	% of total cases processed	42.31%	10.87%
Total	Count	234	46

Figure 4: Table showing the prevalence of mitigation factors used in cases of benefit fraud and tax fraud that received mitigating factors

		Benefit Fraud	Tax Fraud
Good character / exemplary conduct	Count	102	21
	% of total cases with mitigating factors	52.31%	61.76%
Remorse	Count	120	23
	% of total cases with mitigating factors	61.54%	67.65%
Total	Count	195	34

Aggravating Factors

Null Hypothesis: There is no significant difference between aggravating factor rates for cases of benefit fraud and tax fraud.

Alternative Hypothesis: There is a significant difference between aggravating factor rates for cases of benefit fraud and tax fraud.

The results of the chi-square test showed that there is a significant association between aggravating factor rate and offence type (X^2 (1, N = 280) = 16.27, *P* = .000.) The *P*-value is significant at < .05 and < .01. The alternative hypothesis can therefore be accepted.

5. Discussion

In this section of the research paper the results from the empirical study in Section 4 will be examined in the context of the sentencing guidelines. Discussion will assess whether any differences in sentencing, yielded from the results, are considerable enough to represent the differential treatment of classes. The key findings will be discussed for each factor, before drawing overall conclusions regarding the study. Any limitations of the research and its findings will also be addressed, alongside reflection on the potential implications for policy and on further research that has emerged.

A. Immediate Custody Rate

The findings of this study showed that tax fraud offenders were more likely to be sentenced to immediate custody, with a rate of 39.13%, compared to benefit fraud offenders at 17.96% (**Figure 1**). Furthermore, this difference was found to be statistically significant.

As mentioned in Section 2, tax fraud is established by both previous research and sentencing guidelines as the more significant crime. On analysis of the sentencing guidelines this is evident, as they obligate judges to impose custodial sentences in a higher proportion of cases of tax fraud than benefit fraud (Sentencing Council, 2014). Therefore, the finding that tax fraud is significantly more likely to be sentenced to immediate custody would suggest that judges are sentencing in line with the sentencing guidelines. This outcome is contrary to that of previous research, which indicates higher custodial sentence rates for benefit frauds. It also does not support the widespread theory that posits lower-class offenders will be sentenced more severely than their upper-class counterparts.

While this finding from the current study was moderately unexpected, given evidence from previous research, it should be noted that past studies into class and custody rates

are now outdated, with many taking place before the establishment of sentencing guidelines. For example, Cook (1989) found that benefit fraud offenders were eight times more likely to be given custodial sentences than tax fraud offenders. However, her study was completed over 30 years ago when judges were permitted far greater discretion in sentencing. As was observed in Section 2, in that period of time there has been a lack of empirical studies into the topic and therefore the disparate findings are likely to reflect this. This could suggest that the establishment of definitive guidelines for benefit and tax fraud, which impose more severe sanctions for the latter, have succeeded in promoting more proportional sentencing.

However, the validity of these findings may be limited by the small sample size of tax fraud cases compared to those for benefit fraud, as mentioned in Section 3. There were 46 cases of tax fraud sentenced at the Crown Court between October 2014 and March 2015, compared to just over five times as many benefit fraud cases (234). Several academics have pointed out that the relatively small proportion of white-collar fraud cases that do reach the sentencing stage are, in all probability, only the most serious cases (Greenberg, 1977; Wheeler et al., 1982; Levi, 2010; Marriott, 2013). Accordingly, when these cases are sentenced, they are more likely to receive more severe sanction types such as immediate custody. This could potentially explain the above findings.

B. Custodial Sentence Length

In reference to the previous set of findings, the immediate custody case count for benefit fraud and tax fraud was 42 and 18 respectively. The next stage of the research aimed to establish whether, within the sample of cases that received immediate custody, there was a significant difference in the length of sentences handed out. The most significant finding, as shown in **Figure 2**, is that 92.86% of benefit fraud offenders received sentences of less than four years, compared to 88.89% of tax fraud offenders. Correspondingly, tax fraud offenders are around 4% more likely to be sentenced to custody for four to ten years (11.11%) than benefit fraud offenders (7.14%).

On initial analysis, these findings may not seem significant. However, when considered against the sentencing ranges for each offence, they reveal some relevant findings. The definitive guidelines indicate that judges are required to impose longer custodial sentences for tax fraud and lesser ones for benefit fraud. The overall offence sentence range under the benefit fraud guideline is 12 weeks to eight years and for revenue fraud it is 26 weeks to 17 years (Sentencing Council, 2014). Expressly, the bottom and top of the range for revenue fraud custodial sentences is just over two times the length of that for benefit fraud. Although the findings of this study do point to lengthier custodial sentences for tax frauds than benefit frauds, this difference is not as pronounced as the guidelines seem to encourage. This could suggest that cases of tax fraud are being sentenced closer to the bottom of the relevant sentencing range and cases of benefit fraud closer to the top.

Previous literature evaluating sentencing guidelines has observed the significant possibility of over-sentencing and under-sentencing that is enabled by broad ranges within guidelines (Roberts, 2013; Bennett et al., 2016). Furthermore, it is recognised that there is a considerable degree of judicial discretion that is permitted in determining the length of custodial sentences (Roberts, 2013). Therefore, this finding might suggest that judges are using their judicial independence to impose class-related bias when deciding the length of sentences for tax and benefit frauds. This interpretation of these findings also accords with those of a previous study by Bennett et al. (2016), which found that in the majority of white-collar crime cases judges sentence at the bottom of guideline ranges.

A possible explanation for this finding corresponds with one of the recurring theories that was posited throughout previous literature on class and sentencing: that judges are more likely to relate to upper-class defendants, consequently sympathising with their position and sentencing them more leniently (Hopkins, 1977; Cook, 1989; Bennett et al., 2016). This is further supported by the fact that, as previously stated, the considerations involved in adjusting sentence lengths are discretionary, such as mitigating and aggravating factors, and therefore rely heavily on individual judges and their personal attitudes. Findings regarding the impact of extenuating factors on sentencing will be discussed in the following section. Once again, the above findings need to be interpreted with caution because of the small sample size of cases for tax fraud compared to benefit fraud.

C. Mitigating and Aggravating Factors

The findings of this study indicate that 83.33% of benefit fraud cases received a mitigating factor compared to 73.91% of cases of tax fraud (see **Figure 3**), although this difference is not statistically significant. Closer analysis of individual factors revealed that, of those cases that did receive a mitigating factor, tax fraud offenders were slightly more likely to receive a factor pertaining to the positive personal character of the defendant. **Figure 4** shows that 67.65% of tax fraud cases with a mitigating factor applied received 'remorse', compared to 61.54% for benefit fraud. The difference is slightly greater for the factor of 'good character/exemplary conduct', with a 61.76% prevalence for tax fraud and 52.31% for benefit fraud (**Figure 4**).

Very little was found in previous research regarding the application of mitigating factors to different classes in sentencing. Although theories throughout existing literature give basis to assume that judges might apply mitigating factors more generously to tax fraud offenders, the results of this study suggest that this is not the case. Having said that, Cook (1989) did observe that mitigating factors concerning the risk of loss of status and the good disposition of the defendant were notably prevalent in cases of tax fraud. Moreover, various literature has posited that upper-class defendants are often disregarded as being real criminals and instead deemed to be respectable people who have made an error of judgement (Sutherland, 1940; Cook, 1989; Levi, 2010; Bennett et al, 2016). It is therefore noteworthy that when personal mitigating factors that reflected judgement of an offender's good nature were analysed in this study, tax fraud had a slightly higher

prevalence of such factors. However, such a finding should be approached tentatively given its lack of statistical significance and considering that cases of tax fraud have a higher mitigating factor rate overall.

In the case of aggravating factors, analysis revealed a statistically significant difference in prevalence for benefit and tax fraud, at 42.31% and 10.87% respectively (**Figure 3**)**.** This suggests that judges are using their discretion to apply aggravating factors to a significantly greater number of cases of benefit fraud than tax fraud. There are three possible explanations for this finding. The first being that judges are holding back on applying relevant aggravating factors to cases of tax fraud because of the affinity they have with them. The second is that judges are unable to relate or empathize with benefit frauds, consequently viewing them as innately criminal and more culpable and thus warranting the application of aggravating factors. The final is that benefit fraud offenders are more culpable than their upper-class counterparts and therefore their higher aggravating factor rate is reflective of this. The third explanation can be disregarded on account of the well-established argument maintaining the greater criminality of tax fraud (Cook, 1989; White and Velden, 1995; Marriott, 2013). It can therefore be cautiously concluded that the greater application of aggravating factors to cases of benefit fraud indicates a general belief amongst judges, that regards benefit offenders as more culpable than tax offenders. However, it is important to bear in mind the earlier findings in this section that yielded higher mitigating factor rates for cases of benefit frauds, although this finding was not statistically significant.

D. Summary of Findings

The findings from this research are altogether inconclusive in establishing whether the sentencing of benefit and tax fraud represents the differential treatment of classes. There is little evidence of any strong substantive differences in the sentencing of the two offences with custodial rates for tax fraud significantly higher than for benefit fraud, as is established by the guidelines. However, there are some smaller ambiguous findings that could indicate the presence of class bias in some areas of sentencing.

In Section 2, Roberts (2013) advanced that a combination of broad sentence ranges, alongside the permissive application of extenuating factors, constitutes a direct threat to the principle of ordinal proportionality in sentencing. The findings concerning custodial sentence lengths and aggravating factors support this assertion to some degree. The higher aggravating factor rate for benefit frauds could explain why the offence has substantively longer sentence lengths compared to tax fraud, given that the two factors have a large degree of interplay. This is because, as previously mentioned, aggravating factors increase the culpability of an offence and therefore also increase the sentence length accordingly. Furthermore, both the establishment of sentence length and the application of extenuating factors have been determined as stages of sentencing where judges can exercise a large amount of discretion (Roberts, 2013). This might explain why these areas of sentencing display some indications of sentencing bias, whereas immediate custody rate does not.

An ongoing theory throughout this paper has postulated that upper-class judges identify with and accordingly sentence upper-class defendants more leniently. While the finding that immediate custody rates are significantly higher for tax frauds does not support this theory, findings regarding sentence lengths, aggravating factor application and the prevalence of mitigating factors that attest to the good nature of the defendant, do offer some support. This theory is further consolidated when considering an argument put forward earlier in this paper, that senior judges, from which Crown Court judges are appointed, "are the most socially exclusive group of all the professions examined" (Social Mobility Commission and Sutton Trust, 2019, p.55). Research shows that 65 percent of senior judges are privately educated compared to 7 percent of the wider population, making them grossly unrepresentative (Social Mobility Commission and Sutton Trust, 2019). It can therefore be reasonably assumed that the majority of Crown Court judges, in charge of delivering fair and equitable sentences, are drawn from the highest ranks of the social strata and inordinately represent the upper-class. This, coupled with the aforementioned theory regarding judicial affinity, could explain the slightly biased treatment of upper-class defendants by judges when utilising their discretion within sentencing. Therefore, while this study did not confirm the presence of class bias within sentencing, it did partially substantiate claims of differential treatment in some areas of judicial discretion.

One of the most important findings of this study comes from the formerly mentioned disparity in sample sizes, produced by the actual conviction rates of tax and benefit fraud at the Crown Court. Quality assurance tests, as discussed in Section 3, certified the representativeness of the sample to national level sentences heard at the Crown Court (Office of the Sentencing Council, 2015). This confirms that the difference in caseload is not a result of methodological weaknesses by the CCSS, but instead represents structural failures by the justice system to investigate and prosecute white-collar fraud cases such as tax evasion. Such failures have been noted by numerous scholars (Hagan et al., 1980; Cook, 1989; Levi, 2010; Marriott, 2013). On the other hand, benefit fraud is heavily pursued and convicted with the literature contending that there is a disproportionate amount of time, money and personnel put into ensuring benefit compliance over tax compliance (Cook, 1989; Cowburn, 2018; TaxWatch, 2021)

As previously suggested by Levi (2010), this would indicate that true differential treatment of classes is occurring earlier on in the CJS, resulting in only a handful of tax fraud cases reaching sentencing. Naturally, these are the most serious cases, involving larger sums of money and therefore attracting more severe sentences. Thus, when examining sentencing, on the face of it, it appears that tax frauds are being punished more severely than benefit frauds. This is despite the overall conviction rate for the former remaining remarkably low and for the latter, exceptionally high. As has been suggested by Greenberg (1977), the visibility of sentencing presents the ideal opportunity for the state to portray the justice system as fair and equitable, by means of delivering white-collar offenders suitably severe punishments. This suggests that the attention of

criminologists should therefore be directed to exploring the presence of class inequality in earlier stages of the justice system and perhaps even more broadly, in society itself.

E. Limitations and Considerations

The key methodological considerations of this study were addressed in Section 3 of this paper. However, some additional limitations that have come to light when discussing the findings are briefly discussed in this section.

Firstly, because of the time constraints of this study, three sentencing variables were used for analysis. There are a wide range of variables involved in sentencing that this research did not account for. A more comprehensive analysis, without the time limitations of this study, might make use of all the factors and variables available in the CCSS to increase validity. Nevertheless, the factors chosen were selected because they were thought to represent a good general picture of the sentencing process and the decisions involved, still producing valid and reliable results with regards to the research aim.

Secondly, the findings of this research are presented individually for each factor that was analysed. The Office of the Sentencing Council (2015) highlights that, in fact, many factors involved in sentencing are interrelated. However, it is outside the remit of the CCSS to analyse the interaction between individual factors and therefore also outside the remit of this study (Office of the Sentencing Council, 2015). Nevertheless, the factors that were analysed were still able to give an overall measure of sentencing for the purposes of this research.

Finally, it should be noted that due to the discontinuation of the CCSS, the data used for this research is now over six years old. The findings provide a useful insight into the sentencing of benefit and tax frauds in 2014-2015. However, changes to sentencing practices and legislation could make the results less relevant to current discussion on the topic. Having said that, the main findings revealed by the study are unlikely to have changed over this period of time, although further research could certainly explore this.

F. Policy and Practical Implications

The findings of this research have highlighted four key policy implications. Firstly, it is suggested that the welfare state is unsustainable in its current form. There is a strong relationship between the amount a country designates to its welfare system and its incarceration rates (Downes and Hansen, 2006). A system meant to support the most vulnerable appears to be driving many to turn to fraud in order to maintain a basic standard of living. This, alongside excessive surveillance, contributes to high conviction rates for benefit fraud that are reflected in this study. Such a cycle cannot be broken unless the wider structural failures of the welfare state are addressed. It is therefore recommended that there is a thorough review of the welfare system, focusing on the inadequacy of welfare payments to sustain its receivers and the systematic criminalisation of recipients.

Secondly, regarding tax fraud, a key policy priority should be to address the low conviction rates that are reflected in the sample sizes of this study. The allocation of resources for investigating tax compliance need to, at the very least, be brought in line with those for benefit compliance. Furthermore, emphasis should be placed on adopting a similar approach to the investigation of tax fraud as is taken to benefit fraud, by increasing prosecutions of everyday tax fraud cases and not just severe high-profile ones.

Thirdly, the findings of this study suggest that judges could be using their judicial discretion, to a small degree, to impose some personal feelings of empathy on the sentencing of upper-class tax offenders. This presents a threat to some key principles of sentencing, such as judicial neutrality and ordinal proportionality. As such, future policy changes to sentencing are encouraged to tighten the regulation of extenuating factor application by judges, an area of sentencing that allows for excessive partiality. As well as this, changes could be implemented to the Coroners and Justice Act (2009), to prohibit judges from sentencing outside the category ranges within offences and thereby giving out disproportionate sentences.

Finally, a broader recommendation in relation to structural inequality within society is that of promoting diversification within the British judiciary. The predominantly upper-class composition of judges in the UK presents a range of disadvantages for lower-class defendants, many of which have been highlighted throughout this research. Ensuring that those who are in charge of serving justice are representative of the wider population is crucial to the advancement of a fair and equitable justice system.

G. Further Research

There is a distinct lack of academic research into the differential treatment that exists between benefit fraud and tax fraud and what this means for class inequality. Therefore, any further work into the topic would significantly help to broaden understanding.

To build upon this study's findings regarding judicial discretion, further research should focus on determining exactly how far judges depart from sentencing guidelines for benefit fraud and tax fraud. Such a study would help to produce more in-depth findings surrounding the substantive differential treatment of classes and the extent to which judicial judgement might produce such bias. Further investigation using the CCSS might also make use of additional factors that influence sentencing decisions, such as guilty pleas and individual offence severity.

The present study has been somewhat limited by low conviction rates for tax fraud. Consequently, this has thrown up concerns regarding the unequal monitoring and pursuit of benefit fraud compared to tax fraud, an area that needs further investigation. Comparing the investigation and prosecution of the two offences, that results in the disparate sentencing rates seen in the current study, would therefore be a fruitful topic for further research. More broadly, future research might look beyond the CJS and unpick

the underlying narratives that underpin the excessive criminalisation of benefit fraud and the general acceptance of tax fraud.

6. Conclusion

This research set out to examine any differences in the sentencing of benefit fraud and tax fraud that might indicate class bias. A review of previous research into the topic disclosed some evidence of class inequality inherent within the justice system and the judiciary. However, an absence of literature on sentencing of the two offences suggests criminologists had failed to take advantage of the clear class contrast between the two types of fraud. Therefore, the potential they presented for investigating class bias had been somewhat overlooked.

Although the introduction of guidelines placed significant limitations on sentencing, broad guideline ranges and extensive judicial discretion has still presented problems for the equitability of sentencing. Accordingly, previous studies suggested that white-collar offences, such as tax fraud, were sentenced more leniently than lower-class offences such as benefit fraud. Furthermore, there was evidence of an inherent class bias that existed within society, reflected in the way that benefit and tax offenders were portrayed and perceived. As a result, this research set out to explore if the sentencing of benefit fraud and tax fraud reflected the differential treatment of classes by the criminal justice system.

Making use of comprehensive sentencing data from the CCSS, this study sought to analyse the sentencing of the two offences in the context of the individual guidelines. It aimed to arrive at substantive conclusions regarding equality of sentencing that considered both the severity of the offences and the relevant guidelines. A primary focus of the research was the extent to which judicial discretion enabled judges to impose their personal opinions in their sentencing judgements. The fundamental goal of this thesis was to explore whether the social injustice of the class structure, that is ingrained within society and its structural institutions, is also reflected in the administrating of justice.

To achieve its research aim, this study examined three areas of sentencing: immediate custody, sentence length and aggravating and mitigating factors. The study employed a mixture of empirical and statistical analysis to compare each of the aforementioned factors for benefit fraud and tax fraud, before interpreting these findings against the severity of the sentencing guidelines for each offence. One of the main findings to emerge from this study is that, contrary to previous research, tax fraud had significantly higher rates of immediate custody than benefit fraud, as established by the guidelines. Nevertheless, further empirical analysis revealed some small yet substantive differences in length of sentence between the two offences and the application of aggravating factors. Such findings suggest the possibility of some modest class bias from judges when using their discretion, contributing to the understanding of how judges regard offenders of a different social class to their own. It is unfortunate that, given the constraints of the research, the study was unable to accurately measure exactly how far judges departed

from the guidelines in their sentencing. Such analysis could certainly consolidate these findings further, potentially providing stronger support for the notion that judges are unable to relate and subsequently empathise with lower-class offenders and the crimes they typically commit. This would therefore provide a worthwhile area for future research.

Finally, since this study was limited to the examination of sentencing, it was not possible to account for any class discrimination that may have occurred earlier on in the justice process. However, the assumption that such a bias does exist is supported by the small sample size of tax fraud cases compared to benefit fraud cases that was revealed in this research. When discussed in the context of previous literature and higher immediate custody rates for tax fraud, it is highly plausible that the findings of this study reiterate that of previous scholars; that low investigation and prosecution rates for all but the most serious cases of tax fraud reflect failures earlier on in the justice system. Therefore, despite setting out to uncover differential treatment within sentencing, the study has also offered a valuable insight into disparities in the investigation and prosecution of benefit and tax compliance, that undoubtedly require further inquiry.

7. References

Bennett, M.W., Levinson, J.D. and Hioki, K. 2016. Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform. *Iowa Law Review*. **102** (3), pp.939-1000.

Block, D. and Corona, V. 2014. Exploring class-based intersectionality. *Language, Culture and Curriculum*. **27** (1), pp.27-42.

Bryman, A. 2012. *Social Research Methods*. [Online]. 4th ed. Oxford: University Press. [Accessed 10th March 2021]. Available from: https://www.academia.edu/30520568/Social_Research_Methods_4th_Edition_by_Alan_Bryman.pdf

Butler, P. 2020. At least 69 suicides linked to DWP's handling of benefit claims. *The Guardian*. [Online]. 7 February. [Accessed 26 March 2021]. Available from: https://www.theguardian.com/society/2020/feb/07/dwp-benefit-related-suicide-numbers-not-true-figure-says-watchdog-nao

Chambliss, W.J. and Seidman, R.B. 1971. *Law, Order, and Power*. Massachusetts: Addison-Wesley.

Chiricos, T.G. and Waldo, G.P. 1975. Socioeconomic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition. *American Sociological Review*. **40** (6), pp.753-772.

Chorley, M. 2013. And the most outrageous benefits cheats of 2013 are … the drag queen, wicket keeper, darts captain and dog trainer who all said they were too ill to work. *Daily Mail*. [Online]. 30 December. [Accessed 30 March 2021]. Available from:

https://www.dailymail.co.uk/news/article-2524717/Top-10-outrageous-benefits-cheats.html

Cook, D. 1989. *Rich Law, Poor Law: Differential Response To Tax And Supplementary Benefit Fraud.* Milton Keynes: Open University Press.

Cook, D. 1997. *Poverty, crime and punishment.* London: Child Poverty Action Group.

Coroners and Justice Act 2009. (c.25). [Online]. London: The National Archives. [Accessed 17 March 2021]. Available from: https://www.legislation.gov.uk/ukpga/2009/25/part/4

Cowburn, A. 2018. Benefit fraud 'witch-hunt': 280,000 public tip-offs led to no action taken due to lack of evidence. *Independent.* [Online]. 15 January. [Accessed 18 March 2021]. Available from: https://www.independent.co.uk/news/uk/politics/benefit-fraud-public-tip-offs-legal-action-police-no-evidence-dwp-work-pensions-department-a8144096.html

D'Alessio, S.J. and Stolzenberg, L. 1993. Socioeconomic Status and The Sentencing of The Traditional Offender. *Journal of Criminal Justice.* **21** (1), pp.61-77.

Department for Work and Pensions. 2021. *DWP benefit statistics: February 2021.* [Online]. London: Department for Work and Pensions. [Accessed 26 March 2021]. Available from: https://www.gov.uk/government/statistics/dwp-benefits-statistics-february-2021/dwp-benefits-statistics-february-2021

Downes, D.M. and Hansen, K. 2006. *Welfare and punishment: the relationship between welfare spending and imprisonment.* [Online]. London: Crime and Society Foundation. [Accessed 26 March 2021]. Available from: https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Welfare_and_Punishment_webversion.pdf\

Ellicott, C. 2011. Benefits cheat UK: Court sees a staggering 23 cases of welfare fraud in just ONE DAY. *Daily Mail.* [Online]. 5 March. [Accessed 30 March 2021]. Available from: https://www.dailymail.co.uk/news/article-1363162/Benefit-cheat-UK-How-just-day-court-saw-staggering-23-cases-welfare-fraud.html

Greenberg, D.F. 1977. Socioeconomic Status and Criminal Sentences: Is There an Association? *American Sociological Review.* **42** (1), pp.174-176.

Gye, H. 2019. FRAUD FURY: Anger as Government pays out £2.3BILLION to benefits cheats who lie to get extra case from taxpayers. *The Sun.* [Online]. 10 May. [Accessed 30 March 2021]. Available from: https://www.thesun.co.uk/news/9040430/benefits-fraud-universal-credit/

Hagan, J., Nagel, I.H. and Albontetti, C. 1980. The differential sentencing of white-collar offenders in ten federal district courts. *American Sociological Review.* **45** (5), pp.802-820.

Hopkins, A. 1977. Is There a Class Bias in Criminal Sentencing? *American Sociological Review.* **42** (1), pp.176-177.

Kalven, H. 1969. Study of the California Penalty Jury in First-Degree-Murder Cases. *Stanford Law Review.* **21** (6), pp.1297-1497.

Levi, M. 2010. Hitting the Suite Spot: Sentencing Frauds. *Journal of Financial Crime.* **17** (1), pp.116-132.

Levi, M. and Lord, N. 2017. White-Collar and Corporate Crime. In: Liebling, A., Maruna, S. and McAra, L. eds. *The Oxford Handbook of Criminology.* [Online]. 6th ed. Oxford: Oxford University Press, pp.722-743. [Accessed 29 January 2021]. Available from: https://www.researchgate.net/publication/312938770_White-Collar_and_Corporate_Crime

Marriott, L. 2013. Justice and the Justice System: A Comparison of Tax Evasion and Welfare Fraud in Australia and New Zealand. *Griffith Law Review.* **22** (2), pp.403-429.

Marsh, S. 2021. DWP uses excessive surveillance on suspected fraudsters, report finds. *The Guardian.* [Online]. 14 February. [Accessed 26 March 2021]. Available from: https://www.theguardian.com/society/2021/feb/14/dwp-excessive-surveillance-on-suspected-fraudsters-privacy-international

Marston, G. and Walsh, T. 2008. A case of Misrepresentation: social security fraud and the criminal justice system in Australia. *Griffith Law Review.* **17** (1), pp.285-300.

Office of the Sentencing Council. 2015. *Annex B: Quality and Methodology Note.* [Online]. London: Sentencing Council. [Accessed 21 January 2021]. Available from: https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annex-B1.pdf

Pina-Sánchez, J. and Linacre, R. 2013. Sentence Consistency in England and Wales. *British Journal of Criminology.* **53** (6), pp.1118-1138.

Roberts, J. 2013. Sentencing Guidelines In England And Wales: Recent Developments And Emerging Issues. *Law and Contemporary Problems.* **76** (1), pp.1-25.

Sentencing Council. 2014. *Fraud, Bribery and Money Laundering Offences: Definitive Guideline.* [Online]. London: Sentencing Council. [Accessed 3 January 2021]. Available from: https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf

Sentencing Council. 2015. *Crown Court Sentencing Survey Annual Publication.* [Online]. London: Sentencing Council. [Accessed 2 February 2021]. Available from: https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf

Sentencing Council. 2020. *About Us.* [Online]. [Accessed 9 February 2021]. Available from: https://www.sentencingcouncil.org.uk/about-us/

Sentencing Council. 2021a. *History.* [Online]. [Accessed 19 February 2021]. Available from: https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/history/#:~:text=The%20Crime%20and%20Disorder%20Act%201998%20created%20the%20Sentencing%20Advisory%20Panel.

Sentencing Council. 2021b. *Judges and magistrates and the scope of their sentencing powers.* [Online]. [Accessed 1 March 2021]. Available from: https://www.sentencingcouncil.org.uk/blog/post/judges-and-magistrates-and-the-scope-of-their-sentencing-powers/

Sentencing Council. 2021c. *About sentencing guidelines.* [Online]. [Accessed 9 March 2021]. Available from: https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/

Sim, J. 2009. *Punishment and prisons: power and the carceral state.* London: SAGE.

Social Mobility Commission and Sutton Trust. 2019. *Elitist Britain 2019: The educational backgrounds of Britain's leading people.* [Online]. London: Social Mobility Commission. [Accessed 4 March 2021]. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811045/Elitist_Britain_2019.pdf

Sutherland, E.H. 1940. White Collar Criminality. *American Sociological Review.* **5** (1), pp.1-12.

TaxWatch, 2021. *Equality before the law? HMRC'S use of criminal prosecutions for tax fraud and other revenue crimes. A comparison with benefits fraud.* [Online]. York: TaxWatch. [Accessed 26 March 2021]. Available from: https://www.taxwatchuk.org/tax_crime_vs_benefits_crime/

The Guardian. 2013. Benefit fraudsters face increased sentences of up to 10 years in jail. *The Guardian.* [Online]. 16 September. [Accessed 25 March 2021]. Available from: https://www.theguardian.com/uk-news/2013/sep/16/benefit-fraudsters-prosecutions-10-years-jail

Tunley, M. 2010. Need, greed or opportunity? An examination of who commits benefit fraud and why they do it. *Security Journal.* **24** (4), pp.302-319.

Turk, A.T. 1966. Conflict and Criminality. *American Sociological Review.* **31** (3), pp.338-352.

Wheeler, S., Weisburd, D. and Bode, N. 1982. Sentencing the White-Collar Offender: Rhetoric and Reality. *American Sociological Review.* **47** (5), pp.641-659.

White, R. and Velden, J.V.D. 1995. Class and Criminality. *Social Justice.* **22** (1), pp.51-74.