

# NORTHERN IRELAND LEGAL QUARTERLY

Adverse Possession After *J.A. Pye (Oxford) Ltd v The United Kingdom* (*Elizabeth Cooke*)

The Rape Trial and Sexual History Evidence - *R v A* and the (Un)worthy Complainant  
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## **ADVERSE POSSESSION AFTER J.A. PYE (OXFORD) LTD V THE UNITED KINGDOM**

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It is always a pleasure when something really exciting happens in land law. Rarely has there been an excitement to match the decision of the European Court of Human Rights in *J.A. Pye (Oxford) Ltd v The United Kingdom*.<sup>1</sup> This paper is an attempt by an English lawyer to suggest or predict the effects of that decision for Northern Irish land law. The Land Registration Act (NI) 1970<sup>2</sup> is modelled to a considerable extent upon the English land registration statute of 1925, whose provisions on adverse possession were the target of the ECtHR's decision. The English statute has been repealed, but Northern Ireland has the 1925 model still, and therefore faces considerable difficulties in working out the consequences of *Pye*.

The problem therefore stems from English law; it may be that English law can deliver at least part of a solution.

### **Adverse possession in England and in Northern Ireland: how did we get here?**

#### *Making adverse possession work in registered land*

The basics of the law of adverse possession are known to every law student. Possession of land generates a fee simple in the possessor,<sup>3</sup> but a fee simple which is defeasible by the dispossessed proprietor, whom we can call (inaccurately on more than one count) the "true owner". Once land has been in the possession of a trespasser for 12 years, the true owner's right of action against him is barred and the true owner's title is extinguished.<sup>4</sup> The squatter has the best title available; he is now the "owner" of the land.

The fact that possession generates a fee simple has been a considerable problem in Northern Ireland and the Republic, where adverse possession has been so widely used to sort out title on intestacy.<sup>5</sup> Tenant farmers have died intestate, no grant of representation has been taken out, and the deceased's widow and one of his children have farmed the land; subsequent disputes have been resolved, and title confirmed, by the use of adverse possession. For the title confirmed to be a fee simple would be inappropriate in these cases; and the Irish judges have resorted to the doctrine of estoppel to establish that the squatter took over the lease of the land. Land sold under the

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\* This paper was written for a meeting of the Judicial Studies Board of Northern Ireland, on 26th January 2006.

<sup>1</sup> ECtHR App no. 44302/02 (2005).

<sup>2</sup> Hereinafter the "1970 Act (NI)".

<sup>3</sup> *Tichborne v Weir* (1892) 67 LT 735.

<sup>4</sup> The authority in GB is the Limitation Act 1980, s.15. In N.I. it is the Limitation (NI) Order 1989, art.26.

<sup>5</sup> Wylie, *Irish Land Law*, 3<sup>rd</sup> ed., (Dublin, Butterworths, 1997) (hereinafter "Wylie") 1082 ff.

Land Purchase Acts was compulsorily registrable<sup>6</sup> and so the problem came to be resolved largely by the land registrars, who have taken a robust approach and registered the squatter with the leasehold title. They have thus adopted the “Parliamentary conveyance” approach, outlawed in England in *Fairweather v St Marylebone Property Co Ltd*<sup>7</sup> and despite the view taken by the Republic’s Supreme Court in *Perry v Wood farm Homes Ltd*.<sup>8</sup>

So how does the acquisition of title by adverse possession interact, on a technical basis, with the registration of title? Title registration was introduced in England in 1862; it was a rather poor imitation of the very efficient system introduced in New South Wales in 1858 by Sir Robert Torrens. Torrens, whose name is borne by numerous registration systems in the Commonwealth, was an Irishman, from Cork. Ireland very nearly got lucky; Torrens himself came home, became MP for Cambridge and introduced a bill for land registration in Ireland which would have worked rather better than the English statute. As is the way of things, a different Bill was eventually used, and the result was an Irish registration statute very like the English one.<sup>9</sup> In particular, it did not make registration compulsory; and it made the acquisition of title by adverse possession impossible once title was registered – in keeping with the idea that a registered title is absolute and indefeasible. This produced considerable problems when possession ceased to coincide with ownership. The Land Transfer Act 1897 re-activated the Limitation Acts for registered land, but at the court’s discretion – and so did the 1891 registration statute<sup>10</sup> for Ireland. There are of course two problems about allowing the acquisition of title by adverse possession where title is registered. One is the basic principle that there is a state guarantee of title, which sits ill with the idea that your registered title can be lost because someone else has taken possession of the land. The other is a practical problem of documentation; if title to registered land can be acquired by adverse possession, what happens to the registered title of the dispossessed owner, recorded fair and square on the register? Some title registration systems in the Commonwealth, whether on the English or the Torrens model, do not allow acquisition by adverse possession; some do, and have found various different answers to these two problems.<sup>11</sup>

The Land Registration Act 1925 established for England a very successful title registration system which endured here until a couple of years ago. The 1925 approach to adverse possession in registered land was simple: section 75 stated that the Limitation Acts were to operate “in the same manner and to the same extent” in registered land as in unregistered.

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<sup>6</sup> Local Registration of Title (Ireland) Act 1891, s.23.

<sup>7</sup> [1963] AC 510

<sup>8</sup> [1975] IR 104. On this issue see Wallace, (1981) 32 NILQ 254.

<sup>9</sup> The Record of Title Act 1865. See Dowling, “Of Ships and Sealing Wax: The Introduction of Land Registration in Ireland” (1993) 44 NILQ 360.

<sup>10</sup> Local Registration of Title (Ireland) Act 1891, s.52.

<sup>11</sup> Thus it has been remarked that “there is nothing *inherently* contradictory in having principles of adverse possession operate in registered land, at least if those principles are seen positively as a method of transferring title from one person to another”, M. Dixon, “The reform of property law and the Land Registration Act 2002: a risk assessment” in A. Hudson (ed.), *New Perspectives on Property Law, Obligations and Restitution* (London, Cavendish, 2004).

Thus the conceptual problem about guaranteed title is swept unceremoniously aside; the practical problem is addressed, by contrast, with unnecessary ceremony. Section 75 goes on to state that once the squatter's twelve years have elapsed, the registered proprietor holds the land on trust for him. He can apply, or course, to be registered in the dispossessed owner's place – and indeed he will do if at any stage he wants to sell the land, in order to make a convincing title for a purchaser. If, before he does that, the registered proprietor sells, the squatter's ownership binds the purchaser, being an overriding interest.<sup>12</sup>

The trust imposed by section 75 of the Land Registration Act 1925 is a conceptual nightmare,<sup>13</sup> and in any event unnecessary. All that was needed was a provision making the squatter's title an overriding interest. It would thus bind a purchaser; and the nature of the squatter's entitlement would ensure that he would be entitled to rectification of the register under section 82 of the 1925 Act. And that is the solution that the 1970 Act (NI) produced. Section 53 states that the limitation statute applies to registered land as it applies to unregistered land, and among the Schedule 5 interests that affect registered land without registration are “. . . all rights acquired, or in the course of being acquired, consequent on the Limitation (NI) Order 1989”.<sup>14</sup>

### ***Trends in the law of “adverse” possession***

There has been an uneasiness about the law's requirement that, after some time, we forgive those who trespass against us, and actually reward them with ownership. We can see this uneasiness in the tendency to tighten up the requirements for proof of possession. From 1623<sup>15</sup> until the Real Property Limitation Act 1833, possession had to be shown to be “adverse”, that is, not merely a possession of the land but a possession in a manner that was clearly inconsistent with that of the paper owner. The requirement is thus no longer imposed by the legislation but it has proved a persistent notion. It has proved immensely useful as a way of narrowing the goalposts for squatters. In 1879 in *Leigh v Jack*<sup>16</sup> Bramwell LJ revived the notion of adverse possession when he said that “In order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it.” Similarly, a century later in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd*<sup>17</sup> Lord Denning ruled that if a squatter's presence and activities on the land were not inconsistent with the true owner's future intended use of it, he was not in adverse possession, and was present by the implied licence of the owner. This meant that making use of a bit of land for which its owner had no present use, but which he intended to develop later, was deemed to be

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<sup>12</sup> S.70(1)(f).

<sup>13</sup> See Cooke, “Adverse possession: problems of title in registered land” (1994) 14 *Legal Studies* 1 and *Land Registration for the Twenty-First Century: a consultative document* Law Comm. No. 254, (London, The Stationery Office 1998) (hereinafter “Law Comm 254”) at [10.29] ff.

<sup>14</sup> Sch.5, Pt.1, para.14: reference was to the 1958 Act, of course, when the 1970 Act (NI) was enacted.

<sup>15</sup> The limitation statute of James I (21 Jac 1, c.16).

<sup>16</sup> (1879) 5 Ex D 264 at 273.

<sup>17</sup> [1975] QB 94.

permissible and indeed permitted, so that time could not run in the squatter's favour. The implied licence idea was expressly outlawed by the Limitation Act 1980;<sup>18</sup> Bramwell LJ's dictum was rather more long-lasting but was overruled in *Buckinghamshire CC v Moran*.<sup>19</sup>

In the last couple of decades the English courts' approach has swung in the squatter's favour, and we find various rulings making adverse possession rather easier to establish; in particular, it has been made clear that an offer by a squatter to pay rent for the property does not negate adverse possession provided the offer is not taken up.<sup>20</sup> And the squatter does not have to intend to claim ownership, only to possess;<sup>21</sup> he must however intend to exclude the world at large "including, so far as practicable, the paper owner".<sup>22</sup> Those two statements are not entirely consistent, and the latter is not entirely clear, but the courts have juxtaposed the two as an intended concession to the squatter. The intention is that a squatter who is not a deliberate land thief should not be penalised for the fact that he did not, initially at least, actually intend to deprive anyone of their property.

Another trend in legal thinking has been a fresh awareness of the purpose of adverse possession and a new appreciation of the conceptual problem discussed above, that the limitation of actions to recover land does not sit comfortably with land registration theory. A major influence was Martin Dockray's article, "What is adverse possession for?"<sup>23</sup> Dockray highlighted the traditionally quoted objects of the law: to protect defendants from stale claims, to encourage claimants not to sleep on their rights, to ensure that those who possess land may feel confident that they will not be disturbed. He added an idea that is familiar now but which was new at the time, namely the facilitation of the investigation of title to unregistered land. The existence of a limitation period quite simply puts a limit on the length of the abstract necessary. Indeed, the length of title to be deduced, and the length of the limitation period, are directly related (the one is currently 15 years, the other twelve; the one has to be just a little longer than the other). This was a potent influence on the Law Commission's thinking as it prepared for the new law of land registration.<sup>24</sup>

### ***Adverse possession and the Land Registration Act 2002***

In its consultation paper in 1998<sup>25</sup> the Law Commission argued that we needed to move from the rather pedestrian idea of registration of title – the notion that registered title is just an unregistered title seen on a register – to that of title by registration – the fact that registration itself confers title. Consistently with this they sought to reform the law of registered title and to

<sup>18</sup> Sch.1 para.8(4).

<sup>19</sup> [1990] Ch 623, *per* Slade LJ at 639 and Nourse LJ at 645F. The Republic's courts have followed this decision: *Wylie* at p.1089.

<sup>20</sup> *Ocean Estates v Pinder* [1969] 2 AC 19.

<sup>21</sup> *Moran*, *supra* n. 20 at 643.

<sup>22</sup> *Moran*, *supra* n. 20 at 640D.

<sup>23</sup> [1985] Conv 272.

<sup>24</sup> Law Comm. No. 254, Part X; *Land Registration for the Twenty-First Century: a conveyancing revolution* Law Comm. No. 271, (London, The Stationery Office 2001) (hereinafter "Law Comm 271"), Part XIV.

<sup>25</sup> Law Comm. No. 254.

make it squatter-proof. This fits well with theory, as discussed; it also provides a potent motivation for large-scale landowners to register their land voluntarily so as to protect it from squatters, in a context where the completion of the register by the registration of all registrable titles was seen as a priority.<sup>26</sup>

Accordingly the Land Registration Act 2002 provides, at section 96, that no period of limitation shall run against any person in relation to a registered estate.

In addition, schedule 6 makes detailed provision for acquisition of title following, but not really as a result of, possession. It provides that after ten years' possession, a squatter may apply to the registrar to have his title registered. The registrar will notify the registered proprietor, and the latter has sixty-five business days<sup>27</sup> in which to object to the squatter's being registered. If he makes that objection, the squatter will not be registered; and the proprietor has another two years in which to take possession proceedings, if necessary, and remove the squatter. If he does not do so, and the squatter is still in possession two years later, the squatter will be registered as proprietor of the estate.<sup>28</sup> There is therefore provision for a squatter to take the land (or, rather, the registered estate) if the registered proprietor has abandoned it – or, indeed, if he is careless about opening or answering his post.

Moreover, the Schedule sets out three circumstances in which the squatter can be registered as proprietor despite objection. These are:

- it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the squatter, and the circumstances are such that he ought to be registered as proprietor; or
- he has some other entitlement *e.g.* he is an unpaid vendor, or is entitled to the land under a will; or
- he occupied the land under a reasonable mistake about a boundary.

Notice that in none of these cases will adverse possession by itself extinguish a registered estate. In the first two, adverse possession is not in fact relevant to the entitlement; but it is an added ingredient that enables the claimant to apply to the land registry's Adjudicator rather than to the courts.<sup>29</sup> In the third case, the added element of mistake means that only the "innocent" squatter will succeed, even in those boundary cases where adverse possession has traditionally been so useful.

### ***Human rights?***

Notice that the Human Rights Act 1998, incorporating into English law the European Convention on Human Rights and Fundamental Freedoms, has not

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<sup>26</sup> Law Comm No. 271, at [2.9].

<sup>27</sup> Land Registration Rules 2003, SI 2003/1417, r.189.

<sup>28</sup> That is, of the estate of the dispossessed registered proprietor. The Parliamentary conveyance is legitimised; see above, at n.8.

<sup>29</sup> Land Registration Act 2002, ss.73 and 107-111; see Cooke, *The New Law of Land Registration* (Oxford, Hart Publishing Ltd, 2002), 142-3.

figured in this narrative. Article 1 of the First Protocol to the Convention states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The law of adverse possession has not, before the recent decision in *Pye*, been seen to fall foul of this principle.<sup>30</sup> Title to land in this jurisdiction – here meaning the United Kingdom – depends upon possession, and the limitation of actions has always been seen as a necessary corollary of this. That vision of the nature of title has necessarily been tempered by a growing realisation that title to registered land does not depend upon possession but upon registration; but not, until recently, by any concern about human rights.

### ***Pye v UK: what did the ECtHR decide?***

#### ***Pye in the English courts***

Into this background comes the case of *JA Pye (Oxford) Ltd v Graham*, litigated and reported at all three levels – Chancery Division, Court of Appeal and House of Lords.<sup>31</sup> Factually, the case concerned a farm not far from Newbury belonging to *JA Pye (Oxford) Ltd*. Mr Graham had a grazing licence over the land in question for 1983; when it came to an end Pye asked him to vacate the land, indicating that it was going to be the subject of development. In fact, development did not happen. And Mr Graham kept on using the land both for cutting hay and for grazing. He asked again in 1984 and 1985 for another grazing licence but, on getting no response, understandably stopped bothering. Years passed, and Graham grazed and harrowed and rolled and fertilised and maintained the fences. In 1997 he registered a caution at the Land Registry on the basis that he had obtained title by adverse possession, and in 1998 Pye took action to have the caution cancelled.

So here was a development company, knowing the law or at least well able to get advice, which could easily have recovered possession – Mr Graham would have either left or paid rent if asked. Should the penalty for this be the loss of 25 hectares of development land?

At first instance Neuberger J said yes; but added that he did so without enthusiasm. Pye’s appeal to the Court of Appeal succeeded, on the basis that Graham had not had the requisite intention to establish adverse possession;

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<sup>30</sup> The discussion of adverse possession in Rook, *Property Law and Human Rights* (London, Blackstone, 2001) is very brief (pp.205-8); it was written after the Court of Appeal’s decision in *Pye v Graham*.

<sup>31</sup> (2000) 81 P & CR 177; [2001] EWCA Civ 117; [2002] UKHL 30.

but in the House of Lords he triumphed again, their lordships stressing that he did not need to manifest an intention to own the land. The details of that dispute about the necessary intention are fascinating because they demonstrate just how much room for manoeuvre there is in the requirements for adverse possession. True, the House of Lords has affirmed an orthodoxy; but in the post-1998 world, orthodoxy may have to yield to human rights considerations.

In *Pye v Graham* it did not, of course; the three courts each expressed different views about the impact of human rights upon the case, but in none was it accepted that human rights had any impact – not even in the Court of Appeal, where Pye was successful. At first instance human rights points were not argued (note that the Human Rights Act 1998 did not come into force until after the judgment was given). At the close of his judgment Neuberger J simply said: “I believe that the result [in this case] is disproportionate, because, particularly in a climate of increasing awareness of human rights, including the right to enjoy one’s own property, it does seem draconian to an owner, and a windfall for the squatter, that, just because the owner has taken no steps to evict a squatter for 12 years, the owners should lose 25 hectares of land with no compensation whatsoever.” Human rights was argued strenuously in the Court of Appeal. It was not claimed that section 75 of the Land Registration Act 1925 should be the subject of a declaration of incompatibility under section 4 of the Human Rights Act 1998; only that section 3 should be brought into play, so that the court would interpret the statute so as to avoid a breach of Article 1 of the First Protocol. While Pye succeeded on the facts, the human rights arguments were given very short shrift. This was not a deprivation of possessions, only a barring of the owner’s right to evict the squatter, with the extinction of his title a “logical and pragmatic” consequence of this;<sup>32</sup> in any event, if there was a deprivation it was held to be proportionate and in the public interest.<sup>33</sup> In the House of Lords it was conceded by counsel for Pye that the Human Rights Act 1998 was not relevant and did not operate retrospectively; and therefore human rights points were not argued. Lord Hope of Craighead comments, at [73]:

“ . . . one might have expected the law – in the context of a statutory regime where compensation is not available – to lean in favour of the protection of a registered proprietor against the actions of persons who cannot show a competing title on the register. Fortunately . . . a much more rigorous regime has now been enacted in Schedule 6 to the Land Registration Act 2002. Its effect will be to make it much harder for a squatter who is in possession of registered land to obtain a title to it against the wishes of the proprietor. The unfairness in the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor.”

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<sup>32</sup> [2001] EWCA Civ 177 at [45] ff.

<sup>33</sup> [2001] EWCA Civ 117, at [52].

***Beaulane Properties Ltd v Palmer: human rights to the fore***

Not long after *Pye* came another adverse possession case: *Beaulane Properties Ltd v Palmer*.<sup>34</sup> At the point when the case was heard, it was known that *Pye* had applied to the European Court of Human Rights, the defendant being not Graham but the United Kingdom. *Beaulane* was a case where adverse possession had again been taken of a field for grazing livestock; this time, time had expired after the coming into force of the Human Rights Act 1998 but before the coming into force of the Land Registration Act 2002. And this time the registered proprietor argued human rights: that the effect of section 75 of the Land Registration Act 1925 was to deprive it of its property without compensation contrary to the right guaranteed by Article 1 of the First Protocol.

The registered proprietor succeeded. Nicholas Strauss QC sitting as a Deputy Judge of the High Court found that on the normal interpretation of the Land Registration Act 1925 *Beaulane* had become a trustee of the registered title for Mr Palmer, who had made out his claim in adverse possession. He went on to consider the argument based on human rights. He noted the line of authority beginning with *Leigh v Jack*<sup>35</sup> in 1879 until *Buckinghamshire CC v Moran*<sup>36</sup> and pointed out that when the Land Transfer Act 1897 introduced the operation of the Limitation Acts into registered land, and when the Land Registration Act 1925 was enacted, the law was such that it was going to be very difficult for a landowner to lose his title by inadvertence. Possession had to be adverse, in the sense that it was obviously incompatible with a present use of the land; unless a landowner had actually abandoned his land, he could not be taken by surprise by a squatter's claim. *Moran* changed this and resumed the doctrine of non-adverse possession. Accordingly limitation did not, after *Moran*, operate in registered land as the legislature had intended in 1897 and 1925. The Deputy Judge discussed the three limbs of Article 1 of the First Protocol, and concluded that *Beaulane* had indeed been deprived of its possessions, and that there was no public interest in favour of this deprivation. The reasons justifying the operation of the limitation of actions to recover land are largely specific to unregistered land – in particular the promotion of certainty and the facilitation of conveyancing – as indeed the Law Commission argued, in its consultative document,<sup>37</sup> in favour of the reforms it proposed.

This left the court with the obligation to operate section 3 of the Human Rights Act 1998: to interpret the relevant statutory provision in such a way as to make its operation compatible with the convention. Counsel for *Beaulane* argued for the option of declaring the law on the limitation of actions to recover land to be inapplicable to registered land. In view of the express provisions of the Land Registration Act 1925 Strauss QC dismissed this option as an act of “judicial vandalism”.<sup>38</sup> Instead, and with admirable creativity, the Deputy Judge held that section 75 of the Land Registration Act 1925 was to be interpreted in accordance with the case law in existence at the

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<sup>34</sup> [2005] EWHC 1071 (Ch.).

<sup>35</sup> (1879) 5 Ex D 264, CA; see above at n.16.

<sup>36</sup> [1990] Ch 623; see above at n.19.

<sup>37</sup> See n.25 above.

<sup>38</sup> [2005] EWHC 1071 (Ch) at [210].

time of its enactment: namely, as if *Leigh v Jack* remained authoritative. This meant that Palmer's case failed. He had used the disputed land for grazing for a period during which the registered proprietor had no use for it. Accordingly his possession was not adverse and did not establish a title for him.

He also held that, had Palmer's claim succeeded, there would have been no possibility of reinterpreting the statutory provisions in such a way as to create a right for the dispossessed proprietor to be compensated for his loss; but in view of his finding in Palmer's case, the issue of compensation did not arise.

*Beaulane* was a shock. *Leigh v Jack* had been felt to be so outdated and so thoroughly eradicated that it seemed unthinkable that it should be revived. But a bigger shock was to come.

### ***Pye in the ECtHR***

The judgment in *Beaulane* was given with the express intention of influencing the ECtHR in *Pye v UK*. And it seems to have done so.<sup>39</sup> The judges of the ECtHR were faced with a claim by Pye that the UK had deprived it of its possessions without compensation by allowing the Limitation Acts to operate in registered land (i.e. by enacting section 75 of the Land Registration Act 1925 and allowing it to remain on the statute book). Pye succeeded, the ECtHR ruling in its favour by a four to three majority.

The reasoning in the ECtHR judgment focuses on the government's argument that there is no deprivation of possessions in adverse possession cases. The traditional English, feudal view that what we colloquially call "ownership" is in fact a limited right, always subject to the possibility of dispossession, is met by a very European concept of ownership. Ownership is an absolute; and a statute of Limitations, with a provision for the extinguishment of title without compensation, is a deprivation of possessions, which bites upon the property at the moment when the title is extinguished, rather than being a condition of that ownership *ab initio*.<sup>40</sup> The court noted the government's argument that the deprivation if there was one, was the result of Pye's inactivity, and rejected it, laying the blame squarely upon the statute.<sup>41</sup>

As to the issue of legitimate aim, the court noted that limitation periods are not in general incompatible with the Convention.<sup>42</sup> The court noted the Law Commission's arguments and the amendments to our law of registered title in the Land Registration Act 2002; and that the operation of limitation has not been entirely eliminated and cannot be said to serve no public interest in registered land.<sup>43</sup> But it held that in the current case, given the scale of the loss and the absence of compensation, it held that the operation of the law so as to deprive Pye of its title was "an individual and excessive burden and

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<sup>39</sup> ECtHR App. no. 44302/02 (2005) at [33]

<sup>40</sup> *ibid.*, at [50]

<sup>41</sup> *ibid.*, at [56].

<sup>42</sup> *ibid.*, at [63].

<sup>43</sup> *ibid.*, at [67].

upset the fair balance between the demands of the public interest on the one hand and the applicants' right to the peaceful enjoyment of their possession on the other."<sup>44</sup> There was therefore a violation of Article 1 of Protocol 1 of the Convention. The court gave particular weight to the reasons given for the changes in the 2002 statute, "and to the view of the Law Commission and the Land Registry as to the lack of cogent reasons to justify the system of adverse possession as it applied in the case of registered land."<sup>45</sup> There is an element of "you knew it was wrong, didn't you!"

Notice the limitations on the decision. It is relevant only to registered land; in unregistered land there is ample justification for the continuance of the current law.<sup>46</sup> It does not state that all cases of adverse possession in registered land under our 1925 Act will be unlawful; nor does it state that all applications of Schedule 6 of the 2002 Act will be lawful.

There was a strong dissent in the ECtHR, on the basis that as property developers with ample access to legal advice, Pye could easily have avoided the difficulty. The UK government has sought leave to appeal to Grand Chamber of the European Court of Human Rights.

### Consequences for England and Wales

In the House of Lords in *Pye v Graham*, Lord Bingham of Cornhill said:<sup>47</sup>

"It is reassuring to learn that the Land Registration Act 2002 has addressed the risk that a registered owner may lose his title by inadvertence."

It is not entirely obvious that the provisions of the Land Registration Act 2002 will eliminate human rights problems for the future.

Of the three exceptions in Schedule 6,<sup>48</sup> two depend upon an entitlement independent of adverse possession. The third, relating to genuine mistakes about boundaries, is likely to apply only in a small number of cases and, more importantly, to relate to only very small areas of land. Boundary disputes are well-established as an area where adverse possession has a uniquely useful role to play in the resolution of disputes, the avoidance of conveyancing costs and, in some cases, the avoidance of costly demolition operations (consider the possibility of a garage encroaching over a boundary by just a few inches). So when title is transferred under one of these exceptions, there are strong arguments in favour of this being a deprivation in the public interest.

The main weakness would seem to be the possibility of losing land through inadvertence, through failure to respond to the registrar's notice. This is a problem because the majority in the ECtHR seemed to hold that the cause of the loss was not inadvertence (which was after all a conspicuous feature of *Pye* itself). Note that the ECtHR's approval expressed, at [74], of the new provisions in the 2002 Act refers to the three exceptions in Schedule 6 but

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<sup>44</sup> *ibid.*, at [75].

<sup>45</sup> *ibid.*, at [74].

<sup>46</sup> See above at n.24.

<sup>47</sup> [2002] UKHL 30, at [2].

<sup>48</sup> See above, text following n.29.

not to the possibility of title being lost simply because the registered proprietor does not object. Moreover, the 2002 Act (or, rather, rules thereunder<sup>49</sup>) is quite strict: there is a relatively short period in which a registered proprietor can respond to the registrar's notification and object to the registration of the squatter.

This option might be better explored if there were to be a successful appeal to the Grand Chamber on the basis that Pye itself was responsible for its loss. In that event, loss of title under the 2002 Act by failure to respond to the registrar's notice might seem safe, unless the period itself is too short. It is conceivable that an elderly or disabled registered proprietor, or one absent from his address for service for good reason, might miss the notice and lose his land through inadvertence.<sup>50</sup> He might then claim to be suffering a disproportionate burden, and the court would then have to examine the justification for the period of sixty-five business days.

As a separate issue, however, it is possible that the courts may still hear claims of adverse possession under the 1925 Act, where time expired before the Land Registration Act 2002 came into force.<sup>51</sup> This will give rise to considerable problems, in the same terms as those faced in Northern Ireland; the issue is discussed below.

What can we say about the registered proprietor who has lost his title already under the 1925 Act, but who could now allege that the loss was a violation of Article 1 of Protocol 1? It appears that he has no remedy. He cannot proceed again against the squatter, for the time limit for appeal will have expired. He cannot apply to Strasbourg, where a six-month time limit is operated.<sup>52</sup> And although the Human Rights Act 1998 allows him to take action against a public authority, in this case the court, there is a one year limitation period,<sup>53</sup> and in any event there is no right to damages where the public authority is a court except in cases of arrest or detention contrary to Article 5 of the Convention.<sup>54</sup> The registered proprietor who has lost his title in the past would not appear to have a source of redress now.

### Consequences for Northern Ireland

Looking now at Northern Ireland, and taking the latter point first, it would appear that claims from registered proprietors who have lost their title in the past are not going to arise, for the reasons just explained. The difficulty is going to arise in new cases, where a squatter claims title by adverse possession. What are the courts going to do?

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<sup>49</sup> See n.28, above.

<sup>50</sup> Note the provisions enabling the proprietor to give the registry up to three addresses for service; of which one must be a postal address; the others may be electronic, or a document exchange: Land Registration Rules 2003 SI 2003/1417, r. 198.

<sup>51</sup> There are some transitional provisions, which would be tedious here; see Cooke, *Land Registration* (n.29 above) at 152.

<sup>52</sup> Wadham, Mountfield and Edmundson, *Blackstone's Guide to the Human Rights Act*, 3<sup>rd</sup> ed. (Oxford, OUP, 2003), 220.

<sup>53</sup> Human Rights Act 1998 s.7(5).

<sup>54</sup> S.9(3).

In principle, there are three options, assuming a claim that would have been successful pre-*Pye*:

1. Interpret the limitation statute in such a way that the claimant fails (as did the English court in *Beaulane*<sup>55</sup>).

This involves looking back to the line of authority running from *Leigh v Jack*<sup>56</sup> to *Buckinghamshire CC v Moran*.<sup>57</sup> If the case concerns inheritance and intestacy, this would represent a more startling break with tradition even than it did in *Beaulane*.

2. Allow the squatter's claim because it would also succeed under one of the three exceptions in Schedule 6 to the Land Registration Act 2002: the claimant has some other entitlement, or he has made an honest mistake about boundaries, or the defendant has abandoned the land and is to blame for his loss – thus distinguishing *Pye*.

This involves some faith in the provisions of the 2002 Act; but that faith would seem justified if the individual circumstances are examined carefully. If there is a genuine boundary mistake, or if the claimant has some other entitlement, there is every chance that he may succeed without there being any violation of the Convention.

3. Allow the squatter's claim if it appears that the registered proprietor's own inadvertence or inactivity is the cause of his loss.

This is NOT a safe option for the courts at the moment; it could only be pursued if there is an appeal from the ECtHR to the Grand Chamber in *Pye v UK*, and only if that appeal were to succeed on the basis that *Pye*'s own fault caused its loss. Even so, great care would be needed; recall that *Pye* was a development company with ready access to legal advice, so that more might be expected of it than of a private individual.

4. Allow the squatter's claim because the human rights considerations operative in *Pye* are not operative in Northern Ireland.

The Northern Irish courts could take the view that the demographics, economics and legal tradition in Northern Ireland and the Republic make a difference to the argument as to the potential justification for the deprivation of property without compensation. The extensive use made of adverse possession over many years for resolving problems following intestacy could be said to justify the deprivation of property as being "in the public interest".

Among the arguments in favour of doing this are the wealth of case law on this use of adverse possession in Northern Ireland and the Republic,<sup>58</sup> and the special legislative provision in both jurisdictions to facilitate the operation of adverse possession in this context. Thus in the Republic, the limitation period is reduced from 12 to 6 years in respect of estates of deceased person.<sup>59</sup> And in both the Republic and in Northern Ireland legislation has confirmed the courts' rulings that a personal representative is not a trustee for the purposes

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<sup>55</sup> See above at n.35 ff.

<sup>56</sup> (1879) 5 Ex D 264.

<sup>57</sup> [1990] Ch.623. See above, text at n.20.

<sup>58</sup> Of which the material in *Wylie*, chap.23, is but a selection.

<sup>59</sup> Succession Act 1965, s.126.

of the statute of limitations<sup>60</sup> – this enables, for example, a surviving spouse to acquire title to the estate by adverse possession and to bar the interests of the beneficiaries, despite the fact that as administrator of the estate and therefore a trustee she would otherwise be unable to do so.

The difficulty with this argument is that it is rare for an argument to succeed on these grounds in the absence of provision for compensation, in the Strasbourg jurisprudence (to which the domestic courts must give effect in accordance with section 2 of the Human Rights Act 1998). However, the ECtHR in *Pye* referred to some cases where deprivation without compensation had been held to be permissible.<sup>61</sup>

5. Make a declaration of incompatibility (of course, only the higher courts have power to do this<sup>62</sup>).

The final card in the courts' hands is to declare section 53 of the 1970 Act (NI) to be incompatible with the Human Rights Act 1998. This is a dramatic option. It does not change the result in the individual case; it will, assuming that it is acted on by the legislature and results in an amendment of the 1970 Act (NI) change the law of adverse possession for all subsequent cases. It would pave the way for the introduction in Northern Ireland of something to match the adverse possession provisions in section 96 and schedule 6 of the Land Registration Act 2002 in England. In view of the possibility of an appeal against the ECtHR's decision in *Pye v UK*, there may be an argument for not doing this until it is known whether or not there will be an appeal, and what its outcome might be.

This paper has dealt only with land whose title is registered. The decision in *Pye v UK* was expressly limited to registered title, and it can have no effect upon unregistered title. Where title is unregistered, the public interest in having a system of acquisition of title by adverse possession has not seriously been questioned. However, in view of what has been said above, we have to consider whether or not the lack of any scope for compensation might be a route for challenge in the future. The same must be true where land is registered under the deeds registration system.<sup>63</sup> Deeds registration does not guarantee title, and does not always make deduction of title straightforward; accordingly the existence of a system of adverse possession must have the same utility as it has in unregistered land but, again, the absence of compensation may give rise to difficulties.

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<sup>60</sup> Statute of Limitations 1957, s.2(2); Limitation (NI) Order 1989, art.45(1).

<sup>61</sup> ECtHR App. no. 44302/02 (2005) at [47].

<sup>62</sup> Human Rights Act 1998 s.4(2).

<sup>63</sup> Registration of Deeds Act (NI) 1970.

## THE RAPE TRIAL AND SEXUAL HISTORY EVIDENCE - *R V A* AND THE (UN)WORTHY COMPLAINANT

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*“Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society.”<sup>1</sup>*

On August 1 2002, *The Guardian* carried a report of a 17-year-old woman who had taken a fatal overdose of antidepressants.<sup>2</sup> She had been raped by a 14-year-old boy. However, a careful reading of that report, and of an article that was included in the “Women” section of the paper<sup>3</sup> on the following day, revealed that it was not only the physical and emotional violation of the rape that had driven her to such an extreme of despair but the experience that she underwent during the trial of her assailant. Her family are recorded as saying that she had never recovered from the attack or from the humiliation of the trial, when she was twice asked to hold up in court the underwear she had been wearing at the time of the assault and to read out what was written on it – “Little Devil”.<sup>4</sup>

It is beyond dispute that rape is an appalling crime, encompassing assault and violation. From the above example, it is also abundantly clear that rape trials can be horrible.<sup>5</sup> As Purdom has noted, it is often the victim of rape who is made to feel ashamed and dirty, particularly where there is a degree of

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<sup>1</sup> Madame Justice L’Heureux-Dube in *R. v Seaboyer* [1991] 2 SCR 577

<sup>2</sup> “Call to protect rape victims as boy is locked up” – Kirsty Scott: *The Guardian*, August 1 2002

<sup>3</sup> “She Couldn’t Take Any More” – Kirsty Scott: *The Guardian*, August 2 2002.

<sup>4</sup> There are aspects of the media reporting of this case and the representation of the complainant in particular, that are problematic from a feminist perspective. It was made clear in the report that there was a degree of casual acquaintance between the complainant and defendant and this appears to have been used against her in court and in the report, to the extent that it was recorded for example, that the defence counsel suggested that she had gone with the defendant to the park (where she was raped) voluntarily, therefore it was not a “real”, *i.e.* stranger rape. Further, the complainant’s parents appear to have attempted to “reclaim” their daughter’s “honour” by suggesting that she was a virgin, thus playing to the prevalent gender stereotypes of appropriate femininity. The construction of rape complainants and the media is outside the scope of this paper. For a consideration of this issue see Lees, S (1996) *Carnal Knowledge: Rape on Trial*, Penguin, London, chap.3. The purpose of the example at this point is to illustrate vividly the horror and degradation of rape and the second “judicial rape” that takes place during the trial.

<sup>5</sup> See, *e.g.* “Rape is never glamorous” – Julie Bindel, *The Guardian* (Comment) October 2 2003.

acquaintance between her and her alleged rapist as there was in the above example.<sup>6</sup> Yet in our modern, enlightened, equal opportunities society, in the era of so called “girl power”, why should this be so? Why is it that rape is equated with the degradation and shame of the victim? What conception of women and the body does such shame assume?<sup>7</sup> These questions are central to the issue of how women are judged within the arena of the criminal law and arguably infer that rape is a “concern of standards”<sup>8</sup> as much as a matter of assault. As Purdom has perceptively commented, shame is an implicit judgment against the complainant, who throughout the criminal process is made to feel dishonourable, unworthy, indecent, a “tart”.<sup>9</sup> This is particularly obvious in the humiliation that women so often suffer in rape trials, trials which often become as much a judgment of the woman complainant and her “honour,” as of the man and rape.

As several commentators have argued,<sup>10</sup> one of the most important issues in tracing criminal law’s patrolling of the boundaries of appropriate (hetero)sexuality<sup>11</sup> and sexual difference are the rules of evidence, which shape the relevant context and time frame within which the female subject (or in the case of rape, object) is conceptualised. A well-established body of research has considered how the sexing of rape complainants and their objectification happens in the interpretation of the substantive law of rape. This discussion remains relevant in the light of the legislative reforms of the Sexual Offences Act 2003<sup>12</sup> as the new Act focuses almost exclusively on the

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<sup>6</sup> Purdom, J (2000) “Judging Women: Rethinking Shame through Corporeality” in Richardson, J & Sandland, R (eds) *Feminist Perspectives on Law and Theory*, Cavendish Publishing, London at p.209.

<sup>7</sup> Purdom (2000) *supra* n.6. Purdom’s article focuses on the construction of shame in relation to the female body through a consideration of the theories of Deleuze. For a further philosophical discussion of shame and “Woman as Victim” see the discussion of Girard in A. Young, (1996) *Femininity as Marginalia* in McVeigh, Rush and Young (eds) *Criminal Legal Practices*, Open University Press, Oxford.

<sup>8</sup> Purdom (2000) *supra* n.6, p.209.

<sup>9</sup> *ibid.* Purdom used the term “victim” advisedly as her paper is a study of inscriptions of victimhood and conceptions of shame within the law on sexual offences. Throughout this article, I intend to use the term complainant, as the content of the paper is critiquing the disempowerment of women in the Criminal Justice System and I consider that within the conceptions of “woman” constructed by that system, victim can have pejorative connotations. Writers seeking to critique the feminist position such as Camille Paglia (1994) *Vamps and Tramps*, Random House, New York and Katie Roiphe (1993) *The Morning After*, Little & Brown, Boston have certainly used the term victim in that sense.

<sup>10</sup> See generally, N. Lacey, (1998) *Unspeakable Subjects: Feminist Essays in legal and social theory*, Hart Publishing, Oxford; N. Naffine (1994) “Possession: Erotic Love in the Law of Rape”, *Modern Law Review* 10, P. Rumney, (2001) “The Review of Sex Offences and Rape Law Reform: Another False Dawn?” [2001] 64 *Modern Law Review* 890; J. McEwan, (2005) “Proving Consent in sexual cases: Legislative change and Cultural Evolution”, 9 *E & P* 1-28.

<sup>11</sup> I am concerned in this paper with female complainants, *i.e.* women that have been raped. For a consideration of male rape and some of the problems that arise see P. Rumney, (2001) “Male Rape in the Courtroom: Issues and Concerns” *Crim Law Rev* 205 and P. Rumney, and M. Morgan Taylor, (1997) “Recognising the Male Victim: Gender Neutrality and the Law of Rape: Part 1”, 26 *Anglo-American Law Review* 198.

<sup>12</sup> The Act came into force on 1 May 2004.

revision of the substantive law of rape. The consequence of this focus is inevitably, that important issues relating to the way in which legal definitions of rape are interpreted and enforced by the criminal justice system and the norms, assumptions, images and values that shape that enforcement process have been excluded from consideration.

In this paper, I wish to explore the way in which the rules relating to sexual history evidence continue this sexing and thus contract the rape victim's space for a meaningful expression of her violation.<sup>13</sup> This is an area that has attracted much comment since the provisions of the Youth Justice and Criminal Evidence Act 1999 came into force. However, it is my contention that much of the focus on section 41 YJCEA 1999 in academic literature seems to have shifted away from the concerns which led to the legislation in the first place – namely the low conviction rate in rape cases<sup>14</sup> and the myths about women that led to this type of evidence being misused.<sup>15</sup>

Underlying much of the commentary in this area is the traditional assumption that previous sex with the defendant ought to be treated differently to previous sex with third parties. This assumption is rarely made explicit<sup>16</sup> and indeed even when it is raised, it seems to have been accepted uncritically by many, including the House of Lords in the important case of *R v A*.<sup>17</sup> The questions I now want to address are why is previous sexual history with the defendant seen as self evidently relevant to a rape trial? What underlies the assumptions made about relevance and what does the admission of such evidence say about the complainant and her worthiness of protection by the law?

To do this, I will examine the position prior to the 1999 Act and then move on to consider how the judiciary have effected a shift in focus through the

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<sup>13</sup> By this I mean the way that women are being denied a way of talking about their experiences in their own terms in the rape trial. Women need to be taken seriously for who and what they are and not what others, including the law, assume them to be. For a consideration of how female sexual abuse victims are constructed see C. Malone,; L. Farthing, and L. Mace, (1996) *The Memory Bird: Survivors of Sexual Abuse*, Virago Press, London. See also I. Bryan, & J. Wallbank, (2004) "The Lore of Sexual Difference in Social and Legal Discourse on 'Date Rape'" 15 *Law and Critique* 183.

<sup>14</sup> The conviction rate in rape cases has continued to decline since the inception of the 2003 Act. See A. Travis, "Rape Conviction rate falls to an all time low" *The Guardian* February 25 2005 and L. Kelly, J. Lovett, L. Regan, , *A gap or a chasm? Attrition in reported rape cases* Home Office Research Study 293 (February 2005).

<sup>15</sup> See N. Kibble, "Judicial Discretion and the Admissibility of Prior Sexual History Evidence under section 41 YJCEA 1999: "Sometimes Sticking to your Guns means Shooting Yourself in the Foot: Part 2" [2005] *Crim LR* 263.

<sup>16</sup> For a fuller consideration see N. Kibble, "The relevance and admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases (2001) 32 *L. Cambrian Rev* 27 and J. Temkin, (2002) *Rape and the Legal Process*, 2<sup>nd</sup> ed., OUP, Oxford pp196-225.

<sup>17</sup> [2001] 3 All ER 1.

case of *R v A* and the use of the Human Rights Act 1998 – a shift that is perpetuated in the more recent debates.<sup>18</sup>

### **The Troubled Past of Sexual History Evidence:<sup>19</sup>**

Ever since Parliament failed in 1976 to implement the proposal contained in the Heilbron Committee's Report for reform of the common law rules on the admissibility of sexual history evidence,<sup>20</sup> this area of the law has been steeped in controversy. However, as Kibble notes, much of the debate has centred on the general admissibility of sexual history evidence and in particular, the problem of third party sexual history evidence.<sup>21</sup> To some extent, this focus is understandable given that this rule of evidence is perhaps the clearest example of the law's exercise of disciplinary power to police female sexuality. Feminist commentators have rightly asked why is it that when birth control has liberated women from the fear of unwanted pregnancy, when a woman's right to sexual pleasure is allegedly widely recognised, when women in industrialised countries now comprise more than 50% of the workforce, that a rape complainant's credibility is still judged on her sexual reputation, a reputation that is constructed and enforced by male assumptions of appropriate femininity? However, these arguments have failed to address the distinction made by the law between previous sex with the defendant and with other men generally – a distinction that has been maintained throughout the history of the common law and legislation in the UK and a distinction that has continued to be used to the detriment of women who claim that they have been raped in the context of a relationship or acquaintance situation.

Historically, Temkin notes that when the common law rules on the treatment of previous sexual history were developed in the 19<sup>th</sup> century, it was assumed that previous sexual history with the defendant should be treated differently to previous sexual history with third parties in as far as the former was relevant to consent and credibility rather than simply to the issue of credibility.<sup>22</sup> This assumption was not questioned at the time of the Heilbron Report and indeed, Kibble notes that in that report there was no real consideration of the basis for the admission of sexual history evidence with

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<sup>18</sup> *E.g.* see D. Birch, "Rethinking Sexual History Evidence: Proposals for Fairer Trials [2002] *Crim LR* 531; D. Birch, "Untangling Sexual History Evidence: A rejoinder to Professor Temkin [2003] *Crim LR* 370.

<sup>19</sup> For arguments for and against the 1999 legislation see J. Temkin, "Sexual History Evidence – Beware the Backlash" [2003] *Crim LR* 217; N. Kibble, "The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases (2001) 32 *Cambrian Law Review* 27; D. Birch, "Rethinking Sexual history Evidence: Proposals for Fairer Trials [2002] *Crim LR* 531; D. Birch, "Untangling Sexual History Evidence: a Rejoinder to Professor Temkin [2003] *Crim LR* 370; M. Redmayne, "Myths, Relationships and Coincidences: the New Problems of Sexual History (2003) 7 *E & P* 75; N. Kibble "Judicial Perspectives on the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios [2005] *Crim LR* 190.

<sup>20</sup> Report of the Advisory Group on the Law of Rape paras.137-138.

<sup>21</sup> Kibble (2001) *supra* n.19 p.30.

<sup>22</sup> Temkin (2002) *supra* n.16 at p.196-197. *Riley* (1887) 18 QBD 481; *Cockcroft* (1870) 11 Cox CC 410.

the defendant.<sup>23</sup> The assumption that such evidence was obviously admissible was not challenged and has rarely been challenged since, perhaps, in part, because comparative studies show that it is maintained in most other common law jurisdictions.<sup>24</sup> Consequently, although section 2 of the Sexual Offences (Amendment) Act 1976 prohibited the use of sexual history evidence in “third party” cases (with a power for the Judge to admit it if was relevant in the particular case), sexual history evidence between the complainant and the defendant was not included in the prohibition<sup>25</sup> and continued to be freely admissible.

The Home Office Report, *Speaking Up For Justice*<sup>26</sup> recognised that the 1976 Act had failed and recommended that the law be changed. Sections 41 to 43 YJCEA 1999 extended the embargo on the use of sexual history evidence and prohibited the use of such evidence save in 4 exceptional cases – where consent is not the issue,<sup>27</sup> where the evidence relates to sexual behaviour which is alleged to have taken place at or around the same time as the event which is the subject matter of the charge,<sup>28</sup> where the past sexual behaviour is so similar to the complainant’s behaviour on the occasion in question that the similarity cannot reasonably be explained as a coincidence<sup>29</sup> and to rebut or explain sexual history evidence adduced by the prosecution.<sup>30</sup> It is notable that, in contrast to “rape shield” legislation in other jurisdictions,<sup>31</sup> there was

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<sup>23</sup> Kibble (2001) *supra* n.19, p.32. See also Heilbron Report *op cit* n.20, paras.100-101 at p.17.

<sup>24</sup> For a fuller consideration of the comparative position see Temkin (2002) *supra* n.16 at pp.205 -225 and Kibble (2001) *supra* n.19 at pp. 43-58.

<sup>25</sup> The Criminal Law Revision Committee (CLRC 15<sup>th</sup> Report, *Sexual Offences* paras.2.88-2.89), took the view, “based on the opinion of some Old Bailey judges,” that the provision was working well. However, studies suggested otherwise and case law from the Court of Appeal on section 2 indicated that they were entirely unwilling to deal with the issues. See J. Temkin, (2000) “Prosecuting and Defending Rape: Perspectives from the Bar, 27 *Journal of Law & Society* 219. See also V. Baird, (1998) *Rape in Court*, Society for Labour Lawyers, London and “Beware of Barristers” – Jennifer Temkin; *The Guardian* March 8 2000. For a comprehensive view of the pre 1999 attitude of the Court of Appeal to sexual history evidence see A. McColgan, (1996) “Common Law and the Relevance of Sexual History Evidence” *Oxford Journal of Legal Studies*, Vol.6, No.2 275. See also S. Lees, (1997) *Ruling Passions: Sexual Violence, Reputation and the Law* Open University Press, Buckingham, p.69.

<sup>26</sup> Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System 1998, Home Office London para.9.70.

<sup>27</sup> S.41(3)(a) YJCEA 1999.

<sup>28</sup> S.41(3)(b) YJCEA 1999.

<sup>29</sup> S.41(3)(c) YJCEA 1999.

<sup>30</sup> S.41(5) YJCEA 1999.

<sup>31</sup> See n.24 and accompanying text. In the rape shield legislation of New South Wales (Crimes Act 1900 s.409B(3)) and Michigan (Michigan Criminal Sexual Conduct Act s.520j), there is a specific exception to the rule of exclusion so that defence counsel can apply for evidence of sexual history with the accused to be admitted. The ‘new’ Canadian provisions are more complex and rely upon judicial discretion in this area. See s.276 of the Canadian Criminal Code which has been interpreted in *R v Seaboyer* 83 DLR 193, *R v M (M)* (1999) Ont. Sup CJ LEXIS 1027 and *R v Darrach* [2000] SCC 46. Commentary on these cases can be found in Temkin (2002) *supra* n.16 and Kibble (2001) *supra* n.16.

no explicit exception in the legislation relating to previous sexual history with the defendant and so for the first time, this type of sexual history evidence was placed on the same exclusionary footing as sexual history evidence with third parties.

Generally, some writers have expressed concern that the exceptional categories in the 1999 Act were too broadly drawn in relation to third party evidence, allowing the defence ample scope to bring the defendant within one or other of the categories.<sup>32</sup> For example, a mistaken belief defence<sup>33</sup> continues under the Act to provide an opportunity to apply to the judge for the admission of sexual history evidence. The defendant would continue to be able to argue that he mistakenly believed that the complainant was consenting because for example, he knew of specific instances of sexual activity with other men and thought she would be willing to have intercourse with him.<sup>34</sup> Further, Temkin has specifically considered the position of sexual history evidence with the defendant and has persuasively argued that, as with third party evidence, there is scope for the defence to apply to adduce such evidence if it is relevant under each of the four exceptions set out in the Act.<sup>35</sup> Whilst, on the one hand, Temkin appears to argue generally against the admission of prior sexual history evidence with the defendant, she counselled that the lack of such an exception in the Act might lead to a wholesale admission of such evidence without a proper consideration of its relevance.<sup>36</sup> This latter concern appears to have been borne out by the House of Lords decision in *R v A*, which I will consider in some detail later in this paper, and is also evident in a recent study of judicial attitudes to the admissibility of prior sexual history evidence.<sup>37</sup>

As a starting point, I would argue generally that there is no logic in allowing evidence of a woman's sexual history either as an assessment of her truthfulness or to show that the man believed that she consented. There is a difference between what a man has heard, which makes him think that she might consent if he makes an advance, and how she behaves when he does. The latter is the issue in the trial and the evidence should relate to her conduct at the time. It cannot be affected by what he thinks she did with others in the past. Further, a previous relationship with the accused does not necessarily indicate that consent was given on the occasion in question. This point was raised by Lord Lester in the debate prior to the YJCEA 1999

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<sup>32</sup> See N. Lacey, (2001) "Beset By Boundaries: The Home Office Review of Sex Offences", [2001] *Criminal Law Review* 3, p.11; K. Cook, (2001) "Sexual History Evidence: The Defendant fights back", *New Law Journal*, July 27 2001 1133; Temkin (2000) *supra* n.25, p.198; Temkin (2003) *supra* n.19 and McEwan (2005) *supra* n.10, p.20.

<sup>33</sup> It is worth noting here that the previous defence of "honest belief" set out in *DPP v Morgan* [1976] AC 182 has been replaced in the 2003 Act with a defence of reasonable belief in section 1(2).

<sup>34</sup> For examples of judicial attitudes to this scenario see N. Kibble, [2005] Part 1 *supra* n.19, p.196.

<sup>35</sup> Temkin (2002) *supra* n.16 at pp.217-218.

<sup>36</sup> *ibid.*, pp.218 and 224. See also Temkin [2003] *supra* n.19.

<sup>37</sup> N. Kibble, [2005] Part 1 *supra* n.19. Whilst Kibble argues at p.204 that judges appeared to "approach questions of relevance and admissibility thoughtfully", it was noticeable that in each scenario, the majority of the judges questioned would have admitted the evidence in some form.

where he stated that “*consent to engage in sexual relations in the past does not give a blank cheque for consent to engage in sexual relations in the future.*”<sup>38</sup> However, it seems that the principally male judiciary<sup>39</sup> are unable to follow the logic of these arguments or to exclude their own gender bias from the trial,<sup>40</sup> particularly when the complainant is alleging that she was raped by someone with whom she has had a previous relationship.

One possible reason for the continuing (judicial) popularity of such evidence has been suggested by Sue Lees. According to Lees, the reason for the continuing emphasis on a woman’s reputation in rape trials is that the rape complainant is often unmarried, a single mother, separated or divorced and is seen as occupying a space in particular need of regulation and control. Thus the “spectacle of degradation” visited upon her during the trial operates to protect the male defendant from an allegation by such a dangerous and inappropriate model of femininity, consolidate the privilege of men to decide when a woman says yes and acts as a mechanism to control and punish inappropriate expressions of female sexual autonomy.<sup>41</sup> This argument is particularly relevant in the context of “acquaintance” rape type situations where the law has long had difficulty in distinguishing between normal and coercive sexual encounters<sup>42</sup> and the whole issue of consent and who gets to say no to whom is fraught with difficulty.

### Procedural Developments

In response to the Home Office recommendations in *Speaking Up for Justice*,<sup>43</sup> the Youth Justice and Criminal Evidence Act (YJCEA) 1999<sup>44</sup> introduced a new regime which may have the potential to assist some complainants at trial. Complainants are to be eligible for assistance in giving evidence,<sup>45</sup> potentially including screens<sup>46</sup> to ensure that the complainant

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<sup>38</sup> Lord Lester of Herne Hill, Report Stage, 8 March 1999, column 23. Also reported in Kibble (2001) *supra* n.16 at p.34.

<sup>39</sup> Interestingly, in 2001, Cherie Booth QC brought a legal challenge to the all male House of Lords prior to the hearing of *R v A* [2001] 3 All ER 1 arguing that they did not provide an impartial tribunal and could not strike a fair balance between the interests of male defendants and female complainants. She didn’t succeed. See “Rape Law Challenge to All Male Lords” – Clare Dyer: *The Guardian* March 19 2001.

<sup>40</sup> For recent examples of this see N. Kibble, “Judicial Perspectives on the Operation of s 41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios [2005] *Crim LR* 190. One telling quote at the end of the article was the following; “Left to myself I would let it all in but I know I can’t do that anymore” (p.205). Contrary to Kibble’s assertion that this demonstrates that judicial discretion is not necessarily unsatisfactory, I would argue that this comment indicates how far the judiciary have yet to go in understanding and being prepared to rebut robustly the myths surrounding rape.

<sup>41</sup> Lees (1997) *supra* n.25, p.88.

<sup>42</sup> Naffine (1994) *supra* n.10. See also Bryan, I & Wallbank, J (2004) “The Lore of Sexual Difference in social and legal discourse on ‘Date Rape’” 15 *Law and Critique* 183.

<sup>43</sup> Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System 1998, Home Office, London para.9.70.

<sup>44</sup> These sections came into force on 24 July 2002.

<sup>45</sup> S.17(4) YJCEA 1999.

doesn't have to see the defendant, TV links so that evidence can be given from outside the court room,<sup>47</sup> the clearing of press and the public from the court whilst the complainant is giving evidence,<sup>48</sup> and the use of recorded video evidence as a substitute for examination in chief.<sup>49</sup> The judge will decide whether to authorise the measures on the ground that they are likely to improve the quality of the evidence that the complainant is able to give. Further, consideration is to be given to the complainant's views when considering whether the measure would inhibit effective testing of her evidence.<sup>50</sup> These measures, which also preclude the defendant cross examining the complainant himself, were a response to the notorious Ralston Edwards trial<sup>51</sup> in 1996, when the defendant personally cross examined the complainant over 6 days. However, it has already been noted<sup>52</sup> that whilst well meaning in theory, they may not prove effective in practice. It will be particularly interesting to see how (or indeed whether) these provisions assist when the complainant is alleging that she has been raped by someone with whom she has had a previous sexual relationship and that is clearly a matter for further research. However, some indication of the views that may prevail in the court room have already been played out in the academic literature and the media.

First, Dea Birkett in an article for *The Guardian* has argued against both the protection against questioning on sexual history and the Home Office procedural proposals, as in her view, they have worked against women being recognised as full and equal citizens.<sup>53</sup> She argues that such protections imply that women are "too feeble" to stand up to the adversarial process and "too pathetic" to face their alleged attacker. She considers that when women are excused from cross examination or when they remain silent, too traumatised to give evidence or when they are allowed to give evidence by video link, they are situated as "damaged, blubbing women pitched against hardened rapists."<sup>54</sup> They are positioned as children, "incapable, vulnerable and needing guidance,"<sup>55</sup> whilst the accused is portrayed as a "monster." Birkett claims that this compromises the defence. She posits that the accused must be considered innocent until proved guilty,<sup>56</sup> so she argues that both parties should be allowed to have their say and the jury should decide.

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<sup>46</sup> S.23 YJCEA 1999.

<sup>47</sup> S.24 YJCEA 1999.

<sup>48</sup> S.25 YJCEA 1999.

<sup>49</sup> Ss. 27 & 28 YJCEA 1999.

<sup>50</sup> S.19(3) YJCEA 1999.

<sup>51</sup> Cited in Temkin (2000) *supra* n.25, p.202. See also *R v Brown* [1998] 2 Cr App R 364.

<sup>52</sup> See A. McColgan, (2000) *Women Under the Law: The False Promise of Human Rights* Longman, Harlow, Essex generally and Temkin (2000) *supra* n.25, p.202.

<sup>53</sup> (1998) *The Guardian*, 4 August cited in J. Purdom, (2000) "Judging Women: Rethinking Shame through Corporeality" in J. Richardson, & R. Sandland, (eds) *Feminist Perspectives on Law and Theory*, Cavendish Publishing, London at 209.

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> Vera Baird in a critique of rape trials prepared for the Society of Labour Lawyers makes the same point; that a complainant's past history may be relevant and must be allowed in evidence to forestall the assumptions about women which position her as innocent, vulnerable and in need of protection. Of course the danger with

This is also, to some extent, the position taken by Birch, who suggests that we should look for ways of debunking rape myths within the trial process rather than through excluding potentially prejudicial sexual history evidence. However, her article does not really suggest how this might be achieved. Interestingly, her argument for the inclusion of sexual history evidence with the accused seems to be based on the fact that theoretically it would be more coherent to do so rather than from any conviction that such evidence is probative of the issues at trial. She gets around this point by suggesting that sexual history evidence is important context or background evidence and should be admitted only to the extent that it is necessary to do so to enable the jury to make sense of the facts before them.<sup>57</sup> She argues that we should “think of ways of taking the jury into the light rather than deliberately keeping them in the dark.”<sup>58</sup>

However, as Purdom recognises,<sup>59</sup> this is not so easy as women do not have equal citizenship with men.

“They remain under the protection and definition of men. As child, she is ashamed and silent; as whore, she is shameful, and that indecency tempers her complaint of rape. There is both the shame **for** women and the shame **of** women. On both counts she is substandard. Where is her voice?”<sup>60</sup>

What Birkett and Birch fail to recognise, is that unless and until women are permitted to express an affective and embodied narrative of their experience and a female centred space is created in the legal and procedural rules, women will continue to be treated unjustly during the rape trial. Wishing it were otherwise, will not change the vicious reality of the trial for rape complainants and arguments based on the fairness of the trial for the defendant or “lack of theoretical coherence”<sup>61</sup> obscure this.

The second reason for scepticism about the efficacy of the new measures is that they are subject to the Human Rights Act 1998 and as McColgan<sup>62</sup> and Temkin<sup>63</sup> have both noted, the efficacy of similar provisions in Canada has been short-lived. The Canadian Charter of Human Rights and Freedoms was used to effect by defendants in rape cases in Canada to bring about the “dismantling” of legislation to protect complainants from sexual history

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this is that if a woman is not positioned as a child, there is the risk that she will be positioned as a temptress. V. Baird, *Rape in Court*, 1998, London: Society for Labour Lawyers. Purdom argues and I would agree that women are never constructed within the rape trial as independent, with a voice of their own (p.210).

<sup>57</sup> On this analysis, sexual history evidence with the accused would always be relevant. Birch [2003] *supra* n.19. I have attempted to summarise here some of the arguments put forward by Professor Birch in her article.

<sup>58</sup> Birch [2003] *supra* n.19, p.10. Whilst I would not argue with Birch about the need to educate wider society about rape myths generally, I am concerned that her suggestion that such evidence is important background or context evidence would lead to previous sexual history evidence with the accused being considered relevant and admissible in all cases.

<sup>59</sup> Purdom (2000) *supra* n.6, p.211.

<sup>60</sup> Purdom (2000) *ibid.*, p.211.

<sup>61</sup> Birch [2003] *supra* n.19 at p.374.

<sup>62</sup> McColgan (2000) *supra* n.60, chap.9.

<sup>63</sup> Temkin (2000) *supra* n.9, p.202.

evidence<sup>64</sup> and its substitution with a much weaker provision.<sup>65</sup> I will move on to discuss the effect of the Human Rights Act on the protection of rape victims in more detail in the next section of this article, but it is clear from the Canadian experience that the Act will be used by defence lawyers in an attempt to subvert increased protection for rape complainants. Some authors have sought solace in the fact that the jurisprudence of the European Court of Human Rights has latterly demonstrated recognition of the need to protect victims in the criminal justice system as well as defendants. However, the protection of female complainants will be in the hands of the UK judiciary as it interprets the Convention and, given the House of Lords decision in *R v A* and the lack of available gender awareness training for the judiciary,<sup>66</sup> I would suggest that this does not bode well for women,<sup>67</sup> particularly in cases where the complainant alleges that she was raped by an acquaintance or intimate.

### Sexual History Evidence and the Human Rights Act 1998

*R v A* was a case concerned with the wording of section 41 of the Youth Justice and Criminal Evidence Act 1999 and the blanket prohibition on the use of sexual history evidence as between the defendant and the complainant. The Lords were able to consider the circumstances under which such evidence could be admitted, despite the explicitly exclusionary nature of the legislation involved, because of the introduction of the Human Rights Act 1998 into English law. In brief, the facts of the case were that the defendant, A, had been charged with rape. His defences were that the complainant had consented or alternatively that he honestly believed that she had consented. The basis for his belief in consent was that he asserted that he and the

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<sup>64</sup> McColgan (2000) *supra* n.60, chap.9.

<sup>65</sup> *ibid.* See Canadian Criminal Code, s.276. The previous Canadian provision referred to is s.246 of the Canadian Criminal Code. This was enacted in 1982, challenged in the case of *Oquataq* (1985) 18 CCC (3d) 440 and repealed in 1992 to be replaced by s.276. S.276 was then challenged in *Seaboyer*, declared to be unconstitutional and re-interpreted to allow for judicial discretion on admissibility. The full text of s.246 can be found in Temkin (2002) *supra* n.16 at p.206 and a fuller discussion of both provisions can be found on pp.206-225.

<sup>66</sup> Kibble [2005] *supra* n.16, p.205 argues that there has been some significant improvement in the attitudes of the judiciary through specific training for those who sit on trials involving serious sexual offences and I would not seek to undermine the importance of such training. However, my position on this is similar to that of McEwan (2005) *supra* n.10, p.2 that there is evidence that the operation of gender myths and stereotypes continues to impact on judicial directions and judicial decision-making.

<sup>67</sup> See McEwan (2005) *supra* n.10, p.20; *R v Mokadi* [2004] *Crim LR* 373 and commentary by Birch, DJ [2004] *Crim LR* 373 at 375. In *Mokadi*, the defendant sought to cross examine on the basis that the complainant, who was wearing a short skirt and vest top, had accepted a lift from a much older man, shortly before going to Mokadi's flat with him. The trial judge excluded the evidence under s 41 YJCEA 1999. However, on appeal, the Court of Appeal held that the evidence was relevant to consent and should have been allowed. In allowing the appeal, the Court of Appeal appeared to assume that the car incident reflected a willingness to engage in sexual activity with the driver, which could be transferred to a willingness to consent with Mokadi. Both Birch and McEwan are rightly critical of this decision.

complainant had been having a consensual sexual relationship for three weeks prior to the alleged rape. She denied this.

In the course of lengthy judgments, the Lords held that, subject to the importance of seeking to protect the complainant from indignity and humiliating questions, the test of admissibility was whether the evidence and questioning relating to it was nevertheless “so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.” The decision as to relevance was to be a matter for the trial judge based on the individual facts of each case.

The judgment therefore appears, on the face of it, to be an attempt to balance the rights of the defendant to a fair trial under article 6 against the interests of the complainant.<sup>68</sup> However, as I will now explore, the narratives and discourses operating throughout the judgments are likely to have the effect of subverting the intention and policy behind the enactment of section 41, of turning the provision completely on its head by inserting a condition of relevance subject to judicial control and of re-introducing the possibility of sexual history evidence being routinely admitted in trials that do not conform to the ideal of “real rape.”<sup>69</sup> This clearly has important implications for women who have had a sexual relationship with their alleged rapist in the past.

There was a marked shift in their Lordships’ judgments from an acceptance of general notions of the unfairness of admitting sexual history evidence to an attempt, through a particularistic approach, to justify the admission of sexual history evidence as between the complainant and defendant. The Law Lords re-introduced the traditional distinction between sex with the defendant and sex with other men in order to enable them to justify a difference in treatment between the admissibility of such evidence by a logical process of syllogistic reasoning. For example, Lord Steyn supported the “commonsensical” nature of his argument by drawing an analogy between evidence of sexual history between the two parties to the incident in question and a murder suspect who has previously vowed to kill the victim. This, he argued, is logically relevant to the issue of intent in the same way that evidence of previous sexual history may be relevant to consent.<sup>70</sup> The

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<sup>68</sup> This tendency to concentrate on the fairness of the trial for the **defendant** at the expense of considerations of fairness for the **complainant** is precisely the issue that I wish to criticise in some of the contemporary academic literature. *E.g.* see N. Kibble, [2005] *supra* n.16 and D. Birch, (2003) *supra* note 16.

<sup>69</sup> See K. Cook, (2001) “Sexual History Evidence: The Defendant fights back”, *New Law Journal*, July 27 2001 1133 for a further critique of this decision and the consequences of it. Cook suggests that s.41 YJCEA 1999 seems destined in the hands of the judiciary to be rendered as ineffectual as section 2 SO(A)A 1976. For a full examination of s.2 and the judicial “dismantling” of the intention behind it see McColgan (1996) *supra* n.25. See also P. Mirfield, “Human Wrongs” [2002] *LQR* 118 (Jan) 20-27.

<sup>70</sup> Lord Steyn at para.31. This argument was rehearsed by Kibble (2001) *supra* n.16 at p.51. My concern is that this analogy ignores the question of context. There are considerable differences between a murder trial where the prosecution is seeking to prove intent to kill, an important part of which may be motive to do so and a trial for rape where the issue is whether or not the complainant consented to sex with the defendant on this occasion.

Lords thus purported to show that it was a matter of “common sense” that the inadmissibility of sexual history evidence generally had never been intended to encompass evidence relating to a sexual relationship between a complainant and the assailant.<sup>71</sup>

Further, they posited that the test for the admissibility of such evidence must be relevance and that the determination of relevance is best left to the discretion of the judges. This raises several questions, not least as to what meaning the Lords were placing on the term relevance in this context. As Redmayne suggests relevance can be a complex issue, encompassing “common sense” intuitions and notions of probative force, *i.e.* ability to assist in proving one of the issues in the case.<sup>72</sup> Their Lordships appeared to be arguing that sexual history evidence with the defendant is relevant because it is probative of the issue of consent and they were eager to focus on this and distance themselves from any accusation that they were undermining the legislation by attacking the credibility of a complainant through the admission of such evidence. However, I would suggest that throughout the judgments there is a continual slippage between the discrete issues of consent and credibility. Clearly underlying the use of the terms ‘relevance’ and ‘common sense’ in at least some of the judgments, is the intuition or assumption that if the complainant has slept with the accused before, then she is more likely to consent to sleep with him again than she would be if he were a stranger. However, is this assumption a legitimate one to draw? In order to consider this, it is helpful to turn to the available research evidence on sexual behaviour in the UK.<sup>73</sup>

One report that has been drawn upon by McColgan<sup>74</sup> and Redmayne<sup>75</sup> is the National Survey of Sexual Attitudes and Lifestyles.<sup>76</sup> Generally, whilst this report found that sexual activity outside marriage was common, it also suggested that it was rare for women to have a large number of sexual partners and uncommon for them to have sex outside the context of a relationship.<sup>77</sup> It could therefore be inferred from this that the majority of adult female rape victims could be expected to have a sexual history and what is more, it may not be uncommon for them to have had a sexual relationship with the accused in the case. To some extent, this finding is borne out by the increase in reported acquaintance rapes.<sup>78</sup> So what does this indicate about the relevance to consent of a previous sexual history with the accused? If the research evidence is to be accepted then perhaps that such evidence is not as obviously relevant as might previously have been thought.

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<sup>71</sup> For further examples of the use of “common sense” by the Lords see Lord Slynn at para.10 and Lord Steyn at paras. 31 and 45 although such references can be found throughout all five judgments.

<sup>72</sup> Redmayne (2003) *supra* n.19 at p.2.

<sup>73</sup> Johnson, A.M *et al* (1994) *Sexual Attitudes and Lifestyles*, Blackwell Scientific, Oxford and Wellings, K *et al* (1994) *Sexual Behaviour in Britain: The National Survey of Sexual Attitudes and Lifestyles*, Penguin, London.

<sup>74</sup> McColgan (1996) *supra* n.25 at 285-286.

<sup>75</sup> Redmayne (2003) *supra* n.19 at p.3.

<sup>76</sup> Commonly known as NATSAL, *supra* n.73. Redmayne (2003) *supra* n.19 notes the methodological problems of such research at n.18.

<sup>77</sup> NATSAL *supra* n.73 at 97, 113, 115, 130-3, 239-241.

<sup>78</sup> Kelly, Lovett & Regan (February 2005) *supra* n.14.

Further, as Redmayne notes, in the context of the rape trial, the information that the complainant and the accused know one another will already be apparent to the jury.<sup>79</sup> So where does this leave the Lords' reasoning that such evidence is important to the issue of consent rather than to the issue of the complainant's credibility as a witness and why were they so eager to re-insert a condition of relevance subject to their discretion into the legislation?

As Nicholson<sup>80</sup> and Young<sup>81</sup> have suggested in a different context, this jealous guarding of judicial discretion, through the admission of a test of relevance, allows the judiciary to maintain a strict control of the facts and themes in summing up a case. What this may mean in practice, is that the judge in an individual case will be able to manipulate the rules of admissibility and the discourses of consent to privilege a particular notion of (hetero)sexuality and to reward women who exhibit "approved characteristics", for example those who are seen to be "respectable" *i.e.* sexually inexperienced and thus worthy of the law's protection.<sup>82</sup> In this way, through its strict control of the discourses, the law will be able to continue to police the sexuality of women and to maintain the privileged position of male centred notions of sexual intercourse at the heart of rape law.

In general, the Lordships' judgments develop their commonsensical proposition by setting up a sliding scale of "connection" between at one extreme, an isolated incident of sex some time in the past<sup>83</sup> and at the other, a continuous period of co-habitation during which "two young people had lived together and had sex as part of a happy relationship".<sup>84</sup> Lord Slynn noted that he suspects that the "*ordinary man or woman on the street would find* (the exclusion of such evidence) *very strange*"<sup>85</sup> thus inferring that their Lordships' understanding of common sense was drawn from and encompassed societal and cultural notions of what is right and appropriate. The inclusion of the "ordinary woman" in this context could be said to smack of tokenism given the general thrust of the judgments but it is clearly a rhetorical device to suggest that the Lords are enlightened; that they do not subscribe to purely male concepts of common sense but that they appreciate the concerns of women about the issue of rape and its enforcement.

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<sup>79</sup> Redmayne (2003) *supra* n.19 at p.7.

<sup>80</sup> D. Nicholson, (1995) "Telling Tales: Gender Discrimination, Gender Construction and Battered Women", *Feminist Legal Studies* 3(2) 185.

<sup>81</sup> A. Young, (1996) "Femininity as Marginalia" in McVeigh, Rush and Young (eds) *Criminal Legal Practices*, Open University Press, Oxford. Both Young and Nicholson were discussing judicial control of the defence of provocation in cases of "battered" women who kill their partners. However, I would argue that the points that they make are valid in many trials in which the law needs to construct the female gender. As Naffine has commented at p.58 in N. Naffine, & R. Owens, (1997) *Sexing the Subject of Law*, Sweet & Maxwell, London, the law needs to get specific when it considers women, as women are the non standard case which therefore requires definition.

<sup>82</sup> For a reading of the law's construction of "worthy" women in the context of section 2 SO(A)A 1976 and in particular the Court of Appeal decision in *R v Viola* [1982] 1 WLR 1138 see McColgan (1996) *supra* n.25.

<sup>83</sup> Lord Steyn at para.32, Lord Hutton at para.152.

<sup>84</sup> Lord Slynn at para.10.

<sup>85</sup> *ibid.*

Lords Steyn and Hope focused on the difference between (real) rape, where there is extreme violence and little difficulty in proving the fact of the rape, and the acquaintance situation, where consent is in issue and proof is more “sensitive and difficult.”<sup>86</sup> In stressing the difficulties of proof in dating or acquaintance situations, Lords Steyn<sup>87</sup> and Hope<sup>88</sup> both implicitly placed judges in a position of authority as the most likely persons to be able to find the “truth”<sup>89</sup> of an allegation and yet reflected the difficulty that the law has in distinguishing between rape and normal masterful seduction. They utilised this “difficulty”, situated as one of proof rather than one of ideology, to infer that a woman’s sexual reputation, at least as far as the specific defendant is concerned, may be relevant in the jury’s determination of her consent. In drawing this implicit inference, they thus reinforced the very myths and stereotypes about the “woman scorned” that they purport to have disregarded in this “modern” age.

Lord Clyde, however, went slightly further and in doing so interestingly revealed that, on the level of imagination, it is beyond the law’s understanding that there may be many reasons why a woman, having had consensual sex with a man on one occasion, would be less likely to agree to sexual intercourse with him on a future occasion, that acquaintance rape can be “real” rape. He notes at paragraph that section 2 of the 1976 Act dealt only with **rape** and not the complainant’s **sexual experience** with the defendant.<sup>90</sup> In distinguishing rape as involving “other men” and (normal) sexual experience as involving this defendant, Lord Clyde thus, perhaps unwittingly, revealed the inherent sexism inscribed into the language of the criminal law. Clearly, in order to reach his conclusion, Lord Clyde must have started from the historical premise that “unchaste” women were more likely to consent to sexual intercourse and to lie about it when they did. For Lord Clyde, it seems that in an acquaintance situation, all sex is normal *i.e.* consensual sex and once a woman has shown a propensity to have sex with a particular man, her right to withdraw her consent is severely circumscribed.<sup>91</sup>

Clearly, in seeking to justify their “commonsensical” intuitions as to relevance, the Lords struggled to differentiate between a general propensity to consent to sex and a specific propensity to consent to sex with this defendant. In order to avoid appearing to subscribe to the myth that unchaste women are more likely to consent to sex, some of their Lordships and in particular, Lord Hutton attempted to justify the inclusion of sexual history

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<sup>86</sup> Lord Steyn para.35, Lord Hope at para.77, Lord Clyde at para.115.

<sup>87</sup> Lord Steyn at paras.32, 39. Ironically, Lord Steyn argues at 32 that to a blanket exclusion risks “disembodying the case before the jury”!

<sup>88</sup> Lord Hope at para.77.

<sup>89</sup> In Foucault’s explanation of the relationship between power, knowledge and truth, he posits that knowledge claims, such as those made here by the Lords, give rise to the power to assert that what one is saying is the “truth”. M. Foucault, (1980) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, (ed.) C. Gordon, Harvester Wheatsheaf.

<sup>90</sup> Lord Clyde at para.114.

<sup>91</sup> These are precisely the “twin myths” described as discredited in each of their Lordships judgments and this example perhaps most clearly demonstrates the inherent contradiction in the arguments presented by the Lords to allow the admission of certain types of sexual history evidence.

evidence with the defendant by stating that it was not relevant simply because of the bare fact of the relationship (in comparison with Lord Steyn) but because it has some different quality, *i.e.* that it is evidence to show a particular mindset or to show affection.<sup>92</sup> But what does this mean? What is behind this if not the inference that a complainant has a propensity to consent with a particular defendant because she has consented before?

Lord Hutton used the point made by Harriet Galvin<sup>93</sup> and cited in Seaboyer<sup>94</sup> that previous sex with the defendant is relevant to consent because its probative value rests on the nature of the complainant's specific mindset toward the accused rather than on her general unchaste character. This question of affection is raised in a number of the judgments to justify inclusion. But the question must then be raised as to how affection is to be defined in the context of an 'acquaintance' rape trial and what connection exists between previous sexual activity with the defendant, affection and consent on this occasion? These are difficult questions that are not really addressed by their Lordships' judgments, despite (or perhaps because of) the fact that the answers could have serious consequences for the law's assessment of particular women's worthiness of protection, *i.e.* women's ability to say no to past or present partners and be supported in that no by the law.

Boyle and MacCrimmon<sup>95</sup> have argued, in relation to a similar interpretation of Canadian rape shield legislation that the relevance of mindset to show consent "*depends on the sexual nature of the activity and draws on discriminatory generalisations.*"<sup>96</sup> They suggest that an acceptance of reasoning based on a disposition to consent to sex with a particular person –

"reinforces patterns of discriminatory fact finding which legitimates presumptive sexual access and draws on cultural images which invite the inference that women are less likely to be raped by their sexual partners than others."<sup>97</sup>

If past affection or even previous sexual attraction<sup>98</sup> is the key to admissibility, then in their Lordships' terms, very little 'relationship' evidence will be excluded from the rape trial.

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<sup>92</sup> Lord Hutton at para.152.

<sup>93</sup> H.R. Galvin, (1980) "Shielding rape victims in the State and Federal Courts: A Proposal for the Second Decade" 70 *Minn L Rev* 763 at 807. Galvin's work is discussed further in *Seaboyer per McLachlin* at p.279, Kibble (2001) *supra* note 16 at pages 44-45 and Redmayne (2003) *supra* n.19 at p.10.

<sup>94</sup> *Per McLachlin* at 279.

<sup>95</sup> C. Boyle, & M. MacCrimmon, (1998) "The Constitutionality of Bill C-49: Analysing Sexual Assault as if Equality really mattered" 41 *Crim LQ* at 229. This article is considered in some detail in Kibble (2001) *supra* n.16 at p.49 and Redmayne (2003) *supra* n.19 at pp.4 and 10. For a contrary view see: Paciocco, DM (1993), "The new rape shield provisions in section 276 should survive Charter Challenge", 231 *Cr* (4<sup>th</sup>) 223.

<sup>96</sup> Boyle and MacCrimmon (1998) *ibid.*, p.229.

<sup>97</sup> Boyle and MacCrimmon (1998) *ibid.*, p.229.

<sup>98</sup> The question as to whether the reasoning that sexual attraction without affection should be permissible is addressed in Redmayne (2003) *supra* n.19 at p.10.

Further, the Lords' acknowledgement of a difference between stranger rape and acquaintance rape risks undermining the experience of women who allege rape against an acquaintance as being 'real rape' and fails to take the further step of appreciating that acquaintance rape is something very different from consensual sex. In a case involving an allegation of acquaintance rape, something has happened that has led the complainant to accuse the defendant of rape. It is therefore a question of context. This issue has been raised by Schwarz<sup>99</sup> in relation to a similar line of reasoning in interpreting the Canadian legislation. He argues that allowing evidence of specific propensity, such as previous sexual history evidence with the accused, fails to acknowledge the autonomy of an individual complainant to say no on a particular occasion and comes dangerously close to suggesting that she is the type of woman who will be likely to have sex.<sup>100</sup> He suggests that what this kind of reasoning fails to recognise is that there is nothing about the mere fact of other consensual activity in itself which can inform or be logically probative of the issue of actual consent at the time of the sexual assault.<sup>101</sup> In other words, it shifts the focus of the trial away from the accused's behaviour on the night in question (what he said or did to the complainant, her reaction and emotional state) and back to her sexual reputation. In this way, it can be seen that such reasoning risks supporting the myth that rape is committed by strangers and severely circumscribes the ability of a complainant to say no to a previous sexual partner or acquaintance and be believed in her no.

In re-enforcing the assumption that a woman is more likely to consent to sleep with a person she knows, the Lords have failed to appreciate one of the main findings of research on rape, namely that acquaintance rape is far more common than stranger rape.<sup>102</sup> It could be inferred from this that women are most at risk of rape from their partner, in which case, as Redmayne suggests, an ongoing relationship could be both evidence of consent and evidence of rape at the same time.<sup>103</sup> Having made this important point, Redmayne does not go on to tackle the relevance question further but suggests that previous sexual history evidence with the accused may be relevant but of little probative value and could therefore be excluded on policy grounds if there was sufficient evidence to be able to say that excluding such evidence poses no threat to the defendant.<sup>104</sup> He implies that at the current time, there is not the empirical evidence to justify this.

However, I would argue that this point is crucial to undermining the reasoning of the Lords. There are clearly two issues here. First, if previous

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<sup>99</sup> H. Schwarz, (1994) "Sex with the Accused on other occasions: The evisceration of rape shield protection", 31 Cr (4<sup>th</sup>) 232. For a rejoinder to Schwarz's argument see D.M. Paciocco, (1995) "Techniques for eviscerating the concept of relevance: A reply and rejoinder to "Sex with the Accused on other Occasions: The evisceration of rape shield protection" (1995) 33 Cr (4<sup>th</sup>) 365.

<sup>100</sup> Schwarz (1994) *ibid.*, at pp.233-235.

<sup>101</sup> *ibid.*

<sup>102</sup> See, e.g. A. Myhill, and J. Allen, (2002) *Rape and Sexual Assault of Women: The extent and nature of the problem. Findings from the British Crime Survey*, Hors 237 at 30. See also Kelly *et al* (2005) *supra* n.14.

<sup>103</sup> Redmayne (2003) *supra* n.19 at p.7.

<sup>104</sup> *ibid.*

sexual history evidence with the defendant is not self evidently probative of consent (relevant) then where is the detriment in excluding it? Second, even if the arguments against relevance are rejected and such evidence is considered to be probative or relevant, then is it so prejudicial, in terms of its effect of re-inscribing myths and stereotypes about particular types of complainants into the law, that it ought to be excluded in any event? I would argue that it is and this was precisely the reason for exclusion in the legislation and the reason that this has proved such a vexed issue in many other common law jurisdictions.<sup>105</sup> Myths are not something that crop up only in the court room. They are imported there from society, popular culture and the media.<sup>106</sup> A growing body of research has considered the operation of these myths in informing attitudes in the Criminal Justice System and society at large to rape complainants in cases where acquaintance rape is alleged. For example, one study indicated that juries tend to be harsher on the complainant, attribute less responsibility to the defendant and more to the complainant where acquaintance rape as opposed to stranger rape is alleged.<sup>107</sup> Other studies have found that victims are considered less truthful when they have been involved in a close relationship with the defendant<sup>108</sup> and that jurors who hear evidence involving prior sex between the complainant and the accused are less likely to find the complainant credible, more likely to find her blameworthy and more likely to believe that she consented,<sup>109</sup> even when they have been given a judicial direction to the contrary.<sup>110</sup> Therefore, given what we know about the operation of myths in society and the effect that they play in influencing juries' attitudes to credibility (rather than the discrete issue of consent), I would argue strongly that a policy to exclude such evidence could be supported.

On studying the judgments in A, it very quickly becomes clear that the Law Lords, whilst purporting to respect the need to protect rape complainants and the reasoning behind this protection, are not providing a space within the discourses for mutuality of sexual desire or for women's affective experiences. Rather by a subtle process of gender construction, the judgments can be seen to define and limit female experience to social and cultural stereotypes. In other words, there is a subtle suggestion in the language (most explicitly that of Lord Clyde) that such evidence is relevant and admissible because women are inclined to lie about allegations of rape

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<sup>105</sup> For a critique of the position in other jurisdictions see Temkin (2002) *supra* n.16 at pp.205-225.

<sup>106</sup> McEwan (2005) *supra* provides a helpful reconsideration of the nature and operation of rape myths in society and the court room at pp.2-9.

<sup>107</sup> Brown, Burman & Jamieson (1993) *Sex Crimes on Trial: The use of Sexual History Evidence in Scottish Courts*, Edinburgh University Press, Edinburgh. This report and an earlier one by the same authors is considered in Temkin (2003) *supra* n.19 at p.220.

<sup>108</sup> Schuller and Hastings (2002) "Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions" 26 *Psychology of Women Quarterly* 252 at p.253.

<sup>109</sup> Willis and Wrightsman (1995), "Effects of victim gaze behaviour and prior relationship on rape culpability attributions" 10 *Journal of Interpersonal Violence* 367.

<sup>110</sup> Schuller and Hastings (2002) "Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions" 26 *Psychology of Women Quarterly* 252 at p.259.

and that men need protection from women's dangerous sexuality. This inference is expressed most clearly in the frequent references in the judgments to "unchastity"<sup>111</sup> (historically a male rather than a female concern)<sup>112</sup> and the linkage in Lord Slynn's judgment between a woman who engages in sexual intercourse with more than one man and "promiscuity."<sup>113</sup>

A frequent concern expressed in the judgments is the perceived failure of section 41 to distinguish between the different purposes for which evidence may be tendered and the Lords took the view that the blanket exclusion of sexual history evidence, subject to the extremely narrow exceptions, went further than was necessary to prevent what the Lords saw as the "mischief" against which the section was directed, namely the misuse of evidence of sexual activity for irrelevant and misleading purposes, for example to draw the inference that the complainant consented to the act or that she is an unreliable witness. They further took the view that the "obvious"<sup>114</sup> consequence of the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, was that the section raised the real risk that an innocent person may be convicted,<sup>115</sup> thus invoking the spectre of miscarriages of justice to subtly shift the focus of unfairness from the (female) complainant to the (male) defendant.

This shift allowed the Lords to reconstruct admissibility as a matter of proportionality and having found that there was a potential breach of article 6, they were able to re-interpret the section so that sexual history evidence could in certain circumstances be re-admitted. They suggested that although the legislation addressed a pressing and substantial objective by helping to exclude unhelpful and potentially misleading evidence of the complainant's prior sexual conduct, the rights infringed were not proportionate to the pressing objective because the section operated to exclude relevant defence

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<sup>111</sup> *E.g.* see Lord Steyn at para.27.

<sup>112</sup> O'Donovan, K (1991) "Defences for Battered Women Who Kill", *Journal of Law & Society* Vol.18, 720, citing Taylor on the Slander of Women Act 1891.

<sup>113</sup> Lord Slynn at para.3 where he argues that (the exclusion of questioning about previous sexual experience) was necessary in order to avoid the assumption...that a woman who has had sex with one man is more likely to consent to sex with other men and that the evidence of a **promiscuous** woman is less credible." Of course, if their Lordships accepted this assumption as untrue then their assertion that a distinction can be made for sexual history evidence as between the defendant and complainant falls away. If a woman is assumed not to be more likely to have sex because she has done so before with another man, why should she then be assumed to be more likely to consent to sex with the same man on the sole basis that she had done so before. Ironically at para.78, Lord Hope alluded to an argument put forward by Counsel that sexual history evidence relating to the defendant was likely to be less distressing to the complainant than sexual history evidence generally. He stated that to accept this argument would risk developing rules by reference to stereotype. This, I would suggest, is precisely what the Lords have done.

<sup>114</sup> The Lords made much of the danger to the defendant if such evidence was not admitted. See Lord Steyn at paras.32 and 34, where he argued that section 41 risked denying the right of the accused in a **significant range** of cases from putting forward (a) full and complete defence.

<sup>115</sup> Cook (2001) *supra* n.69, perceptively notes that given the attrition rates, miscarriages of justice in this field are more likely to affect the victim than the defendant!

evidence, whose value is not clearly outweighed by the danger it presents.<sup>116</sup> For the Lords, the provision thus strikes the wrong balance between the rights of the complainant and the rights of the accused.

The Lords characterised the purpose of the section as the avoidance of non-probative and misleading evidence, the encouraging of reporting and the protection and privacy of the witnesses.<sup>117</sup> By confining their concern to the blatant misuse of sexual history evidence (which misuse they inferred could be prevented by appropriate exercise of judicial discretion and warnings)<sup>118</sup> and by using the past tense when describing the use of sexual history evidence by defence lawyers in the past to discredit complainants and to characterise them as unworthy of protection against sexual assault,<sup>119</sup> the Lords could readily find section 41 inconsistent with fair trial rights, whilst explicitly stating that rape mythology was no longer operative in the criminal justice system.

As McColgan argues in relation to the majority reasoning in the Canadian case of *R v Seaboyer*,<sup>120</sup> I would dispute the assertion of the Lords that section 41 was directed primarily at encouraging the reporting and protection of the “security and privacy” of witnesses to sexual assault. Rather, the provision was in part an attempt to eliminate sexual discrimination in trials by prohibiting the use of prejudicial and irrelevant sexual history evidence, one aspect of which was to increase the reporting of rape. As I have argued earlier, the very notions of relevance referred to by the Lords are informed by stereotype and myth and any semblance of relevance plays on “*internalised assumptions about what women really want and male desires for specific sexual scenarios*”.<sup>121</sup> I would agree with McColgan<sup>122</sup> and Baird<sup>123</sup> when they argue that the use of sexual history evidence pre-empts considered decision-making. Its use transforms the determination of guilt and innocence into an assessment of whether or not the complainant is the sort of person who should be protected by the law thus undermining any basic principle of equal treatment between complainants and defendants.

Ironically, at the start of his judgment, Lord Steyn traced the development of general principles of equality developed since the end of the war and stated

<sup>116</sup> See n.91 and accompanying text.

<sup>117</sup> Each of the Lords addressed this matter at the start of their judgments. However each also referred to the fact that the Government had signed a declaration that the YJCEA 1999 was compatible with the HRA 1998. Lord Steyn used this fact at para.45 to suggest that he was proceeding on the basis that “the legislature, would not, if alerted to the problem, have wished to deny the accused the right to put forward a full and complete defence by advancing any truly probative material.” Thus Lord Steyn is able to assert that the Judiciary are in a better position than the Legislature to assess the “fairness” of individual cases.

<sup>118</sup> *ibid.* See also Lord Steyn at para.46.

<sup>119</sup> For an example, see Lord Steyn at para.28.

<sup>120</sup> McColgan (2000) *supra* n.52 at p.224 where she cites the minority judgement of Madame Justice L’Heureux-Dube in *R v Seaboyer* [1991] 2 SCR 577. See also Temkin, J “Sexual History Evidence – Beware the Backlash [2003] *Crim LR* 217 at p.228.

<sup>121</sup> *ibid.*

<sup>122</sup> McColgan (1996) *supra* n.25.

<sup>123</sup> Baird (1998) *supra* n.25.

that nowadays the autonomy of women is an accepted norm. He also set out the development of the rules of admissibility for sexual history evidence in relation to this development of principles of equality.<sup>124</sup> However interestingly, he then proceeded to reinforce the previous categorisation by asserting that the reasons for exclusion of sexual history evidence in the case of relations with other men haven't historically and shouldn't today apply to sexual relationships with the accused. The reason for this, according to Lord Steyn, was that such evidence is not introduced to discredit the complainant generally but "*it is a species of prospectant evidence which may throw light on the complainant's state of mind.*"<sup>125</sup> Thus it is not what the woman says on the particular occasion that is relevant to her consent but what she has done in the past, *i.e.* her propensity to agree to sex with the defendant. Lord Steyn continues, "*it is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not blot out all memories. What one has been engaged in in the past may influence what choice one makes on a future occasion.*"<sup>126</sup> Therefore Lord Steyn seems to be suggesting that having once consented, a woman cannot then withdraw her consent. What is more, a man is justified in assuming a woman will consent if she has done so in the past. I would suggest that Lord Steyn's distinction is a distinction without difference, as once the evidence has been admitted, it will inevitably affect the jury not only in relation to the issue of the complainant's "probative" credibility but also in relation to her "moral probity."<sup>127</sup> Further, there is no room in Lord Steyn's assessment for mutuality of desire. Consent continues to be framed by the man's perception not the woman's. In this way, Lord Steyn succeeds in undermining the harm done to rape complainants by unwanted intercourse in acquaintance situations, subordinates the language of the Act to the common sense of the judiciary and re-inscribes into the law the very myths and stereotypes about (hetero) sexual relations that the legislation was designed to undermine.

The reasoning in the decision is decidedly suspect. Despite the Lords repeated assertions that the sexual conduct of complainants was relevant neither to their credibility nor in general terms to the likelihood of their consent, a number of the situations in which the Lords regarded sexual history evidence as potentially relevant relied in part upon outdated and illegitimate notions concerning credibility and consent. It was the acceptance of such evidence as relevant that resulted in the conclusion that sexual history evidence could, in some circumstances, still be admissible. Further, by characterising the balance to be struck as one between the State and the accused, rather than one between the interests of rape complainants and their

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<sup>124</sup> Lord Steyn at para.27. See McColgan (1996) *supra* n.25, *re* the history of admissibility of sexual history evidence in which she notes that ironically, at common law, sexual history was not admissible unless the complainant was a prostitute or of notorious ill repute!

<sup>125</sup> Lord Steyn at para.31.

<sup>126</sup> *ibid.*

<sup>127</sup> These terms are adopted by McColgan (1996) *supra* n.25, p.281. She quotes Adrian Zuckerman who suggests that probative credibility relates to the truth-value of a witnesses testimony, moral credibility to his or her standing as a person.

assailants, the Lords failed to pay much more than lip service to the appalling difficulties faced by the victims of rape.<sup>128</sup>

As noted above, The Lords appeared to reject the traditional view that a woman's sexual history was relevant to her credibility and to the likelihood of her having consented to the sexual intercourse at issue. However, by permitting the introduction of sexual history evidence on the grounds of a relationship between the complainant and the accused, the Lords are continuing to allow juries to judge women on the basis of their sexual behaviour. Research has shown that rape complainants are frequently subject to attack on the grounds of their sexual behaviour through physical evidence such as the humiliating display of their underwear. Complainants are made to feel "*cheap, unworthy of protection, not the kind of women who merit the full protection of the law.*"<sup>129</sup> As McColgan has noted, the admission of such evidence means that the focus of the trial is less one of what the defendant did and whether the woman consented, than whether she is a woman whose refusal of sexual intercourse is such that the full weight of the law should be visited on the man who fails to respect that refusal.<sup>130</sup> The potential consequences of such an attitude in a modern era, when many women have a number of sexual relationships outside marriage,<sup>131</sup> is alarming, as it seems to infer that the majority of women are not worthy of legal protection thus further legitimating male violence against them.

*R v A* demonstrates that in the area of defendant's rights, the Human Rights Act will be of great significance.<sup>132</sup> The rights enshrined in the ECHR tend to provide defendants with remedies against undue process violations such as undue delay or the admission and exclusion of certain types of evidence. They may also impact on the substance of criminal law in situations where criminal offences are drawn in discriminatory terms or fail to accord with fundamental principles.<sup>133</sup> However, it is clear from my analysis of the

<sup>128</sup> *E.g.* see Lord Steyn at para.45. The same argument was presented by the majority in *Seaboyer* and is critiqued by McColgan (2000) n.52 at 223. C. Douzinas, (2000) *The End of Human Rights*, Hart Publishing, Oxford sees the adoption of rights discourses by organs of the State as one of the main factors undermining the efficacy of rights for those groups, such as women, who have not historically been privileged with subjectivity in those discourses. See particularly chaps.13 and 14. See also J. Mc Ewan, "Proving Consent in sexual cases: Legislative Change and Cultural Evolution" (2005) 9 *E & P* 1-28.

<sup>129</sup> For a historical perspective on the legal construction of worthy/unworthy women see McColgan (1996) *supra* n.25.

<sup>130</sup> *ibid.*, p.241.

<sup>131</sup> McColgan *ibid.*, at p.297 draws on empirical research by Wellings *et al* to show that most women do engage in sexual intercourse outside marriage and the majority of women have had sex with more than one partner. See n.73 and accompanying text.

<sup>132</sup> For an unconditional endorsement of the HRA 1998 and the way in which it will assist in the protection of defendant's rights see K. Starmer, (2000) *European Human Rights Law*, Legal Action Group, London. For a more considered view of the efficacy and meaning of human rights in historical perspective see Douzinas (2000) n.128. He notes at p.2 that whilst the 20<sup>th</sup> Century has proclaimed the triumph of human rights, it has also been the era of genocide, massacre and ethnic cleansing.

<sup>133</sup> See generally, Starmer (2000) *supra* n.132, chap.8.

judgments in “A”, that the downside of incorporation of fundamental rights is that they may undermine or restrict the protection afforded to complainants where this conflicts with the rights of the defendant.

As McColgan has observed, the fundamental principles, which the judges apply through rights such as article 6, are the “*principles which they distil from the common law.*”<sup>134</sup> The difficulty that then arises has been clearly demonstrated in both legislative attempts to prohibit the use of sexual history evidence.<sup>135</sup> Given that the flaws underlying the common law may be precisely why an impugned piece of legislation is passed, when that legislation is then overruled or watered down on the basis of common law principles, this marks “*a triumph for the common-law over the legislature*”<sup>136</sup> and a disaster for those the legislation sought to protect. As McColgan notes, “*it is thus hard to escape the conclusion that where such principles are “found” to contradict legislation that the elevated position of rights serves to reinforce at best the position specific views and at worst the personal whims of the judiciary.*”<sup>137</sup>

From a practical perspective, these problems could be overlooked if the substance of judicial lawmaking was preferable in a particular area of

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<sup>134</sup> McColgan (2000) *supra* n.52, p.291. She also makes the point at p.249 that the traditional view of the criminal defendant as a vulnerable individual pitted against the might of the State is frequently accurate but it fails to take account of the fact that the violence suffered by victims such as rape complainants is itself institutionalised. Further, I would argue that the “liberal” model of civil and political rights enshrined in the HRA 1998 does not provide any recourse to victims of such institutionalised violence. Beyond the right to a private life in Article 8, which generally operates in practice against women who suffer violence in the home, there is no civil right not to be beaten or raped by your partner.

<sup>135</sup> S.2 SO(A)A 1976 and s.41 YJCEA 1999.

<sup>136</sup> McColgan (2000) *supra* n.52, p.291.

<sup>137</sup> McColgan (2000) *supra* n.52, p.291. McColgan and Ahmed have both argued that the experience of human rights has shown their tendency to operate in the interests of the powerful whilst leaving the powerless unprotected. The civil and political rights enshrined in the HRA do not give women the right not to be abused by her husband or partner or the right to be protected by the State from such abuse. The main impact therefore of human rights consists of their role in the criminal prosecution of women’s abusers and thus not to the benefit of the women. In support of this argument, McColgan at chap.9 has drawn on a number of examples from the Canadian and US systems relating to the admission of medical records of rape victims in order to discredit them and to a number of attempts to remove the complainant’s rights to anonymity. In general, these examples help to explain in part the vexed nature of rights discourses for feminist analysis. For further discussion see S. Ahmed, (1995) “Deconstruction and Law’s Other: Towards a Feminist Theory of Embodied Legal Rights”, *Social and Legal Studies* Vol. 4:55; T. Murphy, & N. Whitty, (2001) “What is a fair trial? Rape Prosecutions, Disclosure and the Human Rights Act”, *Feminist Legal Studies* Vol. 8:217 and R. Sandland, (1998) “Seeing Double? Or why To Be or Not To Be is (not) the Question for Feminist Legal Studies”, *Social and Legal Studies* Vol.7(3): 307.

concern to that of the legislature.<sup>138</sup> However, it is clear from the previous discussion that this is not the case in the situation where women are victims of male violence. A close reading of the judgments in “A” clearly demonstrates that the judiciary are adept at shutting down any possible discourses from a woman’s standpoint and constructing a notional female sexuality which has little to do with women’s perspectives but everything to do with male standards of behaviour. Rather than assisting women to “speak to”<sup>139</sup> the law, the Lords acknowledgement of a differential standard for the admission of such evidence acts to further distance the reality of women’s sexuality and women’s experience from its “gaze”. Women remain “other”, strictly policed and unworthy of the law’s protection unless they can conform to the historically constructed male models of “appropriate femininity” and “real” rape.

Clearly, this conclusion has implications for the impact of the legislative reforms that have come about as a result of the Sexual Offences Act 2003 and the Criminal Justice Act 2004. The judgment in “A” has retrieved the power of the judiciary to interpret the statutory rules restraining the admission of sexual history evidence with the defendant and in the Human Rights Act 1998, the House of Lords has demonstrated that it has a powerful tool that can be used against the interests of women who claim to have been raped by acquaintances. Indeed, when one looks at the some of the cases that have followed, such as *Mokadi*,<sup>140</sup> and continuing judicial attitudes to sexual history evidence with the defendant,<sup>141</sup> it may be, as McEwan argues, that “the European Convention (in conjunction with section 75) adds to section 41’s potential to make cross examination of complainants in sexual cases more, not less, intrusive.”<sup>142</sup>

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<sup>138</sup> McColgan (2000) *supra* n.52, p.291. For a contrary argument suggesting that judicial discretion is the best safeguard see N. Kibble, [2005] *supra* n.19 and D. Birch, (2003) *supra* n.19.

<sup>139</sup> “Speaking to” is a term used by Gayatri Spivak to describe the process by which the Subaltern Woman can be given a voice in history. She advocates “speaking to” as a technique of constructing subjects rendered “other” by dominant discourses. I adopt the term in the same sense throughout this paper to indicate the way in which the law erases the subjective voice of the rape complainant. G. Spivak, (1988) “Can the Subaltern Speak?” in C. Nelson, & L. Grossberg, (eds.) *Marxism and the Interpretation of Culture*, University of Illinois Press, Urbana.

<sup>140</sup> See n.67.

<sup>141</sup> Kibble [2005] *supra* n.19.

<sup>142</sup> J. McEwan, (2005) *supra* n.10, p.20.

## SUBLESSEES, MORTGAGEES AND THE DOCTRINE OF *TULK v MOXHAY*

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The doctrine of *Tulk v Moxhay* is an illustration of how complexity can be bred from simplicity. When Lord Cottenham granted an injunction to restrain Mr. Moxhay from building on Leicester Square in contravention of a covenant which his predecessor in title had made with Mr. Tulk, he did so on the basis that Moxhay had bought the land with knowledge of the covenant, and should not be allowed to act in defiance of it. Had the law continued on that basis, it would, whatever other objections might have been levelled against it, have had the merit of simplicity. Unfortunately, development of the doctrine in later decisions led to the present state of the law in which to describe the doctrine as simple would be a misrepresentation. One factor leading to the complexity that now surrounds the doctrine is the requirement that a plaintiff seeking to rely on the doctrine must show that he has land for the protection of which the covenant was made. That requirement is the background to the present discussion. What follows is an attempt to address the questions whether a lessor can rely on the doctrine to restrain a sublessee from acting in contravention of the covenants made by the lessee in the lease, and whether a mortgagee or chargee can rely on the doctrine to prevent a successor in title to a borrower from acting in breach of covenants by the borrower contained in the mortgage or charge. The authorities suggest an affirmative answer in each case. One leading text however has suggested that that view may be open to question.<sup>1</sup>

### **The Basis of the Doctrine**

The dictum of Jessel M.R. in *London & South Western Railway Co. v Gomm*,<sup>2</sup> that the doctrine of *Tulk v Moxhay*<sup>3</sup> is either an extension in Equity of the rule in *Spencer's Case*<sup>4</sup> to another line of cases, or an extension in Equity of the doctrine of negative easements, is well known. Though the pedigree of the doctrine may be doubtful, for the first half century of its life the doctrine's parentage did not cause any trouble. The doctrine enabled those to whom promises had been made, that land would not be used in particular ways, or that activities would not take place on land, to obtain injunctions to restrain persons who had not made those promises from acting inconsistently with them. Initially, the doctrine was based simply on the defendant having notice of the covenant. Later, the land was seen as subject to an equitable burden, and those who later acquired the land were affected by the burden, unless they were bona fide purchasers of a legal estate in the land without notice of the covenant.<sup>5</sup> On either view, the absence of notice

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<sup>1</sup> Megarry & Wade, *The Law of Real Property* (5th ed., 1984) p.776. The relevant sentence of the text does not appear in the current edition of the work.

<sup>2</sup> (1881) 20 Ch. D. 562, at 583.

<sup>3</sup> (1848) 2 Ph. 774; 1 H. & Tw. 105.

<sup>4</sup> (1583) 5 Co. Rep. 16a.

<sup>5</sup> For a chronological review of the authorities, marking the developments, see the judgment of Scrutton J. in *London County Council v Allen* [1914] 3 K.B. 642.

meant that the successor took the land free of the obligation. Where however notice existed, the Court of Chancery provided relief where none was available at law, as to the Courts of Common Law the burden of a covenant would not (save in cases where the relation of landlord and tenant existed) affect anyone other than the person who had undertaken the obligation.

### Development of the Doctrine

As time went by however, the simplicity of the doctrine disappeared. The doctrine came to be limited to preventing breaches only of restrictive covenants, *i.e.* covenants *not to do* something.<sup>6</sup> In cases where the covenant required the covenantor *to do* something, the doctrine was of no use to a plaintiff seeking to compel a successor to the covenantor to carry out the terms of the covenant. A further development of the doctrine was the requirement that the plaintiff, if he was not the original covenantee, had to show that the benefit of the covenant had come into his hands in one of the various ways recognised by the courts.<sup>7</sup> The most important development in the doctrine however, for the purposes of the discussion which follows, was the requirement, established shortly after the turn of the twentieth century, that a plaintiff could not succeed under the doctrine unless he had land for the protection of which the covenant was made. No longer would a successor in title to a covenantor be enjoined from acting in contravention of a restrictive covenant simply on the basis that he was affected by notice of the covenant when he acquired the land: if the plaintiff did not have land, Equity would afford no assistance against a defendant who was not the original covenantor.

The last of the developments of the doctrine in *Tulk v Moxhay* mentioned in the preceding paragraph indicates the similarity noted by Jessel M.R. between the doctrine and the law of easements. Just as there can be no easement in gross,<sup>8</sup> so it was held that a plaintiff seeking to enforce a covenant under the doctrine in *Tulk v Moxhay* would not be able to succeed in the absence of land benefited by the covenant. The requirement of dominant and servient tenements for an easement to exist now had its counterpart in the doctrine of *Tulk v Moxhay*. The question for discussion here is whether the effect of this development of the doctrine is to prevent lessors and mortgagees from obtaining injunctions in the situations mentioned. There are authorities that a lessor may succeed under the doctrine in *Tulk v Moxhay* in restraining a sublessee from acting in breach of restrictive covenants in the lease; likewise, decisions exist in which mortgagees have been successful in obtaining injunctions against successors in title to the mortgagor; but in the main these pre-date the establishment of the requirement that the plaintiff have land, and in those cases determined after such requirement was established there has been little explanation of how the situation of the parties to the action can be accommodated with the requirement that the plaintiff have land for the protection of which the covenant was made.

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<sup>6</sup> *Haywood v Brunswick Permanent Building Society* (1881) 8 Q.B.D. 403.

<sup>7</sup> Megarry & Wade, *The Law of Real Property* (6<sup>th</sup> ed., 2000) para.16.059.

<sup>8</sup> *Rankeley v Midland Railway Co.* (1868) 3 Ch. App. 306.

### The Protection of Land

The requirement that the plaintiff have land in order to be able to rely on the doctrine of *Tulk v Moxhay* was established by the Court of Appeal in *Formby v Barker*<sup>9</sup> and *London County Council v Allen*.<sup>10</sup> In the former case, the administratrix and legatee of a covenantor brought an action against the successor in title to the covenantor to prevent the defendant acting in contravention of a restrictive covenant contained in a conveyance by which the covenantor had sold his land to the covenantor. The action failed. The judgment of Vaughan Williams L.J. proceeds on the basis of a distinction between covenants that are personal or collateral and covenants that benefit land of the covenantor. The Lord Justice was unable to find any case in which, after the sale of the whole of an estate in land, the benefit of a restrictive covenant had been enforced by injunction against the assignee of the purchaser at the instance of a plaintiff having no land retained by the vendor, and referred to the absence in the case before him of any relation of dominancy and serviency of lands which would enable an action to be brought against a person not a party to the original contract. The covenant on which the plaintiff relied “ha[d] not been entered into for the benefit of any land of the vendor, or of any land designated in the conveyance,”<sup>11</sup> and would not pass to the heirs of the vendor, notwithstanding that the covenant was made with the covenantor “his heirs, executors and administrators”. The terminology of dominancy and serviency clearly echoes the language of the law of easements, and, with the reference to retained land, suggests that in the absence of two distinct parcels of ground, the one burdened by the covenant, the other enjoying the benefit, the doctrine will not apply. That appears also from *London County Council v Allen*, in which a local authority sought an injunction to restrain the successor in title of a landowner who had covenanted with the authority not to build on his land from acting in breach of the covenant. Refusing the application, Buckley L.J. explained that “[t]he doctrine is that a covenant not running with the land, but being a negative covenant entered into by an owner of land with an adjoining owner, binds the land in equity and is enforceable against a derivative owner taking with notice. The doctrine ceases to be applicable when the person seeking to enforce the covenant against the derivative owner has no land to be protected by the negative covenant. The fact of notice is in that case irrelevant.”<sup>12</sup> Developing the dictum of Jessel M.R. in *London and South Western Railway v Gomm*, Buckley L.J. went on to say: “[t]he doctrine is either an extension in equity of the doctrine in *Spencer’s Case* (in which ownership of land by both covenantor and covenantor is essential) or an extension in equity of the doctrine of negative easements, a doctrine applicable not to the case of easements in gross, but to an easement enjoyed by one land upon another land. Where the covenantor has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant.”<sup>13</sup>

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<sup>9</sup> [1903] 2 Ch. 539.

<sup>10</sup> [1914] 3 K.B. 642.

<sup>11</sup> [1903] 2 Ch. 539, at 552.

<sup>12</sup> [1914] 3 K.B. 642, at 654.

<sup>13</sup> *ibid.*, at 660.

### Lessors and Sublessees

The attraction of the doctrine of *Tulk v Moxhay* for lessors seeking to enforce restrictive covenants contained in leases against sublessees can be seen from a consideration of the principles concerning the running of the burden of leasehold covenants. At common law the burden of a covenant undertaken by a lessee would be enforced against assigns of the lessee, so long as the covenant touched and concerned the land.<sup>14</sup> If therefore an assignee of the lease acted in violation of a covenant undertaken by the lessee, the lessor was able to invoke whatever remedies were available, such as damages or forfeiture. Where however the breach was the result of an act on the part of a sublessee, the lessor's ability to remedy the situation was not assured, as a sublessee was not an assign of the lessee so as to be liable on the lessee's covenants.<sup>15</sup> If the covenant was not an absolute covenant on the part of the lessee (e.g. "the lessee covenants the premises will not be used for . . ."), then unless the acts of the sublessee could be laid at the door of the lessee, so that there was a breach by the latter, the lessor had no cause of action.<sup>16</sup> Hence the use of covenants whereby the lessee promised not only not to do certain acts, but also not to permit or suffer such acts to be done, and the various cases in which the question was whether the lessee could be said to have permitted or suffered the carrying out by sublessees of acts prohibited by the lessee's covenant.<sup>17</sup> In cases where the answer was that the lessee had not permitted or suffered the acts, then there was no breach by the lessee, and therefore no right of action based on breach of covenant against the lessee for damages, forfeiture or anything else. The possibility of an action against the sublessee in such circumstances would obviously be of great benefit to the lessor.

The doctrine of *Tulk v Moxhay* provided just such a possibility. Sublessees, acquiring land which was burdened in Equity by restrictive covenants undertaken by the lessee, took the land subject to that burden unless they were bona fide purchasers for value of a legal estate without notice of the burden. Bona fide purchasers of a legal estate they might well be, but absence of notice was another matter. In most cases sublessees would be fixed with constructive notice of the covenants undertaken by the lessee, and

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<sup>14</sup> *Spencer's Case* (1583) 5 Co. Rep. 16a. For the enforceability of covenants in leases made in England and Wales after 1995 see now Landlord and Tenant (Covenants) Act 1995. In Ireland the ability of lessors to enforce covenants undertaken by lessees against assignees of the lease is governed by section 12 of Deasy's Act.

<sup>15</sup> *Holford v Hatch* (1779) 1 Doug. 183. See generally *Re Town Investments Ltd.'s Underlease* [1954] 1 All E.R. 585; *Hand v Blow* [1901] 2 Ch. 721; *South of England Dairies Ltd. v Baker* [1906] 2 Ch. 631.

<sup>16</sup> Contrast *Bryant v Hancock & Co. Ltd.* [1898] 1 Q.B. 716 (affd. on other grounds [1899] A.C. 442) and *Palethorpe v Home Brewery Co. Ltd.* [1906] 2 K.B. 5. See also *Mumford v Walker* (1901) 85 L.T. 518.

<sup>17</sup> *Hall v Ewin* (1897) 37 Ch. D. 74; *Wilson v Twamley* [1904] 2 K.B. 99; *Berton v Alliance Economic Investment Co. Ltd.* [1922] 1 K.B. 742; *Atkin v Rose* [1923] 1 Ch. 522; *Barton v Reed* [1932] 1 Ch. 362; *Borthwick-Norton v Romney Warwick Estates Ltd.* [1950] 1 All E.R. 798; *Tophams Ltd. v Earl of Sefton* [1966] 1 All E.R. 1039. See also *Prothero v Bell* (1906) 22 T.L.R. 370 (part of covenant held absolute).

the rule in *Patman v Harland*<sup>18</sup> ensured that even where sublessees were prevented from seeing the lease containing the covenants, they would be fixed with notice of the covenants nonetheless. So long therefore as notice was the essential element of the rule in *Tulk v Moxhay*, lessors could look forward to injunctive relief to prevent sublessees acting in contravention of the terms of a restrictive covenant undertaken by the lessee, whether or not any remedy existed against the lessee himself.

And so it proved. Leaving aside cases<sup>19</sup> in which the lessor was possessed of adjacent land, *Parker v Whyte*,<sup>20</sup> *Tritton v Bankart*,<sup>21</sup> *Hall v Ewin*<sup>22</sup> and *Teape v Douse*<sup>23</sup> are all instances in which the court granted an injunction to a lessor to prevent a sublessee acting in breach of a covenant in the lease on the basis that the sublessee had notice of the covenant (*Tritton v Bankart* and *Hall v Ewin* being concerned more with whether an injunction should be granted against the lessee as well as against the sublessee). Whether, following the decisions in *Formby v Barker* and *London County Council v Allen*, these cases remain good law in the case of a lessor who has demised the whole of his land, is the problem.<sup>24</sup> There are few authorities in which the point has been discussed. In *Northern Ireland Carriers Ltd. v Larne Harbour Ltd.*<sup>25</sup> the point was raised, but in the event Murray J. did not have to determine it, as the covenant in question was held to be personal to the lessee, so that the sublessee would not be restrained from acting in contravention of it even if the lessor's interest was sufficient to satisfy the requirements of the doctrine in *Tulk v Moxhay*. In *Hemingway Securities Ltd. v Dunraven Ltd.*<sup>26</sup> an injunction was granted in favour of a lessor requiring a sublessee to surrender a sublease which had been made in breach of a covenant in the lease, the argument that "it is well settled that a restrictive covenant for the benefit of the landlords' reversion counts for the purposes of the doctrine of *Tulk v Moxhay*" being accepted.

### Actions by Mortgagees

The doctrine of *Tulk v Moxhay* has also been successfully used by mortgagees to restrain someone other than the mortgagor from acting in contravention of a restrictive covenant made by the mortgagor. In this context too the question arises whether following the decisions in *Formby v Barker* and *London County Council v Allen* the position has changed. In *John Brothers Abergarw Brewery Co. v Holmes*<sup>27</sup> a brewery company

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<sup>18</sup> (1881) 17 Ch. D. 353.

<sup>19</sup> *Evans v Davis* (1878) 10 Ch. D. 747; *Craig v Greer* [1899] 1 I.R. 258.

<sup>20</sup> (1863) 1 H. & M. 167.

<sup>21</sup> (1887) 56 L.T. 306.

<sup>22</sup> (1887) 37 Ch. D. 74.

<sup>23</sup> (1905) 92 L.T. 319.

<sup>24</sup> In England and Wales, where the lease has been made after the coming into force of the Landlord and Tenant (Covenants) Act 1995, the problems identified above are resolved, section 3(5) of the Act providing that a restrictive covenant on the part of the lessee may be enforced against anyone who is the owner or occupier of the demised premises, thereby allowing actions against sublessees.

<sup>25</sup> [1981] N.I. 171.

<sup>26</sup> (1994) 71 P. & C.R. 30.

<sup>27</sup> [1900] 1 Ch. 188.

holding a mortgage on a public house succeeded in enforcing a covenant made by the borrower to take supplies of beer only from the mortgagee against someone claiming through the borrower. The case was decided before the requirement that the plaintiff have land was established, so does not answer the question. Of more assistance is *Regent Oil Co. Ltd. v J. A. Gregory (Hatch End) Ltd.*<sup>28</sup> in which the question was whether a successor in title to a borrower who had covenanted with a lender in a charge by way of legal mortgage to take supplies of fuel only from the lender was bound by the covenant under the doctrine in *Tulk v Moxhay*. At first instance Ungood-Thomas J. was of the view that there were formidable difficulties in the argument that the successor was liable, but was able to determine the case on another point. On appeal however Harman L.J. saw no such difficulties with the application of the doctrine, saying that “a mortgagee has of necessity an interest in the land the subject-matter of the charge, which I think he is entitled to protect by covenants relating to the user of it.”<sup>29</sup> In Canada a similar view was expressed by White J. in *Cities Service Oil Co. Ltd. v Pauley*.<sup>30</sup>

### Issues Arising

A number of matters arise from the foregoing discussion which call for consideration in addressing the difficulties of the application of the doctrine to the case of a lessor seeking to prevent a sublessee from acting in contravention of a covenant contained in the lease, and that of a mortgagee seeking to prevent a successor in title of the borrower from acting in contravention of a covenant contained in the mortgage. These may be formulated in a number of questions. First, do lessors and/or mortgagees in fact have land within the meaning of *Formby v Barker* and *London County Council v Allen*, so that there is no difficulty in their relying on the doctrine? Secondly, if not, ought they or either of them to be protected by the doctrine? And thirdly, if the answer to that is yes, are lessors and/or mortgagees to be considered simply as exceptional cases, or is there a general principle on which the doctrine can be explained, accommodating lessors and/or mortgagees rather than seeing them as exceptional cases to whom the requirement in *Formby v Barker* and *London County Council v Allen* that the plaintiff have land does not apply?

Answering the first of these questions requires further consideration of what is meant by “land” in *Formby v Barker* and *London County Council v Allen*.<sup>31</sup> In later cases, when the question was whether the plaintiff met the requirements of the doctrine of *Tulk v Moxhay*, the courts were concerned more with whether it was necessary that the plaintiff’s land be defined in the

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<sup>28</sup> [1965] 2 All E.R. 90; [1965] 3 All E.R. 673.

<sup>29</sup> [1965] 3 All E.R. 673, at 680.

<sup>30</sup> [1931] O.R. 685.

<sup>31</sup> For the same question arising in a different context, see *P. & A. Swift Investments v Combined English Stores Group plc.* [1989] A.C. 632 (whether landlord’s reversion itself “land” so as to allow successor in title to landlord to enforce surety covenant where benefit not expressly assigned with reversion).

deed containing the covenant,<sup>32</sup> or whether the wording of the covenant was sufficient to mean that the benefit of the covenant had been annexed to that land,<sup>33</sup> or whether, if the land and the benefit of the covenant had been separated, their later reunion in the hands of the plaintiff cured the difficulty,<sup>34</sup> than with the question whether the doctrine applies where what the plaintiff is relying on is not an adjacent parcel of land but an interest in the land burdened by the covenant. The question arises because of the two possible meanings of the word “land”, *viz.*, signifying either a parcel of land (“my land lies adjacent to yours”) or as signifying certain rights of property, including incorporeal rights. Section 2 of the Conveyancing and Law of Property Act 1881 is an example of the word being defined to include both meanings. A similar case exists under the Law of Property Act 1925.<sup>35</sup> Thus the owner of an easement has something which itself is “land”.<sup>36</sup> The same ambiguity arises in connection with use of the word “estate”, which may mean either an area of land (“the Dulwich estate”) or describe rights in land (*e.g.* “an estate in fee simple”). Although Williams L.J.’s reference in *Formby v Barker* to “the whole of an estate in land” might suggest that the terms “estate” and “land” must signify different things, it seems from the reference elsewhere in the judgment to the vendor having “no contiguous estate” that the Lord Justice’s references both to land and to an estate refer to parcels of land. The same possible construction that “land” in Buckley L.J.’s judgment in *London County Council v Allen* includes the rights of a lessor or mortgagee in land subject to a lease or mortgage derives some support from the reference in the judgment to the doctrine in *Spencer’s Case* “in which ownership of land by both covenantor and covenantee is essential”. In the context of *Spencer’s Case* this can only be a reference to the estates held by landlord and tenant rather than two different parcels of land. The argument that an estate in the burdened land suffices for the purposes of the doctrine of *Tulk v Moxhay* appears to be displaced by the references elsewhere in Buckley L.J.’s judgment to adjoining land, meaning clearly an adjacent parcel of land. It seems clear from the reference in Buckley L.J.’s judgment to covenants entered into *between adjoining owners*, and from his reference to Lord Cottenham’s statement in *Tulk v Moxhay* that unless the court enforced the covenant it would be impossible for a landowner *to sell part of his land* without the risk of rendering what he retained worthless, that what Buckley L.J. meant by the plaintiff having land was that he had a plot of ground separate from the land burdened by the covenant. If that is so, then lessors seeking to enforce restrictive covenants in the lease against sublessees should be unable to do so unless they have land adjacent to the land demised by the lease. The same will be the case for mortgagees and chargees unless they have land adjacent to the land which is the subject of

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<sup>32</sup> *Renals v Cowlshaw* (1879) 11 Ch. D. 866; *Miles v Easter* [1933] Ch. 611; *Newton Abbot Co-Operative Society Ltd. v Williamson & Treadgold Ltd.* [1952] 1 All E.R. 279; *Marten v Flight Refuelling Ltd.* [1961] 2 All E.R. 696.

<sup>33</sup> *Renals v Cowlshaw* (1879) 11 Ch. D. 866; *Miles v Easter* [1933] Ch. 611; *Newton Abbot Co-Operative Society Ltd. v Williamson & Treadgold Ltd.* [1952] 1 All E.R. 279; *Shropshire C.C. v Edwards* (1983) 46 P. & C.R. 270.

<sup>34</sup> *Lord Northbourne v Johnston & Son* [1922] 2 Ch. 309; *Chambers v Randall* [1923] 1 Ch. 149.

<sup>35</sup> Section 205(1)(ix).

<sup>36</sup> *Willies-Williams v National Trust* (1993) 65 P. & C.R. 359.

the security. Even then however, their ability to sue under the doctrine of *Tulk v Moxhay* is not established unless the covenant was made with the lessor or mortgagee for the benefit of the adjoining land, rather than with the lessor simply as lessor of the demised property or mortgagee simply as lender.

The second question identified above is whether lessors and/or mortgagees ought to be protected by the doctrine. As a matter of policy, it is thought the answer should be yes in each case. In the case of a mortgagee, the mortgage debt is protected by the land on which it is secured, and maintenance of the value of the land is clearly therefore important. The view, of Harman L.J. in *Regent Oil Co. Ltd. v J. A. Gregory (Hatch End) Ltd.* and of White J. in *Cities Service Oil Co Ltd. v Pauley*, that a mortgagee has an interest which he should be entitled to protect by covenants must surely be right. The same argument can be made for extending the protection of the doctrine to a lessor who does not retain any adjacent land. As with the mortgagee, the lessor has a direct monetary interest in the land in the form of the rent reserved by the lease. While the rent will be payable whether any covenant in the lease is observed or not, if the value of the land falls because it is used in breach of covenant the lessor may find that any future lease he might make would attract a lower rent. Further, the lessor's estate is protected under the law of landlord and tenant, and it would seem odd if it did not qualify for protection under the doctrine of *Tulk v Moxhay*.

Turning to the third question, if the cases in which lessors have been successful in obtaining injunctions against sublessees and mortgagees have obtained orders against successors to the mortgagor are to be upheld following *Formby v Barker* and *London County Council v Allen*, some explanation must be offered as to how the cases can be reconciled with the view that the doctrine of *Tulk v Moxhay* will not assist a plaintiff who does not have land for the protection of which the covenant was made. One possible explanation is that both lessor and mortgagee have an estate in the land burdened by the covenant, and that ownership of an estate in the burdened land is a sufficient alternative to ownership of adjoining land. A second possibility is that suggested in *Hemingway Securities*, viz., that the lessor's reversionary interest counts for the purposes of the doctrine.

### ***An estate in the burdened land***

Protection of a plaintiff under the doctrine of *Tulk v Moxhay* on the basis that the plaintiff has an estate in the land of the defendant would follow naturally from the explanation that the doctrine has its roots in *Spencer's Case*. There the judges resolved that the burden of a covenant would be enforceable by a lessor against a successor to the lessee if the covenant touched and concerned the thing demised, i.e. the demised land. Some years before *Spencer's Case*, Parliament had determined that successors in title to the lessor should have the same remedies as had been enjoyed by the lessor himself.<sup>37</sup> The result was that in the context of landlord and tenant, benefit and burden of covenants ran with the estates of the parties in the land demised by the lease. If ownership of an estate in land is likewise sufficient for the purposes of the doctrine of *Tulk v Moxhay*, then lessors and mortgagees will be protected,

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<sup>37</sup> Grantees of Reversions Act 1540.

but a problem exists for lenders whose security takes the form of a charge on the land rather than a mortgage. A charge confers no estate in the land on the lender, merely rights over the land exercisable in the event of the borrower's default. It is thought unlikely that a court of Equity would be keen to allow mortgagees to take advantage of the doctrine and at the same time deny relief to chargees on the basis that the former have an estate in the land but the latter do not. The form of the security taken by the lender may well be dictated by circumstances which have little to do with the substance of the transaction, and it would be harsh to say that the form of the transaction alone should mean that one lender has a remedy while another does not. If that view is correct, then the view that the ownership by the plaintiff of an *estate* in the burdened land is what allows lessors and secured lenders to rely on the doctrine in *Tulk v Moxhay* can be discounted.

### ***A reversion***

The possibility needs to be considered whether decisions in which the doctrine in *Tulk v Moxhay* has been successfully invoked by plaintiffs who do not have adjacent land can be upheld on the basis that the plaintiff's reversionary interest is sufficient. It is certainly arguable that if a lessor cannot prevent a sublessee from acting in breach of covenants in the lease, the lessor may, when the lease falls in, recover possession of something less valuable on account of the unlawful activity, and that accordingly he should be protected by the doctrine in *Tulk v Moxhay*. The case of vendor and purchaser is distinguishable in that the vendor has no right or possibility of possession in the future of the property he has sold. There are however problems with such a view. First, the reversionary interest retained by the lessor may be nominal only, as where the plaintiff is himself a lessee, and the (sub)lease he has made is (in practical terms) for the whole of the term for which he is entitled to the land. To uphold the applicability of the doctrine of *Tulk v Moxhay* in the case of lessor and sublessee on the ground of the reversionary interest the lessor has, but a vendor does not, may be unjust in such cases. The second problem is that acceptance of the argument would mean that the doctrine will not protect a mortgagee who has no reversionary interest corresponding to that of a lessor. The same considerations as to protection of the interest of a mortgagee who may on default of the borrower obtain possession of land which has been devalued as a result of the failure to observe covenants undertaken by the borrower in the mortgage apply in this instance.

### ***Exceptional cases***

A third possible explanation for allowing lessors and mortgagees to succeed under the doctrine of *Tulk v Moxhay* following the decisions in *Formby v Barker* and *London County Council v Allen* is that theirs are cases to which the limitations of the doctrine contained in those cases do not apply; in other words, that actions by lessors and mortgagees are simply exceptional cases.<sup>38</sup> Apart however from there being nothing in *London County Council v Allen* to suggest the existence of any exceptional cases, if that is the correct

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<sup>38</sup> A number of exceptional cases do exist in which statutory provisions enable plaintiffs to enforce restrictive covenants despite the absence of land: see Megarry & Wade, *op. cit.* (6<sup>th</sup> ed., 2000) para.16.047.

analysis, it is arguable that such plaintiffs can rely on the doctrine to prevent breach of covenants which are purely personal or collateral (to use the terminology in *Formby v Barker*). That may be undesirable, for reasons considered below. An alternative argument is that the type of covenants which are enforceable under the doctrine is limited by the relationship between the parties. In the case of a lessor relying on the doctrine against a sublessee, an obvious limitation would be that such covenants must “touch and concern the thing demised”, *i.e.* to apply the same test as existed at common law in the case of covenants enforceable against successors to the lessee. In the case of a mortgagee relying on the doctrine against a successor to the mortgagor, it might be thought appropriate that only covenants having reference to the security created might be enforceable under the doctrine.

The cases in which mortgagees have been successful in enforcing covenants against defendants who were not the covenantors seem however to suggest that covenants enforceable under the doctrine are not limited to ones protecting the lender’s interest as lender. All three cases concerned solus ties. In *John Brothers Abergarw Brewery Co. v Holmes* the covenant required the borrower to take supplies of beer solely from the lender; *Regent Oil Co. Ltd. v J. A. Gregory (Hatch End) Ltd.* and *Cities Service Oil Co. Ltd. v Pauley* concerned supplies of fuel. Mortgage cases involving such covenants have usually proceeded on the basis that the covenants were collateral to the security, the question for the court being whether a collateral benefit was an unlawful clog on the mortgagor’s equity of redemption.<sup>39</sup> In contrast, in landlord and tenant cases, covenants by lessees to take supplies solely from the lessor have been held enforceable by and against successors in title to the original parties on the basis that the covenants touch and concern the land.<sup>40</sup> Harman L.J. in *Regent Oil Co.* considered the landlord and tenant cases analogous to the case before him. The result would appear therefore to be that mortgagees can rely on the doctrine to enforce covenants which are made for purposes other than the protection of the mortgagee’s interest as lender. In *Regent Oil Co.* Harman L.J. pointed out that the object of the plaintiff in entering the transaction with the borrower was to find an outlet for its products rather than a security for its money. Similarly, in *John Brothers Abergarw* Kekewich J. found that the object of the covenant was to protect the lender’s business. In each case the plaintiff was a mortgagee, but in neither was the covenant enforced primarily concerned with protection of a mortgage debt.

### Reconsideration

It seems therefore that explanations that lessors and mortgagees are able to rely on the doctrine of *Tulk v Moxhay* either because they have an estate in the land, or a reversionary interest, or because theirs are exceptional cases to which the limitations imposed by *Formby v Barker* and *London County*

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<sup>39</sup> See, *e.g.* *Biggs v Hoddinott* [1898] 2 Ch. 307; *Noakes & Co. Ltd. v Rice* [1902] A.C. 24; *Morgan v Jeffreys* [1910] 1 Ch. 620. For the validity of collateral advantages see *G. & C. Kreglinger v New Patagonia Meat & Cold Storage Co. Ltd.* [1914] A.C. 25.

<sup>40</sup> See *Clegg v Hands* (1890) 44 Ch. D. 503; *White v Southend Hotel Co.* [1897] 1 Ch. 767; *Manchester Brewery Co. v Coombs* [1901] 2 Ch. 608; *Caerns Motor Services Ltd. v Texaco Ltd.* [1995] 1 All E.R. 247.

*Council v Allen* do not apply, are, for one reason or another, unsatisfactory. If lessors and mortgagees are still entitled to the benefit of the doctrine after those decisions, some other explanation must be suggested. One of course would be that *Formby v Barker* and *London County Council v Allen* were wrong in establishing a requirement that the plaintiff have land for the protection of which the covenant in question was made.<sup>41</sup> One comment that can be made in support of that proposition is that in neither case did the court review all the authorities which have a bearing on the question. In *London County Council v Allen* Scrutton J. pointed out that neither *Catt v Tourle*<sup>42</sup> nor *Luker v Dennis*<sup>43</sup> had been mentioned in *Formby v Barker*. In each of those cases a brewery company had been successful in obtaining an injunction to enforce a solus tie despite the apparent absence of any land for the benefit of which the covenant had been made. The cases were however discussed in *London County Council v Allen* itself, Buckley L.J. saying that they “undoubtedly create a difficulty”, before going on to say that statements in the former were inconsistent with later authorities and that the latter could not be relied on as accurately stating the law. More significantly for the purposes of the present discussion, there is no mention in either *Formby v Barker* nor *London County Council v Allen* of the various cases in which lessors and mortgagees had successfully relied on the doctrine, nor is there any discussion of the operation of the doctrine in those situations.

### Rationale

Leaving aside the question whether as a matter of law the decision in *London County Council v Allen* is correct, the rationale of the requirement that the plaintiff have land for the doctrine of *Tulk v Moxhay* to apply is said to be that there must be some identifiable landowner with whom it is possible to bargain for a discharge of the covenant, or that the requirement operates as a test of standing, ensuring that plaintiffs have a legitimate interest in the enforcement of the covenant.<sup>44</sup> Of the two, the latter seems the better explanation, as a release of the covenant can be effected by the person with the benefit of it, whether or not that person has land, and the ability of the covenantor to identify the person who is entitled to enforce the covenant will not be much assisted by the knowledge that it must be someone who owns land nearby. On the other hand, by enforcing only those covenants which are intended to benefit land of the covenantee, the law ensures that land is not indefinitely burdened by obligations which may be capricious.<sup>45</sup> A similar

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<sup>41</sup> For discussion of *Formby v Barker* and the earlier authorities leading to the emergence of the requirement that the plaintiff have land see Gardner, “The proprietary effect of contractual obligations under *Tulk v Moxhay* and *De Mattos v Gibson*” (1982) 98 L.Q.R. 279, the author commenting at p.307 that “the conclusion of appurtenance in restrictive covenants is drawn from an analogue, the easement, which seems no more compelling than other rights which lack that requirement; the presence of the requirement in the analogue itself is questionable in derivation and policy; and the resultant requirement in restrictive covenants is not identical with that in the analogue.”

<sup>42</sup> (1869) 4 Ch. App. 654.

<sup>43</sup> (1877) 7 Ch. D. 227.

<sup>44</sup> See Gray & Gray, *Elements of Land Law* (4th ed., 2005) para.9.160; Gardner, *op. cit.* 309.

<sup>45</sup> See discussion *ibid.*

filtering process exists in the law of easements, so that some rights may exist as easements while others may not,<sup>46</sup> and in the law of landlord and tenant, so that only covenants having reference to the subject-matter of the lease were at common law enforceable outside the law of contract.<sup>47</sup> The underlying principle is that incidents of a novel kind cannot be attached to property at the fancy or caprice of any owner.<sup>48</sup>

### Protection of Property

If *Formby v Barker* and *London County Council v Allen* are open to the criticism that the views expressed in them were arrived at without consideration of cases in which lessors and mortgagees had successfully relied on the doctrine, and yet some filter should exist, in order to avoid the situation envisaged in *Keppell v Bailey*<sup>49</sup> of incidents of a novel kind being imposed on land, the question is what the test should be. One way of distinguishing lessors and mortgagees on the one hand from vendors on the other, and to say that the former are entitled to protection under the doctrine of *Tulk v Moxhay* but the latter is not, is that the former have property other than the benefit of the covenant: the mortgagee has a debt which is protected by the land on which it is secured; the lessor has a rent issuing out of the land demised, and will have possession of the demised land itself once the lease falls in. In each case the value of the land is important for the protection of the plaintiff's interest, so that covenants intended to protect the plaintiff's interest by maintaining the value of the land should be enforceable by the plaintiff against subsequent owners of the land. If the doctrine of *Tulk v Moxhay* had been based on the protection of property, rather than the protection of one form of property only (adjacent land), lessors and mortgagees would have come within the doctrine so long as the covenant in question had been made for the protection of that property. Some support for such a wider view of the doctrine may in fact be found in *Formby v Barker*, Romer L.J. saying that if restrictive covenants are entered into with a covenantee, "not in respect of or concerning *any ascertainable property* belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant".<sup>50</sup>

Had the basis of the doctrine of *Tulk v Moxhay* been the protection of property rather than that which was settled in *Formby v Barker* and *London County Council v Allen*, later cases would of course have proceeded differently. Perhaps the most obvious example is the cases in which the question has been whether the covenant in question was made for the protection of land of the plaintiff, or for the protection of the plaintiff's business. Once the protection of land became the touchstone for enforceability of restrictive covenants, that the covenant was made for the protection of a business owned by the plaintiff rather than for the protection of land owned by him became a matter raised by defendants to avoid an

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<sup>46</sup> See Megarry & Wade, *op. cit.* (6<sup>th</sup> ed., 2000) para.15.022.

<sup>47</sup> See *ibid.*, para.18.053.

<sup>48</sup> *Keppell v Bailey* (1834) 2 My. & K. 517.

<sup>49</sup> (1834) 2 My. & K. 517.

<sup>50</sup> [1903] 2 Ch. 539, at 554 (emphasis added).

injunction.<sup>51</sup> If the doctrine of *Tulk v Moxhay* were applicable where the covenant is made for the protection of property of the plaintiff, then covenants made for the protection of the plaintiff's business would come within it without the need to show that the covenant protects land of the plaintiff as well.<sup>52</sup> The result would be that cases such as *Catt v Tourle* and *Luker v Dennis*, in which covenants imposing solus ties had been enforced by plaintiffs for the protection of whose businesses the covenants had been made, could be upheld, not on the basis of notice, but on the basis that the covenants in question were made for the protection of property owned by the plaintiff.

### Conclusion

So long as the doctrine of *Tulk v Moxhay* was based simply on the defendant having notice of the covenant, whether the doctrine was an extension of the doctrine of *Spencer's Case* or an extension of the law of negative easements was of little moment. *Formby v Barker* and *London County Council v Allen* mark the point at which identifying the pedigree of the doctrine in *Tulk v Moxhay* became important, and in asserting the need for the plaintiff to have land, suggest the courts saw the law of easements rather than the law in *Spencer's Case* as its natural forbear. That is hardly surprising given the cases in which application of the doctrine had commonly arisen. *Tulk v Moxhay* involved the sale of part of the land of the plaintiff and in it Lord Cottenham L.C. had expressed concern about the value of the land retained if the covenant entered by the purchaser were not enforceable against his successor in title. It was this that influenced the court in *London County Council v Allen* to take the view that a plaintiff having no land could not rely on the doctrine. In taking that view however the courts, wittingly or not, may well have brought about the result that lessors and mortgagees whose only land is their interest in the land burdened by the covenant do not come within the protection of the doctrine. To have stated the requirement in terms that the plaintiff must have property other than simply the benefit of the covenant, for the protection of which the covenant was made, would have preserved the decisions in which lessors and mortgagees had been protected by the doctrine while at the same time have avoided the danger articulated in *Keppell v Bailey* that burdens of any kind could be imposed on land which would be enforceable against persons other than the covenantor.

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<sup>51</sup> *Newton Abbot Co-Operative Society Ltd. v Williamson & Treadgold Ltd.* [1952] 1 All E.R. 279; *U.B.H. (Mechanical Services) Ltd. v Jones* (1985) unrep. (Nicholls J.). The same issue had arisen in cases involving easements: see *Moody v Steggles* (1879) 12 Ch. D. 261; *Copeland v Greenhalf* [1952] 1 All E.R. 809.

<sup>52</sup> See *U.B.H. (Mechanical Services) Ltd. v Jones*, *supra*.

## DIVERSION, PUNISHMENT AND RESTRICTING HUMAN RIGHTS

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### Introduction

There are sound reasons, in terms of both policy and criminological thinking, for diverting young offenders who commit comparatively trivial offences from the criminal courts. Indeed, so well accepted is this principle that it has been recognised in Rule 11 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.<sup>1</sup> Traditionally, the mechanism for achieving this in England and Wales was through the administering of a caution by a senior police officer. Whilst this process was well established in practice, and also the subject of a number of Home Office circulars, it lacked any statutory basis.<sup>2</sup>

This informal system of diversion was reformed by the Crime and Disorder Act 1998. The New Labour government was keen to avoid the accusation, levelled at previous Labour administrations, that it was “soft” in its approach to juvenile crime.<sup>3</sup> Under its flagship 1998 legislation, the government wanted to show that it was not prepared to excuse youth crime on the basis of social disadvantage and relative immaturity, but instead that it wished to emphasise the impact of youth offending on victims and local communities. As part of these youth justice reforms, the new government significantly altered the mechanism for diverting juveniles who commit minor offences. This was motivated by a belief,<sup>4</sup> which was far from universally shared,<sup>5</sup> that “[inconsistent], repeated and ineffective cautioning has allowed some

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<sup>1</sup> General Assembly Resolution 40/33 (1985), Rule 11.1: “Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in Rule 14.1 below.”

<sup>2</sup> See further Dingwall and Harding, *Diversion in the Criminal Process* (1998), Chap.7. There had been arguments that cautioning should be given a statutory basis; see May, “The Legal Effect of a Police Caution” [1997] *Criminal Law Review* 491.

<sup>3</sup> See Butler and Drakeford, “Tough Guise: the Politics of Youth Justice” (1997) 44(4) *Probation Journal* 216. Also, Windlesham, *Dispensing Justice: Responses to Crime*, Vol. 4 (2001), Chap.3.

<sup>4</sup> See further Home Office, *Tackling Youth Crime* (1997) and Home Office, *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales* (1997).

<sup>5</sup> See Antonopoulos and Winterdyk, “The British 1998 Crime and Disorder Act: a “Restorative” Response to Youth Offending?” (2003) 11(4) *European Journal of Crime, Criminal Law and Criminal Justice* 386; Bateman, “Living with Final Warnings: Making the Best of a Bad Job?” (2003) 2(3) *Youth Justice* 131; Evans and Puech, “Reprimands and Warnings: Popular Punitiveness or Restorative Justice?” [2001] *Criminal Law Review* 794; Fionda, “Crime and Disorder Act 1998: New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998” [1999] *Criminal Law Review* 36 and Gelsthorpe and Morris, “Much Ado about Nothing – A Critical Comment on Key Provisions Relating to Children in the Crime and Disorder Act 1998” (1999) 11 *Child and Family Law Quarterly* 209.

children and young people to feel that they can offend with impunity".<sup>6</sup> Cautioning was replaced by a new statutory system for diverting children and young people from the court system.<sup>7</sup> This new scheme allowed the police to issue reprimands or warnings if certain, prescribed conditions were met.<sup>8</sup> The system was more invasive in that, if a warning was given, the case would be assessed by a youth offending team which would design a suitable rehabilitative programme for the offender, unless the team believed this to be inappropriate.<sup>9</sup>

At the same time as it was radically overhauling the juvenile justice system, and introducing other measures which have been criticised as inconsistent with the protection of civil liberties,<sup>10</sup> the Government claimed to be "bringing rights home" with its enactment of the Human Rights Act 1998.<sup>11</sup> This legislation was introduced with the specific aim of incorporating the European Convention on Human Rights (hereafter the ECHR) into domestic law. It might have been hoped that the combined effect of incorporating the ECHR into domestic law and introducing a new statutory diversionary system would have been to increase the protection of the human rights of young offenders. However, there were some concerns, even at the time the Act was passed, that this might not be the case. For example, the new scheme of reprimands and warnings did little to address a central problem of the old cautioning system, namely that it bestowed too much discretion upon the police in determining both the guilt of a suspect and the imposition of a sanction.<sup>12</sup> The combination of this concentration of power in the hands of the police with an absence of safeguards for young suspects was a major weakness of the old cautioning system, and this was not eradicated by the new legislation. A further concern was that, under the old system, the consent of the juvenile suspect and his or her parents was required before a caution could be administered. In contrast, the 1998 Act contains no explicit requirement of consent.

### Loss of a Right to a Fair Trial?

These initial concerns about the fairness of the new system of reprimands and warnings were brought into sharper focus by the recent decision of the House of Lords in *R (on the application of R) v Durham Constabulary and*

<sup>6</sup> Home Office, *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales* (1997), para.5.10. Although the white paper acknowledged in para.5.9 that 68% of offenders who were cautioned for the first time were not cautioned again or reconvicted within two years.

<sup>7</sup> Cautioning was retained for adult offenders. Part 3 of the Criminal Justice Act 2003 additionally introduced 'conditional cautioning' for adult offenders.

<sup>8</sup> The Crime and Disorder Act, s.65.

<sup>9</sup> *ibid.*, s.66(2).

<sup>10</sup> *E.g.* see Ashworth, "Social Control and Anti-Social Behaviour: The Subversion of Human Rights" (2004) 120 *Law Quarterly Review*. 263; Reid, "Anti-Social Behaviour Orders: Some Current Issues" (2002) 24(2) *Journal of Social Welfare and Family Law* 205; Hopkins Burke and Morrill, "Anti-Social Behaviour Orders: an Infringement of the Human Rights Act 1998?" (2002) 11(2) *Nottingham Law Journal* 1 and White, "Anti-Social Behaviour Orders Under Section 1 of the Crime and Disorder Act 1998" (1999) 24 *European Law Review* 55.

<sup>11</sup> See Home Office, *Rights Brought Home: the Human Rights Bill* (1997).

<sup>12</sup> *E.g.* see Leng *et al*, *The Crime and Disorder Act 1998* (1998), p.76.

*another*.<sup>13</sup> In this case, the claimant was accused of indecently assaulting a number of girls at his school when he was 14 years old, leading to his suspension (and eventual expulsion) from the school. The claimant attended a police station where he admitted acts which amounted in law to indecent assault, but which he described as “horseplay”.<sup>14</sup> The police decided not to prosecute, but instead to issue a final warning under the Crime and Disorder Act 1998. Section 65(1) sets out the circumstances in which a reprimand or a warning can be given as follows:

“Subsections (2) to (5) below apply where – (a) a constable has evidence that a child or young person (“the offender”) has committed an offence; (b) the constable considers that the evidence is such that, if the offender were prosecuted for the offence, there would be a realistic prospect of his being convicted; (c) the offender admits to the constable that he committed the offence; (d) the offender has not previously been convicted of an offence; and (e) the constable is satisfied that it would not be in the public interest for the offender to be prosecuted.”

The warning was at first accepted by the claimant and his stepfather, who was present at the police interview in his capacity as an “appropriate adult”,<sup>15</sup> and was duly administered by the police. However, in contravention of the Home Office guidance for the police on the final warning scheme,<sup>16</sup> neither the claimant nor his stepfather was told that the former would have to register with the police for inclusion on the sex offenders register.<sup>17</sup> This consequence of receiving a warning did not become known to the claimant or his stepfather until about a week later. The claimant challenged the legality of the warning, arguing that the procedure had contravened his right, under Article 6 of the ECHR, to a fair and public hearing by an independent and impartial tribunal.

The Divisional Court<sup>18</sup> held that the procedure had given rise to a breach of Article 6 and ordered the warning to be quashed. Central to the Divisional

<sup>13</sup> [2005] 2 All ER 369.

<sup>14</sup> *ibid.*, at 377.

<sup>15</sup> S.65(5) states that a reprimand or warning has to be given in the presence of an “appropriate” adult if the “offender” is under the age of 17. For the purposes of this section, s.65(7) defines “appropriate” adult as “(a) his parent or guardian or, if he is in the care of a local authority or voluntary organisation, a person representing that authority or organisation; (b) a social worker of a local authority social services department; (c) if no person falling within paragraph (a) or (b) above is available, any responsible person aged 18 or over who is not a police officer or a person employed by the police”.

<sup>16</sup> Home Office, *Final Warning Scheme – Guidance for Police* (2000), para.73 provides that the officer giving the warning should, amongst other matters, “make it clear” that “if the offence is one covered by the Sex Offenders Act 1997, the young person is required to register with the police for inclusion on the sex offenders register”.

<sup>17</sup> Sex Offenders Act 1997, Part 1. For further comment see Powers, “The Crime and Disorder Act 1998: Sex Offenders, Privacy and the Police” [1999] *Criminal Law Review* 3.

<sup>18</sup> *R (on the application of U) v Metropolitan Police Commissioner, R. (on the application of R.) v Durham Constabulary* [2003] All ER 419.

Court's reasoning was a belief that the procedure adopted had the effect of publicly pronouncing the claimant guilty of indecent assault. The court stated that in this case (and that of a similar claimant):

“Although the decision was taken not to prosecute, the claimants were required to subject themselves to a procedure which had the effect of publicly pronouncing their guilt of the offence of indecent assault. That was the consequence of the final warnings being recorded on the PNC [police national computer], so that the fact of the final warnings became available not only in the event of future offending, but also to all those who have access to the PNC. It seems to us that these consequences *prima facie* constituted a breach of art 6(1) and (2). The claimants were denied a right to a trial of the charges against them, and declared guilty by an administrative process.”<sup>19</sup>

The consequences of the Divisional Court's decision were potentially far-reaching, and it was not surprising that the Chief Constable of Durham and the Home Secretary chose to appeal. The 1998 legislation had not specified that the informed consent of the suspect was required before a warning could be given, but the Divisional Court appeared to have introduced such a requirement if the new warning scheme was not to be in breach of Article 6. The House of Lords reversed the decision,<sup>20</sup> holding that the final warning given to the claimant did not involve the determination of a criminal charge for the purposes of Article 6 of the ECHR. Once a decision not to prosecute had been made, a criminal charge (or the possibility of a charge) no longer existed:

“[The] criminal charge ceased to exist when a firm decision was made not to prosecute. For good and understandable reasons, the protection given to criminal defendants by art 6 covers not only the trial itself but extends back to the preparatory and preliminary processes preceding trial and forwards to sentence and appeal. But the primary focus of the right is the trial itself, because that is the stage at which guilt is decided with the possibility of condemnation and punishment. I find it hard to see how a criminal charge can be held to endure once a decision has been made that rules out the possibility of any trial, or condemnation, or punishment.”<sup>21</sup>

It was held that the process involved no decision in relation to any criminal charge, as the police officer only had to decide whether it was in the public interest for the offender to be warned rather than prosecuted, and he did not have to determine whether the claimant was guilty. The House also held that the possibility of punishment was crucial. As the process in the instant case

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<sup>19</sup> *ibid.*, at 432.

<sup>20</sup> Though it should be noted that Lord Steyn did so “reluctantly” [2005] 2 All ER 369 at 386, and Lady Hale did so with “considerable misgivings” [2005] 2 All ER 369 at 395.

<sup>21</sup> *ibid.*, at 379, *per* Lord Bingham.

did not, in its opinion,<sup>22</sup> involve the imposition (or possible imposition) of any punishment on an offender, it could not be regarded as the determination of a criminal charge. It drew a distinction between a process which could only result in measures of a preventive, rehabilitative, or welfare nature, and the determination of a criminal charge which would normally carry the possibility of punishment.<sup>23</sup> Crucially, the House of Lords did not regard the recording of the warning on the police national computer, and the claimant's inclusion on the sex offenders register, as a determination or public declaration of the claimant's guilt, as access to these databases is controlled and limited.

### **Punishment and Warnings**

In reaching its conclusion in the *Durham Constabulary* case, the House of Lords made two important determinations. First, it was held that there was no longer a criminal charge in existence once a decision had been made "that rules out the possibility of any trial, or condemnation, or punishment".<sup>24</sup> In this case, once a decision had been made to issue a warning, there clearly was no possibility of a subsequent trial. The second determination that the House made was that the process did not involve any degree of condemnation or punishment.<sup>25</sup> It is worth considering this point further.

Did the issuing of a warning involve "public condemnation"? In contrast to a conviction in a criminal court, it could be argued that the warning was not public in the sense that the individual's guilt would not be publicised immediately to the general public. However, it could be contended that the circumstances were such that the process amounted to the equivalent of a public declaration of guilt. It will be recalled that the Divisional Court held that the process involved a "public condemnation" for two reasons. The first of these is that, if the individual offended again, the existence of the warning would be made known to the court. The second is that the warning was accessible to all those with access to the Police National Computer, a group sufficiently large to have the effect of making the warning "public". In the House, there was some disagreement as to the number of individuals who had access to the information, but there was agreement that the procedure did not amount to a "public condemnation". Lord Bingham stated that the process was "far from a public announcement or declaration of guilt", as

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<sup>22</sup> Although Lady Hale noted at 394 that "[The claimant] and many others might consider it punitive. He faces a higher penalty should he offend again, he must notify the police of his whereabouts for some time, and his details are on a computer to which a very large number of people have access, albeit under carefully controlled circumstances".

<sup>23</sup> Although the exact wording used by Lord Bingham at 381 is intriguing: "[The] determination of a criminal charge, to be properly so regarded, must expose the subject of the charge to the possibility of punishment, whether in the event punishment is imposed or not. A process which can only culminate in measures of a preventive, curative, rehabilitative or welfare-promoting kind will not *ordinarily* be the determination of a criminal charge." [Emphasis added]. Does this mean that, in contradiction of the first sentence, there are circumstances where punishment is not a necessity?

<sup>24</sup> *ibid.*, at 379, *per* Lord Bingham.

<sup>25</sup> *ibid.*, at 381.

access was limited to a “relatively small number of authorised people”.<sup>26</sup> Lady Hale, whilst agreeing that “[this] is not the public pronouncement of guilt which the Divisional Court thought it to be”, nonetheless commented that “a very large number of people” had access to the information.<sup>27</sup> Presumably Lady Hale would have deemed the process to involve “public condemnation” only if the information on the sex offenders register was available to the general public, as is the practice in some states in the USA.

It is clear then that, in contrast to the Divisional Court, the House of Lords adopted a narrow conception of “public condemnation”. Similarly, their Lordships’ finding that the process involved no degree of punishment was based on a very restrictive interpretation of punitiveness. There is a considerable literature, much of it of a philosophical nature, devoted to the meaning of punishment,<sup>28</sup> and it is understandable perhaps that their Lordships were reluctant to get drawn into a prolonged discussion of this subject. However, their failure to explore the issue more fully was disappointing, and lends weight to previous academic criticism levelled at the British courts for their unsatisfactory view of what is “punitive”.<sup>29</sup> There have been other occasions on which courts have interpreted punishment restrictively for the purposes of the ECHR, and the House may have considered itself constrained by jurisprudence from the European Commission of Human Rights,<sup>30</sup> the European Court of Human Rights<sup>31</sup> and domestic courts.<sup>32</sup> These courts have all, rather simplistically, assessed whether or not a measure is punitive by considering its *primary* purpose. (For example, it has been held, that registration on the sex offenders register is not punitive because the primary reason behind the scheme is public protection).<sup>33</sup> Accordingly, it might be claimed that the reprimands and warnings scheme’s primary rationale is that it is diversionary, aiming to keep young offenders away from the formal (and potentially harmful) processes of prosecution, trial and sentencing. It is also the case that this diversion of the young person does not involve any *immediate* imposition of a sanction upon the offender. However, this argument ignores the fact that reprimands and

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<sup>26</sup> *ibid.*, at 384.

<sup>27</sup> *ibid.*, at 394.

<sup>28</sup> A useful starting point for defining punishment is Hart, *Punishment and Responsibility* (1968), pp.4-5. For an interesting discussion of the “shared conception” of punishment, see Walker, *Why Punish?* (1991), pp.1-3. A useful overview of the subject can be found in Zedner, *Criminal Justice* (2004), Chap.3. Also see Lacey, *State Punishment: Political Principles and Community Values* (1988).

<sup>29</sup> See Ashworth, *op. cit.*, n.10.

<sup>30</sup> *Ibbotson v UK* (1999) 27 EHRR CD 332; *Adamson v UK* (1999) 28 EHRR CD 209; and *Porter v UK* (2003) 37 EHRR CD 8.

<sup>31</sup> *Raimondo v Italy* (1994) 18 EHRR 237.

<sup>32</sup> *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562; *Porter v Magill* [2001] UKHL 67; *R (on the application of S) v Chief Constable of South Yorkshire Police*, *R (on the application of Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39; *R (on the application of McCann) v Crown Court at Manchester*, *Clingham v Kensington and Chelsea Royal London BC* [2002] UKHL 39; *R (on the application of M) v Inner London Crown Court* [2003] EWHC 301 (admin); *R v Field*, *R v Young* [2002] EWCA Crim 2913; and *S. v Miller* 2001 SC 977.

<sup>33</sup> *Ibbotson v UK* (1999) 27 EHRR CD 332.

warnings are recorded, and that this process might have serious adverse consequences for recipients, in terms of their future prospects (such as employment), and their future disposal within the criminal justice system should they offend again. The primary rationale of diversion might be that of keeping first-time young offenders out of court, and perhaps preventing their future offending, but at what point are the consequences of being reprimanded or warned so serious as to engage their rights to a fair trial under the ECHR?<sup>34</sup>

The Article 6 authorities, it is submitted, are of limited usefulness when it comes to defining punishment. In *Engel v Netherlands (No. 1)*,<sup>35</sup> it was held that three criteria should be considered in order to determine whether or not there was a “criminal charge” for the purposes of Article 6. First, the court should consider how the allegation is classified in domestic law. Then, consideration should be given to the nature of the offence. Finally, an assessment should be made of the severity of any potential punishment. In *Garyfollou AEBE v Greece*,<sup>36</sup> it was established that, in making such a determination, courts should treat these criteria as alternatives, unless this initial analysis proves inconclusive, in which case a cumulative approach may be adopted.

The potential severity of a measure or sanction may be central to a court’s assessment of whether a “criminal charge” exists for the purposes of Article 6.<sup>37</sup> However, in the *Durham Constabulary* case, this was not regarded as determinative of the issue. Their Lordships did not dispute the fact that there was a criminal charge initially, but took the view that this ceased to exist when the decision to issue a warning was taken. This article challenges this conclusion for the reasons outlined earlier, as have other commentators.<sup>38</sup> The third criterion in *Engel*, though, is not the specific reason for our criticism of the House of Lords’ decision. It is accepted that ECHR jurisprudence requires a measure to be highly punitive for this criterion to override the other two,<sup>39</sup> and that a warning may not reach this threshold. However, an assessment of a measure’s punitiveness suggests that it involves *some* degree of punishment. Therefore, the issue appears to be one of quantification, rather than definition. A review of decisions relating to Article 7 might have proved more fruitful. Article 7, which provides a right to be free from retroactive penal provisions, requires consideration of what constitutes a “penal provision”. This shifts the focus away from quantification, and towards definition. As was noted above, the jurisprudence suggests that whether a measure amounts to a “penal provision” should be decided with regard to its primary rationale.<sup>40</sup>

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<sup>34</sup> See Ashworth’s commentary on *R(on the application of R) v Durham Constabulary* [2006] *Crim L R* 87 at 88.

<sup>35</sup> (1976) 1 EHRR 647 at para.82.

<sup>36</sup> (1999) 28 EHRR 344 at para.33. See also *Lauko v Slovakia* [1999] EHRLR 105.

<sup>37</sup> For further discussion, see Ashworth, *op. cit.*, n.10, at p.276.

<sup>38</sup> See *e.g.* Gillespie, “Reprimanding Juveniles and the Right to Due Process” (2005) 68 *Modern Law Review* 1006.

<sup>39</sup> See *Engel v Netherlands (No.1)* (1976) 1 EHRR 647 at para.85; *Benham v UK* (1996) 22 EHRR 293 and *Brown v UK* (1998) 28 EHRR CD 233.

<sup>40</sup> *Ibbotson v UK* (1999) 27 EHRR CD 332.

It is unfortunate that the House of Lords, in the *Durham Constabulary* case, chose not to revisit this important point, as it deserves to be subjected to closer scrutiny. Let us take the (admittedly more extreme) example of imprisonment. The incarceration of offenders may serve a variety of functions, and the imposition of a custodial sentence can be justified on a number of grounds. Indeed, as a result of recent changes to the sentencing structure, a court which considers only one justification in determining a sentence would now be failing in its legal duty.<sup>41</sup> In the case of offenders who are thought to be dangerous, the main reason for imposing imprisonment will usually be for the protection of the public, but can it sensibly be argued that a longer than normal custodial term is not inherently punitive in nature?<sup>42</sup> It is easier to see the problems of competing objectives in relation to custodial sentences, but in the *Durham Constabulary* case Lady Hale recognised that:

“[Reprimands] and final warnings do carry consequences. Individually each of these can be explained away as preventive rather than punitive. Cumulatively, however, they amount to a considerable modification of the child’s legal status. He and many others might consider it punitive. He faces a higher penalty should he offend again, he must notify the police of his whereabouts for some time, and his details are on a computer to which a very large number of people have access, albeit under carefully controlled circumstances... The domestic characterisation of a measure as preventive rather than punitive cannot always be the end of the story. Nor can the perception of an offender and his family that he is being punished, as well as being helped, be completely irrelevant to the interpretation of an autonomous convention concept.”<sup>43</sup>

Our criticism relates not just to this case but to a substantial body of case law which, for pragmatic reasons, has limited the situations where a measure which carries some negative consequence for an individual after that individual admits to or is convicted of a criminal offence, is adjudged to be punitive. The effect of this jurisprudence is that human rights protection is available only in respect of those measures which are primarily punitive in effect. If the measure is judged to be essentially rehabilitative, or preventive, then it is not regarded as punitive. It is submitted that this reasoning is far too simplistic. Punishment is obviously an important response to the problem of offending, but the diversity of sanctions available within the criminal justice process necessitates a broader conception of what is “punitive”. A measure may be punitive in its effect, even where its primary justification is utilitarian

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<sup>41</sup> The Criminal Justice Act 2003, s.142. See von Hirsch and Roberts, “Legislating Sentencing Principles: the Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions” [2004] *Criminal Law Review* 639; and Ashworth, “Criminal Justice Act 2003(2): Criminal Justice Reform: Principles, Human Right and Public Protection” [2004] *Criminal Law Review* 516. Also see the Sentencing Guidelines Council, *Overarching Principles: Seriousness*, 2004, para.1.2.

<sup>42</sup> For details of the special provisions for dealing with “dangerous” offenders, see the Criminal Justice Act 2003, ss.224-229.

<sup>43</sup> [2005] 2 All ER 369 at 394.

rather than retributive. An example of this is where a court imposes a measure on a mentally disordered offender, not as a punishment, but for the purpose of either “treating” the offender or protecting the public. Although punitive considerations are not meant to be relevant to such disposals, it can be argued that ideas of justice and proportionality ought to apply to such offenders even in the (formal) absence of punishment-related objectives.<sup>44</sup>

As Lady Hale observed in the *Durham Constabulary* case, the effects of the warning – the requirement that the individual has to notify the police of his whereabouts, the fact that details of the offence are available to those with access to the police national computer and the adverse consequences should he re-offend – may be regarded by many as punitive. It has been pointed out by Bagaric<sup>45</sup> that the subjective experience of the offender cannot be the sole determinant of whether or not a measure is regarded as punitive. He gives the example of an individual who finds imprisonment preferable to life on the outside, and states that this individual’s term of imprisonment none the less has to be regarded as an imposition of punishment. But, in the *Durham Constabulary* case, as Lady Hale acknowledged, it is not only the offender who may reasonably have regarded the sanction as punitive, as his perception of it would probably have been shared by others.

Why then do we share the belief that reprimands and warnings may involve punishment? Our notion of punitiveness is wider than that adopted by the majority of the House of Lords in the *Durham Constabulary* case.<sup>46</sup> Although there are innumerable definitions, punishment has been defined by Morris as “the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation, where that deprivation is justified by the person’s guilty behaviour”.<sup>47</sup> Adopting this definition, the disposal in this case clearly involved consequences for the offender which would be commonly believed to be a deprivation. These consequences included: the requirement that he notify the police of his whereabouts; that any future sentence would reflect the fact that he had been warned in the past; and (perhaps most notably) the fact that many avenues of future employment would not be open to him, as details of the offence would remain on the police national computer. Accordingly, it would be wrong not

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<sup>44</sup> See Ashworth, *Sentencing and Criminal Justice* (2005), p.378.

<sup>45</sup> Bagaric, *Punishment and Sentencing: A Rational Approach* (2001), p.37.

<sup>46</sup> Although, technically, Lady Hale and Lord Steyn gave assenting judgments it would appear that the reason for this was that the process lacked a necessary element of “public condemnation”. Lady Hale commented [2005] 2 All ER 369 at 394 that, if this element had been present, “I would have found it difficult not to regard it as the determination of a criminal charge. The domestic characterisation of a measure as preventive rather than punitive cannot always be the end of the story.”

<sup>47</sup> Morris, “Persons and Punishments” in Grupp, (ed.), *Theories of Punishment* (1971), p.76. Also see Hart, *Punishment and Responsibility* (1968), at pp.4-5, where he states that punishment “must involve pain or *other consequences normally considered unpleasant*; it must be for an offence against legal rules; it must be of an actual or supposed offender for his offence; it must be intentionally administered by human beings other than the offender; [and] it must be imposed and administered by an authority constituted by a legal system against which the offence is committed” (emphasis added).

to regard the consequences of the warning as significant, and this important point was recognised by Lady Hale.

The other requirement of Morris' definition of punishment is satisfied in that, due to the claimant's admission of the alleged conduct, and the police officer's determination that this amounted to indecent assault, it was believed that he was guilty of criminal behaviour. Incidentally, it is interesting that Morris' definition refers to someone "believed to be at fault", as opposed to actually being "at fault", in view of an observation that we make later about how diversionary approaches can assume guilt even where a suspect might have had a valid defence in law. Not all penal theorists would agree with widening the definition to include those "believed" to have broken the criminal law. Traditional retributivist justifications have concentrated on the idea of punishment being "deserved",<sup>48</sup> so that where an individual is not actually guilty of an offence, the sanction imposed upon him cannot properly be regarded as punishment. This is not the place for a detailed discussion of either this point or the different meanings of retributivism. But, a reasonable response appears to be to define those cases where it is believed that the individual is guilty, but where this is not in fact the case, as examples of "mistaken punishment".<sup>49</sup>

Some penal theorists argue that the element of denunciation of the offending conduct plays an important role in the practice of punishment.<sup>50</sup> The requirement is not that the individual is condemned *publicly* for his or her actions, but rather that the sanction has to make it clear that the conduct was unacceptable. Once again, it is unnecessary to develop this point further in relation to the *Durham Constabulary* case, for we think that it is axiomatic that the warning, and its attendant consequences, would have sent out a clear signal to the individual that his behaviour was unacceptable. It is interesting that few criminologists have studied how offenders perceive diversionary procedures. However, a notable exception is Lee, who argued that the process associated with police cautioning was inherently punitive and viewed as such both by offenders and the police.<sup>51</sup> Given that the new scheme of reprimands and warnings is designed to be more intrusive than the old system of cautioning, Lee's observations would seem to have even greater force today.

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<sup>48</sup> Walker, *op.cit.*, n.28, p.2. For a recent discussion of traditional retributive justifications and their problems, see von Hirsch and Ashworth, *Proportionate Sentencing* (2005), Chap.2. Also see Cottingham, "Varieties of Retribution" (1979) 29 *Philosophical Quarterly* 238.

<sup>49</sup> Walker, *ibid.*, p.2.

<sup>50</sup> For a summary see Bagaric, *op. cit.*, n.45, pp.34-35. See also von Hirsch, *Censure and Sanctions* (1993), which is discussed further in von Hirsch and Ashworth, *op. cit.*, n.48, where it is stated (at p.17) that "punishment conveys to the actor [*i.e.* offender] a certain critical normative message concerning his conduct: *e.g.* that he has culpably harmed or risked harming someone, and is disapproved of for having done so. . . He is being confronted with disapproval in virtue of the wrongfulness of his conduct, and not solely in order to produce preventive or other societal benefits that such censure might achieve".

<sup>51</sup> Lee, "Pre-Court Diversion and Youth Justice" in Noaks *et al* (eds.), *Contemporary Issues in Criminology* (1995).

In the *Durham Constabulary case*, their Lordships appear to have confused the *definition* of punishment with its *justification*. A belief that a process or disposal which is utilitarian in character does not amount to punishment presupposes that punishment has to be retributive. This view lacks plausibility, and it must be concluded that the definition of punishment used by the House of Lords was not a neutral one. Instead of looking at the purpose of the sanction, their Lordships should have developed a more rigorous conceptual framework for determining whether or not a measure can properly be regarded as constituting punishment. It is suggested that a test which states that a measure which is primarily preventive or rehabilitative cannot be punitive is deeply flawed, and that this has the undesirable effect of limiting human rights protection to those subjected to more overt and invasive restrictions on their liberty. Moreover, a proper conception of punishment should not exclude the wider consequences of a particular sanction. For example, the restriction of a person's future employment prospects is (at least potentially) more disadvantageous than the imposition of a nominal penalty, or a fine, by a criminal court. It is particularly important that human rights are respected in the context of reprimands and warnings under the 1998 Act, in view of the fact that the government's main purpose for introducing this new statutory scheme for children and young people was to make diversion more onerous.

### **Diversion**

In the *Durham Constabulary case*, Lord Bingham and Lady Hale gave detailed accounts of how the new system of reprimands and warnings came to replace the earlier practice of cautioning.<sup>52</sup> They noted that police cautioning of young people for minor offences has a long history, and that in many cases its use was highly appropriate. Lord Bingham justified this primarily on the basis of proportionality:

“[It] has long been recognised as undesirable in many cases for young offenders to be drawn into the process of the criminal courts (including juvenile and youth courts) unless this is really necessary. So informal procedures grew up to deal with cases *which were not so serious as to leave no realistic alternative to prosecution*. There were always, of course, some cases which, although disclosing a breach of the criminal law, *were so trivial* as to be properly ignored or dealt with by way of informal and unrecorded advice or admonition. But there were other cases which were *too serious to be dealt with in that way but not so serious* as necessarily to call for prosecution.”<sup>53</sup> (Emphasis added)

Interestingly, this statement appears to acknowledge that the practice of cautioning young offenders, whilst diversionary in its aim, also incorporated an element of punitiveness. For, if this were not the case, why was it that

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<sup>52</sup> For a more detailed history of police cautioning see Dingwall and Harding, *op. cit.*, n.2, pp.98-119; Easton and Piper, *Sentencing and Punishment: The Quest for Justice* (2005), pp.200-205 and Steer, *Police Cautions – A Study in the Use of Police Discretion* (1970).

<sup>53</sup> [2005] 2 All ER 369 at 373.

some offences were deemed too trivial for such a disposition, while others were too serious? Lord Bingham, rather uncritically, accepted the government's claim that cautioning was both a wasted opportunity to provide necessary support for young offenders, and that repeat cautioning had led to a culture where some offenders believed that they could offend with impunity.<sup>54</sup> The new diversionary framework addressed both of these concerns. Final warnings involve a presumption that the offender will complete a rehabilitative programme<sup>55</sup> (although in the *Durham Constabulary* case the youth offending team did not deem this necessary for the claimant), and the 1998 Act also limits the circumstances in which reprimands and warnings can be given more than once.<sup>56</sup> There can be no doubt that the new framework is now more onerous than the informal, non-statutory system that it replaced. This is not to say that the additional requirements cannot be justified, nor to suggest that they will prove ineffective in rehabilitative terms. For example, studies have been undertaken both in England<sup>57</sup> and in Northern Ireland<sup>58</sup> in relation to "restorative" cautioning, building on the important criminological work of Braithwaite,<sup>59</sup> and their conclusions have led to a cautious optimism.

However, what is of relevance to this discussion is that the additional requirements make the scheme more punitive in nature. Lord Bingham's statement (above) remains valid in that a police officer, in determining whether it is appropriate to issue a reprimand or warning, will continue to judge some matters to be too trivial to merit this sanction, and others sufficiently serious that prosecution is to be favoured.<sup>60</sup> It has been argued that diversionary strategies can provide a proportionate response to minor acts of law-breaking and that diversion, if used appropriately, can form part of a coherent, retributive sentencing strategy.<sup>61</sup> By differentiating between

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<sup>54</sup> *ibid.*, at 373. See references in n.5 for an alternative view.

<sup>55</sup> The Crime and Disorder Act 1998, s.66(2). S.66(3) provides that "The Secretary of State shall publish, in such manner as he considers appropriate, guidance as to – (a) what should be included in a rehabilitative programme arranged for a person under subsection (2) above; (b) the manner in which any failure by a person to participate in such a programme is to be recorded; and (c) the persons to whom any such failure is to be notified."

<sup>56</sup> The Crime and Disorder Act 1998, s.65(2) and s.65(4). There were in fact restrictions on the use of multiple cautions (albeit not in statutory form) in the Home Office Circular 18/1994 *The Cautioning of Offenders*. It was stated that a caution should only be used in subsequent cases if the new offence was of a trivial nature or the time span between the new offence and the previous caution suggested that the caution had had some positive impact.

<sup>57</sup> Young and Goold, "Restorative Police Cautioning in Aylesbury – from Degrading to Reintegrative Shaming Ceremonies?" [1999] *Criminal Law Review* 126.

<sup>58</sup> O'Mahony and Doak, "Restorative Justice – Is More Better? The Experience of Police-led Restorative Cautioning Pilots in Northern Ireland" (2004) 43(5) *Howard Journal of Criminal Justice* 484.

<sup>59</sup> Braithwaite, *Crime, Shame and Reintegration* (1989).

<sup>60</sup> Although the Crime and Disorder Act 1998 only refers specifically to situations where prosecution would be an alternative (s.65(1)), it would be practically impossible to administer a system where no cases were diverted informally: see Dingwall and Harding, *op. cit.*, n.2, pp.98-102.

<sup>61</sup> *ibid.*, pp.19-25. Although it was also argued that the existing practice of diversion did not always reflect issues of culpability and/or harm.

reprimands and warnings in terms of consequence, the new framework adds an additional tier of punishment. A police officer must now decide not only whether to divert the offender from prosecution but, if he does so, which of the options is the more appropriate. The Act stipulates that this determination is to be made on retributive grounds: “[where] the offender has not been previously reprimanded, the constable shall warn rather than reprimand the offender if he considers the offence to be so serious as to require a warning”.<sup>62</sup> Therefore, it is recognised in the legislation that warnings are more punitive than reprimands.

One of the strengths of the practice of diverting young offenders from the formal processes of trial, conviction and sentence is that it seeks to avoid the labelling process, which can lead to offenders being stigmatised and also to a deterioration of their chances of becoming law-abiding in the future. As we have observed, the policy of diversion is related to the proportionate use of the formal procedures of the criminal justice system. Clearly, a system of diversion will not inspire public confidence if it permits known offenders to re-offend with nothing more than a further caution; nor should it disregard the feelings of the victims of such offences. It could be argued that the new scheme of reprimands and warnings will lead to greater consistency in the use of diversionary measures, and that this will inspire greater public confidence than the system it replaced. In its recent reform proposals, the government has attached great importance to the need to restore public confidence in the criminal justice system.<sup>63</sup>

However, the *Durham Constabulary* case suggests that, to some extent, the new system may be too punitive in nature. It could be argued that a process which now requires a young person to be placed on the sex offenders register for a relatively minor offence fails to adhere to the positive value of the diversionary process. Can it really be argued that a minor offence, which did not require prosecution, should result in such a negative label being applied to the offender? If the claimant was in fact regarded as a potential danger to the public, it is questionable whether his case should have been dealt with outside the formal criminal justice system without his informed consent. If, as seems more likely from the claimant’s description of his conduct, the offence was a relatively minor one, it is difficult to understand the necessity for his inclusion on the sex offenders register. Its reform of the diversion system might be seen as typical of the government’s tendency, in its youth justice policies, to send out conflicting messages, and the 1998 Act has been criticised for its lack of consistency and coherence.<sup>64</sup> The new scheme of reprimands and warnings is now “tougher” than the former system of cautioning young offenders, and this reflects the government’s preoccupation with public protection and restorative justice.<sup>65</sup>

It is worth making one final comment about the new scheme. As noted earlier, the old system of cautioning required the consent of the young

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<sup>62</sup> The Crime and Disorder Act 1998, s.65(4).

<sup>63</sup> See the “Halliday Report”, Report of a Review of the Sentencing Framework for England and Wales, *Making Punishments Work* (2001) and the Carter Review: Correctional Services Review, *Managing Offenders – Reducing Crime* (2003).

<sup>64</sup> See Fionda, *op. cit.*, n.5.

<sup>65</sup> See Ashworth, *op. cit.*, n.41.

offender and his or her parent or guardian, but the new scheme has no express requirement of consent. It could be argued that the requirement of consent was largely a formality because, if an offender admitted the alleged conduct (as the claimant did in the *Durham Constabulary* case), he was unlikely to withhold consent to being warned when faced with the alternative of being prosecuted. Yet, despite this argument, informed consent should be seen as an important safeguard in what amounts to an informal system of justice.<sup>66</sup> A recurring criticism of diversionary schemes is that they confer too much discretion on the police to make decisions relating to both the guilt and the disposal of suspected offenders, and that this may compromise the rights of the accused. These concerns are substantiated by the *Durham Constabulary* case, where the involvement of the police in important decision-making, and in administering the warning, may have been instrumental in their failure to notify the claimant that (as a consequence of being warned) he would also be placed on the sex offenders register. As a way of ensuring that a young person's rights are protected, and that he or she is given all the relevant information relating to the process, informed consent *ought* to be a requirement of the reprimands and warnings scheme. The Divisional Court appeared to recognise the importance of this point, but it seems to have evaded the House of Lords. By defining the process as something other than the determination of a criminal charge, Lord Bingham was able to argue that the claimant's "fair trial rights were not engaged".<sup>67</sup> This seems to ignore the reality of the informal system of justice which deals with diversionary measures, and it is difficult to escape the conclusion that the claimant was, in fact, dealt with by an administrative process which did not provide the usual safeguards for those accused of a criminal offence. In view of the serious consequences for the claimant resulting from a warning, it is surely sophistry to argue that there was no determination of a criminal charge because the disposal was not "punitive" in nature.

The claimant was faced with an accusation about a certain set of facts, which he accepted as true, but which he argued were trivial in nature. The House of Lords attached importance to the claimant's admission, and it was argued by Lady Hale that "once a reliable admission has been made... the decision whether or not to prosecute is for the authorities rather than the accused".<sup>68</sup> The problem with this approach is that it ignores the fact that an accused young person may lack the expert advice that he or she would receive in the event of formal proceedings taking place. For example, a young person might admit the actual facts made in an accusation, whilst unaware of a relevant argument or defence which might have affected his or her liability or culpability had the case gone to trial. (For instance, a person might admit to the *actus reus* of theft without realising that there was an important issue

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<sup>66</sup> A point developed by Gillespie, *op. cit.*, n.38, pp.1012-1015. It would also appear to breach General Assembly Resolution 40/33 (1985), Rule 11.3: "Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application".

<sup>67</sup> *R (on the application of R) v Durham Constabulary and another* [2005] 2 All ER 369 at 385.

<sup>68</sup> *ibid.*, at 394-395.

relating to dishonesty, which might have been raised in court to negate criminal liability). In the *Durham Constabulary* case, the claimant may (arguably) have admitted to the facts of the alleged conduct, whilst unsure whether the behaviour in question did, in fact, amount to an indecent assault. A criminal court does not permit a police officer to be the sole determinant of such questions, but the informal system of reprimands and warnings appears to do so. This may serve the interests of administrative convenience and economy, but it raises serious concerns about the fairness of the new system.

### Conclusion

Although the actual decision of the House of Lords in the *Durham Constabulary* case invites criticism, there are some promising signs in the judgments that the British courts may yet become less deferential to Parliament when deciding on human rights issues. Lady Hale emphasised that “diversion is not to be bought at the cost of basic fairness to the child”,<sup>69</sup> and she identified an important issue in asking “whether it is fair to subject a child to the formal diversion process with mandatory legal consequences without first obtaining his informed consent”.<sup>70</sup> Lady Hale confessed also to:

“[Grave] doubts about whether the statutory scheme is consistent with the child’s rights under the international instrument dealing with children’s rights. The rigidity of the scheme undermines the emphasis given to diverting children from the criminal justice system, propels them into it and on a higher rung of the ladder earlier than they would have previously arrived there, and thus seriously risks offending against the principle that intervention must be proportionate both to the circumstances of the offender and of the offence”.<sup>71</sup>

In view of Lady Hale’s cogent criticisms of both the new statutory scheme and the police’s handling of the case,<sup>72</sup> it is surprising that she concluded (“not without considerable misgivings”)<sup>73</sup> that there had not been a breach of the claimant’s rights under the ECHR. This article has suggested that the reasoning of the House of Lords, in reaching this conclusion, is far from convincing. It does little to address the concern that the government, by means of some important provisions in the Crime and Disorder Act 1998, has created new procedures which have circumvented its own human rights legislation. It has been discussed elsewhere whether anti-social behaviour orders are consistent with a commitment to human rights.<sup>74</sup> This article has raised similar concerns about the new system of reprimands and warnings. The implications of being reprimanded or warned are now more serious for

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<sup>69</sup> *ibid.*, at 389.

<sup>70</sup> *ibid.*, at 389.

<sup>71</sup> *ibid.*, at 393.

<sup>72</sup> *ibid.*, at 393.

<sup>73</sup> *ibid.*, at 395.

<sup>74</sup> Ashworth, *op. cit.*, n.10, where he states (at p.289): “It is plain that in introducing the anti-social behaviour order. . . the government intended to sail as close to the wind as possible”; and at (p.290) he asks whether the government in developing this order has “crossed the boundary from avoidance to evasion of its responsibility to uphold human rights”.

young people than under the old system of cautioning, with more punitive consequences for the suspect. By accepting a narrow interpretation of what amounts to a “criminal charge”, and of what is meant by “punishment”, the House of Lords has missed a valuable opportunity to subject the government’s reprimands and warnings scheme to a more critical scrutiny.

## CLAIMS FOR DISHONEST ASSISTANCE WITH BREACH OF TRUST, AND CHANGES MADE BY *TWINSECTRA V YARDLEY*

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### Introduction

Accessory liability – also commonly referred to as “knowing assistance” or “dishonest assistance” – is liability imposed by equity upon a third party for assisting in a breach of trust. The fundamentals for this cause of action in equity were established 130 years ago by the Court of Appeal in *Barnes v Addy*.<sup>1</sup> It will be suggested that since that time, the principles underpinning the claim have evolved, such that – in material respects – the present version of the cause of action is quite markedly different from the original. Recently the House of Lords has been asked to revisit the question of what constitutes dishonesty, and it will be suggested that the House of Lords has significantly weakened the cause of action for future claimants. In purportedly seeking to endorse powerful statements made by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan*,<sup>2</sup> the majority of the House of Lords in *Twinsectra v Yardley*<sup>3</sup> have fundamentally altered the approach of the courts to accessory liability. It will be argued that, in doing so, the House has substantially weakened the position of the beneficiary.

The modern foundation of dishonest assistance is to be found in the decision of the Court of Appeal in *Barnes v Addy*.<sup>4</sup> This decision has been said to have founded the basis for liability of a third party (or a stranger) to a beneficiary under a trust.<sup>5</sup> The facts of that case were, briefly, that Addy was the trustee of a fund. He purported to appoint Barnes as trustee of a half of the fund. However, this appointment was in breach of the trust instrument empowering the trustee to act. Nevertheless, Addy, as trustee, attended to the appointment of Barnes. The latter subsequently misappropriated the half of the fund of which he was trustee. As he subsequently became a bankrupt, there was no prospect of recovering that fund from Barnes.<sup>6</sup>

Proceedings were therefore commenced against both Barnes and the solicitors who had facilitated his appointment as a new trustee. The facilitation was effected by way of preparation and execution of the necessary documentation giving effect to his appointment.<sup>7</sup> Importantly, Preston, the solicitor, was aware that it was in breach of trust for the

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<sup>1</sup> (1874) LR 9 Ch. App. 244.

<sup>2</sup> [1995] 2 AC 378.

<sup>3</sup> [2002] 2 AC 164.

<sup>4</sup> (1874) LR 9 Ch App 244.

<sup>5</sup> Peter Radan, Cameron Stewart, Andrew Lynch, *Equity and Trusts*, (Butterworths, Sydney, 2001) p.375.

<sup>6</sup> (1874) LR 9 Ch. App. 244 at 246.

<sup>7</sup> *ibid.*, at 247.

appointment to be made, and in fact advised the existing trustee to this effect.<sup>8</sup> This advice was acknowledged, but the trustee elected to proceed with the actions in any event. Preston therefore proceeded to act in accordance with his instructions, notwithstanding his misgivings.

Given that there was no principal against whom proceedings could be fruitfully brought, due to Barnes' insolvency at the time the misconduct was discovered, an action was brought against the solicitors, on the basis that the breach of trust could not have been carried out unless Preston had facilitated it. The solicitors were therefore said to be persons who had knowingly assisted in the breach of trust.<sup>9</sup> The remedy sought against the solicitors was a declaration by the court that the solicitors were constructive trustees of the fund which had been dissipated by the misconduct of the errant trustee. This is, of course, a legal fiction, in that there was no longer any fund in existence.

This claim was rejected on the facts by the Court of Appeal. The leading judgment of the Court was delivered by Lord Selborne, who endorsed the principle, and set out the necessary criteria for finding accessory liability. In the 130 years following the decision, the observations of Lord Selborne have had substantial influence on the development of the law relating to knowing assistance.<sup>10</sup> Perhaps more importantly, this judgment of His Lordship has been the subject of very wide and varied interpretation, with many differing views being taken of the meaning of His Lordship's words.<sup>11</sup> It has been the subject of substantial interpretation and reinterpretation since the principles were originally laid down.

### Proprietary Remedy Versus Personal Remedy

Before considering the specifics of knowing assistance in more detail, it should be borne in mind that there is some debate as to whether the remedy of constructive trust is in fact an appropriate remedy for claims of this type. The remedy of constructive trust is, at its heart, a proprietary remedy. The problem created by this remedy returns to the fact mentioned above, that the remedy is a legal fiction, and it has therefore been suggested that the remedy is not appropriate to cure the harm caused.<sup>12</sup> That is, often there is no trust property to be found in the hands of the defendant, and the remedy is, in effect, the creation of a personal liability from the defendant to the beneficiary of the trust.<sup>13</sup> Therefore, to endeavour to impose a proprietary remedy – when there is in fact no specific property which may be made the subject of the order – appears somewhat artificial.

The observations of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*<sup>14</sup> have been used in support of this proposition. Lord Browne-Wilkinson makes the general observation in respect to equitable remedies that where there is receipt of a

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<sup>8</sup> *ibid.*, at 248.

<sup>9</sup> *ibid.*, at 250.

<sup>10</sup> Denis Ong, *Trusts Law in Australia* (The Federation Press, Sydney, 2003) p.455.

<sup>11</sup> On this point, note the diverging views within *Twinsectra v Yardley*.

<sup>12</sup> G. E. Dal Pont and D. R. C. Chalmers, *Equity and Trusts in Australia*, (Law Book Company, Sydney, 2004), p.980.

<sup>13</sup> *ibid.*

<sup>14</sup> [1996] AC 669.

benefit with knowledge of the breach of a fiduciary duty, it gives rise to a personal liability.<sup>15</sup> His Lordship further observes that the liability to account for a benefit, where there is the requisite knowledge, is substantially the same remedy as imposition of a constructive trust. He notes that the distinction “may only be a question of semantics”.<sup>16</sup>

Notwithstanding this point by His Lordship, it must be viewed in the context of his earlier observation that the case of dishonest assistance in a breach of trust is a specific exception to the proposition that there must be identifiable trust property for there to be a constructive trust imposed on the defendant.<sup>17</sup> The argument is therefore that courts of equity have taken the argument of artificiality into account, and accepted that it is a specific exception to the logical problem created by the imposition of a proprietary remedy over non-existent property. This is supported by the nature of trusteeship, in that the obligation to account for the property over which the stranger is declared to be a trustee flows naturally from the duties imposed as trustee. Therefore, the argument is that the remedy of constructive trust is an appropriate one in cases of a stranger knowingly assisting in a breach of trust.<sup>18</sup>

The contrary argument is provided by Lord Millett in the more recent decision of *Dubai Aluminium Co Ltd v Salaam*.<sup>19</sup> That case involved an allegation of dishonest assistance with a breach of fiduciary duty. It was asserted that two of the defendants, who were solicitors for the fraudsters, ought to be made constructive trustees in respect to the loss suffered by the plaintiff, on the basis that they dishonestly assisted in the breach of fiduciary duty.<sup>20</sup>

Lord Millett rejected this argument, and took the view that the term “constructive trustee” in such circumstances is – in his words – “unfortunate”.<sup>21</sup> He observed that the person who, by participation in the fraud of another, interferes with the equitable interest of another ought to be made to account in equity for the loss suffered by reason of that interference.<sup>22</sup> However, that does not mean that the guilty party ought to be identified as a constructive trustee, for the primary reason that he is not the recipient of trust property. Therefore, the better way to express the liability ought to be as an obligation to account in equity for the loss suffered, but not necessarily as a constructive trustee, so-called.<sup>23</sup>

His Lordship quotes with approval the comment by Jules Sher QC in *Coulthard v Disco Mix Club Ltd*,<sup>24</sup> where the point was made that this type of remedy is merely a mechanism created by the court for the purpose of granting relief. In support of this proposition, His Lordship prefers the idea

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<sup>15</sup> *ibid.*, at 707.

<sup>16</sup> *ibid.*, at 707.

<sup>17</sup> *ibid.*, at 705.

<sup>18</sup> Dal Pont, *op. cit.*, p.1057

<sup>19</sup> [2003] 1 All ER 97.

<sup>20</sup> *ibid.*, at 128.

<sup>21</sup> *ibid.*, at 131.

<sup>22</sup> *ibid.*, at 131.

<sup>23</sup> *ibid.*, at 131.

<sup>24</sup> [1999] 1 All ER 457 at 479.

of identifying the obligation to account in equity, even though in fact it has the same effect as the imposition of constructive trusteeship.<sup>25</sup>

Ultimately, however, it is submitted that the very point which is being made by Lord Millett, in light of the observations of Lord Browne-Wilkinson in *Westdeutsche* is somewhat self-defeating. The right of a beneficiary in respect to a declaration of constructive trust is to an account of the trust property, just as it is in respect to a non-proprietary remedy in the form of a personal order against the stranger to the trust. Therefore, it is largely a matter of nomenclature as to the identity of the particular remedy. This idea is further supported by the idea that the constructive trust is merely a “formula for equitable relief”,<sup>26</sup> making it clear that the declaration of constructive trust is a vehicle by which a court of equity will provide a remedy to an abused beneficiary.

The position is therefore not entirely clear as to whether the remedy imposed is a proprietary or personal one. It can be said with confidence that there is general, although not unanimous, agreement as to the form of the remedy – that of a constructive trust. A constructive trust, by its nature, is a proprietary remedy. However, given that there is rarely any property in the hands of the liable defendant, in practical terms, the remedy is usually in the nature of a personal obligation to make good the loss suffered by the trust.

### **Basis of Liability for Dishonest Assistance**

In respect to the claim against a third party for accessory liability, perhaps the most important, and most oft-quoted observation of Lord Selborne is his proposition that:

Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que* trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers.<sup>27</sup>

Clearly, this statement allows a stranger to be innocent of the wrongdoing of the trustee where the stranger is fulfilling a lawful activity at the direction of the trustee. However, where the stranger undertakes an activity which facilitates the misconduct of the trustee, and does so with the knowledge that this is not in accordance with the terms of the trust deed, then such conduct must fall foul of the reasoning propounded by Lord Selborne.<sup>28</sup> This will amount to knowing assistance in a breach of trust.

Therefore, the most important exception to the above proposition by Lord Selborne is where the assistance is provided in one of two circumstances. The first is where the stranger actually receives any part of the trust property,

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<sup>25</sup> [2003] 1 All ER 97 at 131.

<sup>26</sup> *Selangor v Cradock (No. 3)* [1968] 1 WLR 1555 at 1579.

<sup>27</sup> (1874) LR 9 Ch. App. 244 at 251.

<sup>28</sup> Ong, *op. cit.*, p.457.

and the second is where the assistance is provided to the trustee “with knowledge of a dishonest and fraudulent design on the part of the trustee”.<sup>29</sup> It is this second limb from *Barnes v Addy* which is the subject of the present discussion, and the wording of which is the subject of such extensive debate.

Ultimately, in the *Barnes Case*, His Lordship accepted the evidence of the defendant solicitor that there was no reason to suspect any misconduct on the part of the trustee. Further, the fact that the solicitor provided advice to the effect that the transaction was not within the terms of the trust deed was, according to His Lordship, sufficient to satisfy him that there had been no dishonesty on the part of the solicitor.<sup>30</sup> Consequently, His Lordship found that there was no basis for equitable intervention against the lawyer in the present case.

In a very real sense, this case is of great assistance in setting down the principles necessary to establish dishonest assistance. At the very least, it has set down the building blocks upon which the later courts have extensively built. However, equally, the case itself provides a somewhat unsatisfying conclusion on the facts. That is, it would appear on its face that the court failed to apply its own principles to the facts of the case before it.

Although the principal judgment in this case was delivered by Lord Selborne, there is an important addendum which has been added by Sir W. M. James LJ, which may be of assistance in the interpretation of Lord Selborne by later courts. James LJ made the following comment:

“I have long thought, and more than once expressed my opinion from this seat, that this Court has in some cases gone to the very verge of justice in making good to *cestuis que* trust the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think it is for the good of *cestuis que* trust, or the good of the world, that these cases should be extended.”<sup>31</sup>

The debate over the extent to which liability ought to be imposed on strangers to the trust relationship has focused almost exclusively on an interpretation of the comments of Lord Selborne. These observations of James LJ are made in the course of a vehement agreement with Lord Selborne.<sup>32</sup> Therefore, when considering the intention of the court in this case, it is submitted that substantial assistance can be gained from incorporating this statement into any analysis. This is particularly so in respect to the issue of whether it is a question of knowledge or dishonesty required to attract liability. This matter will be discussed in more detail below.

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<sup>29</sup> (1874) LR 9 Ch. App. 244 at 252.

<sup>30</sup> *ibid.*, at 254.

<sup>31</sup> *ibid.*, at 256.

<sup>32</sup> *ibid.*, at 255.

***Twinsectra v Yardley - A New Direction***

The most recent authoritative statement on this issue was made by the House of Lords in the matter of *Twinsectra Ltd v Yardley*.<sup>33</sup> In that case, Twinsectra Ltd loaned the sum of £1 million to Yardley, for the express purpose of acquiring certain property. Yardley had two sets of solicitors, Sims and Leach. Sims provided an undertaking to Twinsectra that his firm would not release the funds to Yardley except for the purpose of the purchase of property. Leach was aware of that undertaking. In breach of the undertaking, Sims released the money to Leach. Leach, knowing that it was in breach of the undertaking, subsequently released the funds to Yardley, without confirming that the use of the funds was solely for the acquisition of property, pursuant to the arrangement.<sup>34</sup> In fact, Yardley applied the funds to an unauthorised purpose, the funds were dissipated, and Twinsectra suffered a loss as a consequence. Twinsectra therefore commenced proceedings against Yardley, as well as the two solicitors; the latter on the basis of dishonest assistance to a breach of trust.<sup>35</sup>

The first point the court needed to establish was whether there was in fact a trust in existence, given that there was no express creation of a trust. Their Lordships in this case proceeded on the unanimous basis that the circumstances of the loan created a “Quistclose trust”.<sup>36</sup> Such a trust is often used as a de facto security arrangement, such that where funds are advanced for a specific purpose and that purpose has not been fulfilled at the point at which a company enters into liquidation, the funds will be said to have been held on trust by the company for the lender.<sup>37</sup>

In the present case, it was successfully argued that the undertaking provided by the first set of solicitors was sufficient to create a trust over the funds which were received by Yardley.<sup>38</sup> In agreeing with the majority on this point (although dissenting on the major issue of the case), Lord Millett observed:

“Mr Sims undertook that the money would be used solely for the acquisition of property and for no other purpose; and was to be retained by his firm until so applied. . . .”

It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract.<sup>39</sup>

His Lordship went on to observe that the duty which was created by the present circumstances was a fiduciary one, which was able to affect the

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<sup>33</sup> [2002] AC 164.

<sup>34</sup> *ibid.*, at 168.

<sup>35</sup> *ibid.*, at 169.

<sup>36</sup> So called from the decision of the House of Lords in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

<sup>37</sup> Joyce Lee Suet Lin, “Company Charges Under Singapore Law: Legal and Practical Implications”, *International Company and Commercial Law Review*, 2003, p.2.

<sup>38</sup> This was a unanimous determination.

<sup>39</sup> [2002] 2 AC 164 at 186.

interests of third parties.<sup>40</sup> His Lordship observed that the key to the creation of an express trust is the intention of the settlor. Here, the wording of the undertaking, and the existence of the specific purpose for the fund amounted to an intention to create a trust. Therefore, even though the intention was not expressed as being to create a trust, it was nevertheless accepted that there was such an intention present on the part of the settlor.<sup>41</sup>

#### Four Elements of Dishonest Assistance

It was necessary for the court to establish that there was in fact a trust in place, as this is the first of the four elements to establish accessorial liability.<sup>42</sup> That is, that there is a fiduciary duty of some type owed to the beneficiary. It has therefore been established that there is no longer a necessity for the claim to arise purely in circumstances of a breach of trust. This point was made by the House of Lords in *Dubai Aluminium v Salaam*.<sup>43</sup> Lord Millett in that case accepted that a remedial constructive trust may be imposed where there is a breach of a fiduciary duty, as distinct from a breach of trust.<sup>44</sup> Further, in the less recent Australian case of *Consul Development Pty Ltd v DPC Estates Pty Ltd*,<sup>45</sup> the High Court of Australia proceeded on the basis that a breach of fiduciary duty and a breach of trust were essentially analogous.<sup>46</sup> It can therefore be accepted that the principles espoused in *Barnes v Addy*, are today applicable both to allegations of breach of trust, and allegations of a breach of a less specific fiduciary duty.

The second element from *Barnes v Addy* is the requirement that there be a dishonest or fraudulent design of the trustee or fiduciary.<sup>47</sup> This requirement has created slightly more difficulty in interpretation, and also reflects a point of departure between Australia and the United Kingdom, as there appear to be differing views between the courts of these countries as to the current interpretation of this proposition.<sup>48</sup> The Australian courts would appear no longer to require that the breach of duty be fraudulent, whereas there is some confusion in the authorities which have come out of the United Kingdom as to whether the design is required to be fraudulent or otherwise in order for liability to attach.<sup>49</sup>

The Australian position is perhaps best stated by the High Court in *Consul Development Pty Ltd v D P C Estates Pty Ltd*.<sup>50</sup> In that case, the plaintiff company operated a business whereby it purchased and renovated properties for the purpose of resale. A director of the plaintiff company identified a number of properties, and advised a director of the defendant company that they were worthwhile investments. He did so without the consent of the

<sup>40</sup> *ibid.*, at 186-187.

<sup>41</sup> *ibid.*, at 187.

<sup>42</sup> R. P. Meagher and W. M. C. Gummow, *Jacob's Law of Trusts in Australia*, Sydney: Butterworths, 1997, 338.

<sup>43</sup> [2003] 1 All ER 97.

<sup>44</sup> *ibid.* at 131.

<sup>45</sup> (1975) 132 CLR 373.

<sup>46</sup> In this respect, see especially Gibbs J at 398.

<sup>47</sup> *Barnes v Addy* (1874) LR 9 Ch. App. 244 at 251-252.

<sup>48</sup> Dal Pont, *et al.*, *op. cit.*, p.485.

<sup>49</sup> *ibid.*

<sup>50</sup> (1975) 132 CLR 373.

plaintiff, and notwithstanding that he was acting on behalf of the plaintiff company at the relevant time that the properties were acquired.<sup>51</sup> Importantly, however, at the time that the properties were acquired by the defendant, the plaintiff was not in a financial position to acquire those properties.

The High Court found in favour of the defendant on a majority of three to one; Justice McTiernan being the sole dissident. Nevertheless, a preliminary issue to be determined was whether the plaintiff was entitled to a remedy where it was found that there was no dishonest or fraudulent design on the part of the fiduciary. In this case, it was a bare breach of fiduciary duty, which was actionable *per se* as between the beneficiary and the fiduciary. However, the question was whether that bare breach of fiduciary duty was sufficient to give rise to the entitlement of the beneficiary to bring proceedings against a third party who has interfered with the relationship between the fiduciary and beneficiary.

This point was not expressly and individually dealt with by any of the members of the court. Nevertheless, each member of the court proceeded on the basis that the breach of fiduciary duty in such case was sufficient to support the claim against the third party, in the event that the necessary criteria in respect to third party liability were made out.<sup>52</sup> However, in the present case, the criteria in respect to the third party were not satisfied, and therefore there was no liability of the third party. The court was willing to accept that such liability was available in the absence of any actual fraud or dishonesty on the part of the fiduciary.<sup>53</sup>

The position is not nearly so clear in the United Kingdom. The Court of Appeal was asked to deal directly with the issue in *Belmont Finance Corporation Ltd v Williams Furniture Ltd*.<sup>54</sup> This was an appeal from a decision of the trial judge on a no case to answer submission.<sup>55</sup> One of the issues for determination by the Court of Appeal was whether the plaintiff was required to plead that the breach of duty by the fiduciary was dishonest.

In this case, the Court held that, as it was a component of the original formulation of Lord Selborne that there should be dishonesty, there is no reason to depart from that formulation when determining whether there ought to be liability imposed on a third party.<sup>56</sup> Buckley LJ observed that the phrase “fraudulent or dishonest” simply meant dishonesty. That is, he found that the words were synonymous.<sup>57</sup>

A similar point was made by Goff LJ in his judgment in the same case. His Lordship dealt briefly with the matter, but essentially reiterated the point which was made by Buckley LJ. However, the emphasis of Goff LJ seemed to lie in the risk of uncertainty, in the event that there is a departure from the words of Lord Selborne. He posed the question as to what level of

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<sup>51</sup> (1975) 132 CLR 373 at 374-5.

<sup>52</sup> See, *e.g.* (1975) 132 CLR 373 at 398, *per* Gibbs J and at 413, *per* Stephen J.

<sup>53</sup> Ong, *op. cit.*, p.485.

<sup>54</sup> [1979] Ch 250.

<sup>55</sup> *ibid.* at 254.

<sup>56</sup> *ibid.* at 267, *per* Buckley LJ.

<sup>57</sup> *ibid.* at 267.

impropriety on the part of the trustee is sufficient, if dishonesty is too strict a test. Goff LJ refers to venturing into an “uncharted sea”, and agreed with Buckley LJ that this course would be dangerous.<sup>58</sup> Therefore, it would appear the position in the United Kingdom is that there is actual dishonesty required on the part of the fiduciary in order for the third party to be able to be held accountable.

Nevertheless, the relatively recent decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan*<sup>59</sup> has made the position in the United Kingdom less clear. In that case, Lord Nicholls delivered the advice of the Board. He specifically rejected the idea that there must be dishonesty on the part of the fiduciary in order for there to be any possibility of liability of the third party.<sup>60</sup> In reaching this conclusion, His Lordship focused on the fact that the liability in question was a fault-based liability being imposed on the third party. The principal issue is the fault of the third party, and not the fault of the fiduciary or trustee. Therefore, it ought to be possible to impose liability on a third party, irrespective of whether there has been any dishonest conduct by the fiduciary, provided the necessary impropriety on the part of the third party is ascertained.<sup>61</sup> Quite reasonably, His Lordship notes the corollary of the alternative argument, which is that if a fiduciary is honest, and the conduct of the third party is dishonest, the dishonest third party will escape liability.<sup>62</sup> Clearly, this is an unsatisfactory result, which will be avoided by the formulation proposed in Lord Nicholls’ judgment.

Unfortunately Lord Nicholls did not specifically address the decision of the Court of Appeal in *Belmont Finance* in this context. His Lordship’s comments set out above effectively deal with the objections raised by Goff LJ in his judgment in that case. However, Lord Nicholls did not expressly apply his comments as to an innocent fiduciary to the judgments of Buckley and Goff LJ. The difficulty which therefore creates the confusion is that *Royal Brunei Airlines* is a decision of the Privy Council on appeal from the Court of Appeal of Brunei Darussalam, and does not directly overrule a determination of the Court of Appeal, insofar as it applies to the law of the United Kingdom.<sup>63</sup> Consequently, the observer is left to assume that any subsequent determination by the House of Lords will follow the Privy Council in *Royal Brunei Airlines*.<sup>64</sup>

This point was borne out by the recent decision of the Privy Council in *Agnew v Commissioner of Inland Revenue*,<sup>65</sup> on appeal from the New Zealand Court of Appeal, regarding issues of fixed and floating charges. Although the Board expressly disapproved the decision of the Court of Appeal in *In re New Bullas Trading Ltd*,<sup>66</sup> that decision stood until 2005, when the House of Lords expressly overruled it in *In re Spectrum Plus Ltd*

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<sup>58</sup> *ibid.* at 274.

<sup>59</sup> [1995] 2 AC 378.

<sup>60</sup> *ibid.* at 385.

<sup>61</sup> *ibid.* at 385.

<sup>62</sup> *ibid.* at 385.

<sup>63</sup> Dal Pont, *et al, op. cit.*, p.486.

<sup>64</sup> *ibid.*

<sup>65</sup> [2001] 2 AC 710.

<sup>66</sup> [1994] 1 BCLC 485.

(*in liquidation*).<sup>67</sup> Hence, until the House of Lords expressly overrules the *Belmont Finance* decision, it must be accepted that it remains valid – albeit somewhat questionable – law.

It may, however, be said that one of the weaknesses of the reformulation of the test by Lord Nicholls is that he did not consider the question in the context of the original formulation by Lord Selborne.<sup>68</sup> Lord Selborne expressly stated the requirement for liability to be imposed on third parties as arising in circumstances where the third party has “assist[ed] with knowledge in a dishonest and fraudulent design on the part of the trustee”.<sup>69</sup> Given that Lord Nicholls was deciding on third party liability which was founded on the observations of Lord Selborne, it would have been convenient to provide some explanation as to the reason for departing from the specific formulation set out by the earlier court. Nevertheless, it is submitted that, for the very reasons stated by Lord Nicholls, the refinement offered in *Royal Brunei Airlines* is not inconsistent with the fundamental principle espoused in *Barnes v Addy*, which is to exonerate “persons dealing honestly”<sup>70</sup> with trustees who breach a trust, yet to render liable those who deal dishonestly, or with knowledge of dishonesty. Therefore, those who behave dishonestly ought to be found liable. Although this is implied on the face of the judgment of Lord Nicholls, it would have been a useful distinction to have made the point expressly, particularly in light of the comments of Goff LJ in *Belmont Finance*.

It is equally unfortunate that *Twinsectra v Yardley* was not a case which lent itself to resolution of the situation. There was no doubt in *Twinsectra* that the conduct of the trustee was fraudulent or dishonest, for the purposes of Lord Selborne’s comments. Therefore, the House of Lords did not find it necessary to consider the question. It has therefore been left to another time for consideration.

This then leads to the third element of a dishonest assistance claim, which is arguably the least controversial of all of the elements of the claim. That is, the proposition that the third party must actually provide some assistance to the trustee or fiduciary in the carrying out of the breach of trust.<sup>71</sup> Once again, a reference to the judgment of Lord Selborne in *Barnes v Addy* will offer some insight into what is expected in such a case.

In that case, the solicitor who was subject to attack prepared the trust deed which permitted the trustee to commit the dishonest act in respect to the subject-matter of the trust.<sup>72</sup> However, Lord Selborne found that, in the absence of misconduct by the third party, merely acting as an agent for the trustee is not sufficient to hold the third party charged as a trustee.<sup>73</sup> Therefore, standing alone, the conduct of the third party was simply said to have facilitated the breach of trust, but it was not sufficient to hold the third party liable. His Lordship made it clear that the additional conduct, in the

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<sup>67</sup> [2005] 2 AC 680.

<sup>68</sup> *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252.

<sup>69</sup> *ibid.*, at 252.

<sup>70</sup> *ibid.*, at 252.

<sup>71</sup> Meagher and Gummow, *op. cit.*, p.338.

<sup>72</sup> *Barnes v Addy* (1874) LR 9 Ch. App. 253.

<sup>73</sup> *ibid.*

form of knowledge of the breach of trust (although this issue of knowledge will be considered in more detail below) was necessary before there can be said to have been any basis for making the third party a constructive trustee.<sup>74</sup>

Once again, the question of what is necessary to amount to assistance was not addressed in *Twinsectra*, as it was not an issue as between the parties. There was no argument that the conduct of the defendant solicitors was sufficient to have assisted the breach of trust. However, what can be taken from the observations of Lord Selborne on this issue is that there are two limbs which must be satisfied. The first is that the conduct of the third party must be such as to facilitate the breach of trust. The second, which appears to be inextricably interwoven with the first, is that the facilitation must be with the knowledge that it amounts to a breach of trust (or fiduciary duty). Effectively, this makes it something of a fallacy to say that this is a separate element to the claim of knowing assistance.

This then leads logically to the final, and certainly the most controversial of the elements of knowing assistance. That is, the requirement – as formulated by Lord Selborne – that there be knowledge of the dishonest and fraudulent design of the trustee.<sup>75</sup> The reason it is controversial is that, sadly, Lord Selborne provided no clear definition in his statement for the level of knowledge which is required for a third party to be captured. This is the area in which *Twinsectra* has made the greatest impact.

### Knowledge and Honesty

It is in respect to the question of knowledge that *Twinsectra*<sup>76</sup> finds its greatest importance, and in which the most deleterious effect of the decision is to be found. After the powerful statement of the law set out by Lord Nicholls in *Royal Brunei Airlines v Tan*,<sup>77</sup> the position in relation to such claims shifted from “knowing assistance” to “dishonest assistance”.<sup>78</sup> Lord Nicholls made it clear that the final – and most important – test was whether the third party had acted dishonestly in assisting the breach of trust.<sup>79</sup> Nevertheless, the subsequent decision of the House of Lords in *Twinsectra* would appear to have made the prescription by Lord Nicholls less clear than it may appear on its face.

In addressing the question of what standard of conduct meets the test set out by Lord Selborne, Lord Nicholls in *Royal Brunei* starts with the proposition that the guiding principle is not to be the criminal standard.<sup>80</sup> He goes on to observe that the concepts of “acting dishonestly” and “a lack of probity” are terms which are synonymous. Ultimately, he says that it “means simply not

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<sup>74</sup> *ibid.*, at 254.

<sup>75</sup> *ibid.*

<sup>76</sup> See Robert Hunter, “The Honest Truth About Dishonesty”, *Private Client Business*, 2002, p. 390.

<sup>77</sup> [1995] 2 AC 378.

<sup>78</sup> G. E. Dal Pont, D. R. C. Chalmers, J. K. Maxton, *Equity and Trusts: Commentary and Materials*, (Law Book Co., Sydney, 2004) p.1051.

<sup>79</sup> Hunter, *op. cit.*, p.391.

<sup>80</sup> [1995] 2 AC 378 at 389.

acting as an honest person would in the circumstances.”<sup>81</sup> In order to ensure that this explanation is as clear as possible, he goes on to observe that the standard to be applied to determine whether a person has been acting as an honest person is an objective test.

Prior to the *Royal Brunei Airlines* case, the primary test for whether a third party was liable for misconduct relied on the words of Lord Selborne, to the effect that the assistance was given in the knowledge of the fraud or dishonesty of the trustee.<sup>82</sup> In support of this position, Peter Gibson J, in the case of *Baden v Societe Generale pour Favoriser le Developpement du Commerce et de L’Industrie en France SA*,<sup>83</sup> put forward the proposition that there are five standards of knowledge. They are best described as:

1. Actual knowledge;
2. Wilfully shutting one’s eyes to the obvious;
3. Wilfully and recklessly failing to make such enquiries as an honest and reasonable person would make;
4. Knowledge of circumstances which would indicate the facts to an honest and reasonable person;
5. Knowledge of circumstances which would put an honest and reasonable person on enquiry.<sup>84</sup>

Until *Royal Brunei Airlines v Tan*, these five levels of knowledge were taken by the courts as the starting point for determining the level of knowledge required to satisfy Lord Selborne’s criterion of assisting a fraudulent breach of trust with knowledge of the fraud or dishonesty. The principal question, however, was which of the five categories of knowledge would be sufficient in order to satisfy the criterion.

It is self-evident that actual knowledge will be sufficient to satisfy the requirement. The important question then is whether constructive or imputed knowledge will also be sufficient.<sup>85</sup> Lord Selborne himself observed that it would be an unsatisfactory precedent to set to require that in every case where there was a “doubtful transaction”, the solicitor or other agent responsible for assisting that transaction is thereby made a constructive trustee.<sup>86</sup> This probably suggests that Lord Selborne was counselling against accessory liability being imposed on the basis merely of constructive notice.<sup>87</sup>

The second category of knowledge – also referred to as ‘Nelsonian’ knowledge – has also been accepted as being sufficient to give rise to accessory liability. Buckley LJ confirmed this in *Belmont Finance Ltd v Williams Furniture (No. 1)*,<sup>88</sup> when he observed:

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<sup>81</sup> *ibid.*, at 389.

<sup>82</sup> Radan, *et al, op. cit.*, p.376.

<sup>83</sup> [1992] 4 All ER 161.

<sup>84</sup> Set out in Radan, *op. cit.*, p.376.

<sup>85</sup> Ong, *op. cit.*, p.460.

<sup>86</sup> *Barnes v Addy* (1874) LR 9 Ch. App. 244 at 253-254.

<sup>87</sup> Ong, *op. cit.*, p.461.

<sup>88</sup> [1979] Ch 250.

“If he wilfully shuts his eyes to dishonesty, or wilfully or recklessly fails to make such enquiries as an honest or reasonable man would make he may be found to have involved himself in the fraudulent character of the design, or at any rate to be disentitled to rely on actual knowledge of the design as a defence.”<sup>89</sup>

This confirms that, where a third party simply ignores circumstances which ought to inform him of the existence of fraud or dishonesty by the trustee or fiduciary, the third party will be liable if he provides the relevant assistance in any event, notwithstanding that notice.<sup>90</sup> This point was recently reiterated by Lord Clyde in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd*,<sup>91</sup> when he observed that for “blind eye knowledge” to impugn the conduct of a party, it must be established that there was a reasonable basis for the relevant party to believe that it was best not to investigate, for fear of learning an unwelcome truth.<sup>92</sup>

The decision of the High Court of Australia in *Consul Development Pty Ltd v D P C Estates Pty Ltd*<sup>93</sup> arguably represents something of a watershed in the move by Australian courts from knowledge-based liability to the focus on dishonesty, notwithstanding that the High Court in that case continued to focus on the knowledge of the third party. However, the High Court in this case looked at the level of knowledge of the third party, and determined whether that level of knowledge would have led an honest and reasonable man to the conclusion that there was impropriety by the trustee or fiduciary.<sup>94</sup> In this vein, Stephen J referred to the “reasonable, honest man”,<sup>95</sup> when assessing whether the third party ought to be found liable as an accessory to the breach of duty by the trustee or fiduciary.

It is for this reason that this case can be said to be a watershed in the development of the law in Australia: the High Court accepted that the test as applied by Lord Selborne is the knowledge of the third party. However, it was equally accepted that the standard to be applied in determining whether the third party had the requisite knowledge was the test of the honest and reasonable man.<sup>96</sup> Although this decision pre-dated the decision of Peter Gibson J in *Baden*,<sup>97</sup> the High Court in any event did not find it necessary to address the question of standards of knowledge, other than the direct dichotomy of actual knowledge, and that of the honest and reasonable man.

Lord Nicholls, in *Royal Brunei Airlines*, goes further than the Australian courts, and suggests that the five levels of knowledge set out by Justice Peter Gibson are “best forgotten”.<sup>98</sup> In reaching this conclusion, His Lordship is most concerned with the standard of the honest person. He adopts the view

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<sup>89</sup> *ibid.*, at 267.

<sup>90</sup> Meagher and Gummow, *op. cit.*, p.333.

<sup>91</sup> [2003] 1 AC 469.

<sup>92</sup> *ibid.*, at 472.

<sup>93</sup> (1975) 132 CLR 373.

<sup>94</sup> *ibid.*, at 398 *per* Gibbs J.

<sup>95</sup> *ibid.*, at 413.

<sup>96</sup> Ong, *op. cit.*, p.483.

<sup>97</sup> [1992] 4 All ER 161.

<sup>98</sup> [1995] 2 AC 378 at 392.

that the test for whether a third party ought to be liable rests on the issue of honesty, rather than knowledge, although it is clear that the knowledge of the third party is arguably a decisive factor in determining whether the third party has behaved honestly.<sup>99</sup>

As an illustration of what constitutes dishonesty for present purposes, he arguably goes beyond what is ordinarily understood by the term.<sup>100</sup> He makes the general comment that merely making an investment with some risk is not dishonest. However, where there is such a degree of unnecessary risk that the investment or other act amounts to recklessness, then the conduct may be said to amount to dishonesty on the part of the third party.<sup>101</sup> Clearly, then the concept of dishonesty as espoused by Lord Nicholls is broader than that which would be understood in ordinary parlance. It naturally incorporates the meaning that would be taken by an “honest and reasonable man”, but goes further to cover reckless conduct and the taking of unnecessary risks.<sup>102</sup>

As noted above, the observations of James LJ in *Barnes v Addy*<sup>103</sup> seem to support the position adopted by Lord Nicholls. James LJ’s comments have, unfortunately, been largely forgotten, having been overshadowed by the judgment of Lord Selborne. However, the fact that James LJ refers to the honesty of the third party is indicative that the reformulation of the test by Lord Nicholls is consistent with the original reasoning in *Barnes v Addy*.

This new approach to the formulation of accessory liability appears, on its face, to be relatively straightforward, and allows for ease of application in new circumstances. However, this has been shown not to be the case, with the decision of the House of Lords in *Twinsectra v Yardley*.<sup>104</sup>

Notwithstanding the observations of Lord Nicholls – and in purported reliance on the principles set out in his judgment – the majority of the House seemed to take yet another new position as to the appropriate test to apply in such circumstances. It is submitted that the powerful dissent of Lord Millett is the preferred position. However, this is merely a dissent, and therefore, the law is as stated by the majority.

The leading speech of the majority was delivered by Lord Hutton. In addressing the question of the standard to be applied to determine whether a third party is dishonest, His Lordship seized upon the fact that Lord Nicholls had said that the test is not wholly objective, as there must be some consideration of the knowledge of the defendant, in order to address the question of honesty.<sup>105</sup> However, in interpreting this proposition, Lord

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<sup>99</sup> *ibid.*, at 392.

<sup>100</sup> Alastair Hudson, “Constructive Trusts and the Liability of Banks and Fund Managers”, *Journal of International Financial Markets*, 2000, p.213.

<sup>101</sup> [1995] 2 AC 378 at 389. This was nothing new, however, as the House of Lords had made the point over 100 years earlier in *Derry v Peek* [1886-1890] All ER1 that proof of recklessness was sufficient to make out fraud on the part of a defendant, for the purposes of pursuing an action in deceit.

<sup>102</sup> Hudson, *op. cit.*, p.213.

<sup>103</sup> (1874) LR 9 Ch App 244 at 256.

<sup>104</sup> [2002] 2 AC 164.

<sup>105</sup> [1995] 2 AC 378 at 389.

Hutton sought to narrow the effect of this observation, and effectively converted the primarily objective test proposed by Lord Nicholls into a subjective one. Lord Hutton stated:

“I think that in referring to an objective standard Lord Nicholls was contrasting it with the purely subjective standard whereby a man sets his own standard of honesty and does not regard as dishonest what upright and responsible people would regard as dishonest.”<sup>106</sup>

In making this observation, Lord Hutton potentially left it open to allow a third party to escape an allegation of dishonesty if that third party can establish that, on the basis of what the person knew at the time of the relevant incident, an honest and reasonable person would not have regarded the conduct as dishonest.<sup>107</sup>

This proposition is endorsed by Lord Slynn. He accepted that the defendant in the present case “deliberately shut his eyes” to the circumstances of which he ought to have been aware at the time of making the disbursement.<sup>108</sup> However, on the basis of the reasoning of Lord Hutton, Lord Slynn was able to conclude that the defendant “may have been naïve or misguided”,<sup>109</sup> but he was also able to conclude that the conduct did not amount to dishonesty. This is because the application of the test adopted by the majority was such that the circumstances of which the defendant was aware at the relevant time were found not to be such that an honest and reasonable man would have found that the conduct of the defendant was dishonest.

Further support for this idea is to be obtained from Lord Hoffmann. His Lordship accepted that the defendant was aware of all of the material facts in the case. However, he goes on to observe that “. . . he took a blinkered approach to his professional duties as a solicitor, or buried his head in the sand (to invoke two different animal images). But neither of those would be dishonest.”<sup>110</sup> Lord Hutton agreed that the defendant “deliberately shutting his eyes to the problems and to the implications of the undertaking”<sup>111</sup> nevertheless did not amount to dishonesty.

The clear problem with the approach taken by the majority is that – notwithstanding the overt acceptance that the test is an objective one – a subjective test of honesty is applied. The manner in which this has been applied clearly does not accord with the statements of Lord Nicholls, who was entirely plain in his statement that the test of honesty is an objective one. In making this point, he expressly referred to the criminal standard of honesty, and observed that this is not the standard which ought to be applied.<sup>112</sup> The criminal test is that the defendant must be cognisant of his own wrongdoing for there to be dishonesty found in respect to his conduct.<sup>113</sup>

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<sup>106</sup> [2002] 2 AC 164 at 173.

<sup>107</sup> *ibid.*, at 174.

<sup>108</sup> *ibid.*, at 167.

<sup>109</sup> *ibid.*, at 167.

<sup>110</sup> *ibid.*, at 170.

<sup>111</sup> *ibid.*, at 179.

<sup>112</sup> [1995] 2 AC 378 at 385.

<sup>113</sup> See *R v Ghosh* [1982] 2 All ER 689.

It is apparent from a reading of the judgment of Lord Hutton, and the other members of the majority, that they have sought to apply something approaching the criminal test of dishonesty.

Lord Nicholls was applying what may be regarded as a mixed test of dishonesty. That is, he suggested that the standard ought to be objective, in that it is necessary to look at what a reasonable and honest person would do in the circumstances of the defendant. However, it is – to a limited extent only – also subjective, in the sense that the fictitious honest and reasonable person is expected to act on the basis of the knowledge of the defendant at the time the events occur.<sup>114</sup> To that extent, the test is a “mixed” one, but it is clear on the face of the judgment of Lord Nicholls that the emphasis is definitely leaning towards the objective aspect of the test. This proposition may be further endorsed by extrinsic developments in the law relating to trustees, such as the clarification of the duty of care in the *Trustee Act 2000*.<sup>115</sup>

In contrast, despite the assertion by both Lords Slynn and Hutton that they accept the formulation of honesty as prescribed by Lord Nicholls, it is apparent that a subjective test is applied. From the nature of the comments – and most importantly, the conclusions – of the majority, it is clear that the fact that the defendant was found not to have any dishonest intent was held to be sufficient to vindicate him. That is, the criminal test of dishonesty was applied, and it was found that the defendant did not intend to act dishonestly. This is as opposed to considering whether an honest and reasonable person in the position of the defendant would have acted in the same way. Therefore, the defendant was found not to be liable. With respect, it is submitted that this is an inappropriate application of the test propounded by Lord Nicholls.

Lord Millett provides a much clearer – and, it is submitted, more accurate – statement and application of the principles from *Royal Brunei Airlines v Tan* in his dissenting speech. Interestingly, Lord Millett relies on the same passage from *Royal Brunei Airlines v Tan* as Lord Hutton, in which Lord Nicholls states that the test is not the criminal law test for honesty, but rather want of probity.<sup>116</sup> However, the conclusion reached by Lord Millett is that the intention of Lord Nicholls was not to focus on the dishonest state of mind of the defendant, but rather to focus on the dishonesty of the conduct.<sup>117</sup> Most importantly, Lord Millett rejects the idea that there is any suggestion by Lord Nicholls that the defendant must have any knowledge that he was doing wrong.<sup>118</sup> This is an essential difference between the decision of the majority and that of Lord Millett.

Lord Millett does not expressly suggest that the test applied by Lord Nicholls is a “mixed” one. However, he does implicitly acknowledge this to be the case when he notes that the standard to be achieved by the third party is that of “an honest person placed in similar circumstances”.<sup>119</sup> Naturally, there is some limited, but essential, element of subjectivity in this formulation, in

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<sup>114</sup> Panesar, *op. cit.*, p.13.

<sup>115</sup> Contained in section 1.

<sup>116</sup> [1995] 2 AC 378 at 389.

<sup>117</sup> [2002] 2 AC 164 at 197.

<sup>118</sup> *ibid.*, at 197.

<sup>119</sup> *ibid.*, at 198.

that the particular circumstances of the defendant must necessarily govern the response of that person at any given time. Therefore, although there may be no intention to act dishonestly within any given circumstances, the conduct of a defendant may be found to be dishonest if the response to those conditions does not meet the standard of an honest and reasonable person with the same characteristics, and in the same position.

The conclusion of the various judges in this case illustrates the importance of the distinction between the two methods of interpretation. The majority accepted that the defendant was aware of all of the relevant facts, and that he closed his eyes to circumstances which may have indicated impropriety. However, it does seem to be common ground that the defendant did not have actual knowledge of the fraud or dishonesty. That being the case, the majority were prepared to absolve the defendant on the basis that he meant no harm or dishonesty. Conversely, Lord Millet, in applying (correctly, it is submitted) the test of honesty from Lord Nicholls, found that this conduct would amount to dishonesty, because an honest and reasonable person would have found the actions of the defendant, in all of the circumstances, to have been dishonest. The interpretation adopted by the majority renders the position of the beneficiary much weaker, and makes it potentially much more difficult to impose liability on a third party.

### Recent Attempts at Clarification

The principles in *Twinsectra* were recently considered by the Privy Council in an appeal from the Isle of Man, in the case of *Barlow Clowes International v Eurotrust International Ltd.*<sup>120</sup> Lord Hoffmann delivered the advice of the Board in this case. In doing so, he referred to Lord Hutton's comments from *Twinsectra* that ". . . for liability as an accessory to arise, the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men."<sup>121</sup> This purported imposition of a subjective test has been the subject of some criticism since the *Twinsectra* decision, which Lord Hoffmann notes in his preliminary comments.<sup>122</sup> It is this alleged imposition of a subjective test which his Lordship sought to clarify in the *Barlow Clowes* case.

Although the Privy Council sought to clarify the position, in fact it is respectfully suggested that they have sought to provide a retrospective revision of the words of the court in the earlier case, and in doing so have provided a new – and somewhat contradictory – interpretation. Lord Hoffmann, in referring to the speech of Lord Hutton, states:

“The reference to “what he knows would offend normally accepted standards of honest conduct” meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had

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<sup>120</sup> [2005] UKPC 37.

<sup>121</sup> [2002] 2 AC 164 at 174.

<sup>122</sup> [2005] UKPC 37, para.15.

reflections about what those normally acceptable standards were.”<sup>123</sup>

Similarly, his Lordship considered his own speech in *Twinsectra*, and once again noted that the intention was that the defendant must have knowledge that the conduct breaches the ordinary and acceptable standards of behaviour, but it is not necessary for the plaintiff to show that he reflected on what those standards are.<sup>124</sup> Finally, his Lordship concludes that “the principles of liability for dishonest assistance which had been laid down in *Twinsectra* . . . were no different from the principles stated in *Royal Brunei Airlines v Tan* . . .”.<sup>125</sup> Therefore, the conclusion must necessarily be that the House of Lords in *Twinsectra* was not imposing a subjective test, but an objective one.

With respect, this conclusion is erroneous on two main grounds. The first is that, on its face, the words of the members of the House in *Twinsectra* reflect a significant move away from the position of Lord Nicholls in *Royal Brunei*, for the reasons set out in some detail above. The observations of the majority in *Twinsectra* clearly reflect what might be argued as a more ‘defendant friendly’ approach to the level of knowledge required for liability to attach for dishonest assistance.

Secondly, as is suggested above, this decision clearly amounts to a retrospective attempt to give an alternate – and somewhat confusing – meaning to words which are clear on their face. Lord Hoffmann suggests that the intention of the majority in *Twinsectra* was to conclude that the defendant was liable where he knows that his conduct is dishonest, but that it is not part of the test to establish that the defendant gave any thought to what constitutes dishonesty. The critical element of subjectivity – being the defendant’s appreciation of what constitutes dishonesty – is removed from the test.

This is, however, a logical impossibility. It is not possible for a rational creature to have knowledge of a legal or moral position – such as the honesty or dishonesty of an act – without reflecting upon the essentials of that legal or moral position. If knowledge of dishonesty is the determinant of liability, then the test remains a subjective one, and the *Twinsectra* and *Royal Brunei* tests continue to diverge. It is therefore suggested that the Privy Council’s attempt to reconcile these two cases has failed.

### Consequences and Conclusion

It is submitted that there is a potentially significant negative consequence arising from the decision of the House of Lords in the *Twinsectra* case. The imposition of what is effectively a subjective test of dishonesty imposes a standard of dishonesty which falls only a little short of requiring an intention to commit a dishonest act.<sup>126</sup> Consequently, it could easily be suggested that there is little value remaining in the action based upon the second limb of

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<sup>123</sup> *ibid.*, para.15.

<sup>124</sup> *ibid.*, para.16.

<sup>125</sup> *ibid.*, para.18.

<sup>126</sup> Georgina Andrews, “The Redundancy of Dishonest Assistance”, *Conv.*, Sept/Oct 2003, 403.

*Barnes v Addy*.<sup>127</sup> This is perhaps the reason for the Privy Council's attempt to clarify the position, and establish that the test is in fact an objective one, rather than the subjective test suggested by the words of the majority.

Nevertheless, with the devaluing of this equitable claim, it has been suggested that the common law may now be sufficiently equipped to deal with claims of this sort, through the mechanism of tort, specifically "a tort of interference with a fiduciary relationship".<sup>128</sup> Such a tort would obviate the need for the convoluted interpretations of the concepts of honesty and dishonesty, and focus on the acts of the parties and their consequences. A review of the words of Lord Nicholls reveals that this is what may have been intended by him, but was subsequently derailed. This approach has already been attempted in Australia in the Queensland Supreme Court case of *Voss v Davidson*,<sup>129</sup> in which alternative claims of tort and accessory liability were made against a solicitor. These claims failed on their facts. Nevertheless, it is indicative that this course is not one entirely without merit.

It may therefore be seen that the law of accessory liability has undergone substantial evolution in the 130 years since it was originally formulated as the second limb of *Barnes v Addy*. Originally it was necessary to establish fraud or dishonesty by a trustee, in which a third party knowingly assisted. Subsequently, it is no longer necessary – in Australia at least – to show dishonesty by the trustee, as the remedy focuses on the conduct of the third party, and not on that of the trustee. It is also now possible to impose liability for interference with any fiduciary relationship, not merely a trustee's duty. Finally, the issue of knowledge has been usurped by the powerful restatement of the law by Lord Nicholls in *Royal Brunei Airlines v Tan* and replaced with an objective test of dishonesty. In seeking to interpret and apply this test, the House of Lords has misconstrued the words of Lord Nicholls and inadvertently reverted to a knowledge-based liability, by imposing a subjective test of honesty on the third party. The effect of this position has been to weaken the position of the beneficiary, and render the remedy relatively difficult to obtain. Such is the legacy provided by *Twinsectra v Yardley*.

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<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*

<sup>129</sup> [2002] QSC 316.

## FOREIGN INVESTMENT IN THE WTO

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### Abstract

*This article explores the application of the policy science concepts of 'policy frames' and 'policy transfer' as explanatory tools in the study of law and legal reform. It does so by examining the transformation in international law of foreign investment issues from a state-centred classical international law frame, within which foreign investment appeared as a property issue and protection of property as the central objective of law, to a market-centred neo-liberal frame, under which foreign investment is regarded as a 'trade' issue and growth-oriented liberalization of trade the central objective of law. This transformation can be summarised very crudely as the replacement of a discourse in which states have rights and multinationals have duties, by one in which states have duties and multinationals have rights.<sup>1</sup> However, this transformation is neither complete, nor uncontroversial. This article considers recent efforts to launch negotiations for a multilateral agreement on investment within the WTO from this 'framing' perspective and concludes that framing analysis may have useful applications in the study of law.*

### Introduction

This article uses policy science literature on framing and policy transfer to examine the transformation in international law of foreign investment issues from a state-centred classical international law frame, within which foreign investment appeared as a property issue, to a market centred neo-liberal frame, under which foreign investment is regarded as a 'trade' issue. This transformation can be summarised very crudely as the replacement of a discourse in which *states have rights and multinationals have duties*, by one in which *states have duties and multinationals have rights*.<sup>2</sup> This article focuses in particular on the moves to initiate negotiations within the current World Trade Organisation (WTO) Doha Round on an international agreement on investment. The failure of these moves testifies to the fact that transformation of the foreign investment discourse is neither complete, nor uncontroversial. In considering these events this article employs the policy science concepts of 'policy frames' and 'policy transfer' as explanatory tools

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<sup>1</sup> Brewer and Young, *The Multilateral Investment System and Multinational Enterprises* (1998), p.273.

<sup>2</sup> Brewer and Young, *The Multilateral Investment System and Multinational Enterprises* (1998), p.273.

and considers whether they have anything to offer the study of law and legal reform.

The first section outlines the concepts of ‘framing’ and ‘policy transfer’ as developed in policy science literature. In the second section the process by which foreign investment issues were ‘reframed’ in neo-liberal terms as market issues is discussed. The third section then outlines the major legal developments which have emerged within this neo-liberal frame, and which serve to provide the normative content of the new frame: in particular the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS) and the Draft Multilateral Agreement on Investment (MAI) are considered. The fourth section examines the recent debates in the WTO on a possible multilateral agreement on investment, in particular the conclusion of a negotiating mandate in relation to foreign investment at the Fourth Ministerial meeting of the WTO in Doha in November 2001, and the subsequent dropping of this item in 2004. A final section returns to the concepts of framing and policy-transfer and concludes that they may have useful applications in legal studies.

### **Framing and Law**

Policy science literature on policy framing focuses on the way in which political issues are conceptualised, packaged, or presented in political discourse – framing – and how this framing assists or restricts the successful pursuit of issues in different policy contexts.<sup>3</sup> The policy context may be composed of ideological, conceptual or normative elements, or may relate to historical contingency or institutional settings, but the central notion is that policies will be better received and more likely to be pursued or adopted where they ‘fit’ or ‘resonate’ with other surrounding policy frames, for instance where they ‘fit’ within the ideological mindset of the institution within which they are being promoted. Policy-making can thus be characterised as an ongoing conflict between actors over competing policy frames.<sup>4</sup> Moreover, it can be observed that actors themselves will “gravitate to the policy-making arena(s) most favourable to their cause and their particular policy frame”, and, “seek. . . to create an institutional arrangement that strengthens those institutions that are supportive of them”.<sup>5</sup> The policy framing literature has also been applied in relation to the policy transfer question; that is, the question about when and how policy solutions developed in one political context will be taken up and utilised in another political context.<sup>6</sup> Finally, some literature has focussed on the production of

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<sup>3</sup> See in general Schon and Rein, *Frame Reflection. Towards the Resolution of Intractable Policy Controversies* (1994); McAdam, McCarthy and Zald (eds.), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (1996).

<sup>4</sup> *ibid.*

<sup>5</sup> Mazey, “Introduction: Integrating gender – intellectual and ‘real world’ mainstreaming” (2000) 7(3) *Journal of European Public Policy. Special Issue on Women, Power and Public Policy in Europe* 333 at 339.

<sup>6</sup> On policy transfer see, e.g. Dolowitz and Marsh, “Who Learns What from Whom: a Review of the Policy Transfer Literature” (1996) XLIV *Political Studies* 343; Rose, “What is lesson-drawing?” (1991) 11 *Journal of Public Policy* 3; Wolman, “Understanding Cross National Policy Transfers: The Case of Britain and the US”

policy frames, based on the insight that policy frames are “not just lying round someplace, available to be picked up and used... The frame has to be created.”<sup>7</sup> By focussing on the reflexive process which lies behind the creation of policy frames, rather than on the competition between existing frames, such developments lead in turn to the suggestion that account must be taken of the contestable nature of policy frames and the influence which resistance to the development or establishment of a new policy frame might have in the shaping of the frame itself.<sup>8</sup>

These bodies of literature on policy framing and policy transfer can be seen as directly relevant to legal scholars concerned with explaining the success and/or failure of law reform initiatives and the wider implications of these initiatives. The concept of policy framing, for instance, can be related to the ideational aspect of law and specifically, the role of law in privileging some understandings of problems and some responses to them over other competing understandings and potential approaches. Law, in other words, can play an important part in the reinforcement or weakening of existing policy frames. Thus a particular legal reform, by contributing to the establishment or weakening of a policy frame, can have normative ‘weight’ beyond that particular policy setting.

In this sense the concept of a policy-frame performs a similar role in literature to the concept of a policy paradigm, denoting an established form or pattern to which subsequent laws or policies may or may not conform. Frames, however, can be distinguished from paradigms. Conceptually, ‘paradigm’ usually focuses on the ‘core’ or central features of laws, policies and analyses, stripping them bare or reducing them to a minimum yet essential content. Frames on the other hand, refer more to the outer limits within which laws or policies must fit if they are not to be disruptive of existing orders. Despite this difference of focus there is a sense, however, in which the concepts of ‘paradigms’ and ‘frames’ perform a similar role, describing or prescribing an ideal or exemplar that functions as a reference point in discourse. However, whereas the concept of a ‘paradigm’ usually refers exclusively to the ideational or normative content of particular laws or policies, ‘frames’ are often construed more widely to include institutional and/or process aspects; a policy frame is a ‘view of the world’<sup>9</sup> which both

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(1992) 5(1) *Governance: An International Journal of Policy and Administration* 27. On the role of framing in policy transfer see, for example, Schon and Rein, *supra* n.2; Hafner-Burton and Pollack, “Mainstreaming Gender in Global Governance” *EUI Working Paper RSC No. 2001/46* Florence, Robert Schuman Centre for Advanced Studies, European University Institute, 2002.

<sup>7</sup> Tesh, *Uncertain Hazards: Environmental Activists and Scientific Proof* (2000), cited with approval in Welsh I. “Re-Framing Social Movements: Margins, Meanings and Governance”, paper presented to ECPR Conference, University of Kent, 6-8<sup>th</sup> Sept. 2001.

<sup>8</sup> For a similar argument cast in terms of norm negotiation see Elgstrom, “Norm Negotiations. The construction of new norms regarding gender and development in EU foreign aid policy.” (2000) 7(3) *Journal of European Public Policy. Special Issue on Women, Power and Public Policy in Europe* 457 at 461.

<sup>9</sup> Mazey, *supra* n.5, at 339.

defines the problem and prescribes the solution.<sup>10</sup> Thus while both ‘paradigms’ and ‘frames’, once established, may have weight beyond the immediate policy setting, the weight of the frame may include matters such as the institutional setting and the means by which policies or laws are agreed on or adopted, as well as the content of those laws and policies.<sup>11</sup> Frames may dictate or suggest a choice of institution for a particular innovation in law or policy and/or a particular method of reform: frames, like institutions, ‘embed historical experience into rules, routines and forms that persist beyond the historical moment and condition’.<sup>12</sup>

It follows that a further use to which the concept of policy frames can be put in legal studies is in analysing the role of a particular legal landscape or set of rules in setting the direction or paths of future developments. It has been observed elsewhere that legal reforms and innovations will work best where they ‘fit’ well within the existing socio-legal landscape; that is, where there is ‘resonance’ with existing policy frames. Conversely, the policy context into which reforms are introduced will influence the ways in which those reforms are implemented and the ways in which they play out in a particular context.<sup>13</sup> Overall it is clear that existing policy frames will serve to commend some policy proposals and condemn others, meaning that at times the extra support required to displace or reformulate an existing policy frame will be the factor which determines the choice between competing policy proposals.

Policy framing can also be usefully deployed in the task of explaining how and why particular legal reforms succeeded or failed in particular jurisdictions, when they were modelled, in whole or in part, on legal systems or legal reforms seen elsewhere. Political science explanations can be used alongside scholarship on legal transplants and on the globalisation of legal discourse<sup>14</sup> to explore both the conditions for successful transplantation of

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<sup>10</sup> *ibid.*, 338; Schon and Rein, *supra* n.2, at xviii. In this respect there is resonance with Baachi’s work: Baachi, *Women, Policy and Politics: The Construction of Policy Problems* (1999).

<sup>11</sup> Thus at one end framing literature may overlap with bodies of work on path dependency; see for example Dimitrakopoulos, “Incrementalism and Path Dependence: European Integration and Institutional Change in National Parliaments” (2001) 39 *JCMS* 405; March and Olsen, *Rediscovering Institutions: The Organisational Basis of Politics* (1989); Wilkinson, “The WTO in Crisis: Exploring the Dimensions of Institutional Inertia” (2001) 35(3) *JWT* 397.

<sup>12</sup> March and Olsen, *ibid.*, at 167.

<sup>13</sup> See, e.g. previous work on the impact of EC equality law in Member States’ laws and policies: Beveridge, Nott and Stephen, “Addressing Gender in National and Community Law and Policy-making” in Shaw (ed.), *Social Law and Policy in an Evolving European Union* (2000) at 135; Cram, “Governance to Go: Domestic Actors, Institutions and the Boundaries of the Possible” (2001) 39 *JCMS* 595; Kilpatrick, “Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ” (1998) 4(2) *ELJ* 121.

<sup>14</sup> See for example Seidman, Seidman and Walde, *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (1999), especially contributions by Seidman, Seidman and Walde; Walde and Gunderson; Walde and von Hirschhausen; and Tamanaha; also Thome, “Heading South But Looking North: Globalization and Law Reform in Latin America” in Faundez,

legal 'models' or solutions, and the consequences of attempting such cross-cultural transplantation.

Cross-cultural legal transplantations can be seen to occur in many different ways and, as Nelken warns, these should not be oversimplified.<sup>15</sup> Policy-framing literature posits legal transplantation as the outcome of discursive processes and suggests two particular means by which such transplantation might occur. The first is where policy-makers in one state, whether one or two policy entrepreneurs or the government at large, look to other jurisdictions for solutions to apparently similar economic, social or political problems. Through the process labelled as 'lesson-drawing', a solution which appears to be working elsewhere (in the originating state) may be used as a model by the policy-makers in the first state in the drawing up of proposals: here the protagonists have succeeded in establishing their policy-frame in the receiving state and this may include a new understanding of the problem as well as the solution. Rose identifies five ways in which the solution observed elsewhere may influence the new policy proposals, ranging from merely providing inspiration at one end of the spectrum, to serving as a blueprint at the other.<sup>16</sup> Here the transplantation occurs *horizontally*, and will normally be instigated primarily by policy-makers within the host state. However it should be acknowledged that within the international community the originating state may in reality play a key role in commending the solution to the host state policy-makers or providing incentives for particular types of reform, such as when foreign aid takes the form of technical assistance and know-how directed at policy reform in the recipient state.

The second way in which cross-cultural transplantation can be seen to occur is via an international body such as an international organisation, or via a multilateral discourse, possibly though not necessarily encapsulated in a multilateral legal instrument such as a treaty. Cross-cultural transplantation will occur in this way where solutions developed in one jurisdiction or group of jurisdictions (the originating states) form the basis for the development of 'international' policies or norms, but require adoptive action within the domestic jurisdiction of other states (the host states). Here the transplantation occurs *vertically*, from the international level to the domestic level, and will normally be instigated by either the originating state(s), the international body (the intermediary) or both. It will also require at least the compliance of the host state, and possibly its active participation in adapting or adopting the policy to the local legal and political environment.

This second model fits legal developments in the European Union (EU), where the role of national governments and courts as implementers and enforcers of EU law and policy is well known,<sup>17</sup> though the role of the

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Footer and Norton (eds.), *Governance, Development, Globalization* (2000) 49; Watson, *Legal Transplants: An Approach to Comparative Law* (2<sup>nd</sup>, 1993).

<sup>15</sup> Nelken, "Changing Legal Cultures" in Likosky (ed.), *Transnational Legal Processes: Globalisation and Power Disparities* (2002) 41 at 50-51.

<sup>16</sup> Rose, *supra* n.5 at 21-22. Rose proposes a five-fold typology: Copying; Emulation; Hybridization; Synthesis; Inspiration.

<sup>17</sup> Maher, "National Courts as European Community Courts" (1994) 14 *LS* 226; Snyder, "The Effectiveness of European Community Law: Institutions, Processes,

European Court of Justice in supplying the tools for the job has also been a key factor.<sup>18</sup> It fits also the activities of the International Monetary Fund and the World Bank wherein policies regarding financial assistance to developing states are underpinned by ‘good governance’ strictures requiring changes in political structures and in laws and policies to make them resemble more those seen in developed free market economies.<sup>19</sup> Finally, it also increasingly fits some international trade disciplines which, as Mary Footer has observed, now penetrate more deeply into domestic legal landscapes than previously:

‘[F]or many developing countries the implementation of WTO trade obligations is simply another item to add to the growing list of legal and institutional reforms that underpin neoliberal development policy, which is “...organised around a set of ‘best practices’ rules and institutions, derived from model market economies”.’<sup>20</sup>

One clear example of this is the Agreement on Trade-Related Intellectual Property which requires *inter alia* the provision of particular forms of remedies in domestic law for infringements of intellectual property rights.<sup>21</sup>

### The Re-framing of Foreign Investment

This second section attempts to map the reframing of the issue of foreign investment in international law from the late 1980’s to the present day. This reframing can be divided into three stages: the establishment of a link between ‘foreign investment’ and ‘trade’; full acknowledgement of the relationship between foreign investment and trade; and the realignment of ‘foreign investment’ and ‘trade’ issues as two aspects of a larger market liberalisation phenomenon. Before outlining these stages it will be useful to look briefly at the historic foreign investment ‘frame’ of classical international law

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Tools and Techniques” (1993) 56 *MLR* 19; Temple Lang, “The Duties of National Courts under Community Constitutional Law” (1997) 22 *ELRev.*3.

<sup>18</sup> Weiler, “The Transformation of Europe” (1991) 100 *YLJ* 2403; Snyder, *ibid*; see also Carol Harlow’s discussion of ‘vertical convergence’ whereby the ECJ requires, through its rulings, the alignment of national rules and procedures to a Community standard set by the ECJ: Harlow, “Voices of Difference in a Polyphonic Community. The Case for Legal Diversity Within the European Union” (2000) *Harvard Jean Monnet Working Paper* 2/00.

<sup>19</sup> Faundez, “Legal Technical Assistance” in Faundez (ed.), *Good Government and Law: Legal and Institutional Reform in Developing Countries* (1997); Tshuma, “The Political Economy of the World Bank’s Legal Framework for Economic Development” (1999) 8(1) *SLS* 75; Turner and Hulme, *Governance, Administration and Development: Making the State Work* (1997); World Bank, *Governance and Development* (1992).

<sup>20</sup> Footer, “The WTO, Developing Countries and Technical Assistance for Trade Law Reform” in Faundez, Footer, and Norton, (eds.), *supra* n.14, 353 at 354. The quote is from Rittich, “Transformed Pursuits: The Quest for Equality in Globalized Markets” (2000) 13 *HHRJ* 233 at 234.

<sup>21</sup> Part III of the Agreement on Trade-Related Intellectual Property Rights, 1994 in GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994).

*Foreign Investment – the ‘old’ frame*<sup>22</sup>

In classical international law, the issue of foreign investment was governed by two basic principles: the principle of territorial sovereignty and the principle that the state’s right of self-defence included a right to protection of its nationals abroad. Under the first principle, foreign investors were seen to fall under the jurisdiction of the host state, which in turn was empowered to subject foreign investors to the full panoply of local regulation. Thus the host state had the right to exclude foreign investment all together, or to permit only limited investment, perhaps only in certain sectors of the economy. Once admitted foreign investors could be subjected to local laws on matters as diverse as taxation, protection of the environment, health and safety, worker’s rights and corporate management. Moreover, there was no requirement of equal treatment with indigenous investors: foreign ownership, even of a locally incorporated subsidiary, might readily serve as the basis for discriminatory treatment.<sup>23</sup> The second principle, that the protection of states extends to their nationals abroad, came into play only in the event of expropriation; that is, where there was a ‘taking’ of property owned by a foreign national by the host state. While the sovereign right of states to nationalise, expropriate or otherwise interfere with property situated in their territory can scarcely be doubted, fierce arguments were pursued for decades over the conditions which might attach to this right, such as a duty to pay compensation.

Foreign investment has thus been treated typically by writers in international law as an aspect of the subject of the treatment of foreign nationals or ‘injuries to aliens’, the injury consisting of unjustified interference with the *property* of a foreign national. The many attempts which have been made to clarify the rules through codification, and the many judicial and arbitral innovations in this field, have been discussed largely in this context. An important trend evident in the second half of the twentieth century was to seek to reduce the scope for state-state conflict over the treatment of investors by creating mechanisms whereby disgruntled investors could bring

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<sup>22</sup> See generally Domke, “Foreign Nationalisations: some Aspects of Contemporary International Law” (1961) 55 *AJIL* 585; Foighel, *Nationalisation: A Study in The Protection of Alien Property* (1957); Friedmann, *Expropriation in International Law* (1953); Higgins, “The Taking of Property by the State: Recent Developments in International Law” (1982-3) 176 *Recueil des Cours* 259; Jain, *Nationalisation of Foreign Property: A Study of North-South Dialogue* (1983); Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1985); Miller and Stanger (eds.), *Essays on Expropriation* (1967); Schwarzenberger, *Foreign Investments And International Law* (1969); Sornarajah, *The International Law on Foreign Investment* (2<sup>nd</sup>, 2004), Chap.7; Verway and Schrijver, “The Taking of Foreign Property Under International Law: A New Legal Perspective?” (1984) 15 *NYIL* 3; White, *Nationalisation of Foreign Property* (1961); Wortley, *Expropriation in Public International Law* (1959).

<sup>23</sup> Though more recently it has been possible to point to a general prohibition in international law on discrimination on grounds of race which has the status of *jus cogens*, i.e. a rule from which there can be no derogation. However it should be appreciated that the presence of ‘race’ rather than ‘nationality’ discrimination will in practice often be obscure in a business context. Sornarajah suggests, however, that redistributions to promote equality may be justified: Sornarajah, *supra* n.22, at pp.327, 366-7.

actions directly against host states, which would serve to depoliticise the conflict.<sup>24</sup> Bilateral investment treaties (BITs) too have been regarded as a practical means for clarifying the scope and content of the duty owed by host states to home states in respect of the home state's nationals' commercial investments. Thus BITs have tended to focus on property protection issues, including expropriation. It is only more recently that US and Canadian BITs have evolved to address issues concerning the treatment of existing investments, importing concepts such as the 'most-favoured nation' and 'national treatment' principles from trade disciplines.<sup>25</sup>

On the other hand, international trade disciplines, principally the General Agreement on Tariffs and Trade (GATT), were conceptualised as concerning traffic in goods from one state to another and as having little to say about the closely related but conceptually distinct question of production location.<sup>26</sup>

### *Developing the new frame*

(a) The first step in reframing foreign investment as an issue in international law required that a connection be made between trade in goods and foreign investment. This came through a focus by the U.S. government on the issue of 'performance requirements', which referred to the conditions and terms imposed by host states on foreign investors as a condition of their entry to or operation in the territory. The focus on 'performance requirements' was advanced on two fronts. One was the newly-revised U.S. Model BIT, launched in 1983, which contained provisions outlawing trade-related performance requirements.<sup>27</sup> The other was the assault, under the auspices of the GATT, on the performance requirements regime operating in Canada under the Foreign Investment Review Act (FIRA). Bringing its complaint to a GATT panel, the US argued, *inter alia*, that performance requirements such as local input requirements and export performance requirements, which were commonly the subject of written undertakings given by foreign

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<sup>24</sup> Measures ranged from the 'internationalisation' of investment contracts to the establishment of *ad hoc* and systematic arbitral institutions and processes such as the Iran-US Claims Tribunal and the International Centre for the Settlement of Investment Disputes.

<sup>25</sup> UNCTAD, *Series on issues in international investment agreements – Admission and Establishment* (1999), at pp.26-28. First developed in the US Model BIT of 1994, this approach is also found in NAFTA, in the 1994 Treaty on Free Trade between Colombia, Mexico and Venezuela, within MERCOSUR and in the APEC Non-Binding Investment Principles, subject in each case to limitations and exceptions (*ibid.*). See also Eden, "The Emerging North American Investment Regime" (1996) 5(3) *Transnational Corporations* 61; Shenkin, "'Trade-Related Investment Measures' in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty" (1994) 55 *U. Pitt. L. Rev.* 541.

<sup>26</sup> For a discussion see Bhagwati, "The Capital Myth. The Difference between Trade in Widgets and Dollars" (1998) 77(3) *Foreign Affairs* 7.

<sup>27</sup> Art.II:5 of the Model BIT provided: "Neither party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements." As Shenkin reports, most of the BITs concluded after the adoption of the new model included such provisions, though occasionally the binding language of the model was replaced in negotiations with soft or hortatory language: Shenkin *supra* n.25 at 580-582.

investors to the Canadian government during the approvals process, produced anti-competitive effects for goods produced elsewhere, and hence breached GATT non-discrimination rules. The GATT panel upheld the complaint<sup>28</sup>, in part at least, thus recognising the link between conditions imposed on investors and trade in goods.

(b) The second step in the reframing of foreign investment in international law required full acknowledgement of the connection between foreign investment decisions and trade. Two factors in the global economy served to highlight this connection. The growth in foreign investment and in trade in goods, and increased industrialisation in developing states, served to erode previously understood divisions between primary and secondary producer states (central and periphery economies) and to replace it with an understanding centred on the notion of 'globalisation'. The 'globalised' economy was shaped not so much by 'inherent' advantages possessed by states, such as access to raw materials, technological capacity or closeness to markets, as by their ability to attract and retain capital investment and to foster prosperity and efficient markets. As a corollary, flows of foreign investment and trade in goods were clearly the consequence of single location decisions taken by transnational corporations. Thus the notion of globalisation helped to make visible the close connection between trade in goods and foreign investment.

A second factor was the rise of trade in services, perceived as largely technology-driven and hence more mobile than trade in goods. The increasingly important economic contribution made by this trade to developed countries' economies led to the inclusion of trade in services in the GATT Uruguay Round negotiations, with access for service-based industries to the economies of other states at the top of the agenda. Since market access is often realised by making an investment in the economy (for example, by establishing a subsidiary or a branch through which the services will be provided), foreign investment was implicated from the beginning in the negotiations on services.<sup>29</sup>

(c) From these first two points flowed a third: the development of an understanding that trade and investment were two aspects of a single phenomenon; that they were merely components of something larger which was the 'market', the market in turn being understood as a single global market. Foreign investment, in other words, was located alongside trade issues within a single policy frame, so that it became difficult to discuss one of these without at least awareness of the implications for the other, and legitimate, possibly even normal, to discuss them together.<sup>30</sup> Moreover this

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<sup>28</sup> *Canada – Administration of the Foreign Investment Review Act (FIRA Case)*, adopted on 7 February 1984, GATT Basic Instruments and Selected Documents Supp. 30, 140. See further Beveridge, *The Treatment and Taxation of Foreign Investment under International Law: Towards International Disciplines* (2000), pp.160- 161; Shenkin, *ibid.*, at p.563.

<sup>29</sup> Four modes of access are recognised in the GATS Agreement, Art. 1: for an overview see Sauvé, "A First Look at Investment in the Final Act of the Uruguay Round" (1994) 28(5) *JWT* 5.

<sup>30</sup> One example is the observation that some foreign investment, for example some investment into South-East Asia in the 1990's, was fuelled by restrictive trade policies: that is, it was 'tariff-jumping' investment. The phasing out of quantitative

policy frame was conceived in distinctively neo-liberal terms, with the focus on liberalisation rather than on regulation.

Through these three stages in reframing, the issue of the treatment of foreign investment ceased to be about the protection of the property of nationals abroad – the understanding on which classical international law rules rested – and came to be understood instead as a question of market regulation. To draw again on the policy science literature, there was now a clear ‘fit’ or ‘resonance’ between foreign investment issues and global trade issues. This resonance had further implications, some political and some normative.

An important political consequence of this reframing was that national restrictions on foreign investment came to be perceived as damaging to the global economy in the same way that national tariffs on goods were regarded as damaging to international trade. The progressive liberalisation philosophy that gave GATT its label as a one-way street, which also underpinned free trade areas and had become central in North-South relations under the ascendant neo-liberal orthodoxy, now attached also, in political and economic discourses, to foreign investment. Under this orthodoxy, state regulation of foreign investment became part of the problem, not part of the solution. The logic of this was irresistible: trade liberalisation and liberalisation of foreign investment were two key components in a larger economic integration project and while substantial progress towards liberalisation had been made in relation to one (goods), the other (services) had been left largely untouched. Indeed, given the rising importance of trade in services, it was now illogical and inefficient to look only at goods and to ignore restrictions on trade in services; hence, liberalisation of foreign investment became imperative.

There were also important normative consequences. Since the ‘problem’ was now framed in terms which mirrored the problems addressed historically in relation to trade in goods, foreign investment could now be presented as amenable to the same type of legal regime as trade in goods; that is, a GATT-type regime based on the ‘most-favoured nation’ and ‘national treatment’ principles.<sup>31</sup> This, of course, was precisely what had already been pursued in free trade areas such as the European Union, where liberalisation of intra-Community investment is guaranteed by the freedom of establishment and the right to provide services, together with the freedom of movement of capital and goods.<sup>32</sup>

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trade restrictions was likely in this context, it was observed, to lead to changes in the direction and nature of inflows of foreign investment. WTO *2000 Report of the Working Group on the Relationship Between Trade and Investment to the General Council* (WT/WGTI/4, 27 Nov. 2000)

<sup>31</sup> Not all commentators have accepted this argument: see Bhagwati, *supra* n.23.

<sup>32</sup> EC Law, however, does not refer explicitly to the ‘most favoured nation’ and ‘national treatment’ principles, using instead a general concept of non-discrimination; for a discussion see further Beveridge, *supra* n.26, Chapter Six. In the UNCTAD ‘Issues’ series ‘Admission and Establishment’ booklet this is labelled as the ‘mutual national treatment model’. It can be found, to an extent, in EC Association Agreements, in the OECD liberalisation codes, the CARICOM treaty and a number of other regional economic development agreements, subject to varying limitations and exceptions in each case: UNCTAD, *supra* n.22, at pp.22-26.

The second normative consequence was that the focus of attention within the area of foreign investment had broadened out from exclusive concern with expropriation at, by definition, the end of the life cycle of the investor, to the treatment of foreign investment at the pre-entry and operating phases. This also entails a shift from the property focus of traditional international law to a broader economic focus encompassing the freedom of an investor to exploit economic opportunities, costs associated with regulation, fairness of competition and the medium to long-term security of investments.

In conclusion, the reframing of foreign investment as an economic integration issue produced a political imperative to tackle restrictions on foreign investment, and the solution which commended itself was a cradle-to-grave legal regime founded on the non-discrimination - most favoured nation and national treatment - principles. It also encompassed a trajectory towards greater liberalisation. Though there was no explicit denial of the sovereign rights of host states, their regulatory powers were now discussed less as rights and more as 'limitations' and 'exceptions', opening up questions about how well this normative approach could accommodate environmental, social and cultural concerns.<sup>33</sup>

To reduce this argument to its barest interpretation, this new 'trade' centred policy frame on foreign investment suggested a move from a discourse in which states had rights and multinationals had duties, to one in which states have duties and multinationals have rights. The focus of negotiations in future would be on the rights of multinationals to establish themselves in new locations, to operate there on equal terms with indigenous enterprises and to be protected from unwarranted and arbitrary state interference, and on the duties of states to liberalise in these areas and to provide a level playing field and a secure and transparent legal framework for foreign investors, subject only to agreed limitations and exceptions.

### **Law in the New Frame**

This section outlines the major legal developments which emerged within this new neo-liberal frame, and which give it its normative content, in particular TRIMS, GATS and the Draft MAI. From the outset it should be recognised that these legal agreements and regimes both build on the new foreign investment policy frame identified above, and serve to reinforce or secure it. This reinforcement may in turn make it more difficult to secure legal developments in the future that do not fit within the new frame.

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<sup>33</sup> This issue is explored elsewhere in relation to gender issues: Beveridge, "Feminist Perspectives on International Economic Law" in Buss and Manji, *International Law: Modern Feminist Perspectives* (2005) 173.

***The Agreement on Trade-Related Investment Measures (TRIMs)***<sup>34</sup>

Trade-related investment measures were not included in the 1982 Ministerial Declaration which formed the basis of the preparatory work for launching the Uruguay Round, but were introduced into the preparatory discussions by the US in 1986.<sup>35</sup> During the intervening period the US had scored a partial victory in establishing in the FIRA Case<sup>36</sup> that certain TRIMs were in any case inconsistent with existing GATT articles. The negotiation of the mandate on TRIMs highlighted the differences between foreign investment 'frames' which are the subject of the earlier section of this piece, with the US and Japan, for instance, setting out to take a broad look at restrictions on foreign investment, while the EC and developing countries wanted to restrict the mandate to issues more specifically related to trade in goods. In the event the latter view prevailed, with the result that the TRIMs agreement is cast as an agreement which supplements the GATT and relates only to trade in goods.

The Agreement on TRIMs, concluded under the auspices of the Uruguay Round of Multilateral Trade negotiations, consolidated the decision of the GATT Panel in the FIRA case by formalising the notion that certain trade-related investment measures were contrary to the GATT. 'Trade-related investment measures' are national controls on foreign investment imposed *de jure* or *de facto* which have a distorting effect on international trade. The Agreement on TRIMs provides that such measures should not be utilised where they would be in conflict with basic GATT obligations (Articles III and XI) and this basic obligation is reinforced by the listing of the most trade-distorting of these practices in an 'Illustrative List of TRIMs'<sup>37</sup> agreed to be inconsistent with GATT. While the Illustrative List itself is modest, it is not intended to list comprehensively practices which are contrary to GATT. Hence it is always open to WTO Members to question practices not included in the Illustrative List, if necessary by resort to enforcement procedures. The establishment of this discipline as part of the WTO package means also that Members are expected to operate transparently and to respond positively to queries from other Members<sup>38</sup> and to co-operate with the WTO institutions, for instance in the Trade Policy Review Mechanism. A Committee on TRIMs was established to monitor the implementation of

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<sup>34</sup> Agreement on Trade-Related Investment Measures (hereafter TRIMs) in GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994); for discussion see, e.g. Knaw, "'Trade-Related Investment Measures' in the Uruguay Round: Towards a GATT for Investment" 16 *NCJ Int'L and Com. Reg.* 309; Shenkin, *supra* n.25; Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992) Volume II* (1993).

<sup>35</sup> For a full account see Stewart, *ibid.*, 2061-72.

<sup>36</sup> Canada – Administration of the Foreign Investment Review Act, adopted 7 February 1984, GATT BISD Supp. 30 140

<sup>37</sup> TRIMs, *supra* n.34, Annex.

<sup>38</sup> TRIMs, *ibid.*, Art.6; DSU, Art.4. Further reflections of this approach can perhaps be found in the establishment under the OECD of National Contact Points: OECD, *Guidelines for Multinational Enterprises, Decision of the Council June 2000 on National Contact Points C/M* (2000) 96/FINAL, 19 Jul 2000.

the Agreement and to report to the Council for Trade in Goods,<sup>39</sup> which in turn reviews the operation of the Agreement and can propose amendments.<sup>40</sup>

It could be argued that the cumulative effect of these measures is to require justification of restrictions on foreign investment, except where they fall within a clearly accepted class of restriction. Overall, in terms of policy frames, the Agreement on TRIMs perhaps represents a half-way house, bringing foreign investment within the purview of WTO disciplines and under the scrutiny of WTO institutions, while still endorsing the traditional view that restrictions on foreign investment are permissible provided that they do not conflict with any *lex specialis*. However, while the 'old' policy frame is not displaced, it can be said to have been substantially undermined by the establishment of TRIMs as a future agenda-item and by the establishment of mechanisms – the DSB and the TPRM – by which regular scrutiny of existing restrictions on foreign investment became legitimate. The TPRM also contributes to the establishment of the new policy-frame in that it focuses on pre-entry and operating conditions imposed on foreign investment, rather than on expropriation issues.

### ***The General Agreement on Trade and Services (GATS)***

The principal significance of the conclusion of the GATS was the extension of multilateral trade disciplines to services sectors under the umbrella of the new WTO regime. The central legal obligations which accession to the GATS entailed can be divided between the general provisions and the scheduled commitments. The general provisions include adherence to the most favoured nation principle (MFN) in services sectors and a general requirement of transparency in services regulation, though these general obligations are hedged in practice by both country-specific and general exceptions. The general provisions refer to both access to markets for new service providers, and the regulation of existing service provision.

Under their schedules of commitment each state then undertakes to apply the national treatment (NT) standard of treatment to the sectors and activities included in their schedules. The schedules in turn are organised into four 'modes of supply' of services: cross-border supply of services; cross-border consumption of services; services supplied through a commercial presence in the territory of another state; and services supplied by nationals of one state in the territory of another.<sup>41</sup> It is the third of these, the commercial presence in another state, which is of greatest relevance to foreign investment and this is defined to include 'any type of business or professional establishment' including the establishment of a juridical person (*e.g.* a company) or a branch or office.<sup>42</sup> The schedules then list the major forms of restriction maintained by states in relation to the sectors covered, broken down by mode of supply. This adoption of 'modes of supply', as a central organising feature of states' commitments under the GATS has been criticised as providing an 'architectural incentive' to states to restrict many of their commitments to the

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<sup>39</sup> TRIMs, Art.7. See, *e.g.* WTO, *Report (2000) of the Committee on Trade-Related Investment Measures*, G/L/390, 20 Sept. 2000.

<sup>40</sup> TRIMs, Art.9.

<sup>41</sup> GATS, Art.I.

<sup>42</sup> GATS, Art.I (2).

'establishment' mode of supply and to impose restrictions on cross-border supplies of services, hence restricting economic integration.<sup>43</sup>

The general provisions and the specific commitments under GATS taken together can be described as the normative requirements; they are supplemented by important institutional requirements and expectations. GATS, like GATT, can be seen as entailing both current commitments and an expectation that Members will participate in good faith in future rounds of negotiation with a view to further liberalisation of access and treatment. Indeed further negotiations in 1997 led to the conclusion of plurilateral agreements on financial services and telecommunications. In addition, GATS is subject to wider WTO disciplines, notably the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU)<sup>44</sup> and the Trade Policy Review Mechanism.<sup>45</sup>

Set against the backdrop of classical international law approaches to foreign investment, GATS can be seen as an important part of the 'reframing' of foreign investment issues as part of a wider trade liberalisation agenda. While some commentators have expressed disappointment with it and have pointed out its flaws<sup>46</sup>, GATS succeeded in focusing attention on the pre-entry and operating phases of foreign investment, and balances state restrictions on foreign investment against the operation of the MFN and NT disciplines. It also embodies the expectation of future liberalisation and, through the establishment of a strong system for the resolution of disputes, establishes firmly that issues of foreign investment regulation fall squarely within the scope of international trade law.

### ***The Draft MAI***

The Draft Multilateral Agreement on Investment was an attempt to negotiate a multilateral agreement on investment which, unlike the Agreements on TRIMs, was not restricted to issues relating to trade in goods. Like GATS, its ambit extended to pre-entry restrictions and operating conditions, but it also embraced the traditional expropriation concerns and was not restricted to the services sector. In this sense it was regarded, by both its proponents and its detractors, as an ambitious treaty which would be substantially wider in scope than other existing foreign investment agreements. It can be seen as

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<sup>43</sup> Sauvé "Assessing the GATS – Half-Full or Half-Empty?" (1995) 29(4) *JWT* 125 at 138.

<sup>44</sup> GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts* (1994), 404.

<sup>45</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex – Trade Policy Review Mechanism, in GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts* (1994), 434.

<sup>46</sup> Mattoo, "National Treatment in the GATS – Corner-Stone or Pandora's Box" (1997) 31(1) *JWT* 107; Mukherjee, "GATS and the Millennium Round of Multilateral Negotiations – Selected Issues from the Perspective of the Developing Countries" (1999) 33(4) *JWT* 87; Sapir, "The GATS From 1994 to the Year 2000" (1999) 33(1) *JWT* 51; Sauvé *supra* n.43; Yi Wang, "Most-Favoured-Nation Treatment Under the GATS – And its General Application in Financial Services" (1996) 30(1) *JWT* 91; Weiss, "The General Agreement on Trade in Services" (1995) 32 *CMLR* 1197.

an exercise in frame extension, seeking to both deepen and widen the new 'trade' frame identified above in normative terms: however, a free-standing agreement separate from the WTO was proposed and this had important consequences in areas such as dispute settlement.

The Draft MAI proposed that the MFN and transparency requirements of GATS would apply to foreign investment across the board.<sup>47</sup> In addition the NT principle would apply, but on a top-down basis rather than the bottom-up basis used in GATS. This would mean, in effect, that NT should be extended to any investments not excluded in the schedules of Contracting Parties or in one of the (limited) general exceptions provided in the MAI. Thus great importance would attach to the initial negotiations of country-specific schedules, an aspect which many felt would present a capacity-problem for the poorer developing countries most in need of protection. The Draft MAI also embraced the performance requirements agenda which had led to the conclusion of the Agreement on TRIMs, though the list of performance requirements which would be unlawful or restricted was substantially longer than that contained in the Agreement on TRIMs.<sup>48</sup> Taken together these developments seemed to many opponents of the MAI to push the pendulum too far: state regulatory action seemed potentially to be unduly restricted, without compensatory international legal mechanisms through which environmental, social and cultural concerns could be addressed.<sup>49</sup>

On expropriation, the Draft MAI invoked international law standards, while providing that foreign investments should be treated fairly and equitably and accorded full and constant protection and security. Thus the standard of treatment required went beyond the non-discrimination benchmark to incorporate reference to the customary international law requirements concerning takings, including a reference to the Hull formula, though efforts to spell out in greater detail what this would entail had mixed results.<sup>50</sup>

The Draft MAI provided two distinct dispute resolution mechanisms, one State-State, the other Investor-State. State-State arbitration before an *ad hoc* tribunal was envisaged for alleged breaches of the Agreement. The tribunal would be able to declare a Party's actions illegal, recommend action to bring the erring state into conformity with the Agreement and/or award compensation including, if both sides agreed, restitution. Provision was made for appeal where it was claimed that the original decision was flawed. Recourse to countermeasures in the event of non-compliance by a Party with the ruling of a tribunal was envisaged, though the level of supervision to be exercised by the Parties Group was contentious.<sup>51</sup>

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<sup>47</sup> The definitions of 'investor' and 'investment' included are very wide: *c.f.* Beveridge, *supra* n.26, at pp.175-6.

<sup>48</sup> Beveridge, *ibid.*, pp.179-80.

<sup>49</sup> Zia-Zafiri, "International Economy and the Environment: Multilateral Agreement on Investment" (1998) 9 *Yearbook of International Environmental Law* 345; see also Waelde and Kolo, "Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law" (2001) 50 *ICLQ* 811.

<sup>50</sup> MAI Text, Chapter IV, Art.2: Expropriation and Compensation; see further Beveridge, *supra* n.26, pp.181-3.

<sup>51</sup> *ibid.*, Chap.V, Article C(9) and Commentary thereon. Beveridge, *ibid.*, 185-6. An unfavourable comparison might be drawn with WTO dispute settlement provisions

Investor-State procedures were modelled on NAFTA Chapter Eleven provisions, providing for arbitration at the behest of an investor under ICSID, UNCITRAL or ICC rules.<sup>52</sup> Disputes might be allegations of breaches of the MAI itself, or allegations of breaches of investment agreements entered into by the State and the investor. Since the Draft MAI dealt only with the obligations of states towards investors, and not with the obligations of investors, opponents of the MAI could portray the Investor-State provisions as creating a one-sided ‘right to sue’ for business corporations who would not be subject to any corresponding obligations under the Draft MAI to observe the laws and policies of the host states.<sup>53</sup> This was viewed as an attack on democracy and the regulatory power of the state: “a far-reaching move to bring international law into the service of the powerful and economically strong, while entirely neglecting the interests of the poor and economically weak”.<sup>54</sup>

Indeed the heavy reliance by the drafters on NAFTA Chapter Eleven served only to facilitate efforts by anti-MAI campaigners to frame the Draft-MAI as an effort to export already discredited NAFTA-type provisions to an unsuspecting world. Far from reinforcing the policy frame for foreign investment established by the Uruguay Round agreements, the Draft MAI could be portrayed as an attempt to introduce a competing and far more contentious frame into the international arena. A number of environmental cases which had proceeded to Investor-State arbitration under NAFTA Chapter Eleven were invoked as examples of the far-reaching and ‘chilling’ effects which the MAI might have on government regulatory action.<sup>55</sup>

In the event, however, the negotiation failed and this wider policy-frame thus failed to materialise in any institutional sense. The negotiation, however, had served to bring together opponents of various aspects of the Draft MAI and to politicise the foreign investment issue. Disparate parties came together and their opposition coalesced into an act of resistance to any widening of the policy-frame. This resistance, it is contended, was central to subsequent multilateral negotiations on foreign investment.

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under which the Dispute Settlement Body is vested with the authority to authorise (or refuse permission) for the permitted countermeasures: Understanding on the Rules and Procedures Governing the Settlement of Disputes, *GATT The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* GATT, 1994) 404, Article 22.

<sup>52</sup> The arbitration procedure is not optional for states – the Parties’ assent to the MAI itself would in itself serve as consent to arbitration.

<sup>53</sup> World Development Movement briefing paper “The MAI – A Dangerous Leap in the Dark” 1997, viewed at <http://www.gn.apc.org/negreens/mai-leap.htm>; Sforza-Roderick, Nova and Weisbro, “Writing the Constitution of a Single Global Economy” Preamble Collective, 1998, viewed at <http://www.islandnet.com/~ncfs/masite/analysis.htm>.

<sup>54</sup> Oxfam UK and Ireland Briefing Paper “The OECD Multilateral Agreement on Investment (MAI)”, October 1997.

<sup>55</sup> These included the *Metalclad*, *Ethyl*, and *S.D. Myers* cases. For a discussion see Beveridge, *supra* n.26, at pp.154-158; 190-91; Ganguly, “The Investor-State Dispute mechanism (ISDM) and a Sovereign’s Power to Protect Public Health” *Columbia JTL* 1999 113; Waelde and Kolo *supra*, n.45.

## Foreign Investment in the WTO

This section examines the debate which proceeded between 1995 and 2004 on whether a multilateral agreement on investment should be introduced into the WTO. This debate can be seen, it is argued, as a debate between those who continued to attach importance to the 'old' frame outlined above and who did not wish to proceed any further with the new frame tentatively established through TRIMS and GATS, and those who wished to extend this new frame further and reinforce it by negotiating a multilateral foreign investment agreement along the lines set out in the Draft MAI. Resistance to such a development, it is argued, played an important part in shaping the mandate on foreign investment negotiations agreed at Doha and was in the end fatal to the debates. Indeed at times it threatened to spill over and jeopardise the whole of the Millennium Round of trade negotiations.

### *Shaping the Issue – talks about talks*

In 1996 the WTO established a Working Group on the Relationship between Trade and Investment<sup>56</sup> to examine the relationship between trade and investment. Foreign investment is also examined by the Committee on TRIMs and the Council on Trade in Services, as part of the review work conducted by these bodies into the operation of the TRIMs and GATS respectively. Some, though not all, of the issues worked on by these bodies were also the subject of proposals for the Millennium Round Negotiating Agenda and, though the failure of the Seattle Ministerial Conference in December 1999 meant that between then and the Fourth Ministerial Meeting in Doha in 2001 there was no official Mandate, discussions about possible disciplines continued.

The Working Group began its work by establishing links with other interested bodies.<sup>57</sup> Co-operation was established, as required in the Singapore Declaration, with relevant UNCTAD bodies and with the World Bank and the IMF (who have observer status at the Working Group). The Working Group began its deliberations by adopting a 'Checklist of Items' which would form the basis of its work programme<sup>58</sup> and met regularly between 1996 and 2001, receiving written comments and hearing the views of a range of WTO Members and of interested intergovernmental organisations on a range of foreign investment-related issues.<sup>59</sup>

It is difficult to discern any clear outcomes since, with no negotiating mandate and hence no authority to take any decisions or soundings which might have indicated the balance of views among Members, the Working Group (inevitably) was no more than a talking shop. While at times some distinctly neo-liberal views were propounded arguing the case for a GATS-

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<sup>56</sup> Hereinafter 'Working Group'.

<sup>57</sup> WTO 1997 *Report of the Working Group on the Relationship Between Trade and Investment to the General Council* (WT/WGTI/1/Rev.1, 9 Dec. 1997).

<sup>58</sup> Checklist of Issues Suggested for Study, *ibid.*, Annex 1.

<sup>59</sup> WTO 1997 *Report of the Working Group on the Relationship Between Trade and Investment to the General Council*, *supra* n.57; 1998 *Report*, (WT/WGTI/2, 8 Dec. 1998); 1999 *Report*, (WT/WGTI/ 3 ); 2000 *Report*, (WT/WGTI/4, 27 Nov. 2000), 2001 *Report*, (WT/WGTI/5/Add.1, 22 Oct. 2001), 2002 *Report*, (WT/WGTI/6, 9 Dec. 2002), 2003 *Report*, (WT.WGTI/7, 11 July 2003).

style multilateral agreement on investment, there were also voices of dissent to be heard at regular intervals. Moreover, over this period of time the balance of power within the WTO between developed and developing country Members changed radically. What follows is an attempt to identify some of the important themes of the Working Group's discussions, rather than any sort of representative summary of the discussions or an attempt to identify common ground between WTO Members.

One key theme was the importance of foreign investment to development, and hence the importance of developing state policies towards foreign investment. Foreign direct investment was often characterised as bringing a package of tangible and intangible benefits to host states, and as an important vehicle (as important as trade in goods) for the integration of developing economies into the world economy. However, there were also many concerns raised about how the potential negative effects of foreign investment could be reduced and about whether a 'development-friendly' multilateral agreement on investment could be produced.

Liberalisation of the regulation of foreign investment was also a key theme, with many contributions either pointing to the low level of regulation currently in place in successful economies, or arguing that intervention came at a high price. Sometimes, however, there was resistance to this viewpoint.<sup>60</sup>

Globalisation also featured as a recurrent theme in discussions, with the view regularly expressed in one context or another that globalisation presented a threat to developing countries, especially the least-developed countries. For some, this required an increased focus on competitiveness, and that foreign investment should be approached in this context.<sup>61</sup>

A further major theme was the question of what, if anything, multilateral rules could achieve that the existing network of bilateral treaties and other international instruments could not. In the earlier years of the Working Group's existence a number of Members made rather non-specific and general observations about the patchy nature of existing commitments and the general lack of transparency which reliance on bilateral treaties fostered. For some Members the bilateral approach was problematic, resulting in an absence of normative coherence, and creating the potential for gaps and conflicts between existing instruments.<sup>62</sup> Others defended the bilateral approach as a method which afforded Members freedom and flexibility in pursuing their development objectives.<sup>63</sup> By 2000, with the prospect of a negotiating mandate in sight, this debate had become a little more focussed on the possible alternatives, with Members more willing to express their support or opposition to particular models of multilateral agreement. A key question was whether, and if so how, a multilateral agreement could provide benefits while preserving a substantial degree of flexibility to enable states to pursue a range of regulatory objectives. While a small number of states

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<sup>60</sup> See, e.g. the claims and counter-claims made about the effectiveness of a 'hands-off' approach in encouraging the transfer of technology: *2000 Report*, paras.9-13.

<sup>61</sup> *1998 Report*, para.20.

<sup>62</sup> *1998 Report*, paras.143, 146, 154, 164-5.

<sup>63</sup> *ibid.*, paras.139, 147. This difference of opinion is still evident in 2001: *2001 Report*, paras. 8-9, 12.

wanted the option of a MAI-like top-down agreement to remain on the table, a much greater number focussed on the possible advantages and weaknesses of a bottom-up GATS-type approach.<sup>64</sup>

A final and recurrent theme throughout the discussions of the Working Group was the need for further study of many of the issues addressed.<sup>65</sup> Two observations may be pertinent here: the first is that many Members, particularly developing country Members, resisted the assumption that liberalisation was necessarily a good thing and called regularly for such arguments to be grounded in research and studies which addressed the particular situations of different Members. In other words, there was a recurrent call for policy development to be evidence-led, rather than ideologically-driven.

A second observation is that these calls for further studies supported and echoed the view put forward by some developing country Members to the Ministerial meeting in Seattle in 1999 that the area of foreign investment was not yet 'ripe' for the launch of negotiations on a multilateral agreement. This view also helps to explain the eventual compromise reached in Doha, where a mandate for negotiations was concluded but with a built-in delay.<sup>66</sup>

### *The Doha negotiation mandate*

The negotiating text for the Doha Ministerial meeting in November 2001 documented a serious split over the very idea of opening negotiations on a foreign investment agreement under the auspices of the WTO.<sup>67</sup> Though the same developed countries who supported such a move were keen to emphasise that this would not be a new MAI, many developing countries were convinced that the time was not yet ripe for any negotiations along these lines, and resisted such a development. Developing countries were keen instead to build on the post-Seattle agenda of increased attention to the issues of concern to developing countries, increased technical assistance and capacity-building efforts to enhance the domestic capacity of developing countries, and greater effort to ensure the full participation of developing countries in international negotiations. Specifically in relation to foreign investment there was a view that further studies were required before multilateral disciplines could be negotiated.<sup>68</sup>

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<sup>64</sup> See, e.g. *2000 Report*, paras.26-33; *2001 Report*, paras.35-7, 43, 46, 49. See also Kentin, "Prospects for Rules on Investment in the New WTO Round" (2002) 29(1) *LIEI* 61 at 66-7.

<sup>65</sup> There are numerous such references throughout the cycle of reports. See, e.g. *2000 Report*, para.20 (relationship between foreign direct investment and the transfer of technology), paras.24-33 (various); *2001 Report*, para.17 (mergers and acquisitions) and para.28 (investment incentives).

<sup>66</sup> See 4.3 below.

<sup>67</sup> As in many areas of the current round of talks, the demarcation lines do not follow traditional North-South or East-West lines: on this issue the EC was the strongest advocate of inclusion while the US did not set this as one of its priorities, apparently concerned that a 'watered-down' MAI would be worse than no agreement at all: *c.f.* Schlegelmilch. "WTO: Why still no Multilateral Rules for Foreign Direct Investment" (2000) 6(3) *Int.TLR* 78.

<sup>68</sup> UNCTAD has played an important role in furthering the study of foreign investment, particularly with the development needs of developing states in mind.

Heightened sensitivity to the situation of developing states and, in the wake of the terrorist attacks of September 11, 2001, to the security implications of failing to address the needs of these states, may have served to ensure that developing countries had some degree of success at Doha, notably in the Declaration on the TRIPs Agreement and Public Health<sup>69</sup>, in the reaffirmation of the principle of special and differential treatment<sup>70</sup>, and in ensuring that developing countries' concerns were noted in relation to a number of items in the agreed work programme.<sup>71</sup> Overall, however, the developed countries succeeded in their objective of establishing negotiating mandates over a broad range of issues.<sup>72</sup>

In relation to investment, the Doha Ministerial Declaration stated that "negotiations will take place after the Fifth Session of the Ministerial Conference".<sup>73</sup> The Working Group on the Relationship Between Trade and Investment would in the meantime continue its work, concluding its series of discussions clarifying aspects of the relationship between trade and investment, while the WTO in co-operation with other intergovernmental organisations (including UNCTAD) would address capacity-building and technical support issues in relation to developing country Members. The language was obscure: the Working Group would develop, prior to the Fifth Ministerial, a draft text on 'modalities' which the Fifth Ministerial would be asked to adopt by explicit consensus, allowing negotiations to take place thereafter. It was not entirely clear what 'modalities' meant in this context.

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See, e.g. the annual *World Investment Reports*, the *Issues in Bilateral Investment Treaties* series and the numerous other studies listed at [www.unctad.org](http://www.unctad.org).

<sup>69</sup> WT/MIN(01)/DEC/W/2 of 14 Nov. 2001. This affirmed that the TRIPs agreement should be interpreted in such a way as to be 'supportive' of WTO Members' right to protect public health and to promote access to medicines to all (para.4).

<sup>70</sup> Doha Ministerial Declaration of 20 Nov. 2001, WT/MIN(01)/DEC/1 (hereafter Ministerial Declaration), para.44.

<sup>71</sup> Ministerial Declaration, *ibid.* For instance, emphasis was placed on the issue of technical co-operation and capacity building (paras.38-41) and on the issue of quota-free access for products originating in least-developed country Members (para.42), though the obligations undertaken in these fields were 'soft' in nature. For a useful discussion of the background to the conflict between developed and developing states see Wilkinson, *supra* n.10.

<sup>72</sup> Ministerial Declaration. The areas on which mandates were secured include: implementation issues (para.12); Agriculture (para.13); Services (para.15, building on the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001); Market Access for Non-Agricultural Products (para.16); a Multilateral Framework on Investment (para.20); a Multilateral Framework on Competition Policy (para.23); a Multilateral Framework on Transparency in Government Procurement (para.26); the Dispute Settlement Understanding (para.30); and Trade and Environment issues (para.31).

<sup>73</sup> This technique of agreeing to future negotiations was also adopted in relation, for example, to competition policy and a decision on the modalities of the negotiations was first to be taken at the Fifth Ministerial. There was a notable contrast with areas such as Agriculture where negotiations were to produce the framework (modalities) for future commitments by March 2003 and draft commitments were to be made in advance of the Fifth Ministerial: Ministerial Declaration, para.13. Agriculture was not the only area subject to much shorter time constraints: *c.f.* para.15 on Services; para.12 on Implementation Issues.

The reference to 'explicit consensus' for the adoption of a draft text on modalities was an interesting development. The need for consensus, meaning the agreement of all states, or at least the absence of dissent, was previously established.<sup>74</sup> It appears that following an intervention by Jamaica and a number of African nations an interpretative amendment to the text adopted at Doha was approved, which defined explicit consensus as the formal written consent of each Member.<sup>75</sup> The requirement was used in relation to foreign investment, competition, trade facilitation and procurement.

The Ministerial Declaration appeared to commit the WTO to follow a GATS-type, positive list approach to any multilateral agreement on investment which emerged. It also stated that any such agreement should reflect "in a balanced manner" the interests of home and host states, and take due account of development policies of host governments as well as "their right to regulate in the public interest".<sup>76</sup> The work programme established for the Working Group on the Relationship between Trade and Investment included a mandate to clarify the use of dispute settlement 'between members' in relation to trade and investment. It was argued that this excluded investor-state dispute settlement from consideration.<sup>77</sup> Thus it can be seen that many of the tensions evident in earlier discussions of the Working Group also affected the mandate.

The Ministerial Declaration also contained a general provision stating that, with the exception of the work to be undertaken on improvements and clarifications of the Dispute Settlement Understanding, any agreements reached would be treated as parts of a single undertaking.<sup>78</sup> Given the context of different timescales for different areas of the Work Programme, this appeared to mean that all WTO Members would be required to participate in all the new agreements under discussion (except in relation to the DSU as indicated above). Alongside the 'soft' commitments on capacity-building and technical assistance for developing country Members, the Ministerial Declaration also stated that the "special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances."<sup>79</sup> It was also established in relation to the Work Programme as a whole that the principle of special and differential treatment for developing and least-developed countries should be

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<sup>74</sup> Jackson "The Great 1994 Sovereignty Debate: United States acceptance and implementation of the Uruguay Round results" (1997) 36 *Columbia JTL* 157.

<sup>75</sup> *C.f.* Public Citizen "What Really Happened at the WTO Qatar Ministerial: US Concedes Everything and Get's. . .What?" <http://www.citizen.org/trade/wto/Qatar/> The Chair of the Ministerial meeting in his closing remarks commented that in his view this language "would give each member the right to take a position on modalities that would prevent negotiations from proceeding after the fifth session of the ministerial conference until that member is prepared to join in an explicit consensus." Quoted in Trade Regulation Newsletter 35/36 at p.4.

<sup>76</sup> Ministerial Declaration, para.22.

<sup>77</sup> Trade Regulation Newsletter 35/36 at p.4.

<sup>78</sup> Ministerial Declaration, para.47.

<sup>79</sup> Ministerial Declaration, para.22.

taken fully into account.<sup>80</sup> In general terms these conditions could be said to reflect growing attention to the development issue and to the concerns of developing countries post-Seattle.

The tensions inherent in the Ministerial Declaration proved in the end to be fatal as far as an agreement on investment was concerned. Following the failure of WTO Members to reach any agreement at the 5<sup>th</sup> Ministerial in Cancún in September 2003 the breadth of the Millennium Round negotiating agenda came under renewed scrutiny. In August 2004, after protracted periods of stagnation in the negotiations, the issues of investment, competition and transparency in government procurement were dropped from the negotiations.<sup>81</sup> This in return reflected a growing consensus that investment and other ‘Singapore’ issues such as competition were proving too expensive for the WTO negotiations i.e. that the wider failure of the negotiations at this juncture could be attributed, in part at least, to the insistence of some Members on retaining these issues.<sup>82</sup>

### **Doha, Foreign Investment and Framing**

Employing the framing analysis developed above, a number of points can be made about the failure of the Doha Round in relation to foreign investment.

First, the decision to pursue this issue under the auspices of the WTO served to reinforce the framing of the ‘problem’ of foreign investment as one of trade barriers: state regulation was the ‘problem’ and liberalisation the solution. Thus a GATS-type solution – whereby states would give commitments on market access and apply established non-discrimination principles and transparency rules – was viewed as the obvious solution. Thus the ‘new’ policy frame, tentatively established in the Uruguay Round agreements, received a major (if temporary) boost.

Furthermore, during discussions in the WTO Working Party on Trade and Investment and negotiations, the parameters of the new frame became clear: traditional investment protection issues would be addressed, endorsing the cradle-to-grave approach of the Draft MAI, but using a GATS-style bottom-up approach to commitments. The re-location (and tailoring) of a potential multilateral investment agreement to the WTO emphasised the interrelationship between this issue and other market integration issues, a matter given considerable concrete significance through the commitment in the Doha Declaration to treat resultant agreements as part of a single undertaking. This can be understood as an act of frame alignment.

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<sup>80</sup> Ministerial Declaration, para.50.

<sup>81</sup> WTO Doha Work Programme, *Decision Adopted by the General Council on 2 August 2004*, WT/L/579 of 2 August 2004.

<sup>82</sup> House of Commons, International Development Committee *Trade and Development at the WTO: Learning the lessons of Cancún to revive a genuine development round* HC 92-I of 2003-4; UNICE *Post-Cancún Trade and Investment Strategy* UNICE Position Paper of 5 December 2003. The issue of foreign investment, previously politicised through the MAI negotiations, may to some extent have acted as a ‘lightning conductor’ for more general concerns: *c.f.* Kennedy, “A WTO Agreement on Investment: A Solution in Search of a Problem?” (2003) 24 *U. Penn. JIEL* 77 at 178-182.

The re-location of the talks to the WTO also carried significant institutional consequences. Re-framing the issue as a 'WTO issue' made it foreseeable that any emergent foreign investment agreement would be subject to other parts of the WTO package (such as the DSU and the TPRM). As far as dispute settlement was concerned this in turn appeared to resolve doubts about what type of dispute resolution mechanism would be involved – it seemed unlikely, at least at an initial stage, that any 'Investor-State' mechanism might be involved, since this would have been so far out-of-line with what already existed at the WTO.

Had the negotiations been successful, the result would have been a form of policy transfer which combined elements of copying/emulation with elements of hybridization/synthesis.<sup>83</sup> The direction of policy transfer would have been more or less along a classical North/South axis whereby norms already established in developed states (here the parties to the Energy Charter Treaty, the NAFTA State Parties, the EU Member States and, more generally, the OECD Members) would have been transferred, in this case via an international institution, to developing states. Any multilateral investment agreement negotiated within the normative and institutional context of the WTO was likely to impose obligations on WTO Members relating to transparency, notification, scrutiny and review of exceptions and exclusions from its core principles, and dispute settlement (through the operation of the WTO Understanding on Dispute Settlement). In turn these institutional dimensions may have served to ensure that the policies transferred via that agreement became firmly embedded in the domestic law of the recipient states.

However there was also significant evidence of resistance to the 'new' frame, from developing states. This was notable in discussions both before and after this mandate was established and in the mandate itself, for instance in the commitment to a bottom-up agreement (in contrast to the top-down approach of the Draft-MAI), in the affirmation of states' right to pursue their development goals and to "regulate in the public interest", and in the specific references to the development, trade and financial needs of developing and least-developed states. Above all it was evident in the requirement for "explicit consensus" before negotiations of binding commitments could proceed: there was resistance to the whole move to frame the problem as a 'trade' problem amenable to a WTO-type solution.

Resistance to the Draft MAI appeared to have cast its shadow forward into the Doha negotiations, so that developing countries' concurrence in the negotiation of any international investment agreement always remained highly conditional and contingent. This perhaps serves to demonstrate that 'frames' can be presented negatively as well as positively, so that 'framing' can serve opponents as well as proponents of a proposed policy solution by bringing possibly disparate opponents together. In this instance, the weight of environmental, social and development groups was combined in opposition to the proposed policy frame, and this opposition transferred from the Draft MAI to the WTO negotiations, though the substance of the objections held by different groups may have been very different. As the Doha Round progressed, heightened awareness of development concerns

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<sup>83</sup> See, Rose's typology, *supra* n.16.

appears to have served, if anything, to strengthen attachment to the 'old' frame, placing emphasis on the need for foreign investment to be regulated in the interests of the host state and harnessed to the development goals of the host state.<sup>84</sup>

### ***'Framing' and legal studies***

This article has sought to examine the WTO negotiations on a multilateral agreement on investment as an attempt to build on a policy frame tentatively established in the Uruguay Round in which foreign investment is seen as a trade issue amenable to the application of trade law concepts, techniques and regulatory approaches. Indeed, the moves after the failure of the Draft MAI talks to relocate this issue to the WTO in part reflected a view that the WTO had the necessary expertise on trade issues as well as credibility as a global institution.<sup>85</sup> In this final section the argument is advanced that framing analysis can assist in the development of an understanding about why a proposed policy development failed, here the negotiation of a WTO multilateral agreement on investment.

Throughout the course of events documented above, the resistance of developing states to moves to initiate negotiations on a foreign investment agreement within the WTO was not centred on a single issue but rather on a broad set of concerns. For instance there was disagreement on normative issues, such as the appropriateness of open-door policies to developing countries, as well as concerns about process, here a fear that developing countries lacked the capacity to fully protect their interests even under a bottom-up approach to future negotiations on commitments in the investment field. These concerns persisted throughout the discussions, even despite assurances that there would be scope within any proposed agreement for individual WTO Members to adequately address their concerns (as exists, it can be argued, in the GATS and in the Agreement on TRIMs).<sup>86</sup> Yet many of the developing states in question have already accepted the high standards of protection proposed for existing investments in other obligations (such as Bilateral Investment Treaties) and/or already have broadly open door policies in place, and all have previously accepted this procedural approach in the context of services provision under the GATS. This suggests that it was not just the substantive rules which were at issue.

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<sup>84</sup> *E.g.* in November 2002 a Submission from China, Cuba, India, Kenya, Pakistan and Zimbabwe raised the issue of the conduct of multinationals, connecting it with the corporate social responsibility agenda which can be said to have enjoyed something of a renaissance in recent years: WT/WGTI/W/152, 19 Nov. 2002.

<sup>85</sup> One of the biggest issues raised during the MAI negotiations was the credibility of the OECD as a forum, given the stated intention of opening the resultant treaty up for global participation.

<sup>86</sup> Bora and Graham have argued that the real choice facing the WTO was between deepening of commitments in these areas and the negotiation of a new free-standing agreement on investment; however, Cosbey *et al* suggest that the scope of existing disciplines on investment is so limited that this sort of argument cannot be sustained: Bora and Graham, "Investment and the Doha Development Agenda" in Petersmann (ed.) *Reforming the World Trade System: Legitimacy, Efficiency, and Democratic Governance* (2005) 335 at 336; Cosbey *et al.*, *Investment, Doha and the WTO* International Institute for Sustainable Development (2003).

There were also concerns about institutional issues, such as the linking of foreign investment to other WTO disciplines such as dispute settlement, despite the fact that developing states are already broadly supportive of these institutional dimensions of the WTO. However bringing foreign investment disputes under the remit of the dispute settlement body would have reversed the trajectory pursued in the second half of the twentieth century away from state-state settlement processes, another factor that may have pushed support back towards the 'old' frame. Finally there were concerns relating to linkage, particularly the scope which the single undertaking approach would create for linkages to be made between concessions on foreign investment and concessions in areas of critical importance to developing countries such as access to markets for agricultural products.<sup>87</sup>

One way of looking at this would be to say that these states simply failed to be convinced, on a cost-benefit analysis basis, of the potential benefits the new agreement might hold for them. However, their resistance reflects an understanding that the proposal to negotiate new rules in that particular forum introduced a package of inter-linked concerns – that it implied possible consequences that extended beyond the potential normative commitments which a new agreement on investment might entail.

Additionally it seems that developing states were rejecting not just the proposed solution but the way in which the foreign investment 'problem' was presented. Under the proposed new frame the long-term trajectory underlying reform is towards liberalization – an objective which can be described as a cornerstone generally of WTO Agreements. However this liberalization agenda appeared to conflict directly with the apparent desire of many developing states to repatriate the issue of foreign investment by refocusing on issues concerning the regulation of investors and questions of corporate social responsibility: from the discussions it was clear that for many developing states the problem was not so much whether to open up to foreign investors but how to regulate foreign investors to minimise negative impacts and maximise their contribution to the host's development goals. Thus, rather than seeking reassurances about the new agreement and whether it would accommodate their concerns, the resisting states displayed an attachment to the pre-existing, property-centred policy frame which placed greater emphasis on the sovereign rights of states and their inherent right to regulate activities on their territory in the public interest.<sup>88</sup> Thus it can be said that it was the whole package of proposed reforms which they resisted, rather than its contents.

The concept of 'framing' and the idea of a clash of policy frames appear to capture the essence of this resistance accurately and to offer a plausible explanation for the failure of the WTO initiative. In particular it captures the

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<sup>87</sup> Hoekman and Saggi question the value of a commitment to a WTO agreement on investment as a bargaining chip for developing countries in the 'grand bargain' context: Hoekman and Saggi "Multilateral Disciplines for Investment-Related Policies?" *World Bank Research Working Papers*, No. 2138.

<sup>88</sup> Interestingly the US's decline in support for a WTO investment agreement can also be seen as a defensive action to protect the progress which had been made particularly in the NAFTA sphere to establish its preferred policy-frame: see n.67, above.

essential connection between substantive norms, processes and institutions which explains why many states who might accept particular standards in one institutional context (a BIT) might rationally oppose the same standards in a different institutional context (the WTO). In this aspect in particular framing appears to offer something beyond the concept of a paradigm and, by focussing attention on the longer-term implications of the policy 'turn', alters the parameters of the 'grand bargain' calculation. Moreover it captures the many aspects of this negotiation which revolved around competing explanations of the 'problem' rather than competing versions of a 'solution'. Finally, it focuses attention on where the new frame originated (and who created it) and hence on the policy transfer/legal transplant dynamic of the proposed solution.

With the abandonment of this negotiating item in 2004 it appears that efforts to re-frame foreign investment as a 'trade' issue have, temporarily at least, run aground. While GATS and TRIMs remain part of the WTO package agreed in the Uruguay Round, the developed states who supported the negotiation of an agreement on investment as part of the Doha Round failed to convince developing states that widening or deepening of the new 'trade' frame for foreign investment was a positive step. Instead, developing countries have opted to continue to pursue their interests through the patchwork of national laws, bilateral investment agreements, multilateral agreements and non-binding codes with which they were already familiar: indirectly the old 'property' frame may have received a boost.

## A QUESTION OF DEFINITION: FEMINIST LEGAL SCHOLARSHIP, SOCIO-LEGAL STUDIES AND DEBATE ABOUT LAW & POLITICS

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In recent years, debate about the relationship between law and politics appears to have become a good deal more intense in the United Kingdom. As others have observed, one major catalyst for this has been the ascent of human rights in the popular imagination and in national, and international, legal and political orders.<sup>1</sup> The problem, however, is that this development also has the capacity to skew the debate: it threatens not just the already-weakened claim that “law is politics” but also, if left unchecked, it could deepen the neglect of two questions that ought to be at the heart of debate about law and politics: namely, the question of law, and the question of the political.

In this article, we offer a perspective on this problem. We propose that one way of minimising it would be to have a broader definition of what counts as scholarship relevant to the question of the law/politics relationship. The redefinition we propose focuses specifically on two respected traditions in contemporary legal scholarship: the first of these is socio-legal scholarship, the second is feminist legal scholarship. The particular strength of these traditions, we suggest, is that they would encourage a broader perspective on the complexity of law and of the political. We outline the case for redefinition in Part III of the article. Prior to that, in Parts I and II, we explain what is wrong with the current “official” law/politics debate in the United Kingdom. Specifically, we identify a linked set of problems: the first is the generally-weakened status of the claim that “law is politics”; and the second is the extraordinary power of the idea of law as a system of rights and, relatedly, the fact that important concerns about this conception of law have registered far too lightly – if at all.

### **I: “Law is Politics”?**

We begin by looking, in a general way, at the standing of the claim that “law is politics”. This claim lies at one end of the conventional law/politics spectrum; the opposite end is generally described via the assertion that “law is above, or superior, to politics”.<sup>2</sup> There is also, of course, a range of more

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<sup>1</sup> For accounts of this phenomenon, see, e.g. Stevens, *The English Judges: Their Role in the Changing Constitution* (2002); Oliver, *Constitutional Reform in the UK* (2003); Steiner and Alston, *International Human Rights Law in Context: Law, Politics, Morals* (2000).

<sup>2</sup> For an excellent introduction, see Loughlin, *Sword and Scales: An Examination of the Relationship Between Law & Politics* (2000).

nuanced claims:<sup>3</sup> here we focus on the “law is politics” claim, and subsequently on its “law is above politics” counterpart, because our disquiet about the law/politics debate is linked directly to the contemporary standing of these two arguments.

The first point to note is that the claim that “law is politics” is now a shadow of its former self. Twenty to twenty-five years ago, in the first wave of critical legal scholarship (cls) in the US<sup>4</sup> and amidst the initial impact of John Griffith’s polemic in “The Political Constitution”,<sup>5</sup> it felt fresh, full of potential and very compelling – albeit in a disquieting way. At that time, it seemed to be a genuine hard-hitter, a serious challenge to the prevailing orthodoxy: nowadays, however, it feels almost clichéd. It has become a truism and, by and large, it is greeted with routine acknowledgement. It provokes a shrug or a nod, rather than genuine engagement.

How, then, might we explain this change of status? Is it the case, for example, that “we are all crits now (just as we are all legal realists, and Keynesians)”<sup>6</sup> It certainly would not take long to find evidence encouraging a crit-style worldview: consider, for example, the US Supreme Court’s decision in *Bush v Gore* (2000),<sup>7</sup> handing the presidency of the United States to George W Bush. Or the to-ing and fro-ing around the (as yet partially-ratified) Constitutional Treaty for the European Union.<sup>8</sup> Alternatively, one might point to the now-undeniable promiscuity of human rights claims<sup>9</sup> and, relatedly, to the burgeoning awareness amongst liberal rights-enthusiasts that “their” rights initiatives have no “always and everywhere”<sup>10</sup> destiny.

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<sup>3</sup> See, e.g. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid* (1995); Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); Loughlin, *The Idea of Public Law* (2003).

<sup>4</sup> See the account in Kennedy, “The Critique of Rights in Critical Legal Studies” in Brown and Halley (eds.) *Left Legalism/Left Critique* (2002), pp.178-228.

<sup>5</sup> Griffith, “The Political Constitution” (1979) 42 *MLR* 1. See also his *The Politics of the Judiciary* (1977).

<sup>6</sup> Abel, Review of Bauman, *Ideology and Community in the First Wave of Critical Legal Studies* (2003) 30 *JLS* 601 at 602-603.

<sup>7</sup> (2000) 531 US 98. See the apparent acknowledgement of this in Justice Stevens’ dissent: “[a]lthough we may never know with complete certainty the identity of the winner of [the 2000] Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law”.

<sup>8</sup> Treaty Establishing a Constitution for Europe CIG 87/2/04 Rev. 2, Brussels, 29 October 2004.

<sup>9</sup> That is to say, the ways in which rights have become the language of choice for a radically diverse, often oppositional and expanding range of social movements: see, e.g. Goldberg Hiller, “‘Subjectivity is a Citizen’: Representation, Recognition and the Deconstruction of Civil Rights” (2003) 28 *Studies in Law, Politics, and Society* 139 at 173 describing the rise of an “equal rights, not special rights” idiom amongst US groups opposed to gay marriage and noting that these arguments “invert the nature of harm and redefine majorities as victims of anarchic demands and as authentic rights subjects”.

<sup>10</sup> Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004), pp.32-33.

But other explanations for the change in status of “law is politics” also merit consideration, not least because they might help to provide a fuller understanding of the ebb and flow of the claim. One such explanation is that the downturn in fortune can be attributed, at least in part, to the fact that some of those who have made this claim failed to follow-through on their own argument. In other words, reliance in the past on “law is politics” as a conclusion rather than a starting-point could be to blame for the broad but superficial following that the claim receives today. Rick Abel makes this exact criticism in reviewing the history of critical legal scholarship in the United States, pointing out that the argument that “law is politics” cannot serve (nor was it ever designed to serve) as more than the entry-point for inquiry into the interesting questions, such as “the consequences of emphasizing or denying the unity [between law and politics]”.<sup>11</sup>

Another explanation for the change in status can perhaps be found in the fact that both cls and the Griffith tradition in English public law – two groupings traditionally associated with the argument that “law is politics” – are generally categorised as “left” theories, and left theories have a popular (if largely unfair) reputation for being heavily totalising. In other words, part of the reason for the weakened status of the “law is politics” claim could be reluctance to become associated with a broader left project, or mindset, allegedly lurking behind it. And, looking specifically at the Griffith tradition in English public law, a further related explanation comes to mind: this once-powerful tradition has recently been in disarray. Much (though not all) of its repertoire has been castigated as overly-familiar and insufficiently-attentive to the changed circumstances of contemporary governance. David Dyzenhaus, for example, has described the tradition – which he labels “left public law” – as beset by problems of adaption.<sup>12</sup> Its proponents, Dyzenhaus argues, have come across as unsure about how best to respond “in the face of its loss of purchase on control of parliamentary politics and the more general decline in parliament as the main engine of politics”.<sup>13</sup> This uncertainty has, he says, been accompanied by a tendency towards “an abandonment of hope in a principled approach to questions of social justice, a resort to tradition in a bid to ground the substance of political identity, and the thought that the executive is the guardian of the political constitution in that it is for the executive to decide how to resolve the existential conflicts of politics”.<sup>14</sup> The fact that judges in the Human Rights Act era do not always live up to the “left public law” stereotype has been another problem for the tradition: so, for example, the Law Lords’ opinion in *A and Others v Secretary of State for the Home Department* (2004),<sup>15</sup> declaring the internment of terrorist suspects

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<sup>11</sup> See n.6 above. Abel suggests that the “interesting questions” include: “Does it affect who are appointed as judges? How they decide? How they justify those decisions? Others’ willingness to comply? General respect for state authority?”

<sup>12</sup> Dyzenhaus, “The Left and the Question of Law” (2004) 17 *Canadian J of Law and Jurisprudence* 7.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*, at p.24.

<sup>15</sup> [2004] UKHL 56. But note Lord Bingham’s account of the judicial role and the law/politics divide: “it is the function of the political and not judicial bodies to resolve political questions. Conversely, the greater the legal context of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not

unlawful, would seem to provide an effective retort to the Griffith-esque taunt that, “particularly in times of crisis”, judges will fail to protect “the individual who comes face to face with the state”.<sup>16</sup> More generally, it surely does not help that legislatures and traditional conceptions of democracy have dropped down discussion agendas amidst a frenzy for the common law, courts and all things adjudicative.<sup>17</sup>

A fourth explanation might go as follows: the claim that “law is politics” is out of step with a powerful contemporary impulse – the impulse to *protect* law. We believe that this protective instinct can be traced to a number of sources. One such source is the age-old enthusiasm for treating law as distinctive: in short, the “great imaginative sway”<sup>18</sup> in law’s claim to impartiality continues to influence almost all of us. Another is the fact that, in legal circles, law’s formal qualities have been acquiring new advocates. These advocates emphasise the importance of law’s formalism whilst remaining totally alert to law’s political nature: see, for example, David Dyzenhaus’ argument that, although “law may be ‘politics by other means’”, it is nevertheless “politics under the constraints of legal order, constraints which impose conditions of publicity, obligations to justify official decisions, and a general obligation on judges to find a role for themselves as the enforcers of legality, not just of positive law”.<sup>19</sup> Amongst academic lawyers, this sort of advocacy could well have bolstered the enthusiasm for treating law as distinctive. More importantly, by exploring how law’s formal qualities can be flawed but indispensable, it has surely made the claim that “law is politics” considerably less attractive.

The waning popularity of “law is politics”, and the rise of the protective instinct towards law, may also be linked to another recent trend in academic circles: namely, the outpouring of commentaries on “the politics of ...” – for example, the politics of nature, the body, culture, economics, the social, the domestic or the intimate. It seems likely that, amidst this “dispersion of the political”,<sup>20</sup> the claim that “law is politics” became less interesting. To put it crudely, if everything is political, then nothing is political. Or, at the very least, the claim that “law is politics” is likely to register as pedestrian or nondescript. Moreover, having observed the way in which anthropologists, economists, literary theorists and others became “experts” on the political, thereby crowding the space once occupied almost exclusively by political theorists, academic lawyers may well feel (even) more inclined to argue for

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of political bodies to resolve legal questions’ (para.29). On the question of the “political”, see below 553-556.

<sup>16</sup> Ewing, “The Futility of the Human Rights Act” [2004] *PL* 829 at 840. More generally, see Lord Justice Sedley, “The Rocks or the Open Sea: Where is the Human Rights Act Heading?” (2005) 32 *JLS* 3 at 17 arguing that “we are making headway”.

<sup>17</sup> For an argument that the legislature’s role merits greater attention than it is receiving, see especially, Waldron, *The Dignity of Legislation* (1999).

<sup>18</sup> Loughlin, n.3 above, p.52.

<sup>19</sup> Dyzenhaus, “The Difference That Law Makes” (1997) 60 *MLR* 866 at 873. See also Harvey, “Playing with Law and Politics” (2001) 51 *University of Toronto LJ* 171; Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001).

<sup>20</sup> See generally, Brown, “At the Edge” (2002) 30 *Political Theory* 556.

the distinctiveness of law (and, hence, the authority of lawyers) in an effort to guard the boundaries of their own discipline.

The current level of protectiveness towards law can also be traced, we suggest, to the fact that, in accepting that law is politics, one often ends up feeling that insufficient room has been left for faith – whether faith in law in general or, more narrowly, faith in the now-popular idea of law as a system of rights. This form of faith is widespread, deep-rooted and hugely resilient. Basically, once you admit the possibility that law could be (or sometimes has been) a tool of progressive social change – albeit a complex and contradictory one – it becomes difficult to square this with a stark “law is politics” vision of legal reasoning and of rights. Not surprisingly, faced with this problem, most of us will pull back from the stark claim that “law is politics”. After all, why concede the potential power of law – no matter how treacherous or transient – to others? Is there not a risk, as Colin Harvey argues in light of the history of the Northern Ireland conflict,<sup>21</sup> that denuding legality could hurt, and in serious not superficial ways?

In our view, the risk of conceding the potential of *rights* is now being felt in a particularly acute way. To begin with, there is the fact that it is very difficult to resist the evangelism of contemporary rights enthusiasm. There are also cherished histories of rights’ revolutions (*e.g.* the 1960s in the US), as well as nascent rights’ challenges, that seem to call out for recognition and support. Indeed, in making an argument *against* faith in rights, the cls scholar Duncan Kennedy acknowledges that rights talk benefits greatly from the fact that it is connected to daring, specifically “to daring to claim things on a basis that might previously have been disqualifying, to claiming things *for* blacks, women, gays, or Hispanics, when the feeling before might have been that *because* one was one of these things one was disintitiled to make claims”.<sup>22</sup> Kennedy also points out that rights talk profits from the widespread feeling that “if ‘we’ lose our faith in rights rhetoric but ‘they’ don’t, then they will gain an advantage over us”. And, as he acknowledges, this feeling is entirely understandable given the “sense of righteousness, of mediation, that rights have historically provided”:

‘Giving up’ rights would be like a professional athlete giving up steroids when all his or her competitors are still wedded to them.<sup>23</sup>

There is one final point that deserves mention before we conclude this discussion of the protective instinct towards law: namely, there seems to have been an increase in depictions of law as an essential corrective – or, in Abel’s words, of law as a “port in the storm”.<sup>24</sup> The reasons for this increase are manifold: they include, first, the frequency of news stories describing political corruption, patronage and spin, thereby intensifying the understanding of politics as an arena of troubling passions and motives; secondly, the fact that the perennial hunger for constraints on the powerful is stronger in an era of global power; and, thirdly, as we discuss in the next section, the spread of rights talk and the associated “globalization” of

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<sup>21</sup> See n.19 above.

<sup>22</sup> See n.4 above, at p.214.

<sup>23</sup> *ibid.*, at p.217.

<sup>24</sup> See n.6 above, at p.608.

human-rights lawyering.<sup>25</sup> Of course, whatever the reasons, the key point for present purposes is that increasing interest in the idea of law as a “port in the storm” is likely – as a general rule – to be tied to a downturn of interest in the claim that “law is politics”.

## II: The Ascent of Rights

In this section, we focus on one of the points mentioned above: namely, the force and scale of contemporary rights enthusiasm. As others have observed, rights enthusiasm has already had a huge impact on debate about the law/politics relationship. Specifically, the ascent of the idea that law (or, more specifically, human rights law) provides universal principles that can, and should, govern the conduct of politics has given new power to the claim that “law is above politics”.<sup>26</sup> Part of this power comes from the fact that there are some extremely sophisticated versions of rights enthusiasm: Ronald Dworkin’s acknowledgement that “law is argumentative” has, for example, made it far more difficult to mount a “law is politics”-type challenge to the argument that law (as rights) is superior to politics.<sup>27</sup> But, as we argue below, at least in the UK the power may also come from the fact that, in public-law circles, debate between critics and proponents of the ascent of rights tends to revolve around a specific, relatively narrow set of issues. Our concern is that this is distorting debate about law and politics: specifically, important and challenging questions about the idea of law as a system of rights – questions concerning underlying conceptions of law, and of the political – are often left unasked.

In Part III, we suggest that the distortion could be reduced by broadening the terms of engagement through the use of strands of legal scholarship that, hitherto, have largely been neglected in the acknowledged or “mainstream” debate about law and its relationship to politics. First, however, we need to examine the phenomenon itself: that is, the widespread reorientation of legal and political orders, and of the popular imagination, towards the idea of law as a system of rights.

### *Law as a System of Rights*

The first key point to note is that the ascent of rights is multi-dimensional. Institutions of governance are affected; so too are public and professional

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<sup>25</sup> See, e.g. the observation by Murphy, Review of Luhmann, *Law as a Social System* (2005) 25 *LS* 520 at 522: “But lawyers around the world have now snuggled in to a perspective of moral superiority in relation to politicians and others; upholding the rule of (international and national) law is now presented as paramount (with these lawyers as their champions). A mish-mash of human rights, morality and legal technicalities is offered, vociferously and voluminously, as the solution to our troubles and as the new *regles du jeu* for politics, international finance and so on.” Cf. Riles, “Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage” (2006) 108 *American Anthropologist* 52, arguing that the professional lives of a range of human rights actors are defined by “a subtle agnosticism”, that is, by a “set of questions and concerns about human rights practice”.

<sup>26</sup> For an introduction to this phenomenon, see, e.g. Loughlin, n.2 above.

<sup>27</sup> But for an example of one such challenge, see Hutchinson, *It’s All in the Game: A Nonfoundationalist Account of Law and Adjudication* (2000).

consciousness. We are, as Neil Walker points out, in the midst of the ‘institutionalisation and internationalisation of the idea of law as a system of rights which frames and contains government power. . .’.<sup>28</sup> The potential for rights to constrain private power also seems to be gaining momentum. Evidence of these trends is everywhere. Most obviously, charters of rights are currently a pre-eminent feature of democratic transition around the world, and insistence on the protection of human rights has become both a mantra of global governance (see, for example, the standard positions of the UN or the IMF) and an alleged cornerstone of Western foreign policy.<sup>29</sup> Second, many existing rights regimes are widely considered to be flourishing: South Africa and Canada are perhaps the best-known examples. In addition, in Europe, the expansion of the Council of Europe and the reach of the ECHR, and the European Union’s adoption of a charter of fundamental rights in its proposed Constitution, are widely seen as further evidence that protection of rights is an essential component of the “European project”.

The ascent of rights is also strongly in evidence in the academy and in popular consciousness. In academia, advocacy of rights has been a theme in the work of a number of prominent figures who have had significant cross-over or popular appeal. Three notable examples are Ronald Dworkin, John Rawls and Patricia Williams.<sup>30</sup> Moreover, although these individuals differ in their preferred approaches to rights, their work (and that of other theorists who are pro-rights) tends to function in combination in a way that assists the ascent of rights and makes criticism of the phenomenon a great deal more difficult: “[a]ll show that philosophy, something at once higher than, more intellectually sophisticated than, and also more determinate than postrealist text-based constitutional argument, supports legalizing liberal rights claims”.<sup>31</sup>

That said, it is in public consciousness, rather than in academia, that rights talk features most strongly. As noted earlier, rights now provide *the* language of claims-making. And they provide this language not just for activists, advocates and victims who seek to engage the power of law but also for the “everyday”: in short, as Duncan Kennedy has pointed out, rights have seeped into “just about every milieu where people argue about who should do what”.<sup>32</sup>

### ***The Ascent of Rights & the Law/Politics Debate***

Not surprisingly, there is already a wide range of scholarship commenting on the ascent of rights. This scholarship includes accounts that welcome or

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<sup>28</sup> Walker, Review of Loughlin, *Sword & Scales: An Examination of the Relationship Between Law & Politics* [2001] *PL* 644, at 646.

<sup>29</sup> For criticisms of these trends, see Kennedy, n.10 above; Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2002); Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005).

<sup>30</sup> See, respectively, Dworkin, *Taking Rights Seriously* (1977); Dworkin, *Freedom’s Law* (1996); Rawls, *The Law of Peoples* (1999); Williams, *The Alchemy of Race and Rights* (1991).

<sup>31</sup> Kennedy, n.4 above, at p.180.

<sup>32</sup> *ibid.*

anticipate the alleged triumph of rights.<sup>33</sup> In starkest contrast to these, are the accounts that declaim the ascent of rights (and, in particular, the positivisation of rights) as the end of human rights,<sup>34</sup> or espouse a deep cynicism about the enthusiasts' claims.<sup>35</sup> There is also an established body of sceptical accounts, with some sceptics seeing the detail of the positivisation of rights as key – specifically, whether or not the form chosen permits legislative override, which is seen as essential for 'dialogue' between courts and legislatures.<sup>36</sup> In addition, there are accounts that express qualified or cautious optimism for charters of rights.<sup>37</sup> Finally, there is a set of accounts that can be grouped together under the heading of "critical pragmatism".<sup>38</sup> The scholars who produce these latter accounts tend to share a view of rights as "paradoxes"<sup>39</sup> and, in line with this, they endorse the use of rights but emphasise the need for ongoing vigilance as regards the constraints that can be produced by rights claims.<sup>40</sup> In other words, critical pragmatists work with or "do" human rights but this activity is placed – intentionally and explicitly – in a form of ongoing tension with their critique of rights.

For present purposes, one particular allegation about the ascent of rights is of special interest: it concerns the views of law and of politics that are seen as grounding, and as fostered by, rights enthusiasm. The core of the allegation is that the institutionalisation of rights has led to a disturbing juridification of national and global politics. Duncan Kennedy, one of those making this allegation, uses stark language to convey his concerns: "the rule of law and rights seem to function as crucial paradigms of rightness for everyone. There has been a kind of concentration of experiences of rightness into the two contrasts of law versus politics and rights versus mere preferences".<sup>41</sup> Martin Loughlin has been equally forthright, describing the developments as the legalisation of politics and the politicisation of law.<sup>42</sup>

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<sup>33</sup> See, e.g. Klug, *Values for a Godless Age: The Story of the UK's New Bill of Rights* (2000); Williams, *The Case for an Australian Bill of Rights* (2004).

<sup>34</sup> Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000).

<sup>35</sup> See, e.g. Arthurs, "Constitutional Courage" (2004) 49 *McGill LJ* 1; Ewing, n.16.

<sup>36</sup> See, e.g. Campbell, Ewing and Tomkins (eds.), *Sceptical Essays on Human Rights* (2001).

<sup>37</sup> See, e.g. Gearty, *Principles of Human Rights Adjudication* (2004); Feldman, "The Impact of Human Rights on the UK Legislative Process" (2004) 24 *Statute LR* 91; Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 *Osgoode Hall LJ* 75; O'Connell, "Democracy, Rights and the Constitution: New Directions in the Human Rights Era" [2004] *CLP* 175.

<sup>38</sup> This is only one of a number of labels used to designate this grouping, and not all of those who identify with the characteristics we outline would choose this term.

<sup>39</sup> See, esp. Brown, "Suffering the Paradoxes of Rights" in Brown and Halley, n.4 above, pp.420-434.

<sup>40</sup> See, e.g. Herman, "Beyond the Rights Debate" (1993) 2 *SLS* 25; Stychin, *A Nation By Rights: National Cultures, Sexual Identity Politics and the Discourse of Rights* (1998); Whitty, Murphy and Livingstone, *Civil Liberties Law: The Human Rights Act Era* (2001).

<sup>41</sup> See n.4 above, at p.219.

<sup>42</sup> See n.2 above, at pp.232-233.

A related allegation accuses rights' enthusiasts – particularly international ones<sup>43</sup> – of being caught up in a dangerous sense of self and of mission. Michael Ignatieff is one of those who has made this criticism: “[h]uman rights activism likes to portray itself”, he says, “as an anti-politics, in defense of universal moral claims designed to delegitimize ‘political’ (*i.e.* ideological or sectarian) justifications for the abuse of human beings.”<sup>44</sup> The attitude of rights' enthusiasts has also been criticised by the international lawyer, David Kennedy. Overall, Kennedy is more optimistic than Ignatieff about the future of rights professionalism, but he does accuse international humanitarianism of being “tone deaf to the specific political consequences of its activity in particular locations, on the mistaken assumption that a bit more human rights can never make things worse”.<sup>45</sup> And he reminds all those who are tempted by rights that there is no “always and everywhere” destiny of human rights initiatives: indeed, he suggests that “it may be that all we have is a list of possible downsides, open risks, bad results which have sometimes occurred, which might well occur”.<sup>46</sup>

In essence, then, the argument being made by all of these critics is that the widespread institutionalisation of rights, in a climate of unreflexive rights enthusiasm, is encouraging an impossible idea of law and adjudication: an understanding of law as autonomous from, and contrasting with, the messy particularity of politics – of law as the essential and effective constraint upon the political. For present purposes, what interests us most about this argument is its relatively limited impact: specifically, why has it not made more of a dent in the status of the claim that “law (as rights) is above politics”?<sup>47</sup>

Part of the explanation perhaps is that this criticism is pitted against an extraordinarily powerful trend. But we want to suggest that it is also because, in public law circles in the UK, debates about rights, and about law and politics generally, tend to be dominated by a specific and relatively narrow set of concerns. For example, commentators will often define their concerns in ways that speak only to those possessing specialised knowledge of a particular subject area – say, rights constitutionalists, or European lawyers. Moreover, within these subject areas, debate is sometimes marked by an

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<sup>43</sup> See, *e.g.* Kennedy n.10 above, at p.xiv describing “a posture or sensibility” exhibited only by the internationalist – typically, a dedication to “the international itself”. Some see this posture as an asset, but for Kennedy and others it is a cause for concern: see, *e.g.* Mutua, *Human Rights: A Political and Cultural Critique* (2002), arguing that “many in the human rights movement mistakenly claim to have seen a glimpse of eternity . . . This view is so self-righteous and lacking in humility that it of necessity must invite probing critiques from scholars of all stripes”; and Harlow, “Public Law and Popular Justice” (2002) 65 *MLR* 1 at 17 reflecting on the English context and criticising an international human rights lobby “which will not stop pushing until the door is wide open” and the legal process has been transformed into a “free-for-all”.

<sup>44</sup> Ignatieff, *Human Rights as Politics and Idolatry* (2001), at p.9.

<sup>45</sup> See n.10 above, pp.33-34.

<sup>46</sup> *ibid.*

<sup>47</sup> Note, however, the influence of neo-conservative thinking on the perceived threat to US political power by a globalizing human rights agenda: see further, Mansell and Haslam, “John Bolton and US’ Retreat from International Law” (2005) 14 *SLS* 459.

even more disorienting level of specialisation – “deep insiderism” might be a good way to describe it.<sup>48</sup> These tendencies are understandable. And they are, to some extent, unavoidable. But their downside is that the argument that “law (as rights) is above politics” has tended to get an easier ride as some concerns have become over-dominant (thereby blocking out others) and others have failed to migrate from one specialisation to another (thereby limiting their power).

It could be argued that some of these problems flow from the narrow definitions of adjudication that continue to dominate the public law literature. For example, accounts of Human Rights Act jurisprudence have been particularly animated about the importance of identifying, and constraining, judicial “activism”. In particular, commentaries on section 3(1) of the Act<sup>49</sup> have sought to establish a definitive construction of the judicial role, with a recognisable boundary between the (legitimate) task of “interpreting” and the (illegitimate) task of “legislating”.<sup>50</sup> Academic responses to the revival of a common law rights-based constitutionalism have followed a similar pattern, with little attention being paid to how and why judges construct the law/politics distinction in individual cases.<sup>51</sup>

Our concern then is that the nature of debate on law and politics in public law circles could be part of the explanation for the remarkable power of the claim that “law (as rights) is above politics”. To put it crudely, and accepting also that there are notable exceptions, the claim is not being met by a sufficient level of challenge. There is not, in other words, enough of a range of challenges and, in addition, the very precise, almost technical focus of certain existing challenges means that common underlying concerns can feel submerged by detail. That said, there is evidence pointing towards the development of new forms of engagement. There is, for example, obvious support for Jeremy Waldron’s suggestion that more direct attention needs to be paid to legislative processes and traditional conceptions of democracy.<sup>52</sup> The burgeoning public-law profile of legal pluralist scholarship on the one hand, and transitional justice scholarship on the other, also augur well for the development of a fuller range of challenges. In fact, legal pluralism’s

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<sup>48</sup> In the English public law context, a notable example of this is provided by the ongoing dispute between two leading scholars on their understandings of the constitutional foundations and limits of judicial review: see Allan, “Legislative Supremacy and Legislative Intent: A Reply to Professor Craig” (2004) 24 *OJLS* 563 and Craig, “Legislative Supremacy and Legislative Intent: A Reply to Professor Allan” (2004) 24 *OJLS* 585.

<sup>49</sup> S.3 provides that: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”.

<sup>50</sup> See, e.g. the discussion in Young, “*Ghaidan v Godin-Mendoza*: Avoiding the Deference Trap” [2005] *PL* 23; Hickman, “Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998” [2005] *PL* 306.

<sup>51</sup> See Hutchinson, *Evolution and the Common Law* (2005) for a wider critique of the development of the common law, arguing that most judges and jurists remain united in “demonstrating that not only can the common law balance the competing demands of stability and change, but can do so in a legitimate way that respects the important distinction between law and politics” (p.10).

<sup>52</sup> See, e.g. Tushnet, “Non-Judicial Review” (2003) 40 *Harvard J on Legislation* 453; Tomkins, *Our Republican Constitution* (2005).

capacity to problematise the question of law seems particularly promising: as Gavin Anderson has pointed out, the reason for this is that “[f]or most lawyers, the question of law never arises – according to the dominant paradigm of liberal legalism, law is exclusively state law, made by legislatures or pronounced by courts. Moreover, it is simply assumed that law is a coherent system of norms that operates directly on society as a tool of social engineering”.<sup>53</sup>

As mentioned above, transitional justice is another promising and increasingly-acknowledged source. Broadly speaking, transitional justice scholarship is characterised by very direct engagement with the question of the relationship between politics and the (now-powerful) understanding of law as rights. Think, for example, of the work on Northern Ireland that is being done by Christine Bell *et al*, Colin Harvey and Kieran McEvoy. Their scholarship promises to add very considerably to current understandings of law as a system of rights: it explores, for example, the risks of deformalisation that attach to an unthinking “cult” of rights (*e.g.* the dangers that could result from widespread popular support for the idea that judges are no longer simply to apply the law but to protect rights); the ongoing negotiations that are involved in a culture of rights’ claims and counter-claims; the attitudes of non-state protagonists (*e.g.* paramilitary prisoners) towards law (and, more particularly, law as a system of rights) during the Northern Ireland conflict; and the pros and cons of different ways of dealing with past atrocities (*e.g.* individual prosecutions vs. inquiries or truth commissions) when building a new society.<sup>54</sup>

That said, in concluding this article, we want to draw attention to other established strands of legal scholarship which continue to be neglected or under-used in discussions on law and politics and which we contend can fruitfully broaden the terms of the debate. The two particular legal traditions we have in mind are, first, feminist legal scholarship and, secondly, socio-legal studies.

### III: A Question of Definition

In our view, socio-legal studies and feminist legal scholarship have been peripheral to the mainstream law/politics debate because of a problem of framing or definition. In the case of the latter, the neglect seems to have been produced by the framing of legal feminism as a form of “identity politics”, which has led in turn to the assumption that – at best – its contribution to a

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<sup>53</sup> Anderson, *Constitutional Rights After Globalization* (2005), p.39. Anderson’s own work provides a good example of the fundamental nature of the challenge presented by legal pluralism: he has targeted the dominant liberal legalist form of constitutionalism, arguing for a “paradigm shift” to a new *legal pluralist constitutionalism* which, he says, offers both a better explanation of political power and law in a globalised world and a better starting-point for holding private power – for example, transnational corporations – to account.

<sup>54</sup> See, *e.g.* Bell, Campbell and Ní Aoláin, “Justice Discourses in Transition” (2004) 12 *SLS* 305; Harvey, “On Law, Politics and Contemporary Constitutionalism” (2003) 26 *Fordham Int LJ* 996; McEvoy, “Beyond the Metaphor: Political Violence, Human Rights and ‘New’ Peacemaking Criminology” (2003) 7 *Theor Crim* 319. See also Atria, “The Time of Law: Human Rights Between Law and Politics” (2005) 16 *Law and Critique* 137.

law/politics discussion would be limited to insight on specialist aspects of the topic of “law as a system of rights”. That said, the neglect has perhaps been compounded by the fact that legal feminists have not engaged sufficiently (or at least sufficiently explicitly) with the central concerns animating mainstream constitutionalism.<sup>55</sup> As regards socio-legal studies, the neglect feels less pronounced but, as we suggest below, it is still problematic. Here the neglect seems to arise from the fact that socio-legal scholarship continues to be placed in a largely technical, supporting role: it remains, in other words, the policy-maker’s or theorist’s “little helper”,<sup>56</sup> and its core questions on law “in action”, as well as its endorsement of empirical inquiry, continue to be seen as marginal to mainstream constitutional law and theory. But, as with feminist legal scholarship, here too it might be argued that the neglected party also bears a certain responsibility. It could, for example, be argued that the relatively low level of dialogue between socio-legal scholars and comparative lawyers in recent decades<sup>57</sup> meant that an opportunity for socio-legal studies to reach out to a constitutionalist audience by using overlaps with comparative law as a common link (and, hence, a potential “ice-breaker”) was wasted.<sup>58</sup> More generally, as with feminist legal scholarship, socio-legal studies’ “outsider” perspective on law has meant that its proponents have generally focused on concerns different to those of “mainstream” legal scholars. And, finally, there is also the argument that the socio-legal commitment to serious empirical inquiry has encouraged some of its proponents to pass over both theoretical work and doctrinal work.

### *Socio-legal studies*

In essence, then, what we are suggesting is an exercise in redefinition or reframing so that both socio-legal studies and feminist legal scholarship are accorded new status in “mainstream” debates about law and politics. Given this, it is of interest that, amongst constitutional scholars, there is now increasing attention to quantitative studies of government win-and-loss rates in rights-based judicial review:<sup>59</sup> these studies provide an important complement to the qualitative work that has tended to dominate this field and they should facilitate better-informed discussion of the alleged counter-

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<sup>55</sup> Exceptions include Cooper, *Governing Out of Order* (1998); Millns and Whitty (eds.), *Feminist Perspectives on Public Law* (1999).

<sup>56</sup> For an argument about the relationship that ought to exist between socio-legal research and critical legal theory, see Lacey, “Normative Reconstruction in Socio-Legal Theory” (1996) 5 *SLS* 131.

<sup>57</sup> On this issue, and also on the evidence of a “new rapprochement” between comparative lawyers and socio-legal scholars, see Riles, “Casting Off, and Reclaiming, the Weberian Tradition: Comparative Law and Socio-legal Studies” in Zimmerman and Reimann (eds.), *Oxford Handbook of Comparative Law* (forthcoming 2006). Riles also notes that legal pluralism and non-European comparative law are two areas where there has been a tradition of dialogue between comparativists and socio-legal scholars.

<sup>58</sup> See below pp.551-552 and p.554 for discussion of the burgeoning constitutionalist interest in comparative law.

<sup>59</sup> Choudhry and Hunter, “Continuing the Conversation: A Reply to Manfredi and Kelly” (2004) 49 *McGill LJ* 765. It is noteworthy that in the UK context the empirical data on asylum claims continues to be submerged within “administrative law” rather than playing an explicit part in the law/politics debate. But for an exception, see Rawlings, “Review, Revenge and Retreat” (2005) 68 *MLR* 378.

majoritarian tendency of rights-based adjudication. More importantly, however, this trickle of interest in quantitative studies opens the possibility of a new, more substantial place for empirical socio-legal work in generating constitutional knowledge. And this possibility is enhanced by the fact that recently there have been a number of calls for more socio-legal work on “constitutional questions”: John Dryzek, for example, has emphasised the lack of detailed empirical evidence on issues relevant to the debate over deliberative or discursive democracy,<sup>60</sup> and in the UK there have been several essay collections<sup>61</sup> and a number of articles<sup>62</sup> urging greater attention to the empirical effects of human rights law “in action”.

Not surprisingly, we agree with these sentiments: more specifically, we believe that constitutional knowledge (and, by implication, debates about law and politics) would benefit from more empirical work on both the *initiation* of legal rights claims and the *implementation* of rights-based rules and judgments. As regards the former issue, socio-legal studies clearly has a great deal to offer in the framing and answering of questions that deserve to be central to debates about law and politics: questions such as “how does a person or a group come to understand a problem in terms of rights?” or “how does a person’s identity affect this understanding?” (e.g. is gender a relevant variable in the “turn to law”?). Moreover, socio-legal scholars will be well aware that, in gathering evidence about initiation, there has to be scrutiny of the turn to law outside of courts and legislatures. And, by looking beyond litigation and legislation to the use of commissions of inquiry and the practice of rights-proofing (in both public and private sectors), this work could help to shift the obsession with courtrooms that has gripped so much of contemporary constitutionalism.

We also think that there would be benefits for socio-legal scholars via this framing of their traditional “law-in-action” questions through a law/politics lens: this lens might facilitate a fuller picture of gaps or distortions in current socio-legal work, and it might also provide a mechanism by which to identify or promote emerging projects. On the issue of gaps or distortions, it is for example worth noting that Sally Engle Merry, a US law and society scholar, has expressed concern that, although there is a body of socio-legal literature exploring the contribution of rights talk to social movement activism, relatively little is known about why and when *an individual or a vulnerable population* adopts rights talk.<sup>63</sup> And, as regards the argument that a law/politics lens could be a mechanism by which to identify and deepen emerging socio-legal projects, one obvious area of study is surely “legal migration”: in other words, the increasing citation, by judges and by other

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<sup>60</sup> Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (2000).

<sup>61</sup> Halliday and Schmidt (eds.), *Human Rights Brought Home: Socio-Legal Studies of Human Rights in the National Context* (2004); Harvey (ed.), *Human Rights in the Community: Rights as Agents for Change* (2005).

<sup>62</sup> Clements, “Winners and Losers” (2005) 32 *JLS* 34; Thomas and Costigan, “The Human Rights Act: A View from Below” (2005) 32 *JLS* 51.

<sup>63</sup> Merry, “Rights Talk and the Experience of Law: Implementing Women’s Human Rights to Protection from Violence” (2003) 25 *HRQ* 343.

legal actors, of non-binding sources from other jurisdictions or legal orders.<sup>64</sup> Constitutional and international law scholars, as well as comparativists, have become deeply interested in this practice.<sup>65</sup> Should comparative analysis be seen, they inquire, as an embodiment of the marketplace-of-ideas or is the image of a mirror (“something that helps us to see ourselves clearly”<sup>66</sup>) more apposite? Other approaches call for examination of norms that are not “borrowed” (what Scheppele calls “aversive constitutionalism”) and for consideration of what happens to difference if a one-size-fits-all, “comparative-lite” approach to constitutional interpretation takes hold in a range of courts.<sup>67</sup> All of this suggests to us that the subject of the globalisation of norms requires empirical study by socio-legal scholars. Moreover, although judicial behaviour provides an obvious source of material for such studies, the ways in which legal professionals on the one hand, and social movements on the other, are using global rights norms also deserves greater attention than it has hitherto received.<sup>68</sup> And these latter studies will need to examine both local actors and international ones because it should not be assumed that they wield sources in an identical manner.<sup>69</sup>

Turning now to the question of implementation: as we see it, the commitment to the ongoing study of implementation that characterises socio-legal studies should be of considerable benefit to debates about law and politics – in particular, it should provide a powerful reminder of the complex relations between law and social change. As mentioned earlier, there seems to be a real need for such a perspective given that rights-based constitutionalism tends to think of law as an autonomous, effective tool of social change and thus focuses almost exclusively on the point at which the law or rule is agreed. Socio-legal studies, by contrast, understands that final rules are elusive and that there is no sense in ending one’s inquiries at the point at which a rule is “agreed”. Think, for example, of the socio-legal literature on the effects of the US Supreme Court’s opinion in *Brown v*

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<sup>64</sup> See, e.g. *Lawrence v Texas* (2003) 339 US 558, where the US Supreme Court majority entered the realm of constitutional borrowing and cited *Dudgeon v UK* (1982) 4 EHRR 149 to bolster the finding that a Texas statute criminalising homosexual sexual relations was unconstitutional.

<sup>65</sup> See generally, McCrudden, “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights” (2000) 20 *OJLS* 499; Booth and Du Plessis, “Home Alone? The US Supreme Court and International and Transnational Judicial Learning” [2005] *EHRLR* 127.

<sup>66</sup> Michelman, “Reflection” (2004) 82 *Texas L Rev* 1737.

<sup>67</sup> See respectively Scheppele, “Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models” (2003) 1 *Int J of Cons Law* 296; Legrand, “Comparative Legal Studies and the Matters of Authenticity”, Paper delivered at University of Melbourne, 20 October 2004 [www.law.unimelb.edu.au/alc/assets/legrand\_paper.pdf].

<sup>68</sup> There is, however, a growing literature in these areas: see, e.g. Hajjar, “Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in Israel/Palestine” (1997) 31 *Law & Society Review* 473; Riles, “The Virtual Sociality of Rights: The Case of ‘Women’s Rights are Human Rights’” in Likosky (ed.), *Transnational Legal Processes* (2002), pp.420-439.

<sup>69</sup> Stychin, “Same-Sex Sexualities and the Globalization of Human Rights Discourse” (2004) 49 *McGill LJ* 951 makes this observation in contrasting local gay rights activism with international lobby groups.

*Board of Education* (1955).<sup>70</sup> Or of the socio-legal literature on domestic violence, which provides compelling evidence of the problem of “widespread subversion of criminal penalties” and thereby demonstrates that “law is much less effective as sanction than as cultural system” and that “continuous political engagement is necessary to maintain effective legal intervention”.<sup>71</sup> What socio-legal scholars understand – and what rights enthusiasts, in particular, need to appreciate – is that legal rules can be avoided or subverted, that rival interpretations are possible, and that even the most well-intended and carefully-drafted rules can have unexpected adverse consequences. Review of rules is also an unavoidable reality. In sum, as James Tully has reminded fellow constitutionalists, implementation is not so “different in kind to [rule] justification”; it is not, in other words, “simply a technical question of applying rigid rules correctly”.<sup>72</sup> Overall, therefore, our argument is that socio-legal scholarship can provide a powerful challenge to the traditional parameters of the law/politics debate; in particular, it can help to problematise the question of law.

### ***Feminist legal scholarship***

We now want to look at the question of the political: as mentioned earlier, we take the view that although the question of the political features in a great deal of the debate about law and politics (it quite clearly dominates discussions about adjudication), it is generally framed in too limited a form. One way of addressing this problem, we suggest, would be to make greater use of the second source of critical-theoretical work mentioned above: feminist legal scholarship. Specifically, we want to recommend the use of narrativ method – both in analysing adjudication and, more broadly, as a tool in constitutional theorising.

Feminist legal scholarship has made a compelling case for the use of narrativ method, showing many times over how legal judgments produce and reproduce particular images of women and of men as natural and inevitable. Think, for example, of the feminist work on the ways in which judgments present accounts of good and bad women, and of innocent and less-than-innocent victims.<sup>73</sup> For present purposes, the key issue is the potential benefits of narrativ method for the law/politics debate. This issue has been examined in some detail by the feminist scholar, Joanne Conaghan. In an article analysing Duncan Kennedy’s book, *A Critique of Adjudication (Fin de Siècle)*, Conaghan argues that “an adequate understanding of the politics of adjudication demands a broader focus, embracing the role of adjudication not only in determining issues of ideological disagreement but

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<sup>70</sup> (1955) 349 US 294.

<sup>71</sup> Merry, “Global Human Rights and Local Social Movements in a Legally Plural World” (1997) 12 *Can J of Law & Soc* 247.

<sup>72</sup> Tully, “The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy” (2002) 65 *MLR* 204 at 227. For an account of the response of local housing authorities to judicial review, see Halliday, *Judicial Review and Compliance with Administrative Law* (2004).

<sup>73</sup> See, e.g. Diduck and Kaganas, *Family Law, Gender and the State* (1999). Scholarship on the construction of sexual legal subjects is equally persuasive on this point: see, e.g. Sandland, “Not ‘Social Justice’: The Housing Association, the Judges, the Tenant and his Lover” (2000) 8 *FLS* 227.

also in defining/reproducing the *limits* of disagreement”. And, in line with this, she calls on Kennedy to consider the following important question: “Why privilege (for purposes of an analysis of adjudication) the role of judges in determining issues that are culturally perceived to be politically contentious . . . and neglect the importance of adjudication in constituting and reproducing the *politically taken for granted*?”<sup>74</sup> The same question ought to be put, we suggest, to the many other acknowledged participants in the law/politics debate who have centred their attention on adjudication, thereby encouraging them to adopt a broader stance on the question of the political or, at the very least, to offer an explicit defence of their own starting points.

The prospect of accepted players in the law/politics debate – say, for example, constitutional scholars – adopting, or even being interested in, narrativial method may seem far-fetched. But we would argue that this scepticism should be kept in check and, in support of this, we would point to a recent overview of the last 25 years of constitutional theory in which the author, Martin Loughlin, recommends that “[o]ne aim of constitutional theory should be to highlight the ways in which . . . figurative language shapes the way we think about constitutions”.<sup>75</sup> To explain this, Loughlin contrasts two conceptions of a constitution and notes the radically different metaphors attaching to each: on the one hand, the metaphor of mechanism (“checks and balances”) and, on the other, evolutionism (“the ‘living’ constitution”). In so doing, he may well prompt an interest in the use of narrativial method amongst constitutional scholars.<sup>76</sup>

Two other important ways in which feminist legal scholarship could enhance the quality of debate on law and politics are as follows. First, amidst increasing interest in comparative constitutionalism and, more broadly, in the migration of legal norms, feminist legal scholarship should help to ensure that studies of the relationship between law “here” and law “there”<sup>77</sup> give sufficient attention to the gender impact of comparative and international leanings by domestic judges. At present, for example, we simply do not know whether courts using international law or the constitutional law of other jurisdictions respond differently to legal feminist claims.<sup>78</sup>

Relatedly, there is also clear scope for a new “constitutional” variant on the longstanding feminist engagement with questions of boundary or divide.

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<sup>74</sup> Conaghan, “Wishful Thinking or Bad Faith: A Feminist Encounter with Duncan Kennedy’s *Critique of Adjudication*” (2001) 22 *Cardozo L Rev* 721 at 734-5 (our emphasis).

<sup>75</sup> Loughlin, “Constitutional Theory: A 25<sup>th</sup> Anniversary Essay” (2005) 25 *OJLS* 183 at 185.

<sup>76</sup> See, e.g. Poole, “Harnessing the Power of the Past?: Lord Hoffmann and the *Belmarsh Detainees* Case” (2005) 32 *JLS* 534, analysing the use of judicial myths, historical analogy and nationalist rhetoric by Lord Hoffmann in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

<sup>77</sup> The terminology is from Knop, “Here and There: International Law in Domestic Courts” (1999) 32 *NYU J of Int Law and Politics* 501.

<sup>78</sup> For more on this argument, see, e.g. Jackson, “Gender and Transnational Legal Discourse” (2002) 14 *Yale J of Law & Feminism* 377. On the approach of the European Court of Justice, see Cichowski, “Women’s Rights, the European Court and Supranational Constitutionalism” (2004) 38 *Law & Soc Rev* 489.

Judith Resnik has formulated this new variant in the following way: is jurisdiction gendered?<sup>79</sup> In asking this question, Resnik is calling for closer scrutiny of arguments that particular areas of law “belong” to a particular level of decision-makers (*e.g.* local rather than national government). Her interest in this issue was prompted by the US Supreme Court’s opinion in *US v Morrison* (2000)<sup>80</sup> striking down the civil rights remedy in the Violence Against Women Act 1994, which authorised lawsuits in federal courts against those who physically harmed plaintiffs because of their gender. The *Morrison* court viewed the remedy as a federal entrenchment on lawmaking arenas belonging to the states: “[t]he Constitution”, the Chief Justice said, “requires a distinction between what is truly national and what is truly local”. Resnik, in responding to this, points out that family law and criminal law – areas of law classified as “local” by the Supreme Court – “have long been subjected to federal lawmaking”; in addition, by equating family life with state law, the role played by federal actors “in shaping the meaning of gendered family roles” is hidden from view.<sup>81</sup> She insists that, whilst “categorical” decision-making cannot be avoided, we ought to cultivate a questioning attitude towards it. In the Chief Justice’s words – “truly national”, and “truly local” – she finds traces of anxiety, “an effort to make meaningful a division that is not only elusive but increasingly inaccurate . . . [an] attempt to buffer the states from the nation, and [the] nation from the globe”.<sup>82</sup> And, in a comment that resonates very clearly with legal pluralism, she concludes that we need always to remember that “many categories are intertwined in lawmaking enterprises and that more than one source of legal regulation is likely to apply to any set of behaviours”.<sup>83</sup>

The other way in which feminist legal scholarship could enhance debate on law and politics is by helping to instill an attitude of greater reflexivity. Contemporary feminist legal scholarship is almost consumed by reflexivity, generated it would seem by the ongoing challenge of facing the immediacy of practical problems whilst being aware of the complex relationship between law and social change. Or from the feeling of being marginal and, at the same time, needing to avoid the trap of being part of a legal feminist orthodoxy.<sup>84</sup> Or, indeed, from the worry that one’s scholarship has “lost its zing”.<sup>85</sup> In combination, these experiences and the overriding commitment to reflexivity make feminist legal scholarship very pertinent to the strain of contemporary rights enthusiasm that is impatient with theorists and theorising (and is cosseted by the idea that “[t]here is work to be done, people to be saved . . .”) and imagines itself to be “innocent of rulership”.<sup>86</sup> A commitment to greater reflexivity could for example dislodge the belief, prevalent in certain rights’ circles, that law is a terrain of truth or expertise

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<sup>79</sup> Resnik, “Categorical Federalism: Jurisdiction, Gender, and the Globe” (2001) 111 *Yale LJ* 619.

<sup>80</sup> (2000) 529 US 598.

<sup>81</sup> See n.79 at 621.

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*, at 622.

<sup>84</sup> For discussion, see Bottomley, “Shock to Thought: An Encounter (Of a Third Kind) with Legal Feminism” (2004) 12 *FLS* 29.

<sup>85</sup> Halley, “Take a Break from Feminism” in Knop (ed.), *Gender and Human Rights* (2004), pp.57-82 at 65.

<sup>86</sup> Kennedy, see n.10, at p.332.

and not one of politics. And, crucially, it could demonstrate to rights' enthusiasts that they are not "innocent of rulership": rather they have power, they make choices and these choices have real, distributional consequences for individuals and groups.<sup>87</sup>

### Conclusion

To recap: the starting point for this article was a feeling of general disquiet about the state of debate in the UK on the relationship between law and politics. Specifically, we noted that the balance between the traditional opposing arguments – that "law is politics", that "law is above politics" – is noticeably askew. We traced this to the fact that the now-extraordinary power of the claim that "law (as rights) is superior to politics" generally faces insufficient challenge or questioning. The largely passive embrace of the previously-shocking claim that "law is politics" is part of the problem. But, in addition, there is the difficulty that, amidst a widespread preoccupation with a particular set of questions about the boundaries of judicial role, neither the question of law nor that of the political seem to be receiving sufficient mainstream attention. The upshot is that the claim that "law (as rights) is above or superior to politics" continues to face only limited scrutiny and this benefits neither rights enthusiasts nor rights cynics, nor indeed anyone else.

Having outlined the problem, we suggested one way to counteract it: namely, there should be a broader definition of what counts as scholarship relevant to questions of law's relationship to politics. Specifically, we proposed that there ought to be a redefinition of the traditional boundaries of the law/politics debate so as to reverse the neglect or under-use of two potentially important resources: first, socio-legal studies and secondly, feminist legal scholarship. As regards socio-legal studies, our argument is that socio-legal approaches which focus on providing empirically-grounded perspectives on the attraction and uses of legal rights claims, and provide an expanded scrutiny of the institutions and cultures where formal legal knowledges are produced, shared, and mediated, merit greater use and acknowledgement in mainstream law/politics debate. As regards feminist legal scholarship, our argument is that both the underlying feminist legal commitment to broadening the concept of the political and the use of narrational method as a key resource could provide an important check on the tendency to base the law/politics divide on a traditional understanding of what is (and, by implication, what is not) politically-contentious. More generally, the emphasis within feminist legal scholarship on the need for reflexivity – as regards assumptions about what counts as feminist legal scholarship, about what should be studied, and about the theories and techniques that are used – deserves to be seen as an exemplar for scholarly engagement with rights.

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<sup>87</sup> *ibid.*, at p.350.

## **DRESSING THE PART: GENDER, PERFORMANCE AND THE CULTURE OF LAW SCHOOLS**

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### **Introduction**

This article forms part of a project to examine the culture of the discipline of law, and the professional identities of academic lawyers. In particular, it focuses on the practices of legal academics with regard to their everyday dress, using previously unpublished data about what legal academics choose to wear to reveal significant aspects of the culture of academic law and the lived experience of legal academics.

Clothes perform a major role in the construction of identity, and at the same time provide an excellent field for studying the ways in which people interpret a specific form of culture for their own purposes.<sup>1</sup> In the context of the legal academy, choice of everyday dress reveals a number of ways in which legal academics construct their professional identities as “academic lawyer”, “lecturer”, “professor”, and so on, as well as revealing some otherwise hidden aspects of the culture of academic law.

### **Academic Examination of Everyday Dress**

The academic study of dress is still in its infancy, although, as Entwistle and Wilson note, over the last twenty years or so it has moved a long way from its previous marginal status, whereby it was regarded as being of intellectual interest only to anthropologists and otherwise unworthy of serious attention.<sup>2</sup> This longstanding reluctance to take dress seriously has been reinforced by general societal norms, which require that we do not judge others by their appearance, as well as by the influence of the Cartesian mind/body dualism within the academy, with its emphasis upon reason and rationality, which has relegated the everyday dress choices of individuals to a matter of relative unimportance.<sup>3</sup> The stereotype of the academic who exemplifies this – scruffily dressed in out-of-date, unfashionable, badly-fitting clothes, is alive and well, as a recent series of articles in the press has made clear.<sup>4</sup>

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<sup>1</sup> Crane, *Fashion and Its Social Agendas: class, gender and identity in clothing* (2000), p.1.

<sup>2</sup> Entwistle & Wilson, ‘Introduction: Body Dressing’ in Entwistle & Wilson (eds.), *Body Dressing* (2001), p.1.

<sup>3</sup> Csordas, ‘Introduction: the body as representation and being-in-the-world’ in Csordas (ed.), *Embodiment and Experience: the existential ground of culture and self* (1994), p.7.

<sup>4</sup> ‘Spruce Up’ *Guardian Education* 17.12.02 p.27; ‘What Not to Wear at the Whiteboard’ *Guardian Education* 24.02.04 p.19; ‘What Not to Wear if you Want to Get On’ *Times Higher* 18.06.04 p.19; ‘Ditch the Smocks – Dress to Impress’ *Times Higher* 29.10.04 p.54. I would like to thank Phil Bielby, Lecturer in Law at the University of Hull, for drawing my attention to some of this material.

“Styles may shift, but academics’ reputation for bad dress sense never changes. . .”<sup>5</sup>

“Sitting in an august body of academics recently, the woman chairing the event caught my attention. For not only was she gracious, authoritative without being bossy, well-informed and pleasant, she was also well dressed. . . Around her were the usual bunch of shabby men and women instantly recognisable as academics by their battered trousers, tieless shirts, scuffed brogues, shapeless frocks, haircuts unchanged for 25 years and general lack of style of any kind.”<sup>6</sup>

Yet the academy is a much more fruitful site for the study of everyday dress than these somewhat disparaging remarks might suggest. In his analysis of the discipline of dress studies, William Keenan notes that many academic disciplines and sub-fields have a “hidden dress dimension”. The examples he gives include the “going native” practices of anthropologists and sociologists, the “dress for success” manoeuvres of aspirants to join the academic executive class, and the image-management of the academic feminist. He goes on to observe that the possibilities for “community self-surveys” by participant insiders of the dress code behaviours, beliefs and values of professional academics are endless.<sup>7</sup> This article seeks to exploit some of those possibilities by revealing hitherto un-noticed aspects of dress practices in the contemporary law school, and examining their significance, in terms of the construction of the professional identities of academic lawyers and the culture of the discipline of law.

Although anthropologists have been engaged in the serious analysis of dress for many years, their work has usually focused on non-Western or “traditional” societies, and it was not really until the development of the discipline of cultural studies in the 1960s that a wider range of academics began to take a serious interest in dress practices, resulting in a burgeoning literature on fashion.<sup>8</sup> Interest in the analysis of the body, which blossomed at the end of the twentieth century, focused attention on practices such as tattooing and piercing, but it is only recently that attention has turned to everyday dress practices.<sup>9</sup> Yet everyday dress plays a large part in social interaction; dress helps to define a person’s location in geographic and historic terms, and it also differentiates the individual from all others.<sup>10</sup> It is frequently an indication of the social status of a person, and a symbol of economic position. In addition, gender distinctions are a crucial part of the

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<sup>5</sup> ‘What Not to Wear if you Want to Get On’ *Times Higher* 18.06.04 p.19.

<sup>6</sup> ‘Ditch the Smocks – Dress to Impress’ *Times Higher* 29.10.04 p.54.

<sup>7</sup> Keenan, ‘Dress Freedom: the personal and the political’ in Keenan (ed.), *Dressed to Impress: looking the part* (2001), p.183.

<sup>8</sup> Keenan, ‘Introduction: Sartor Resartus Restored: dress studies in Carlylean perspective’ in Keenan (ed.), *Dressed to Impress: looking the part* (2001), pp.1-50

<sup>9</sup> Entwistle & Wilson, ‘Introduction: Body Dressing’ in Entwistle & Wilson (eds.), *Body Dressing* (2001), p.3; de la Haye & Wilson (eds.) *Defining Dress: dress as object, meaning and identity* (1999) chap.1.

<sup>10</sup> Johnson & Lennon, ‘Introduction: appearance and social power’ in Johnson & Lennon (eds.), *Appearance and Power* (1999), p.1.

construction of dress.<sup>11</sup> In everyday life, dress is the insignia by which we read others and by which we are read, however ambivalent and unstable those readings may be.<sup>12</sup> An extensive body of literature exists which indicates that clothing is an important cue in judgements of others, and can be used not only as an indicator of more obvious factors, such as social status, but can also affect perceptions which are particularly relevant in the context of the law school, such as competence and credibility.<sup>13</sup>

The communicative aspects of dress have been studied in a number of different ways. Lurie argued that dress could be interpreted like a language, complete with grammatical rules, while Davis argued that dress is more accurately characterised as being similar to music, emphasizing its suggestive and ambiguous nature.<sup>14</sup> In the context of examining dress in the context of the culture of academic law and its contribution to the construction of the professional identities of academic lawyers, Entwistle's framework for the analysis of everyday dress is particularly useful. She starts with the idea that dress is a "situated bodily practice", which is embedded in the social world.<sup>15</sup> Her work provides a bridge between theories of the body (which often overlook dress) and theories of fashion and dress (which often overlook the body). In terms of work on the body, the structuralist and post-structuralist analyses of writers such as Douglas, Foucault and Mauss have provided insights into how the body is rendered meaningful by culture.<sup>16</sup> However, in general, as Entwistle points out, these writers tend to neglect the need to account for how structures result in actual embodied practices, with the result that individuals tend to be reduced to puppet-like actors.<sup>17</sup> On the other hand, the work of phenomenologists like Merleau-Ponty, which explores the idea of the body as a site of culture, are helpful in suggesting ways in which the body can be understood as an actual practice; the self is located in a body, which itself is located in time and space.<sup>18</sup> Entwistle draws on these two apparently irreconcilable traditions to construct her theory of dress as a situated bodily practice, which is both a social and a personal experience. She argues that a study of the dressed body requires an understanding both of the socially processed body, and the experiential

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<sup>11</sup> Barnes & Eicher, 'Introduction' in Barnes & Eicher (eds.), *Dress and Gender: making and meaning in cultural contexts* (1992), p.1.

<sup>12</sup> Entwistle, 'The Dressed Body' in Entwistle & Wilson, *Body Dressing* (2001), p.37.

<sup>13</sup> See: Kwon, 'The Influence of Appropriateness of Dress and Gender on the Self-Perception of Occupational Attributes' (1994) 12(3) *Clothing & Textiles Research Journal* pp.33-39 at p.33.

<sup>14</sup> See: Lurie, *The Language of Clothes* (1981) & Davis *Fashion, Culture and Identity* (1992).

<sup>15</sup> Entwistle *The Fashioned Body: fashion, dress and modern social theory* (2000), Ch.1.

<sup>16</sup> See, e.g. M. Douglas, *Natural Symbols* (1973); M. Douglas (ed.), *Implicit Meanings: essays in anthropology* (1979); M. Foucault, 'Body/Power' in Gordon (ed.), *Power/Knowledge: selected interviews and other writings 1972-77* (1980); Mauss, 'Techniques of the Body' 2(1) *Economy and Society* (1973), p.70-89.

<sup>17</sup> Entwistle, 'The Dressed Body' in Entwistle & Wilson, *Body Dressing* (2001), p.35.

<sup>18</sup> Merleau-Ponty, *The Primacy of Perception* (1976).

dimension of embodiment, whereby dress is translated into actual bodily presentation.

“Dress lies at the margins of the body, and marks the boundary between self and other, individual and society. This boundary is intimate and personal, since our dress forms the visible envelope of the self, and . . . serves as a visual metaphor for our identity; it is also social, since our dress is structured by social forces and subject to social and moral pressures.”<sup>19</sup>

Entwistle’s insights prove particularly useful when combined with those of Goffman, whose exploration of the “presentation of self” also provides a useful framework for the examination of everyday dress practices.<sup>20</sup> Goffman argues, in his theory of “impression management”, that when individuals interact with others, they try to control the impression that the others receive of the situation. His analysis is concerned with the participant’s dramaturgical problems of presenting an activity to others.<sup>21</sup> In discussing impression management, Goffman also makes us aware of the importance of different spaces; the street, the office, the shopping-mall all operate with different “rules” which help to determine how we present ourselves and how we interact with others. The university law school is another such space, with its own particular cultural norms. Dress forms part of the microsocial order of such spaces, and is an important part of what Goffman terms “personal front”, the items of “expressive equipment” that we most intimately identify with the performer. He tells us that these include sex, age and racial characteristics, speech patterns, posture, facial expressions, bodily gestures – and clothing.<sup>22</sup> It is very clear that for Goffman, as for Entwistle, the dressed body is both the property of the individual *and* of the social world. It expresses our identity, but we manage our identities in relation to the different social situations we participate in. Thus, dress lies at the junction of culture and identity, and provides an excellent site for the examination of these concepts in relation to legal academia. Dress, as both these theorists would argue, is thus the result of a complex interaction between the individual and the social, between culture and identity.

In this context, we cannot ignore the insights of Bourdieu. He sees us as inhabiting a “habitus”, that is to say, a context of custom, tradition, evaluation and response which significantly shapes our personal choices. Once acquired, the habitus allows us to generate practices which are adaptable to the differing social conditions we meet.<sup>23</sup> Our position is also greatly affected by our command over various types of “capital”. Dress is one mode of “symbolic capital” and a significant part of the sources of power available to us in our interactions with others.<sup>24</sup> In their dress choices, individuals are reproducing their social position in the world, but doing this

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<sup>19</sup> J. Entwistle, ‘The Dressed Body’ in Entwistle & Wilson, *Body Dressing* (2001), p.37.

<sup>20</sup> E. Goffman, *The Presentation of Self in Everyday Life* (1990).

<sup>21</sup> E. Goffman, *The Presentation of Self in Everyday Life* (1990), p.26.

<sup>22</sup> Goffman, *The Presentation of Self in Everyday Life* (1990), p.34.

<sup>23</sup> Bourdieu, *Outline of a Theory of Practice* (1977).

<sup>24</sup> Bourdieu, *The Field of Cultural Production: essays on art and literature* (1993).

through individual embodied actions. As Tseelon comments, there is “a dialectical dialogue between cultural categories and the people who inhabit them.”<sup>25</sup> This is clearly reflected in the dress choices made within the context of the law school, which are made by individuals who belong to a particular “tribe” of academics, and a particular disciplinary culture.<sup>26</sup>

### The Project

The empirical data discussed in this article is drawn from an extensive qualitative study of academic lawyers and the culture in which they live their professional lives. During the period between June 2001 and December 2002, I interviewed 54 legal academics working in university law schools in England. All the academics were involved in teaching on academic law courses, as opposed to vocational courses.<sup>27</sup> The interviews were semi-structured and lasted between one and two hours each; they were conducted on the basis of confidentiality; neither the names of individuals nor the identity of the institutions involved are revealed. All interviews were taped and a full transcript was produced of each one.

As with most qualitative studies, I do not make any claims that my sample of respondents is statistically representative of my subject as a whole. Indeed, that is not the point of the study. Like Colin Evans, in his two books on the culture of Modern Languages and of English in higher education, my interest is not with the question “How representative is this?” but with the question “What does it represent?”<sup>28</sup> Nevertheless, the methodology I used is a kind of theoretical sampling, directed at validity of findings, rather than representativeness of population.<sup>29</sup> Thus the sampling was systematically carried through so that, as Finch and Mason argue, it is possible to justify a degree of generalization.<sup>30</sup> Interview sites were chosen to reflect variations in institution, including both old and new universities, while individuals were selected to reflect differing status, experience and gender; since, on the basis of previous research, there were grounds for believing these factors could be significant in relation to the construction of the professional identities of academics and the culture of the law school.<sup>31</sup> For the purposes of this study,

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<sup>25</sup> Tseelon, *The Masque of Femininity* (1997), p.3.

<sup>26</sup> On disciplinary cultures, see: Becher & Trowler *Academic Tribes and Territories: intellectual enquiry and the culture of disciplines* (2001); on the culture of academic law, see: Cownie, *Legal Academics: culture and identities* (2004), esp. chap.3.

<sup>27</sup> Note that legal academics teaching on vocational courses tend to have particular dress practices, due to the necessity to ‘model’ legal practice for their students.

<sup>28</sup> Evans, *English People: the experience of teaching and learning English in British universities* (1993), p.x.

<sup>29</sup> ‘Theoretical sampling’ is a term often associated with Glaser and Strauss’ treatise on grounded theory, but its logic and practice has become part of a tradition of qualitative research.

<sup>30</sup> Finch & Mason, ‘Decision-taking in the Fieldwork Process: theoretical sampling and collaborative working’ in Burgess (ed.), *Studies in Qualitative Methodology* (1990), p.28.

<sup>31</sup> On the importance of institutional diversity, see, for example: Clark, *The Academic Life: small worlds, different worlds* (1987); Henkel, *Academic Identities and Policy Change in Higher Education* (2000); Scott, *The Meanings of Mass Higher Education* (1995). On the importance of status see: Thorsen, ‘Stress in

I evolved three broad categories of experience: “early career” of up to ten years’ experience; “mid-career” of ten to twenty years’ experience and “experienced” with more than twenty years’ experience. My respondents comprised eighteen experienced academics, fifteen mid-career and twenty-one early career academics, giving a broad range. The spread of interviewees in terms of status also reflected McGlynn’s findings about the ratio of senior/unpromoted positions in relation to legal academia as a whole.<sup>32</sup> The sample included thirty-five men and nineteen women, also giving roughly the same gender balance as that found by McGlynn.<sup>33</sup>

### Everyday Dress and Legal Academia

The traditional response of academics to everyday dress has been to adopt what Davis has termed “fashion indifference” – a state in which “. . . one is either oblivious to, or, for one reason or another, thoroughly unconcerned with what the reigning or ascendant fashion is.”<sup>34</sup> Stereotypically, the (male) academic has dressed in baggy cords and a jumper or tweedy jacket.<sup>35</sup> However, a closer examination of the everyday dress practices of the legal academics in my study reveals that both the variety of dress, and the conclusions to be drawn from its analysis, is more complex than might at first seem to be the case. Even clothing that says “I don’t care what I wear” has a meaning – it does not say nothing.<sup>36</sup>

The first question about dress that I asked was “How do you choose what to wear to come to work?” Respondents used three terms to describe the style of dress they wore to work: “smart”, “smart-casual” and “casual”. Casual clothes, for both sexes, were jeans or chinos, worn with t-shirts, sweatshirts or a casual shirt. Smart-casual for men referred to slightly less casual trousers, worn with a smart shirt, and possibly an unstructured jacket.<sup>37</sup> Women who described their dress as “smart-casual” defined this as wearing tailored trousers or a smart skirt and top which was not a t-shirt. Smart clothes for men meant a suit and tie; for women, suits (including trouser-suits) or tailored outfits. There were no very significant differences in dress practices between people with different amounts of experience or working in different types of institution, merely a slight tendency for more experienced men to wear suits, and a slight tendency for those in old universities to be more casual. However, there were clear differences related to the gender of

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Academe; what bothers professors?’ (1996) 31 *Higher Education* p.471; and on the importance of gender see: Acker, *Gendered Education* (1994); Brooks, *Academic Women* (1997); Morley & Walsh, *Breaking Boundaries: women in higher education* (1996).

<sup>32</sup> McGlynn, *The Woman Lawyer: making the difference* (1998), p.41.

<sup>33</sup> McGlynn, *The Woman Lawyer: making the difference* (1998), p.41

<sup>34</sup> Davis, *Fashion, Culture and Identity* (1992), p.161.

<sup>35</sup> Kaiser, Chandler & Hammidi, ‘Minding Appearances in Female Academic Culture’ in Guy, Green & Banim, *Through the Wardrobe: women’s relationships with their clothes* (2001) at p.117.

<sup>36</sup> Harvey, *Men in Black* (1995), p.11.

<sup>37</sup> An unstructured jacket is a man’s jacket which lacks the stiffening, shoulder pads and so on which traditionally gave the jacket its structure. This style of jacket is most famously associated with the fashion designer, Giorgio Armani and the suits he designed for the film *American Gigolo*; see Tungate *Fashion Brands: branding style from Armani to Zara* (2005), p.119.

respondents. The largest group of respondents (nearly half of the total) described their style as “smart-casual”; this group contained slightly more women than men. Just over a quarter described themselves as dressing casually; there were significantly more men than women in this group. The “smart” dressers (just under a quarter of the total) included significantly more women than men. As these respondents said:

“I think the women almost always dress more smartly. When I think of people who wear casual clothes, they’re always men.”

*(Lecturer, female, early-career, old university)*

“I guess towards the casual end of the spectrum you’d be more likely to see a man in jeans than a woman.”

*(Principal lecturer, male, mid-career, new university)*

“. . . male members of staff sometimes can look a bit untidy, myself included, perhaps, but female members of staff don’t ever seem to look untidy...”

*(Senior Lecturer, male, early career, new university)*

“. . . you don’t see women wandering around in tracksuits – but you do occasionally see the men [doing that] – so there is a difference.”

*(Lecturer, female, early career, new university)*

As I have argued elsewhere, it would appear that this data provides new empirical evidence of some of the ways in which women’s experience of the workspace is different to that of their male colleagues, and shows how they frequently use dress in order to gain credibility in the masculine environment of the university law school which has strong associations both with rationality (a stereotypically masculine trait) and with law (also stereotypically associated with masculinity).<sup>38</sup> The way in which they dress shows women attempting to overcome their corporeal differences from the “hallmark male” while retaining the stamp of authority.<sup>39</sup> They tend to dress more smartly, since otherwise they find it harder to achieve the status of “authoritative knower” than their male counterparts, while men, inhabiting their “natural” environment, can dress casually without relinquishing authority or credibility.<sup>40</sup>

Looking at dress choice overall, it is clear that this culture is one in which some form of casual dressing is the accepted norm. This immediately differentiates the culture of legal academia from that of legal practice. As Richard Collier points out in his study of law firms’ recruitment literature,

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<sup>38</sup> Cownie, *Legal Academics: culture and identities* (2004) chap.8. On the association of rationality and masculinity, see: Ross-Smith & Kornberger ‘Gendered Rationality? A Genealogical Exploration of the Philosophical and Sociological Conceptions of Rationality, Masculinity and Organization’ (2004) 11.3 *Gender, Work & organization* pp.280-305; on the association of law with masculinity in the context of the academy see: Wells ‘Working Out Women in Law Schools’ (2001) 21.1 *Legal Studies* pp.116-136 at p.119.

<sup>39</sup> Cownie, *Legal Academics: culture and identities* (2004), chap.8.

<sup>40</sup> Cownie, *Legal Academics: culture and identities* (2004), pp.54-58.

“The legal profession shares with other workplace contexts the primary cultural norm of the post-war business and corporate sphere within western capitalist economies, as well as throughout the world; that is, the wearing of the business suit as a common visible marker of social respectability.”<sup>41</sup>

Several respondents commented on the difference in dress codes between legal practice and legal academia, especially those who had experience of working as a practising lawyer.

“Probably when I first came here I was a bit uncertain about the way to dress. I’d never taught before. Now I know you can wear what you want. Shorts and t-shirts every day if you want.”

*(Senior Lecturer, male, mid-career, new university)*

“... I think it’s expensive, dressing at university! When I was in practice, all I needed was a couple of suits – which the tax man helped me with. My accountant got me one new suit a year which was tax-deductible. Because I can choose what I want to wear now, I tend to have more clothes, more different things...”

*(Lecturer, male, early-career, new university)*

“My dress is reasonably casual, and I don’t feel the need to dress up in a suit as I would if I was a solicitor. I make some sort of effort not to be scruffy – like I’d wear jeans at home but not at work. But I don’t try that hard.”

*(Lecturer, female, early-career, old university)*

Commentators outside the legal academy often assume that legal academics are closely connected with legal practice themselves (perhaps as part-time practitioners) and that a law degree is a heavily vocational degree.<sup>42</sup> However, legal academics themselves do not identify with legal practice in this way, and their dress practices reflect the fact that their cultural mores are much more closely aligned to those of the academy than those belonging to the very different culture of legal practice.<sup>43</sup>

### **The Significance of Dress in the Culture of Academic Law**

Even though the culture of legal academia as a whole was casual, in terms of dress practices, clothes formed an important part of a significant number of

<sup>41</sup> Collier, ‘Be smart, be successful, be yourself . . .’: representations of the training contract and trainee solicitor in advertising by large law firms’ (2005) 12.1 *International Journal of the Legal Profession* 51-92 at p.60.

<sup>42</sup> See, e.g. Warnock, *Universities: knowing our minds. What the Government should do about higher education* (1989) p.12; equally, Becher & Trowler have no hesitation in categorizing the discipline of law, along with education and social administration, as an applied social science and “functional, utilitarian, concerned with the enhancement of (semi) professional practice.” (Becher & Trowler, *Academic Tribes and Territories* (2001), p.36.

<sup>43</sup> Legal academics in my study regarded the main purposes of legal education as broadly ‘liberal’, rather than vocational. See: Cownie *Legal Academics: culture and identities* (2004), p.78.

the respondents' professional identities, and their "performance" as legal academics. This was made clear when they were asked whether they wore the same type of clothes at weekends or in the vacations as they did in term time. Half of them said that they wore different clothes when they were not in a work context. Unsurprisingly, this figure was made up of all the smart dressers, plus half of the smart-casual dressers (one might speculate, those at the smarter end of the smart-casual spectrum). All the casual dressers remained resolutely casual. Slightly more women than men, and slightly more academics working in new universities, wore different clothes at weekends; both of these variations seem to be explained by the existence of "smarter" smart-casual dressers, who tended to "dress down" at weekends. There were no significant differences in dress habits in terms of length of experience as academics.

"Yes, I dress a bit more casually at weekends and in the vacation. I just feel that there should be a difference between one's work and other things. One needs to appear a bit more professional – it doesn't mean a suit, but a little more professional when you come to work. . ."

*(Professor, male, mid-career, old university)*

"I think I kind of have a view that this is work and home is home, and I want to try and – it's my way of keeping some separation between them, although I am very bad at that, because I take work home, and do work at home."

*(Lecturer, female, early-career, old university)*

". . . I don't like wearing my work clothes out of work...my work clothes are my work clothes and my play clothes are my play clothes...although it's not absolute – I do sometimes wear my work clothes out of work – but it's generally the basis of a little distinction, a habit, of distinguishing between work and play, and having a different wardrobe."

*(Lecturer, mid-career, female, new university)*

"I also think it's an advantage to have a "work wardrobe" and a "free-time wardrobe", just psychologically, you can take those clothes off when you come home in the evening, and at the weekend you can enjoy dressing up, that can be part of your weekend. . ."

*(Lecturer, female, early-career, old university)*

Putting on different clothes when going to work appeared to be an important part of the "performance" as legal academic for a significant number of respondents. As these responses illustrate, the maintenance of clear boundaries between "home" and "work" was very important for some, and clothing played a significant role in achieving this goal. However, the very indeterminacy of the academic job, in terms both of time and commitment,

makes it very difficult for academics to maintain clear temporal and spatial boundaries between “work” and “home”.<sup>44</sup>

### The Casual Dressers

At first glance, it would appear that dress did not play a significant role in the professional identities of the “casual dressers”. Most of them denied any interest in clothing at all:

“Well, I’m not a very good clothes-y sort of person; I normally just wear what’s on the chair. . .”

*(Senior Lecturer, male, mid-career, old university)*

“. . . By and large, I wear what’s comfortable, and don’t worry too much about what it is. . .”

*(Senior Lecturer, male, mid-career, new university)*

Arguably, however, everyday dress plays just as significant a role in the construction of the professional identities of these respondents as it does for respondents who show more obvious interest in what they wear. Evidence of this can be found in the fact that, although they were unanimous in saying that they hardly ever altered their dress style, the casual dressers frequently identified occasions on which they *would* dress more smartly. These would almost always be occasions on which respondents would encounter “outsiders”. In addition to illustrating the importance of dress, even for casual dressers, these practices also illustrate the way that individual dress choice is highly influenced by social/structural forces, as Bourdieu and Entwistle would suggest.<sup>45</sup>

“. . . I’ve done some media work over the years, and that’s caused me every now and then to rush out and buy something if I thought it would be more appropriate, but on the whole I’ve got away with what I wear, which suits me.”

*(Senior Lecturer, male, experienced, old university)*

“. . . I recognise there are occasions when it’s appropriate to be smart and wear a suit..First and foremost if I was representing the institution (either the law school or the university) to an outside group of people. I’ve also worn suits to things like inaugural lectures, where it’s clearly very important to the person themselves, they’ve put a lot of work and effort into a public lecture – it’s politeness, really, in that situation.”

*(Lecturer, early career, male, old university)*

“. . . if I am involved in one of the open days then I would dress more smartly. When you have potential students coming

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<sup>44</sup> Collier, ‘The changing university and the (legal) academic career: re-thinking the relationship between women, men and the ‘private life’ of the law school’ (2002) 22.1 *Legal Studies* p.1-32 at p.21.

<sup>45</sup> Entwistle, ‘The Dressed Body’ in Entwistle & Wilson *Body Dressing* (2001), at p.37; Bourdieu; *The Field of Cultural Production: essays on art and literature* (1993).

along, and you want to create a reasonably favourable impression, and I don't want to seem disrespectful to them. . . ."

*(Senior Lecturer, male, early-career, new university)*

The propensity to "dress up" for interaction with "outsiders" was a tendency shared by the "smart-casual" dressers, so that overall the result is that the majority of respondents agreed that "outsiders" are presented with a particular image of an academic lawyer – looking remarkably like a lawyer in practice. This consciously managed performance gives the impression to those outside the law school that academic lawyers are much more like stereotypical image of a city lawyer than they *actually* are. Evidence from other parts of my research suggests that the concerns of legal academics are increasingly focused on the demands and pressures of the academy, rather than those of the legal profession, so that the outsiders who see smartly-dressed legal academics looking like the stereotypical solicitor are being given, to some extent at least, a misleading impression of the culture of legal academia.<sup>46</sup> This is a clear example of Goffman's "impression management", and, in particular, an example of "idealisation", where performers are offering observers a performance that is idealised, in the sense that it "highlights the common official values of the society in which it occurs".<sup>47</sup> It would appear that these legal academics are bowing to the wider societal norms which (in contrast to the academy) equate scruffy dressing with low status. They are like the individuals described by Goffman who are presenting a product to others; in this situation, the audience will be led into judging the performer "on the basis of something that has been finished, polished and packaged."<sup>48</sup> This is made explicit in responses such as these:

"I think there is a tendency for a number of staff to dress up if they think they're going to come into contact with parents. . . . I think there is a factor these days that we are trying to recruit people, so we're trying to impress, whereas – I did admissions here twenty years ago, and in those days we were selecting, not recruiting, and I don't think people necessarily did make the effort on open days then that they might do now to try and create the expected image of them as perceived by the "customer", if I can put it that way."

*(Reader, male, experienced, old university)*

". . . The only time I put on something special is if I'm externalling, going to the Law Society or QAA, that sort of work. I'd dress up a bit, and I'd certainly make sure my shoes were polished, and put a jacket on . . ."

*(Senior Lecturer, female, mid-career, new university)*

However, it is important to understand the subtlety of the "impression management" which is taking place here. These respondents reflect a culture where one does not go too far in the "dressing up" stakes – people dress "a bit more smartly", in keeping with the stereotypical academic norms that appearance is unimportant. The result is that suits may be worn, but they may

<sup>46</sup> Cownie, *Legal Academics: culture and identities* (2004), pp.54-58.

<sup>47</sup> Goffman, *The Presentation of Self in Everyday Life* (1990), p.45.

<sup>48</sup> Goffman, *The Presentation of Self in Everyday Life* (1990), p.52.

not be particularly expensive (Marks and Spencer, not Armani) and they may not be very fashionable. They are not a carbon copy of the sharp suits found in legal practice, but an academic version of the suit (which might also encompass a smart jacket and trousers, as opposed to a matching suit). It is also noticeable that the casual dressers, in contrast to the smart-casual and smart dressers discussed below, appear to rely primarily on their own judgement about the appropriate clothes to wear, rather than being concerned about how others will see them. Nevertheless, social pressures do bring about a change in their everyday dress practices, and their propensity to dress up for outsiders is a clear example of the interaction of individual choice and social forces which is stressed by Entwistle and Goffman.

Wearing casual dress in law schools is strongly gendered, not only because male legal academics are more likely to wear casual clothes to work, but because of the effect of the dress choices being made. Men who dress in casual clothes are, *in the context of the academy*, reinforcing their identification with the idea of rationality, though the same is not true for women. As Kaiser et al comment:

“The idea that the world of clothing and fashion is distinct from the life of the mind has a long and deeply gendered history in modern western culture. . . the dominant “disconnect” between the mind and the body has placed women in the position of “choosing” between thinking and appearing. This false, oppositional choice has persevered with tenacity, in part because it reifies dominant gendered power relations. Viewed from this lens, academic women embody and represent a contradiction in terms. . .”<sup>49</sup>

Outside the academy (in legal practice, for example) dressing casually might be seen as less authoritative, a sign of low status. However, within the academy, it would appear that the prevailing norms are different, and that casual dress reflects the (male) wearer’s disdain for the frivolous (fashion) and for physical appearance (unimportant, as compared with things of the mind). This concern with “higher things” appears to have close connections to the concept of rationality, which is a key aspect of the academy. But rationality itself is not necessarily a neutral concept. Indeed Ross-Smith and Kornberger argue powerfully that it is gendered in its core assumptions, and that Western rationality is masculine rationality.

“Abstract thought, objective judgement or general principles are seen as masculine characteristics, whereas subjectivity, emotions and orientation towards the concrete are understood as female. . . This separation is not equal, but organized in a hierarchical relation of subordination”<sup>50</sup>

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<sup>49</sup> Kaiser *et al* ‘Minding Appearances in Female Academic Culture’ in Guy *et al* (eds.) *Through the Wardrobe: women’s relationship with their clothes* (2001), at p.117.

<sup>50</sup> Ross-Smith & Kornberger, ‘Gendered Rationality? A Genealogical Exploration of the Philosophical and Sociological Conceptions of Rationality, Masculinity and Organization’ (2004) 11.3 *Gender, Work & Organization* 280-305 at p.282.

In terms of everyday dress, this would suggest that male legal academics who dress casually are merely strengthening their identification with some of the key (masculine) values of academia, and reinforcing their claim to “belong”.<sup>51</sup> On the other hand, women who dress casually do not obtain the same benefit, because, by dressing casually, their dress usually works against strongly-held societal norms which dictate that women should be feminine. As Eileen Green notes in her study of the dress practices of female professors, women academics are faced with the need to present themselves as “. . . professional, authoritative, “substantial” selves who are at the top of their subject field, while also signalling what are perceived to be acceptable levels of femininity”.<sup>52</sup> If women make dress choices which challenge the accepted societal norms (by dressing very casually to go to work, for instance) this can easily serve to undermine their credibility, rather than facilitate acceptance and reinforce their position, as it does for men. In their study of professional women, Johnson et al tell the story of a female senior manager in an accounting firm who was denied partnership.

“In evaluations fatal to her promotion, partners described her as “macho, harsh and aggressive”, speculating that she might have overcompensated for being a woman. In fact, one male supporter advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewellery.”<sup>53</sup>

Although this sort of reaction would be unlikely to be expressly stated in the context of a university law school, it remains true that overtly challenging societal “dress codes” can diminish a woman’s authority, even in academia. Thus, while the casual dress codes found in the legal academy may appear to signal that both men and women have considerable freedom in their choice of clothes, it is arguable not only that women are much more constrained in their dress choices, but that the casual dress worn by male academics reinforces their dominant place in the law school.

### The Smart-Casual Dressers

Half of the smart-casual dressers dressed differently at weekends to the way in which they dressed to come to work. For these people, clothes played a clear role in the construction of their professional identity and their “performance” as “legal academic”.

“. . . I like the idea of looking a bit smarter than perhaps I do when I’m at home – I mean, I wouldn’t go out to the pub dressed like this, basically...”

*(Lecturer, early-career, female, new university)*

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<sup>51</sup> See: Wells, ‘Working Out Women in Law Schools’ (2001) 21.1 *Legal Studies* 116-136 at p.119.

<sup>52</sup> Green, ‘Suiting Ourselves: women professors using clothes to signal authority, belonging and personal style’ in Guy, Green & Banim, *Through the Wardrobe: women’s relationships with their clothes* (2001) at p.99.

<sup>53</sup> Johnson, Crutsinger, Workman, ‘Can Professional Women Appear Too Masculine? The Case of the Necktie’ (1994) 12(2) *Clothing & Textiles Research Journal* 27-31, at p.27.

“Oh yes, [I dress differently at weekends and in the vacations], it’s part of the joy of being an academic. I can slob, can’t I? Which, when I was in practice – perhaps for one’s two week summer holiday, you know, but you never had long enough to feel really what it was like.... “

*(Lecturer, early-career, male, new university)*

“. . . I do think it’s important when you’re interfacing with the students to look professional. We are professionals, we want to be treated as professionals, and I think there’s therefore a case for acting and looking like that – to a degree. That doesn’t mean I am coming in wearing my court suit every day. But, you know, there’s a difference between coming in and wearing my jeans and trainers, as I might do if I’m just me, and I’m just researching all day, or if I’m teaching and standing up in front of a group of sixty students. Why should they pay any attention to me if I just look like I’ve come in from the pub?”

*(Lecturer, female, early-career, old university)*

These respondents are consciously constructing their identities as “law lecturer”, thinking about their interaction with students and the way in which they wish to present themselves. It is noticeable that the smart-casual dressers, in contrast to the casual dressers, are more concerned with the way in which they are seen by others. It would appear that they view casual dressing for work as unacceptable, appearing to assume that if they dressed casually, they would be viewed negatively (particularly students). There may be some evidence for their assumptions – in a recent poll, students complained that their lecturers are “Stuck-up, disorganised and unclean, with terrible dress sense and illegible handwriting.”<sup>54</sup>

Although it was not only women who made conscious dress choices as part of their performance as legal academic, the relationship of women to everyday dress choice appears to be significantly more complex than that of men. Green, in her study of the dress choices of female professors, argues that the clothes choices made by women in academia are part of a complex social process:

“Outfits are put together with an eye for the necessity of deference to the formal dress code of professional contexts but are also motivated by a strong desire to signal originality and difference via womanly bodies which challenge the male “suits” and avoid senior women being taken for secretaries or junior administrators”<sup>55</sup>

This idea of the complexity of the choices made by women was emphasised by the respondents in my study, when I asked them “Do you think that choosing what to wear to come to work is different for men and women?” The majority of respondents agreed that dressing for work is different for men and women. There were no significant differences as between male and

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<sup>54</sup> THES 27.1.06, ‘My Prof is a bit stinky, snooty and very unhip’.

<sup>55</sup> Green, ‘Suiting Ourselves: women professors using clothes to signal authority, belonging and personal style’ in Guy *et al* (eds.), *Through the Wardrobe: women’s relationships with their clothes* (2001), at p.104.

female respondents, those working in old or new universities or those with varying amounts of experience. What the majority of respondents emphasised was that, in their view, the choices around dress for men are much more straightforward than they are for women.

“...I suspect it is more difficult for women. What does a man have to do? A man has to simply put a jacket on and button down their shirt and perhaps put a tie on, and you’ve got the difference between casual and formal. It must be a very difficult choice for a woman...”

*(Principal lecturer, male, mid-career, new university)*

“I think women have more problems in choosing what to wear – they haven’t got what I would call the “cop-out” of wearing a suit like a bloke has. I mean, if a bloke wears a suit – most suits are of a similar kind and type, you know – so you wear a suit and as long as your tie isn’t too flashy, basically, that’s it, that’s all you have to think about . . . but women don’t have the equivalent of a work suit – I mean, I know there are suits that women wear, but there are many different types . . . I think it must be a nightmare for women, dressing for work . . . I mean, just from what I observe from my partner (who’s female) and the difficulties she has to “get it right” – I think it must be really difficult. . .”

*(Senior Lecturer, male, mid-career, old university)*

“... The older men don’t give much thought to what they wear, but I don’t think they need to give such thought because if you’re wearing a pair of trousers and a shirt as a man in your 40s or 50s you can get away with almost anything in that outfit – whereas for a woman, younger or older, to be wearing just a casual pair of trousers and a shirt – I think you look more casual for some reason. . .”

*(Lecturer, female, early-career, old university)*

“I think for men it’s much easier to look formal – they just stick a tie on, and everyone knows: “Ah, yes, we’re in serious dress mode.” I think for women it’s trickier, isn’t it? . . .”

*(Senior Lecturer, male, mid-career, old university)*

It appears that the complexity to which these respondents refer is brought about by the particular difficulties, for women, of managing a “smart-casual” style. Rucker et al note that once workplace dress codes shift in the direction of casual dress, it makes the construction of a powerful image much more complex than if it were possible merely to rely on the suit.<sup>56</sup> This is a particular problem for women, who do not physically represent the stereotypical (male) academic, and are also denied the possibility of using the business suit in order to approximate to the male authority figure. Women have to constantly maintain the balance which Eileen Green pointed to in her study of the dress practices of female professors: to present

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<sup>56</sup> Rucker, Anderson & Kangas, ‘Clothing, Power and the Workplace’ in Johnson & Lennon (eds.) *Appearance and Power* (1999), p.60.

themselves simultaneously as “professional” *and* “feminine” in a way which is not true for men – since “being professional” is, as it were, “built in” to the modes of dress adopted by men in the academy.<sup>57</sup> Once we understand everyday dress in law schools to be mediated through the culture of the (masculinised) academy, then any attempt to express the “othered” female identity can be seen to be loaded with meaning about how the wearer sees the relationship between herself and the academy, and it is this complexity which is reflected in the respondents’ comments.

### The Smart Dressers

All except one of the smart dressers dressed differently at weekends to the way they dressed to come to work. Dress played a significant role in the creation of their professional identity. For all the smart dressers, as for the smart-casual dressers, the image of “legal academic” was associated with dressing more smartly. This was as true when they were interacting with students as when they were considering other aspects of their professional life.

“I wouldn’t come to work in jeans, unless it was the weekend – I have a friend who says “You never know who’ll ask you out to lunch”, and I think that’s a good reply, but, for me, it isn’t quite that reason. Maybe it goes right back to when I first started teaching, in a school. I went to uni when I was incredibly young, probably some of the people I was teaching looked older than me, and I always made a point, then, of looking like I was the teacher, and then you just get into the habit. It isn’t that reason any more. I just guess I like to look smart.”

*(Reader, female, mid-career, old university)*

“Oh, yes, I dress differently as soon as I go home. The first thing I do is throw it all off and put something comfortable on. And during vacation, too – though if I have a meeting, I’ll put on a suit.”

*(Professor, male, experienced, old university)*

“. . . I also think it’s an advantage to have a work wardrobe and a free-time wardrobe, just psychologically. You can take those clothes off when you come in in the evening, and at the weekend, well, you can enjoy dressing up – that can be part of your weekend. And just to reserve some clothes for work – I think you feel more workmanlike as well – you know how some London firms have tried to introduce dressing down days and found it was less productive, and they’re emailing each other all the time and they can’t take the job seriously – well, that struck me as perfectly understandable . . . I like to get up in the morning, and dress in clothes that make me feel I’m going to work.”

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<sup>57</sup> Green, ‘Suiting Ourselves: women professors using clothes to signal authority, belonging and personal style’ in Guy, Green & Banim, *Through the Wardrobe: women’s relationships with their clothes* (2001), at p.99.

(Lecturer, female, early-career, old university)

Looking at the responses of the “smart dressers”, I want to explore these data further, by examining some of the ways in which everyday dress choices constitute one of the social practices which contribute to the continuing marginalisation of women in the legal academy. As Collier notes, the “masculine culture” of the law school is heterogeneous, encompassing a plurality of masculinities. What these masculinities share is a social positioning which, by virtue of being a sexed man, is constructed as having at least the potential to make claims to the status of “authoritative knower”.<sup>58</sup> The benefits for men of being identified with the dominant masculinity derive from the social power it confers, the various attributions of mastery it elicits from others.<sup>59</sup> Everyday dress is arguably one of those social practices which systematically privileges men, and in his aptly-titled article, ““Nutty Professors” “Men in Suits” and “New Entrepreneurs”: corporeality subjectivity and change in the law school and legal practice.” Collier identifies the business suit as exemplifying “a broadly hegemonic masculine style.”<sup>60</sup> His reading of the suit is that it serves two critical functions: it “desexualises” the male body, in terms of erasing the sexed specificity of the male body, and it thereby constitutes men as neutral conduits of legal knowledge.<sup>61</sup>

I would agree with Collier that the constitution of masculine bodies and subjectivities can be seen as important factors in the production and maintenance of the normative constructs of social, economic and cultural capital which tend to marginalize and discriminate against women in the law school. However, I wish to offer a different reading of the role of the male suit in this culture. Another reading of the effect of the suit in the legal academy might be that the ability of men to be dominant in the masculinised world of law is not dependent upon a *denial* of men’s sexed corporeality, but rather that it involves *reinforcing* their heterosexual masculinity, and that the suit plays an important role in achieving this. Even Hollander, whose work Collier himself refers to, notes that suits “. . . express a confident adult masculinity”, while McCracken sees the suit as having an intensely masculine sexual charge.<sup>62</sup>

I would argue that the business suit worn by men is highly sexualised. Suits, with their broad shoulders and slim hips emphasise masculinity. They do not look overtly “sexy”, which would detract from authority, but that does not

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<sup>58</sup> Collier, “Nutty Professors” “Men in Suits” and “New Entrepreneurs”; corporeality subjectivity and change in the law school and legal practice. (1998) 7 *Social & Legal Studies* pp.27-53 at p.40.

<sup>59</sup> Waldby, ‘Destruction: boundary erotics and the refigurations of the heterosexual male body’ in Grosz & Probyn (eds.), *Sexy Bodies: the strange carnalities of feminism* (1995), p.271.

<sup>60</sup> Collier, “Nutty Professors” “Men in Suits” and “New Entrepreneurs”; corporeality subjectivity and change in the law school and legal practice. (1998) 7 *Social & Legal Studies* pp.27-53 at p.33.

<sup>61</sup> See also: Thornton, *Dissonance and Distrust: women in the legal profession* (1996), p.216.

<sup>62</sup> Hollander, *Sex and Suits: the evolution of modern dress* (1994), p.112; McCracken, ‘The Trickle-Down Theory Rehabilitated’ in Solomon (ed.), *The Psychology of Fashion* (1985), p.48.

mean they are “de-sexed”. In his detailed analysis of the suit, Flusser points to the different suit silhouettes which arose during the twentieth century from different “schools” of tailoring. The British style modelled itself along the lines of a military uniform, as exemplified by the long-fitting hourglass-shaped hacking jacket. His description serves to emphasise the way in which suits were designed to emphasize the wearer’s masculinity:

“Adhering closely to the body, with subtle emphasis on the chest and a soft shoulder, the silhouette’s marked waist, slightly flared skirt and deep side vents, trimmed sleeves and trouser line gave a man a firm, almost regal bearing, especially if he happened to be aristocratically slender.”<sup>63</sup>

Turning to the Continental or European style, the ability of the suit to emphasize the wearer’s masculinity is even clearer. The traditional European cut was:

“. . . characterised by high squarish shoulders and a short overall length, the jacket demanded small, high armholes to give the chest the length that the jackets denied it. Cut close through the chest and hips...its trousers had a lower rise with figure-hugging legs. The European’s wedge-like torso and lean-fitting trousers turned many a young male into a walking phallic symbol.”<sup>64</sup>

My reading of the suit is much closer to that of Flusser than that of Collier. I see the male business suit as a sexualised garment, which emphasises stereotypically masculine qualities, and in doing so, reinforces the position of the hegemonic male. As Edwards comments:

“. . . the suit is as much a symbol of masculine sexuality in terms of broadening shoulders and chest and connecting larynx to crotch through collar and tie as it is a practical (if historically uncomfortable) uniform of respectability.”<sup>65</sup>

However, it is also important to acknowledge the variety of male suits which it is possible to wear, most notably the “business suit” and the unstructured or casual suit. There are important signals of non-conformity and even subversion which the male wearer can convey through the cut, fabric and style of the casual suit, particularly when worn on formal occasions. Unstructured jackets in light or “earthy” tones, baggy trousers, open-necked shirts and supple linen or cotton fabrics “soften” the male silhouette, whereas the dark colours, broad padded shoulders, heavy fabrics and stiff lapels of the business suit “harden” the silhouette. If, like Entwistle, we understand dress to represent “the visible envelope of the self”,<sup>66</sup> then men who have a preference for dressing in unstructured suits could perhaps be suggesting that the boundary between their (males) selves and (female) others is less rigid and well-defined than the man who dresses in the business suit. Wearing an

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<sup>63</sup> Flusser, *Dressing the Man: mastering the art of permanent fashion* (2002), p.80.

<sup>64</sup> Flusser, *Dressing the Man: mastering the art of permanent fashion* (2002), p.81.

<sup>65</sup> Edwards, *Men in the Mirror: men’s fashion, masculinity and consumer society* (1997), p.3.

<sup>66</sup> Entwistle, ‘The Dressed Body’ in Entwistle & Wilson, *Body Dressing* (2001), at p.57.

unstructured suit could be interpreted as a subtle act of repudiating some of the “baggage” associated with being male in a culture of intellectual machismo, while simultaneously adhering to some of its conventions. These subtleties of dress reflect the different masculinities found in the law school, some diverging greatly from hegemonic masculinity, some closely adhering to it. In doing so, they reinforce the importance of “performance” as a way of theorising dress practices in the law school.

Some of the female “smart dressers” also wore suits, reflecting the strategy common among professional women of wearing a version of the male business suit in order to suggest that they, as much as men, possess the requisite qualities for success in their chosen field.<sup>67</sup> There are, of course, many versions of the female suit – some of them much closer to the masculine model than others – merely wearing a suit cannot guarantee that the (female) wearer overcomes her “otherness”. Green notes that her female professors’ narratives were “threaded through with the contradictions involved in feeling vulnerable and exposed as otherly bodies in a masculine academy, while celebrating their embodied differences as women.”<sup>68</sup>

The importance of the suit in legal academia should not be over-emphasised. Only a minority of my male respondents habitually wore suits (and with few exceptions they were over 35). Most other male legal academics wore suits only on specific occasions. Nevertheless, for a man, the effect of wearing a suit remains the same, whatever the occasion; it effortlessly reinforces masculine claims to authority. Denied this straightforward relationship between dress and authority, women’s dress choices are much more complex.

### Conclusion

“Dress is neither culturally nor politically neutral. It is loaded with significance. Clothes are stuff that “speaks volumes.”<sup>69</sup> In his analysis of the importance of the freedom to dress as we choose, William Keenan makes a powerful argument for the importance of protecting dress freedom, reminding us that “Whenever enforced dress codes are employed as a deliberate instrument of repression, torture and dehumanization, we are in an order of things where civilization is at risk.”<sup>70</sup>

“...we should value that most individual and personalized of freedoms, dress freedom, and seek to nurture it and safeguard it when we can in the wider interest of individual liberty within

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<sup>67</sup> Johnson, Crutsinger & Workman, ‘Can Professional Women Appear Too Masculine? The Case of the Necktie’ (1994), 12(2) *Clothing & Textiles Research Journal* pp.27-31 at p.27.

<sup>68</sup> E. Green, ‘Suiting Ourselves: women professors using clothes to signal authority, belonging and personal style’ in Guy *et al* (eds.) *Through the Wardrobe: women’s relationships with their clothes* (2001), at p.113.

<sup>69</sup> Keenan, ‘Dress Freedom: the personal and the political’ in Keenan (ed.) *Dressed to Impress: looking the part* (2001), at p 181

<sup>70</sup> Keenan, ‘Dress Freedom: the personal and the political’ in Keenan (ed.) *Dressed to Impress: looking the part* (2001), at p.188.

the open society. It requires eternal vigilance, no less so than other rights and freedoms with which dress liberty is intimately connected, such as are associated with freedom of conscience, freedom of expression, and free expression of personal beliefs...a high tolerance of diversity of dress expression is a measure of our practical commitment to a democratic, open society. . .”<sup>71</sup>

In the context of the university, where dress freedom is generally taken for granted, it is easy to overlook the fact that the apparent free choice of individuals to dress as they please is actually a matter of complex negotiation between different individual and social forces. Examining the results of these negotiations (the dress choices made on a day-to-day basis) tells us much about the way that the working lives of legal academics are played out. Although the culture of the law school, as regards dress, is predominantly casual and self-consciously different from legal practice, this apparently laid-back attitude hides considerable complexities. “Outsiders” are very unlikely to be given an accurate picture of the habitual everyday dress of legal academics. The impression they get is highly managed, to ensure that a professional image, which speaks to them of the lawyer in private practice, is conveyed. However, the everyday dress culture which can be found in what Trow refers to as the “private life” of the academy is much more informal than that found in legal practice, and the majority of legal academics do not identify closely with the legal profession.<sup>72</sup>

In the law school, as in other workspaces, dress speaks of gender, and power. Perhaps what is significant about the data from my research is the way in which it reveals that, whether dressed casually or in a business suit, men are able, through their everyday dress, to reinforce the claims of the multiple masculinities found in law schools to the status of “authoritative knower”. They can do this by adopting the casual, “non-fashion” approach, demonstrating that their claim to be authoritative is so strong that they do not need to reinforce it with dress choice – indeed, their adoption of dress which could be thought to undermine their authority has, in some ways, the opposite effect in academia, where it fits in so well with the Cartesian mind-body dualism. Or they can adopt the smart approach, and wear a suit – in which case, they get all the benefits so clearly described by Thornton, in her study of the legal profession:

“In our society, it is a man in a dark suit, plain shirt, unostentatious tie, with a neat haircut and beardless face who is most commonly equated with the image of impersonal authority. . .”<sup>73</sup>

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<sup>71</sup> Keenan, ‘Dress Freedom: the personal and the political’ in Keenan (ed.) *Dressed to Impress: looking the part* (2001), at p.180.

<sup>72</sup> Trow, ‘The Public and Private Lives of Higher Education’ (1975) 104 *Daedalus* pp.113-127.

<sup>73</sup> Thornton, *Dissonance and Distrust: women in the legal profession* (1996), p.223.