



Editor

Mr Tom Lewis, BA (Oxon), Solicitor

Assistant Editor

Ms Jane Jarman, BA (Leicester), ACI Arb, Solicitor

Advisory Board

The Rt Hon the Lord Saville of Newdigate
Judge Bostjan Zupancic, the European Court of Human Rights
Prof Mark Findlay, University of Sydney
Mr Jonathan Griffiths, Queen Mary & Westfield College, London
Prof Martin Hunter, Essex Court Chambers & Nottingham Law School
Mr Roger Leng, University of Warwick
Miss Helen Milgate, Solicitor
Prof Neil Peck, Attorney, Snell & Wilmer, Denver, Col, USA & Nottingham Law School
Prof Barry Rider, University of Cambridge
Mr Paul Smith, Partner, Eversheds
Mr John Snape, Warwick University
Dr Kim Stevenson, University of Plymouth
Dr Christian Twigg-Flesner, University of Hull
Prof Stephen Weatherill, University of Oxford

The Rt Hon Sir Philip Otton
Prof Conor Gearty, London School of Economics
Mr Keith Gaines, Dean of Nottingham Law School
Prof Michael J. Gunn, University of Derby
Prof Geraint Howells, University of Manchester
Prof Peter Jones, Nottingham Trent University
Prof Robert G. Lee, Cardiff Law School
Prof Mark Mildred, Nottingham Law School
Mr Christopher Muttukumaru, Director of Legal Services, Department of Transport
Prof John Peysner, University of Lincoln
Prof Mary Seneviratne, Nottingham Law School
Dr Marc S. Stauch, Leibniz University, Hannover
Prof Adrian Walters, Nottingham Law School
Mr Gary Watt, Warwick University

Editorial Board

Mr Graham Ferris, LLB (Nott), Solicitor
Prof Ralph Henham LLB (Leicester), MA (Keele), MPhil (Nott), Ph D (Keele), Solicitor
Ms Andrea Nicholson, LLB (Buckinghamshire), LLM (Durham)
Miss Kay Wheat, BA (Reading), Solicitor

Administrative Assistant

Ms Carole Vaughan

Editorial Assistant

Robert Crosby

The *Nottingham Law Journal* is a refereed journal, normally published in Spring and Autumn each year. Contributions of articles, casenotes and book reviews to the *Journal* are welcomed. Intending contributors are invited to contact the Editor for a copy of the stylesheet, which gives details of the format which submissions must follow. Submissions and enquiries should be addressed to:

Mr Tom Lewis or Ms Jane Jarman, Nottingham Trent University, Burton Street Nottingham, NG1 4BU. Telephone 0115 9418418. They can also be contacted on the following e-mail addresses: tom.lewis@ntu.ac.uk and jane.jarman@ntu.ac.uk. Style notes and further details about the Journal are available on request.

Intending subscribers should please contact Ms Carole Vaughan at the above address. Intending subscribers in North America are advised to contact Wm W Gaunt & Sons, Inc, Gaunt Building, 3011 Gulf Drive, Holmes Beach, Florida 3417 2199.

The citation for this issue is (2009) 18(1) Nott L J.

ISSN No. 0965-0660

Except as otherwise stated, © 2009 Nottingham Law School and contributors. All rights reserved. No part of this Journal may be reproduced or transmitted by any means or in any form or stored in a retrieval system of whatever kind without the prior written permission of the Editor. This does not include permitted fair dealing under the Copyright, Designs and Patents Act 1988 or within the terms of a licence issued by the Copyright Licensing Agency for reprographic reproduction and/or photocopying. The authors of material in this issue have asserted their rights to be identified as such in accordance with the said Act.

CONTENTS

v	EDITORIAL	<i>Tom Lewis</i>
	ARTICLES	
1	“She got past knowing herself and didn’t know how many there were”: Uncovering the Gendered Brutality of Gang Rapes in Victorian England	<i>Kim Stevenson</i>
18	Irrationality, The Human Rights Act and the Limits of Merits—Review	<i>Ian Turner</i>
	CASE AND COMMENT	
37	Defaulting Structured Investment Vehicles: Are Some Creditors More Equal Than Others? <i>In the matter of Sigma Finance Corporation (in Administrative Receivership)</i>	<i>Paula Moffatt</i>
	BOOK REVIEWS	
41	Alison Clarke and Paul Kohler, <i>Property Law: Commentary and Materials</i> , Cambridge University Press, 2005	<i>Graham Ferris</i>
46	James Chalmers, <i>Legal Responses to HIV and AIDS</i> , Oxford, Hart Publishing, 2008	<i>Peter McTigue</i>
	PRACTICAL APPLIED LEGAL THEORY	
48	Introduction	<i>Graham Ferris</i>
49	The Relevance of Faith Integration in Legal Education	<i>Scott A Taylor</i>
	NOTTINGHAM MATTERS	
55	A Corporate Approach to Legal Practice	<i>Keith Gaines</i>
	TABLES	
vii	Table of Cases	
ix	Table of Statutes	
x	Table of EU Legislation	
x	European Convention on Human Rights	

EDITORIAL

This issue of the *Nottingham Law Journal* typifies its tradition of diversity and eclecticism. Kim Stevenson, one of the co-founders of the SOLON interdisciplinary project on “crime and bad behaviour” gives us a disturbing, and at times shocking, account of the way in which the legal system in Victorian England dealt with the crime of gang rape. Given George Santayana’s famous warning that “those who cannot remember the past are condemned to repeat it”, and given some of the contemporary resonances evident in Kim’s article, it is to be hoped that her piece will receive a wider readership than solely those interested in legal history.

In the *Practical Applied Legal Theory* section of the *Journal* we have, from Scott Taylor, an extremely interesting and thought provoking meditation on the role of religious faith in legal education. It is certainly the hope of Graham Ferris, the founder of PALT, that Scott’s reflections will inspire (or provoke) debate and he would welcome the submission of responses for possible publication in future issues.

In a more classical vein, though no less interestingly, Ian Turner provides an analysis of the doctrine of irrationality in the context of human rights and judicial review, and Paula Moffatt comments on the implications of the Court of Appeal’s recent judgment in the *Sigma* case. We also have book reviews from Graham Ferris and Peter McTigue.

In completing the mix the Dean of the Law School, Keith Gaines, considers the huge impact to be wrought on the legal profession by the Legal Services Act 2007 (major parts of which came into force in March 2009) and the difficulties that these changes pose for legal educators. Nottingham Law School spans the gamut of legal education and as such, Keith argues, is very well placed to meet these new challenges and capitalise on these new opportunities.

Finally, I am sad to report that Jane Ching has recently left the editorial board after many years service as Assistant Editor. Jane’s contribution to the *Journal* over the years has been immense, a fact to which, I know, my predecessor Editors will attest. I should therefore like to offer my gratitude to Jane, and also to welcome onto the board Jane Jarman, who takes over as Assistant Editor.

TOM LEWIS

ARTICLES

“SHE GOT PAST KNOWING HERSELF AND DIDN’T KNOW HOW MANY THERE WERE”: UNCOVERING THE GENDERED BRUTALITY OF GANG RAPES IN VICTORIAN ENGLAND

KIM STEVENSON*

INTRODUCTION

The sexual violation of rape is unquestionably a manifestation of intense violence but even more extreme is the brutalization and ultimate humiliation of gang or group rape. Measures to create a more intrinsically aware and receptive criminal justice system over the last two decades have resulted in increased reporting rates from victims of single perpetrator rapes, both male and female.¹ But group rape is still a complex and concealed crime that presents difficult and sensitive challenges for law enforcement. Apart from Sue Lees’ laudable work in the 1990s which confirmed that stranger gang rape in England and Wales is not as uncommon as generally believed,² it is surprising that (except in the context of international warfare) there is virtually no academic commentary on the subject for the modern period.³ This is also largely true from an historical perspective. The phenomenon appears to have been either overlooked by historians or treated as an adjunct to analyses of individual rapes. From the late eighteenth to the mid-nineteenth century the work of Anna Clark, Carolyn Conley, Shani D’Cruze and Martin Wiener has raised important issues about the nature and incidence of rape generally and how it was dealt with by the criminal justice system. All make some reference to multiple rapes but mainly within the context of wider perspectives on rape and the inclusion of any legal perspective is limited.

The aim of this article is to start to open up an historico-legal discourse on the phenomenon of gang rape by suggesting that an examination of the treatment and representation of gang rape victims in Victorian England can help inform contemporary understandings of group rape. This is because it was in the mid-nineteenth century that, in an atmosphere of consciously advancing “civilised” standards, the first

*Senior Lecturer in Law, University of Plymouth.

¹ See J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008), ch 1.

² S Lees, *Carnal Knowledge: Rape on Trial* (Penguin, 1997), ch 2.

³ I have come across very few references in the leading UK texts on rape. S Tomaselli and R Porter, *Rape* (Basil Blackwell, 1986), make only three brief references at 45, 86, 99. In S Adler, *Rape on Trial* (Routledge, 1987), and S Edwards, *Female Sexuality and the Law* (Martin Robertson, 1981), there are no references to group or gang rape as a separate category in the indices. J Temkin, *Rape and the Legal Process* 2nd edn (Oxford University Press, 2002), makes only passing reference to sentencing and the Australian gradation scheme at 33, 53 157–8 and none in *Sexual Assault and the Justice Gap*, *op cit*.

modern attempts to cope with and respond to gang rape in a domestic perspective can be identified. Popular perceptions of the Victorian criminal justice process might tend to presume that the legal environment was harsh on female victims given the emphasis then on female modesty and chastity. But was this the case? What were the experiences of our Victorian sisters and to what extent are modern attitudes still affected by the legacies of that period? Did physically brutalised women, who had been sexually violated by men, then find themselves facing further (masculine imposed) obstacles when prosecuting their assailants? How sympathetic was the overwhelmingly male courtroom, possessed (to our modern eyes at least) of arguably less understanding and awareness of the psychological and physical impact of sexual crimes?

The discussion seeks to challenge such perceptions and demonstrate that unlike the apparent muted discourse on gang rape today, the Victorians were energised and outraged about such attacks. Utilising nineteenth century newspaper reports, the paper explores how cases of gang rape were reported in the press and how victims and offenders were dealt with and perceived in the courtroom. It demonstrates that victims did in fact secure convictions at what seems to be a higher rate than is occurring in the present criminal justice system, and that the courts often dealt severely with those found guilty. This raises some interesting issues about the potential factors that could make a conviction more likely, including the underlying societal and legal norms reflected in public attitudes towards brutalizing and gendered violence.

SOME CAVEATS ON METHODOLOGY AND MODERN PARALLELS

Labels and Definitions

There is no specific crime of gang rape or legal definition. Section 4 of the Sexual Offences Act 2003 creates the gender neutral crime of “causing sexual activity,” primarily targeted at enabling those who aid, abet or encourage others to commit rape to be charged as principals. This was largely a response to the 2001 case of 18 year-old Claire Marsh who orchestrated the 14 strong attacks on 37 year-old Delphi Newman raped near Regent’s Canal, London.⁴ Marsh, being female, could not be convicted as a principal, only an accomplice, because rape has always been, and remains, a gender specific crime.⁵ Gang rape is in effect only “legally” distinguished from single perpetrator rapes by virtue of the sentencing threshold issued by the Sentencing Guidelines Council: where two or more offenders are involved the starting point is eight years as compared to five years for single rapes.⁶ This reflects Brownmiller’s original classification of a gang rape as two or more men assaulting one woman and is the definition adopted here.⁷

However, the question of whether the use of the term “gang rape” is apposite needs to be considered. In the modern criminal justice arena it appears that this label is no longer regarded as appropriate because of its “emotive” association in popular culture, with “gang” implying groups of lower class, particularly non-white, male youth. In May 2003 the Metropolitan Police Authority Committees Section report determined that the preferred official term should be “group rape;” defined (also following Brownmiller) as a rape or serious sexual assault where two or more persons are present at the time of the

⁴ Justice Pontius described her role as “vicious and utterly merciless,” *The Times*, 9 May 2001.

⁵ *DPP v K and C* [1997] Crim LR 121; s1(1) Sexual Offences Act 2003.

⁶ As established in *R v Billam* (1986) 82 Cr App R 347; and see *AG’s Reference (No. 26 of 2003) sub nom R v M* [2003] EWCA Crim 2736.

⁷ S Brownmiller, *Against Our Will: Men, Women and Rape* (Simon & Schuster, 1975), at 187.

offence, or have prior knowledge of the attack.⁸ Racial sensitivities aside, such political correctness is somewhat disingenuous as this type of declassification instantly diminishes the extreme severity of the nature of the violence and, consequently, the crime itself. Typically dictionary definitions express the meaning of a "gang" as a band of persons acting or going about together especially *for a criminal purpose*; in contrast "groups" are a number of persons belonging or classed together. In the author's view gang rape *is* the correct term because of the overriding dimension of criminal and extreme intent which distinguishes it from more ordinary "group" activities.

The aim and purpose of gang rape is undeniably sexual degradation and masculine domination resulting in the objectification of the victim, as non-consensual penetration the use of violence is implicit and brutal violence a further aggravating factor. Semantic labelling, determined with understandable intent, can be highly significant in terms of how criminal justice agencies present such crimes and ultimately how they are represented in the press and perceived by the public. Interestingly, as electronic searches of newspaper indexes using the keyword "group rape" demonstrate, the national press has not yet embraced this term in its by-lines or reports.

From a historical perspective such linguistic changes are relevant as they can distort a continuity that does in fact exist. This is significant because the whole issue of gang rape today appears to be largely hidden from public view. Either such crimes are so rare that they never appear on the media radar (unlikely) or there is an insidious, albeit unconscious, downplaying of the severity and existence of such rapes in the public discourse. The substitution of group rape for gang rape is an example of this modern trend and is of concern, particularly when it becomes embedded as a means of concealing the over-representation of teenage gangs participating in such activity.

Incidence

It is widely acknowledged that it is virtually impossible to ascertain the true incidence of reported or "actual" rape, especially when the Home Office do not classify multiple rapes separately from single perpetrator rapes. Encouragingly, Home Office figures for 2007/2008 show that the number of all rapes perpetrated against a female fell by 8% to 11,648 offences but unfortunately the percentage of multiple rapes cannot be extrapolated from these figures.⁹ In respect of single perpetrator rapes, evidence from victimisation surveys, including the self-reported British Crime Survey, suggests that despite recent initiatives to support victims there are still a significant number who remain reluctant to come forward and report their violations.¹⁰ This is further exacerbated by the well publicised (and indefensible) conviction rate for rape in England and Wales, currently less than 6%.¹¹

There is evidence to suggest that group rapes are significantly under-reported. Lees' work with rape victims in the late 1990s concluded that women rarely report group rape; she found that only four victims out of 15 gang/pair rapes tracked reported their

⁸ Metropolitan Police Authority Committees, *Planning, Performance and Review Reports: Group Rape* (8 May 2003), section 1 at <http://www.mpa.gov.uk/committees/x-ppr/2003/030508/10.htm>. See also S Adams, "Straight Talk: Could 'group rape' lessen that perception of the crime?" *The Guardian*, 21 September 2005.

⁹ See C Kershaw, S Nicholas and A Walker (eds), *Crime in England and Wales 2007/08: Findings from the British Crime Survey and Police Recorded Crime* (Home Office, July 2008).

¹⁰ See S Walby and J Allen, *British Crime Survey on Interpersonal Violence 2001* (Home Office Research Study 276, March 2004), who found that approximately 15% of rapes are reported to the police, at x.

¹¹ The conviction rate dropped from 32% in 1977 to 5.6% in 2002 see, L Kelly, J Lovatt and L Regan, *A Gap or a Chasm: Attrition in Reported Rape Cases* (Home Office Research Study 293, February 2005), at ix; of 11,766 allegations of rape made just 655 men accused were convicted. In 2004 the rate dropped to its lowest ever of 5.3% see Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims: Justice for Victims of Rape. A Consultation Paper* (Home Office, 2006). See also Temkin and Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude*, *op cit*.

attacks to the police, of these only two cases went to full trial and subsequently none of the accused was convicted.¹² As part of the annual British Crime Survey undertaken in 2001, a self-completion questionnaire revealed that in 6% of serious sexual assaults committed upon women more than one perpetrator was involved.¹³ The extent of the crime was confirmed when the Metropolitan Police Sexual Offences Unit conducted a survey in 2002 which found that within the Greater London area allegations of group rape ranged from 10 to 90 reports per month, with reporting normally peaking during the months of May and July.¹⁴ In the light of such estimates, Sapphire, the specialist rape investigation team, is re-opening 2,000 recent cases of suspected gang rape underlining a more realistic understanding of the issue.¹⁵

Typically there is even less statistical evidence available for the Victorian era, certainly in terms of any national picture, as sexual assaults were recorded, if at all, under more generic categories such as “offences against the person” or “crimes of morals.” Case transcripts of crimes of rape were omitted from the public court record in the early nineteenth century because of concerns about the immorality of such documents, so few primary sources survive outside any media reportage. However, a broad survey of newspaper reports of rape and sexual assault for the period 1850–1885 reveal that a comparatively significant number of gang rapes, some quite brutal and involving multiple assailants, were prosecuted successfully in the higher courts.¹⁶ These tended to be spontaneous and opportunistic involving groups of men who targeted women or young girls walking alone, primarily in rural localities or relatively lonely urban public spaces such as parks, further underlining the opportunism involved.¹⁷

Media Representation

Despite such relatively sizeable estimates the whole subject of gang rape remains largely muted within the public discourse with little evidence of any associated public outrage or commensurate press reportage. Such under-representation might seem surprising given that there is considerable public and official concern about the dire conviction rate for single rapes. Annually a handful of (relatively brief) reports appear in the national and provincial press concerning the most brutal, distressing or “newsworthy”¹⁸ cases but these do not reflect the apparent extent of the crime. A search of London’s *Evening Standard* to correlate and ascertain more details about the rapes identified in the Metropolitan Police survey revealed just three news reports of cases for the whole of 2002. A search of the national press between January 2000 and January 2003 exposed only 30 cases of gang rape over 50% of which involved victims under the age of 16 years and perpetrators in their teens.¹⁹ One of the continuing issues with this

¹² S Lees, *Carnal Knowledge: Rape on Trial*, *op cit* ch 2.

¹³ Walby and Allen, *British Crime Survey on Interpersonal Violence 2001: Assaults on women since the age of 16* *op cit* at 35 and confirmed in House of Commons Written Questions Gang Rapes 15 November 2004 Column 1107W. Bearing in mind that compared to the official report of 12–14,000 rapes recorded annually the BCS suggests that only one in five of all types of rape are reported to the police.

¹⁴ Metropolitan Police Authority Committees Section, *Planning, Performance and Review Reports: Group Rape* *op cit*. The survey provides a statistical breakdown of victims and perpetrators according to ethnicity but such issues are beyond the remit of this article see <http://www.mpa.gov.uk/committees/ppr/2003/030508/10.htm>.

¹⁵ See R George, “They don’t see it as rape. They just see it as pleasure,” *The Guardian*, 5 June 2004.

¹⁶ See K Stevenson, “Unearthing the Realities of Rape: Utilising Victorian Newspaper Reportage to Fill in the Contextual Gaps” (2007) 28 *Liverpool Law Review* 405–423.

¹⁷ According to a 1989 Home Office study some 60% of all group rapes comprise this category, see C Lloyd and R Walmsley, *Changes in Rape Offences and Sentencing* Home Office Research Study 105, (HMSO, 1989).

¹⁸ Such as the unproven allegations made against eight “celebrity” premier league football players at the Grosvenor Hotel, Park Lane, London, see *The Times*, 30 September 2003.

¹⁹ K Stevenson, “Ganging Up: Should Stranger Gang Rapes Constitute a Hate Crime?” Paper presented at SOLON Hate Crimes Conference, Galleries of Justice, Nottingham, 22–23 February 2003.

form of sexual offence is, therefore, its lack of visibility, not only in the public record but consequently the public discourse. This may be self-perpetuating in the sense that if victims are reluctant to report such crimes then it is perhaps understandable that they attract minimal media attention. Equally victims may welcome the lack of media interest, but such disinterest is even more perturbing when recent initiatives to create a supposedly more accessible and sensitive legal environment to encourage rape reportage are taken into account.

This is in sharp contrast to the Victorian reportage of group rapes. If modern press reports of gang rape are elusive, it might be considered that given the sensitivities of the Victorian era the issue would be even more concealed and obfuscated. But there is material in nineteenth century newspapers, national and provincial, to suggest that the Victorians did not shy away from reporting such incidents or the trials that followed. It is important not to be too positive. The reports also reveal that often gang rapes were disguised as lesser sexual assaults because of the legal difficulties in proving that all participants had committed the full offence of rape by penetration, and the reluctance of respectable women to permit a public acknowledgement of their sexual violation.

It is recognized that there are limitations with this approach, relying as it does so heavily on media reportage, as the precise nature and detail of these attacks is difficult for modern researchers to recover. Typically, all types of sexual assault, whether rape or indecent assault, tended to be euphemistically described in the press as "outrages" or "moral outrages."²⁰ The style and language used was frequently vague and ambiguous, using a type of codification of meanings which contemporaries clearly read in a way that is inaccessible to the modern commentator, and making it impossible to interpret events with absolute accuracy. But what can be fairly implied from the media text is that the actuality of the assault was far more brutal than that portrayed. The intention is thus not to provide a systematic and statistically accurate representative sample but to use these newspaper reports qualitatively to highlight and reflect legal practices and victim experiences.

Cultural Shifts and 'Justifications'

Research by historians so far has largely revealed instances of gang rape as incidental to more intensive local studies on rape or crime more generally. For example, Clark estimates, from her examination of early nineteenth century newspaper reports of sexual assaults committed upon factory girls in Leeds and Bradford in Yorkshire, that gang rapes accounted for 13% of such rapes committed between 1830 and 1845; and that of these, 75% of the offenders were aged 20 years or under. She claims that largely these "were not strange deviations but actions rooted in the traditional culture of young men . . . an adolescent rite of passage."²¹ D'Cruze also notes that in Middleton, Lancashire, in the 1860s, "youthful romping" where males engaged in sociable and sexually aggressive tomfoolery in their leisure time, produced a form of group assault directed against young girls that was locally regarded as "just a joke" and so was treated leniently by the courts.²² Wiener too identifies this notion of "sport" in the first half of the nineteenth century and makes some reference to gang rapes but primarily where the victim was a prostitute and the impact this had on her credibility as a witness. He remarks that in the second half of the nineteenth century the danger of

²⁰ See K Stevenson, "Crimes of Moral Outrage," in J Rowbotham and K Stevenson (eds), *Criminal Conversations: Victorian Crimes, Social Panic and Moral Outrage* (Ohio State University Press, 2005), at 232–246.

²¹ A Clark, *Women's Silence, Men's Violence: Sexual Assault in England 1770–1845* (Pandora, 1987), at 96–97.

²² S D'Cruze, *Crimes of Outrage: Sex, Violence and Victorian Working Women* (UCL Press, 1998), at 118.

prostitutes being gang raped had diminished with society's increasing intolerance of violent crime.²³ These snapshots are illustrative of the civilising shift that occurred during the nineteenth century. The relatively dismissive nature of these examples of sexual violation, regarded by local communities as "acceptable and predictable" anti-social misbehaviour gradually gave way to public acknowledgement and outrage that such attacks actually constituted serious criminal conduct requiring commensurate punishment.

Disturbingly such "cultural justifications" and "adolescent rites of passage" remain omnipresent, even today. This was evidenced recently in the tactics utilised by the defence counsel in a trial of three 13 year old boys charged with raping two 16 year old girls in a park in Bromley, Greater London, in May 2007. The female barrister defending suggested to the jury that one of the girls, who weighed over 12 stone at the time of the rape, "may well have been glad of the attention. . . [and was] not quite the swan she might turn into," by the time of the trial the girl had slimmed down considerably. The barrister continued that while "No-one suggests this is a lesson in politeness and gallantry. It is all too unrealistic that sexual encounters between boys and girls who have never met before must be *against the girls' will* [emphasis added]."²⁴ The implication made here reflects the "youthful romping" attitudes of the nineteenth century and is clearly intended to diminish and downgrade the nature of the crime in the eyes of the jury. It also impliedly reinforces the Victorian insistence that genuine rape victims must demonstrate that they had responded to the violation with sufficient force to protect their honour.

The extent of a woman's resistance was established in the case of *R v Hallett* in 1841.²⁵ Hallett and seven others raped Mary Maiden in a lodging house which was also a brothel. There was some doubt about whether their actions were forced as Mary, despite being held against a door, had been heard to say, "It is too bad for so many attacking one poor girl; but if you will go away, and come, one at a time, I will do what I can to satisfy you."²⁶ In the light of this testimony Justice Coleridge gave the jury three options: if Mary was so overpowered by numbers and actual force that resistance was futile and dangerous then rape was proven; if, given the nature of the lodging house and the sort of person Mary was, she initially resisted but then yielded, consent could be found. The third option offered was a neat compromise. If the jury believed she had made every resistance she could but was forced to consent, the prisoners could still be found guilty of a physical assault though not rape, as being held against the door against her will constituted such. The jury accepted this 'third way' demonstrating sympathy with Mary's predicament and recognizing that there are limitations to assumed consent even where there could be a sexual contract as in a brothel; any attempt to unlawfully detain or use physical force on a woman in order to procure sexual intercourse will be legally presumed to be against the will of the victim.

However, given the overt sexualization of many modern teens the somewhat controversial views expressed by the barrister in the 2007 case, implying consent, might perhaps be thought reasonable by some. This prompts the argument of whether there should be a delineation between "non-violent" encounters where "acquiescence" between young teens is present (group rape?) and the use of threats and "force" against

²³ M Wiener, *Men of Blood: Violence, manliness and criminal justice in Victorian England*, (Cambridge University Press, 2006), at 105–108.

²⁴ R Stansfield, "Gang rape girl was 'glad of attention,'" *The Mirror*, 18 May 2007.

²⁵ *R v Hallett* (1841) 9 Car & P 748.

²⁶ *Ibid*, at 748.

the victim's will reflecting Victorian expectations of women fighting back to maintain their honour (gang rape?). Certainly within the context of Victorian gender relations multiple rape would seem to represent the epitome of absolute masculine domination over absolute feminine submission. At one extreme, "youthful romping" and adolescent ritual though not justifying such conduct might explain those assaults where primarily sexual exploration and gratification constituted a youthful rite of passage, especially as such cases were rarely proceeded with. But where extreme and brutal violence was employed such conduct cannot be so easily dismissed as experiential "male-bonding" machismo. In both scenarios the sexual activity is non-consensual and so illicit, but in the former individual sexual release is more likely to be the dominant driver whereas in the latter it is the aggregate physical domination of the gang acting together *in concert* which is the key factor. In the author's view both constitute gang rape as both humiliate and degrade the victim, the level of violence used is a further aggravating factor.

This is borne out by the cases examined and is also evident in Conley's examination of Kent court records for the period 1859–1880. Of 41 men convicted of rape during this period she calculates that 25% of the complainants were victims of gang rape (her term). She suggests that most attacks occurred in public *ie* outdoor spaces, and that generally it was unlikely that the women knew their antagonists making tacit acquiescence less likely.²⁷ The "civilising process" so consciously evident in Victorian society was clearly a significant factor in relation to curbing violence more generally and increasingly in relation to sexual violence. However, the severe brutality of the cases examined below provide evidence that these were not just the "youthful romps" of groups of young men justifying a lenient response but something much more vicious and violent. These were most definitely gang rapes where all were acting together with the same intent and common purpose, and demanded a much more ruthless response from the law if society was to achieve "civilization."

EXTREMES OF VIOLENCE

An interesting and curious starting point in considering the nature and extent of gang rapes committed in the second half of the nineteenth century is the apparently bizarre and coincidental reports of two fairly horrific attacks committed in the Forest of Dean, Gloucestershire, and tried at Gloucester Assizes, one in August 1851 and the other, 25 years later almost to the day, in August 1876. Both cases involved large groups of men who were seemingly undeterred about being caught and convicted.

In August 1851 the *Gloucestershire Chronicle* under the by-line "Forest of Dean – Horrible Outrage" reported that Gloucester Magistrates had heard details of a "most atrocious outrage." Mary M'Carthy, "a poor Irish female tramp," aged 35 years had been grossly assaulted near the Nags Head Public House, Yorkley: "we select from her narration of the affair so much as is fit for publication."²⁸ Richard Kear, aged 24 years, married and a devout Methodist and Master of Oldcroft Level Colliery, his brother George, and seven other male colliers aged between 18 and 26 years²⁹ had enjoyed a club feast at the inn that evening. Mary was walking from Coleford to Lydney searching for her brother who was working on the new railway line; a servant who had worked for good families in London she was forced to move west selling caps and making shirts as she had conceived an illegitimate child. Tired, cold and exhausted she

²⁷ C Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (Oxford University Press 1991), at 85.

²⁸ *Gloucestershire Chronicle*, 9 August 1851.

²⁹ George Charles, Thomas Stephens, James James, Thomas James, Hiram Archer, Henry Shapcott, John Lea.

sat down near a brazier where she was approached by two of the men who invited her into the public house, she refused the invitation.

Later the men left the inn “belligerent but happy,” however, when Mary again refused their offers to join them they threatened her with a shovel and one said he would burn her alive: evidence of clear, and extreme, criminal intent. Kear then raped Mary followed by four of his associates. He offered to let her stay for the night but others threatened to kill her if she did not leave. As she tried to flee at daylight, Kear followed her and committed another “indecent act.” Mary then met a woman, Anne Jenkins, and informed her of what had happened, as a result Jenkins directed Mary to the Westbury Union workhouse. Later, at the trial, Jenkins confirmed to the court that she had witnessed Mary groaning, holding her stomach with both hands and that she appeared to be in great pain, Mary had also shown her the handkerchief that the men had used to silence her with. Mr Humble, surgeon to the Westbury Union, testified that he had examined Mary and that the “nature of her injuries were of such a character as would result from the violence described.”

This is a clear example of what, in terms of modern typologies, would be classified as the stereotypical stranger group rape where the victim does not know her attacker making it harder for the authorities to detect those responsible.³⁰ Even though the men were strangers to Mary it would not have been easy for them to escape detection in a rural community, unlike the anonymous environment of the more populous towns and cities. It is probable that Mary would have been able to remember and identify Kear as the leader though she would have been less likely to recall the more faceless participants of the crowd. In fact five of the nine offenders were arrested immediately and committed for trial at Gloucester Assizes.

At the trial³¹ the prisoners were all defended by Mr Cooke who made much of the fact that Mary had never married but had bore a child, had never settled in one location and therefore asserted that she had led an immoral life. When Cooke also tried to imply that she was a prostitute, something Mary strongly denied, the judge, Baron Martin, said he was bound to protect the witness from further “fishing expeditions.” Cooke implored the jury not to be carried away by any accounts of “horrible outrage” styled in the newspapers, nor from any feelings of anger or disgust, but to return a verdict according to the evidence. The evidence was clearly convincing as the jury took just five minutes to decide that all five were guilty of rape.

Sentences were harsh; the prisoners were transported for their natural lives or, if they had shown any remorse, 15 years imprisonment. The remaining four offenders were eventually caught six months later and they too were convicted of rape and transported for life.³² It is doubtful whether a conviction would have been so easily secured if this had been a case of single rape given the imputations made against Mary’s character and the fact she was walking alone in the forest. As Wiener affirms, judges and juries, at least in the first half of the century, were at best “ambivalent” about the rape of prostitutes.³³ Despite such attempts to undermine her respectability³⁴ it would appear that the jury was not prepared to countenance such behaviour. Such extreme and uncivilised violence from a particularly intransigent gang with an inherent masculine culture, incapable of recognising the shift in the prevailing social standards of

³⁰ See Lees, *Carnal Knowledge* *op cit*.

³¹ For reports of the trial see *Gloucestershire Chronicle*, 9, 16, 23 August 1851, *The Times*, 16 August 1851.

³² *The Times*, 5 April 1852.

³³ Wiener, *op cit* at 106.

³⁴ See K Stevenson, “The Respectability Imperative: A Golden Rule in Cases of Sexual Assault?” in I Inkster (ed), *Golden Age? Britain 1850–1870* (Ashgate Publishing, 2000).

respectable behaviour, was clearly regarded as unacceptable – especially as they were led by the local colliery Master. As Wiener argues, the law increasingly stigmatized and "civilised" long accepted modes of male behaviour,³⁵ if, in fact, gang rape can ever be regarded as an accepted mode.

Mary remained in the workhouse but her plight gained some sympathy in the local community. The Master of the Union Workhouse wrote to the *Gloucestershire Chronicle* saying that he had received £2 gathered by the local clergy "for the benefit of the ill-used woman" and confirmed that Mary, who had suffered real pain, was in fact a "sensible, intelligent and well-conducted" woman.³⁶ But the uncivilised behaviour of the defendants cost them dearly. Richard Kear and three of his co-defendants served eight years on the Medway Hulk in Bermuda³⁷ building a new dockyard. They were allowed to return to England in 1861 as the use of transportation was gradually withdrawn. They were then put to work at Chatham docks serving a total of 12 years in captivity. By the time he was released, Richard's wife had re-married and his son had grown up.

Twenty five years later and the *Gloucestershire Chronicle* reported details of a strikingly similar and almost identical "Outrage in Dean Forest."³⁸ On 8 August 1876 Richard Morgan and nine other colliers aged 17 to 21 years appeared before Mr Justice Grove at Gloucester Assizes, charged with raping, or aiding and abetting the rape of, Jane Goodall, aged 23 years. She, too, had been walking through the woods in the Forest of Dean but was accompanied by William Barrett, aged 27, who had taken her to a public house. Jane decided it was time to leave and left to walk home to Barrett's house where she was staying with his mother. Barrett caught her up, suggesting a shortcut. He walked a short distance but then lay down apparently drunk. Jane continued walking but was accosted by Jesse Cockayne, his brother Henry, two other brothers named Morgan, and their associates.³⁹ Cockayne knocked Jane to the ground and detained her while William Watkins held her right hand, John Morgan took hold of her other arm and two more held her legs. They put a cap on her face and "placed three hands a time on her mouth." She "got past knowing herself and did not know how many were there," crying "Lord save me and take them off me." Barrett, supposedly her protector, was still lying down 20 yards away. He failed to come to Jane's assistance despite her screams, and was therefore indicted as the tenth, and (at 27) the oldest, defendant. Eventually several witnesses rescued Jane who, like Mary M'Carthy, ended up at the Westbury Union Workhouse. It would appear that Jane did in fact know, or was able to identify, some of her attackers including Jesse Cockayne.⁴⁰

Like Mary, the defence counsel, Mr Gough, also tried to impugn Jane's reputation. It was established that she had no parents, had made a previous complaint of indecent assault in Monmouth which she was forced to withdraw as she did not know the identity of her assailant, and was accused of intimacy with Barratt, and of screaming as a means of covering up her alleged "immoral conduct." Jane denied any intimacy with Barratt stating that she slept with his mother and counter-alleged that Barratt had tried to assault her on another occasion in Hay Wood where the rape took place. Jane

³⁵ M Wiener, "The Victorian Criminalization of Men," in P Spierenburg (ed) *Men and Violence* (Ohio State University Press, 1998), at 198.

³⁶ *Gloucestershire Chronicle*, 23 August 1851.

³⁷ Kear earned the nickname Bermuda Dick, see A Kear, *Bermuda Dick*, (Lightmoor Press, 2002), the author is a descendant of Kear and argues that the gang were sentenced too harshly.

³⁸ *Gloucester Chronicle*, 12 August 1876, *The Times*, 10 August 1876.

³⁹ Jesse Cockayne 17 years, Thomas Fisher 17, Richard Haverhill 17, Frederick Dyer 17, Henry Cockayne 18, John Morgan 18, Richard Morgan 19, William Watkins 21, Thomas Goode and William Barrett 27.

⁴⁰ Suggesting that in modern terms this would have constituted an acquaintance gang rape – see Lees *op cit*.

also claimed that Barratt was not drunk but was simply pretending to be so. Witnesses confirmed the nature of the outrages that had occurred, but Gough focussed on Jane's "peculiar antecedents" advising the jury that they ought to be cautious as to her credibility.

Again if this had been a single rape such imputations could have destroyed Jane's respectability making an acquittal likely. The defendants clearly thought as much too as while the jury were out they were relaxed and jocular in court and did not "seem to be much perturbed." The jury thought otherwise and 25 minutes later the two Cockayne brothers, as principals, were found guilty of rape and sentenced to 15 years imprisonment. The rest, including Barrett whose cowardice clearly operated in Jane's favour (and except for one of the youngest who was acquitted), received ten years as accessories to the crime. Justice Grove said that if it had not been for the intervention of the witnesses it was evident that all nine would have committed the full act.⁴¹ Thus the court was more concerned with the unifying actions of the group acting as a single entity rather than necessarily the individual actions of its constituent members.

Even by today's standards where it is acknowledged that we live in an uncompromisingly violent society, such savage use of force seems inexplicable, especially in a period where women were idealized as moral exemplars to be protected. Equally these incidents are too complex to be easily explained by the assumptions surrounding the numerically more common individual rape. For example, that women such as Mary M'Carthy and Jane Goodall, who asserted their independence, or strayed from designated feminine spaces, trespassed onto masculine territory and so made themselves potential targets. Neither transgression warranted such brutal punishment and such rationale does not determine whether the attacks were a display of contempt against women in general, or, as in the case of poor Irish Mary, against an 'acceptable' target representative of a resented social group. Nor do these cases fit Brownmiller's motif that group rape is the process of anonymous mass assault against a female victim who becomes, for the purposes of the group a representative of "anonymous women."⁴² Though the women themselves were largely anonymous to their attackers and were objectified, as far as their attackers were concerned the women were not necessarily anonymous to them. Either the women knew these men, or within the local community and locality were able to recognize and identify them, unlike the position in many modern gang rapes where it is much easier for offenders to retain their anonymity by disappearing into the urban morass.

More significantly these events would seem to indicate that the colliers and miners of the Forest of Dean genuinely believed their violent actions and conduct to be an acceptable part and norm of the local "crowd" culture. Not, as Sue Lees would argue, the actions of pathological bullies,⁴³ but an extreme form of normative "gang" masculinity. In both cases brothers acted together as one (the Kear, Morgan and Cockayne brothers), the elder condoning the actions of the younger. In terms of culpability, Pearsall has suggested that, in the Victorian era, rape was not a coefficient of sadism but largely a product of circumstance singling out poverty as the primary circumstance and causal factor. He argues that rape was an extension of the general sexual ethos of the poorest, of those who did not work or drank their lives away. Further, he claims that the prospect of never working produced a level of immorality

⁴¹ *The Times*, 10 August 1876.

⁴² Brownmiller, *op cit* at 187.

⁴³ Lees, *op cit* at 7-8. Gleeson confirms that in the colonies gang rape was endemic and that in Australia in particular it was "by definition not the act of a deranged individual, but normalised, encouraged and abetted by an entire social group." See K. Gleeson, "White Natives and gang rape at the Time of the Centenary," in S. Poynting and G. Morgan (eds), *Outrageous: Moral Panics in Australia* (ACYS Publishing, 2007) at 175.

that has few echoes in modern society (though modern commentators might well challenge this), an immorality that reflected a complete oblivion to right and wrong and to any kind of social adjustment or logical behavioural pattern.⁴⁴ But while this justification may apply to some of the actions of those engaged in Victorian group rapes, it does not even partly explain the conduct of the defendants in the Forest of Dean cases. All were employed and according to the reports neither they (nor their victims) were so drunk as to be out of control of their actions. Rather these were examples of extreme gang rapes where the local community were not prepared to tolerate the actions of highly independent young men, who unlike their colleagues in the industrialized coalfields, thought themselves neither answerable to their employers, their community or indeed the law.

INTOXICATING CONDUCT

As Pearsall suggests the issue of intoxication, and popular and legal concern about the immorality of those who drank to excess was undoubtedly a factor in some single rape cases. This is evident in examining judicial reactions to the involvement of intoxication in cases of rape generally. In 1856 Mr Justice Willes seriously doubted whether a drunken woman could be raped and was not prepared to acknowledge that her violation should be so-called. He commented that there was "some doubt entertained whether the offence of rape could be committed upon the person of a woman who had rendered herself perfectly insensible through drink" making the women the culpable factor.⁴⁵ Recently the Court of Appeal also adopted a stringent approach in the case of *R v Bree*, determining that it was not rape where the complainant was intoxicated, having voluntarily consumed substantial amounts of alcohol but was still capable of making a decision about consent.⁴⁶ But, surprisingly, as regards group rape, few of the cases examined make any direct reference to the consumption of alcohol or drunken nature of the defendants suggesting that drink was not generally a major contributory factor.

One illustration is a case from 1882 at Brighton Crown Court where the Lord Chief Justice commented on the atrocious circumstances whereby three artillerymen⁴⁷ contrived to perpetrate an horrendous assault against a weak and defenceless woman (the prosecutrix was partially disabled as she only had one foot) who had given them neither encouragement "by levity or impropriety."⁴⁸ The narrative and the defence arguments highlight the role of drink in the case. As she sat outside a public house one Sunday evening waiting for her male escort, Hoadley, the victim was seized and dragged to a piece of open land and "notwithstanding her resistance," and attempts by both Hoadley and another soldier to protect her, each of the defendants "committed the offence." None of the accused said anything in their defence except one of the three who said he was so drunk he could not recollect what had happened. As the guilty verdict and the sentence underlines, neither judge nor jury was willing to overlook such drunken excess. The judge passed a severe sentence, 15 years penal servitude, to serve as a warning against any "idle and silly belief that intoxication could afford any defence or palliation for such conduct." Thus it would appear that it was the

⁴⁴ R Pearsall, *The Worm in the Bud*, (Penguin Books, 1983), at 395.

⁴⁵ *The Times*, 6 December 1856.

⁴⁶ *R v Bree* [2007] EWCA Crim 256.

⁴⁷ Arthur Cleveland, John Moynihan, Cornelius Moynihan.

⁴⁸ Brighton Crown Court, *The Times*, 20 March 1875.

intoxicated state of the defendants that attracted the severity of sentence, as much as the act of rape itself.

This concern about drink and intoxication applied equally to both victims and defendants. In July 1852 in Mirfield, Yorkshire, Charlotte Flook, a respectable married lady, but a little intoxicated from a drinks party, sensibly asked Robert Senior to walk her home. A group of youths expecting a little impropriety gathered and one deliberately tripped up Senior. Six ravished Charlotte in turn while the others held her down. Senior tried to prevent the assault but was physically overwhelmed. Charlotte eventually managed to get home at 4 am and informed her husband of the attack. She was unable to move for two days afterwards, and the surgeon confirmed that “her person was bruised and swollen and needed treatment for 3 weeks.” The reference to ‘person’ here is likely to refer to her genitalia. Henry Healey and two others were sentenced to 15 years transportation. It is, though, probable, given her intoxicated condition, that if she had been unaccompanied the jury might have been less forgiving.⁴⁹ Such cases indicate that drink-fuelled bad or criminal behaviour was not acceptable in either sex, but while an individual woman could expect to be blamed for self-induced intoxication, it is more difficult to find cases where an individual man was held to account for his drunken conduct. The key here seems to be that it was the intoxicated conduct of the drunken *crowd* that was frowned on and castigated and the potential of such a group to quickly become out of control.

A PREDOMINANTLY RURAL PURSUIT?

Like the Forest of Dean rapes the majority of reported rapes appear to occur in rural locations where the activation of extreme masculine behaviour was less constrained, typically in fields or when women were walking home. As might be expected, group rapes were regarded more seriously if class based and the victim a respectable married woman, or single, chaste and properly accompanied. One March evening in 1852 Charles Walker, 17 years, and his two associates overtook Hannah Self, 16 years, as she was on her way home from evening preaching in North Walsham, Norfolk. Walker raped Hannah, aided and abetted by the other two, but they were seen by a police constable who having heard her shrieks “had no doubt of their guilt.”

Reflecting on the inability of the victim to protect her honour in such circumstances and indicating that such unconstrained behaviour must be controlled, Serjeant Adams, at Norwich Assizes, sentenced Walker to 15 years transportation and his accomplices to ten years.⁵⁰ In 1861, Gloucester Magistrates committed seven young men to trial for the rape of Dorcas Davis, “a good-looking young girl”, aged 16 years, who had visited Gloucester Mop for the day where she met a young man from her village. Returning home at 10 pm with another girl, Annie Tombs, the threesome was overtaken by a group of men who demanded tobacco from their male escort. When he claimed he had none, the men turned on the girls. Annie and the young man managed to struggle free, leaving Dorcas alone. The report from *Reynolds Weekly* is uncharacteristically graphic, and so shows the limits, as well as the extent of the assault:

One of them then threw her down on her back, and while another sat on her chest, the whole party, one after another, thrust their hands up her person, lacerating her and causing the blood to flow. They tore her drawers off her person, crushed her bonnet, and

⁴⁹ *The Times*, 20 July 1852. Unfortunately, no ages are cited for any of the participants.

⁵⁰ *The Times*, 22 March 1852.

tore her other clothing, leaving her on the ground bleeding and exhausted . . . While she was on the ground, one of the men held his hand over her mouth to prevent her screams being heard . . .⁵¹

The surgeon, who had "fully detailed the appearance of the poor girl's person, and the undoubted indications of the violence used," confirmed that the injuries were quite recent and indicated considerable violence. Even though one of the more explicit press reports, it is still ambiguous. The defendants were committed to trial for rape but the facts suggest the physical reality of the assault actually constituted the lesser crime of indecent assault. It appears that the graver charge was preferred because the gang was acting *in concert* and so the associated potential for uncontrolled and unrestrained behaviour greater. In an 1875 case reported in the *Daily Telegraph* the gravity of the charge is clearly expressed in the by-line a "Serious Charge." Arthur Dicks, a labourer, was charged at Highgate Police Court with feloniously assaulting (raping) Ellen O'Donnell a servant, out of place (temporarily unemployed). The complainant stated that one Sunday night as she was walking across some fields near Fleet Road, Gospel Oak, the prisoner rushed out of a tent with a number of men. He "knocked her down and acted with further violence to her." The other men aided him and they all "severely insulted" her, indicating that they all penetrated her.⁵²

Many attacks tended to occur in more rural locations or smaller communities where, unlike the ease with which the services of prostitutes could be obtained in the larger cities and garrison towns,⁵³ there was perhaps no obvious outlet for a young man's testosterone fuelled sexual frustration. Also as women became more independent and mobile as a result of greater employment outside the home, they were more likely to find themselves in vulnerable situations when walking home alone. The fact that gangs did not seem particularly perturbed about being caught also suggests that their members had not yet fully realised that society was no longer willing to tolerate such conduct. The actual length of time it must have taken offenders to commit such acts given the numbers involved, and the inhibitions provided by the standard Victorian woman's dress and underclothing, also implies that they did not expect to be caught.

Avoidance of the law was not, in fact, easy as is indicated in many of the cases by the details of the witness testimonies, and reference to others in the near vicinity who heard screams and shouts, or found distressed and dishevelled victims. As Conley confirms, after the mid-century, public assaults in urban areas were more likely to result in a conviction. Firstly this was because witnesses were more likely to be present and to come forward; and secondly, because of concern about the physical protection of women, especially those who were married or were respectable.⁵⁴ It is also apparent that this may have acted as a real deterrent to urban gangs who, though notorious for their acts of physical violence and the development of "yob" culture, appear less predisposed towards committing gang rapes.⁵⁵

Fear of being caught by the police might also depend on the reputation of the local constabulary. Until the County and Borough Police Act 1856 laid down the framework

⁵¹ *Reynolds Weekly*, 13 October 1861.

⁵² *Daily Telegraph*, 14 September 1875.

⁵³ Though as throughout history it is not uncommon to find examples of soldiers committing group rape. A typical one involved two privates from the 19th Hussars who attempted to rape a 19 year old girl behind the furzebush on Newbury Common, Berkshire, in 1872. Their conduct was observed but when "their object was frustrated" they were captured and pursued. According to Mr Hatfield, Superintendent of Police, the victim was in a state of delirium and two surgeons were tending to her, *News of the World*, 15 September 1872.

⁵⁴ Conley, *op cit* at 85.

⁵⁵ For example there is no reference to any form of gang rape in R Sindall, *Street Violence in the Nineteenth Century* (Leicester University Press, 1990).

for a systematic organization of police forces the provision of constables in county areas was not universal and there were huge variations.⁵⁶ Interestingly from the 1840s, the county of Gloucestershire, which together with neighbouring Worcestershire, appears to feature prominently in terms of the number of gang rapes, enjoyed the highest ratio of constable to population for any county force in England and Wales.⁵⁷ Thus one explanatory factor for the county's high incidence could be that constables existed to whom reports of rape could be made and who were willing to accept them at face value. Arguably then the greater visibility of gang rape trials in the Victorian press could be partly due to the fact that, for different reasons, perpetrators, in both rural and urban areas, found it difficult to avoid detection and arrest.

DISGUIISING GANG RAPES IN THE HISTORICAL RECORD

Certain factors could either aggravate or mitigate the likelihood of guilt and the severity of the sentence imposed depended on whether full penetration had occurred⁵⁸ and the involvement of those who might be regarded as accessories to the crime, the onlookers and "eggheads-on." It is apparent that many multiple rapes were often charged and reported in the press as assaults or indecent assaults disguising their true nature; particularly if full penetration could not be proved against all perpetrators and especially given the absence of any legislation specifically prohibiting group rape. The Offences Against the Person Act 1861 and Criminal Law Amendment Act 1885 failed to acknowledge group rape either substantively or within the sentencing tariff. For charges of rape the judiciary used the issue of factual penetration to distinguish the culpability of principals from secondary participants.

In an earlier 1841 case at Worcester Assizes, the victim, Ellen, had been attacked by five men, including interestingly another pair of brothers, the Guttridges.⁵⁹ Baron Parke advised the jury that they must be satisfied that all secondary participants both *intended* and *attempted* to commit rape by penetration. If it could be shown that Ellen had "consented" to any of her violators then no rape could have occurred and none of the secondary participants could be convicted, not even of the lesser crime of assault. Parke did remark that it was unlikely that Ellen would have consented if so many persons were present, and that "even an immodest woman" could not be expected to consent in such circumstances. The jury agreed but were not convinced that the two brothers who held Ellen down while the principals raped her had engaged in full penetration therefore it was decided that the two principals could only be found guilty of assault, not rape, and the other three walked free.

A similar case reached the same court in March 1852. Mary Williams, 18 years, and her female friend were walking home across fields near Pershore, Worcestershire, after leaving the aptly named Quiet Woman public house. They were attacked by John Shephard and three other men, all in their early 20s, who attempted to rape them. Again two of the defendants were acquitted as penetration could not be proved against

⁵⁶ See C Emsley, *Crime and Society in England 1750–1900* (2nd ed Longman, 1996).

⁵⁷ See D Taylor, *Crime, Policing and Punishment 1750–1914* (Macmillan, 1998), at 80; also R Storch, "Policing Rural England before the Police," in D Hay and F Snyder (eds), *Policing and Prosecution in Britain 1750–1850* (Clarendon Press, 1989).

⁵⁸ The requirement of proof of emission of seed had been removed in 1828 largely to protect the modesty of the prosecutrix who, especially if a virgin, was not expected to know of or speak of such things.

⁵⁹ *R v Guttridge, Fellowes and Goodwin* (1840) 9 Car & P 471. There was also some suspicion that the accused had tried to buy Ellen's silence and deliberately set about keeping her from appearing before the Grand Jury or giving evidence at the trial. As a result the Guttridge brothers, who had been released on bail, were ordered to be detained pending the trial see *Guttridge, Guttridge, Goodwin and Fellowes* (1840) 9 Car & P 227.

all four but the judge was clearly of the view that this was the gang's overall intent as he sentenced Shepherd, as the principal, and one of the others to 18 years transportation for indecent assault.⁶⁰ At Middlesex Assizes in 1861 Joseph Waller, a carman, aged 27, was sentenced to 12 months for indecently assaulting Mary Strother, "a very respectable looking woman and the wife of a mariner now at sea." He and two others seized her by the throat with great violence. She "struggled valiantly" but all three held her down while Waller "tore away from her person" her crinoline and petticoat leaving her naked from the waist down, and in "other ways most infamously assaulted her." Mary was still suffering from the violence at the trial three weeks later. Again full penetration by all three was not proved and only Waller convicted of the lesser charge.⁶¹ However, in a case at York Assizes in 1859 the claim from the principal's four accomplices that they were acting as mere "innocent bystanders" and should therefore be acquitted was dismissed. The jury clearly believed that while all five may not have effected penetration all were equally culpable for the "unexampled brutality and atrocity" and "other outrages" perpetrated against Sarah Anne Barrow, a "well-dressed and good looking" complainant. Such extreme conduct from a gang acting as one against a highly respectable victim invoked class dimensions reflected in the sentencing of the principal Briggs to 25 years imprisonment and his accomplices to 20 years.⁶²

Conversely, even where it was clear on the facts that rape had occurred offenders were not always so charged. One evening in April 1882 Emily Knowles was walking along Chester Road, Birmingham, to meet her husband when she heard footsteps behind her and was approached by Thomas Knight and four young men. Knight threw her down, another put his hand over her mouth while a third, Page, held her legs. Knight then raped her. She screamed and a gentleman came out of a nearby house to help her. All five were initially charged with indecent assault and it was only after Emily contacted her solicitor that the graver charge of rape was preferred and a sentence of 20 years imposed at Warwick Assizes on Knight and 14 years on Page. The others were acquitted due to lack of identification evidence.⁶³

Despite such instances of hefty sentences in extreme cases there was an underlying criticism that the judiciary were generally too lenient in dealing with sexual outrages often sentencing gang rapists to the same penalty as single rapists typically 5 years, or reducing the sentences significantly if full penetration had not been achieved. *The Spectator* called for the death penalty to be reinstated (it had been revoked in 1841 and transportation ended in 1867) after a case at Worcester Assizes in 1864 where six men in succession ravished an "unhappy woman." Justice Igott imposed 5 years imprisonment on the ringleaders and 3 years on the others.⁶⁴ In 1876 Justice Mellors at Stafford Assizes confirmed that a 5 year sentence was appropriate stating he would give the "sentence he always inflicted when an offence was committed single handed and no more violence was used than was necessary for the object in view."⁶⁵ In 1882 Eliza Tibble, 19 years, was walking with her father along the canal towpath in London when seven young men threatened to assault her, her father attempted to protect her but they threw him in the canal. By the time he had contacted a police officer, Charles Leaper, a hawker had already attempted to rape Eliza assisted by the others. She died of

⁶⁰ *The Times*, 10 March 1852.

⁶¹ *News of the World*, 23 March 1861.

⁶² *The Times*, 12 September 1859.

⁶³ *The Times*, 11 May 1882.

⁶⁴ "The Leniency of the Bench", *The Spectator*, 9 January 1864, 35.

⁶⁵ *The Times*, 27 November 1876.

typhoid before the trial yet the jury still recommended mercy because “he did not complete the full offence.” Hawker received just 12 months hard labour. Thus in terms of sentencing some judges – and juries – not only failed to recognise the fact of multiple rape as an aggravating factor but insisted – unfairly and often impossibly, that full penetration must be proved against all members of the gang. And in terms of being convicted as principals this view of accomplices endured until the recent enactment of section 4 of the Sexual Offences Act 2003.

CONCLUSION

These case examples illustrate that in the nineteenth century historical record at least crimes of gang rape, and they should properly be labelled as such and not be allowed to be mitigated downwards as group rape in the light of politically correct modern parlance, are not as ‘invisible’ as might have been first thought. Careful reading and interpretation of media reportage can allow a more realistic and accurate picture of the nature and extent of such crimes to materialize and demonstrates that from a legal perspective the actuality of particular instances of criminal conduct may be overlooked where they are disguised as lesser offences. This confirms Emsley and Knafla’s view about sexual offences generally, that as the nineteenth century progressed there was a “tremendous increase in sexual crimes as society’s sensitivity changed from toleration to degrees of non-acceptance in the area of customary gender relations.”⁶⁶ Though the increase was in the acknowledgement that sexual assaults were now *illicit* and should be prosecuted rather than tolerated. The outcome of these cases suggest that mostly the courts were very willing to adopt a high degree of non-toleration and, given the brutality of some of these gang rapes, had no compulsion other than to impose the maximum penalties available. The extreme violence of gang rapists increasingly came to be regarded as at odds with the hardening of societal expectations and norms about what constituted acceptable *ie* respectable, behaviour, estimated on a scale of what marked out and constituted “civilised” society. Such physical violation seemed to represent the epitome – or extreme – of absolute masculine domination over absolute feminine submission.

So was it much harder for our nineteenth century sisters? According to the cases presented, and bearing in mind that the experiences of these women are based on our modern interpretation of what happened, it would at least appear that in many respects it was no harder for them than for their modern counterparts today. Despite the huge and ongoing effort over the last decade to make the modern courtroom more accessible to victims, instructions to jurors to dispense with cultural stereotypes and the provision of specialist and expert criminal justice personnel, victims are still reluctant to come forward. Victorian women (at least until the 1870s) had to prosecute their antagonists themselves, or rely on their families or benefactors to instigate proceedings on their behalf, there being no state prosecutor. And they had more to lose; if unsuccessful their reputation would be destroyed. Yet victims, whose reputation and persona in single rape cases, would have been subject to challenge unless unequivocally in conformance with the respectability imperative, generally received sympathy and credence. The ambivalence of the law in failing to provide any definition for the crime of rape, let alone any specific provision to deal with these particular crimes of rape, offered little protection, but the judicial response, in terms of the treatment of victims, guidance

⁶⁶ C Emsley and L Knafla (eds), *Crime History and Histories of Crime* (Elsevier, 1996), at 35.

offered to juries and sentences imposed, appears largely positive and commensurate with the perpetration of brutal violence and extremes of uncontrolled masculinity unleashed.

The female barrister in the 2007 case referred to at the beginning of this article spoke of the need to be realistic about sexual encounters between "groups" (gangs?) of young teens. That it should not be presumed that such sexual activities are automatically *against the girl's will*. Yes, the teens in the case were boys and not men but the implication that their acts could be exculpatory as implied through the victim's "consent" is a dangerous view. The Victorian cases demonstrate a virtually irrebuttable presumption that gang rapes were in fact against the victim's will. Even where the case was not proved against all members involved this was not because of implied suspicions that she had consented, but that the law demanded the same criteria be satisfied in respect of each gang member as if they were being charged for an individual rape. Although the substantive law did not recognize the concept of gang rape as a joint enterprise where all persons act together specifically for a criminal purpose; many judges certainly reflected this in the sentences imposed.

IRRATIONALITY, THE HUMAN RIGHTS ACT AND THE LIMITS OF MERITS-REVIEW

IAN TURNER*

INTRODUCTION

Traditional principles of judicial review dictate that the courts are concerned with assessing only the lawfulness of administrative decision-making rather than its merits.¹ For example, Lord Irvine, a previous Lord Chancellor, has justified this on the basis of three arguments. First, “a constitutional imperative”: public authorities should exercise discretionary powers that have been entrusted to them by Parliament. Every authority has within its influence a level of knowledge and experience which justifies the decision of Parliament to entrust that authority with decision-making power. Second, “lack of judicial expertise”: it follows that the courts are ill-equipped to take decisions in place of the designated authority. Third, “the democratic imperative”: it has long been recognised that elected public authorities, and particularly local authorities, derive their authority in part from their electoral mandate.² These three imperatives are grounded, of course, in the constitutional principle of the separation of powers between the organs of the state.³ Though this ideal has never been strictly adhered to in the UK, it is still accepted as an important principle of constitutional law.⁴ Indeed, it has been strengthened in recent years with the coming into force of the Human Rights Act 1998 (HRA), incorporating certain Articles of the European Convention on Human Rights (ECHR) into UK Law,⁵ such as Article 6, the right to a fair trial by an independent and unbiased court or tribunal, and the Constitutional Reform Act 2005 (CRA),⁶ section 3 of which upholds the independence of the judiciary.⁷

Nevertheless, is this theory that the courts’ supervisory role in reviewing only the legality of executive action respected by the judiciary in practice? If not, what are the

*Senior Lecturer in Law, The University of Central Lancashire. The author wishes to thank Patrick Birkinshaw, Satvinder Juss, Michael Salter and an anonymous referee for comments on earlier drafts of this article. The author is, of course, responsible for any errors or omissions.

¹ S De Smith, H Woolf and J Jowell, *Principles of Judicial Review*, (Sweet and Maxwell, 1999), at 20.

² Lord Irvine, “Judges and Decision-Makers: the Theory and Practice of *Wednesbury* Review” [1996] PL 59, at 60–61. An inference that Lord Irvine objects to the judicial review of merits in every situation should not be drawn, however. He rejected the review of merits where the courts were employing principles of the common law (such as irrationality), but later accepted it when they were applying the proportionality test to certain breaches of the European Convention on Human Rights (ECHR) – see, for example: Lord Irvine, “The Development of Human Rights in Britain” [1998] PL 221, at 229; and Lord Irvine, “The Impact of the Human Rights Act: Parliament, the Courts and the Executive” [2003] PL 308, at 313.

³ C Montesquieu, *De l’Esprit des Lois*, 1748, Chapter XI, at 3–6 famously said where the legislative and executive powers were united in the same person or body there could be no liberty. Again, there was no liberty if the judicial power was not separated from the legislative and executive. There would be an end of everything if the same person or body were to exercise all three powers.

⁴ See, for example, E Barendt, “Separation of Powers and Constitutional Government” [1995] PL 599; and N Barber, “Prelude to the Separation of Powers” (2001) 60 CLJ 59.

⁵ Section 1 of the Human Rights Act 1998 (HRA) labels Articles 2–12 and 14 of the European Convention on Human Rights (ECHR), Articles 1–3 of the 1st Protocol of the ECHR and Protocol 13 of the ECHR as “Convention rights”. Reference to several of these Articles of the ECHR which have been incorporated into UK Law is made in the main text of this article.

⁶ Parts II, III and IV of this legislation reform the Office of the Lord Chancellor (by, for example, removing the automatic right to act as the Speaker of the House of Lords), create a Supreme Court for the UK to replace the Appellate Committee of the House of Lords and introduce an independent Judicial Appointments Commission, creating a more transparent system of appointing senior judges.

⁷ Indeed, the HRA, in strengthening the separation principle in UK law, is in part responsible for the enactment of the Constitutional Reform Act 2005; see, for example, R Masterman, “Determinative in the Abstract? Article 6(1) and the Separation of Powers” [2005] EHRLR 628.

implications of this for administrative law doctrine in the 21st Century? Is the judicial review of merits a usurpation of the power of the executive by the courts? Or is it something more benign? A matter of evolution, a natural repositioning of the judiciary within the normal jockeying for power that exists amongst the institutions of the state? Or is it something more systematic? If some administrative power has been ceded to the courts in, for example, the pursuit of furthering human rights' protection, perhaps with Parliament's approval, we are arguably witnessing a legitimate shift in the constitutional balance between the courts and the executive. But what now are the boundaries of this increased power of the judiciary?

This article is the third piece of work on the *Wednesbury*/irrationality ground of judicial review.⁸ In the first article of this study the author attempted to address the question whether the courts were in practice respecting the constitutional principle that they should not be engaging in a review of merits when assessing the exercise of administrative action.⁹ He analysed several cases where the courts had ruled that the executive body in question had acted irrationally and questioned whether the facts in some of these cases could be categorised as unreasonable in a public law sense. That is, by reference to the standard of review implied by Lord Diplock's definition of irrationality in the *GCHQ* case, were the decisions of the executive "so outrageous in [their] defiance of logic and accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at [them]"?¹⁰ In finding that the case facts in some of these cases arguably did not support judicial intervention, the author concluded that low standards of irrationality had been adopted, thus causing the judges to review the merits of the decisions under consideration.¹¹ Having found that the courts were employing low standards of judicial intervention, the author sought in the second article of this study to question whether these reviews of merits he had identified previously were in fact legitimate.¹² There it was concluded that these low standards were constitutionally justified: either because, for example, the "proportionality" test¹³ had been employed instead of irrationality or the courts had exercised an "anxious scrutiny"¹⁴ approach to breaches of fundamental rights. For reasons of word length the author was unable to assess, to any great degree, the effects the HRA had on the legitimacy of these merits-review cases. This is one of

⁸ Referring to the judgment of Lord Greene in the Court of Appeal in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, Lord Diplock in *Council of Civil Service Unions and Others v Minister for the Civil Service* (the "*GCHQ*" case) [1985] AC 374 said that irrationality could now be succinctly referred to as "*Wednesbury* unreasonableness" (at 410). Thus in this article the terms irrationality and *Wednesbury* unreasonableness are used interchangeably to denote the same ground of review.

⁹ I Turner, "Judicial Review, Irrationality and the Review of Merits" (2006) 15(2) Nott LJ 37.

¹⁰ *Council of Civil Service Unions and Others v Minister for the Civil Service* (the "*GCHQ*" case) [1985] AC 374, at 410.

¹¹ The author analysed the rulings of the House of Lords in *Wheeler and Others v Leicester City Council* [1985] AC 1054, the Court of Appeal in *West Glamorgan County Council v Rafferty and Others* [1987] 1 WLR 457, the Court of Appeal in *Regina v Secretary of State for Trade and Industry, Ex parte Lonrho PLC* *The Times*, 18 January 1989 and the Court of Appeal in *Regina v Cornwall County Council, Ex parte Cornwall and Isles of Scilly Guardians Ad Litem and Reporting Panel* [1992] 1 WLR 427.

¹² I. Turner, "Judicial Review, Irrationality and the Legitimacy of Merits-Review" (2008) 29(3) LLRev 309.

¹³ The author justified this by reference to the writings of several academic commentators: Paul Craig (eg P Craig, "The Impact of Community Law on Domestic Public Law", in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons*. (Blackstone Press, 1997) at 271–296); Jeffrey Jowell (eg J Jowell, "Is Proportionality an Alien Concept?" (1996) 2 EPL 401; J Jowell and A Lester, "Proportionality: Neither Novel Nor Dangerous", in J Jowell and D Oliver (eds) *New Directions in Judicial Review*. (Stevens, 1988) at 51–72; and J Jowell and A Lester, "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368); Gareth Wong (eg G Wong, "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" [2000] PL 92); Mark Elliott (eg M Elliott, "Scrutiny of Executive Decisions Under the Human Rights Act 1998: Exactly How 'Anxious'?" [2001] JR 166); Michael Fordham (eg M Fordham, "Common Law Proportionality" [2002] JR 110); and Tom Hickman (eg T Hickman, "Proportionality: Comparative Law Lessons" [2007] JR 31).

¹⁴ This was developed first by the House of Lords in *R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] AC 514. There Lord Bridge said: "When an administrative decision... is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny." (at 531).

the aims of this third article since arguably this statute now renders the applicability of the “anxious scrutiny” approach redundant. The author finds here that the constitutionality of these low standards of judicial intervention identified previously has been significantly widened since the coming into force of the HRA in 2000. However, the principle of the separation of powers, although not strictly enforced in the UK, must still oppose a merger of the judicial and executive functions. To this end, in reassessing here the legitimacy of the courts’ review of the merits of administrative action post the enactment of the HRA, this article also proposes to establish the limits of this increase in judicial power, that is, a zone of executive decision-making, for reasons of democracy, where the courts are clearly excluded.

THE HUMAN RIGHTS ACT 1998 (HRA) AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

The HRA allows individuals to enforce “Convention rights” in domestic courts. It incorporated some of the Articles of the ECHR¹⁵ into domestic law principally through section 3(1): “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.” In interpreting primary and secondary legislation, the courts according to section 2 are under a duty to take into account the case law of the European Court of Human Rights (ECtHR). If a court cannot interpret a statute “so far as it is possible to do so” section 4(2) of the HRA provides for a “legislative review”:¹⁶ “If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of incompatibility.” A declaration of incompatibility is not an order invalidating an Act of Parliament on the basis that it infringes a Convention right. Amending offending primary legislation to make it Convention compatible is the preserve of the executive through a fast track procedure under section 10 of the HRA.¹⁷ However, the judicial review of secondary legislation because of an infringement of a Convention right is not excluded: the HRA creates a free-standing statutory head of review on the grounds of illegality. Section 6(1) – “applied review”¹⁸ – states: “It is unlawful for a public authority to act in a way which is incompatible with a Convention right.” Nevertheless, despite applicants now being able to enforce “Convention rights” in UK law by virtue of the HRA, this does not preclude the availability of traditional irrationality review, and its “anxious scrutiny” avenue,¹⁹ since the procedural rules for the two approaches do differ.²⁰

The legitimacy of low standards of intervention and “qualified” Convention rights

In determining breaches of the ECHR the ECtHR applies the test of proportionality to “qualified rights”, Articles 8–11. Once a reviewing court has been convinced by the legitimacy of the aim identified by the state for infringing, for example, a fundamental

¹⁵ See footnote 5 for a description of the Articles of the ECHR – “Convention rights” – incorporated into UK law.

¹⁶ D O’Brien, “Judicial Review Under the Human Rights Act 1998: Legislative or Applied Review?” [2007] EHRLR 550.

¹⁷ In fact practice has shown that the executive is more likely to address the incompatibility of legislation by replacing it with another Act that is compatible rather than invoking this “Henry VIII” clause in the HRA.

¹⁸ D. O’Brien, *op cit*.

¹⁹ See footnote 14 for a description of the “anxious scrutiny” approach.

²⁰ Procedurally, there are different rules for conventional judicial review and judicial review under the HRA. This means that, notwithstanding the coming into force of the HRA, infringements of fundamental rights must still be pursued through the traditional *Wednesbury* irrationality test. See, for example: J Miles, “Standing Under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication” (2000) 59 CLJ 133; and D Squires, “Judicial Review of the Prerogative after the Human Rights Act” (2000) 116 LQR 572.

right of the applicant, and there was a reasonable nexus between the means to achieve the aim and the aim itself, such as national security or the protection of the rights and freedoms of others, it must then consider whether there was a pressing social need for the infringement of the right. In asking itself the latter question, the reviewing court is determining whether the means are proportionate to the legitimate aim being pursued. The case of *Regina (Daly) v Secretary of State for the Home Department*²¹ in the House of Lords establishes that the test must be applied by the UK courts when considering breaches of qualified rights under the ECHR.

In *Daly* the court held that the blanket policy of the Secretary of State (the requirement that a prisoner be absent during cell searches whenever privileged legal correspondence held by them was examined but not read) was unlawful. Although the state had identified a legitimate aim under Article 8(2) of the ECHR for the policy – the prevention of crime – Lord Bingham said: “The infringement of prisoners’ rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified”.²²

The courts could not conceivably employ such a process of review, where they are comparing the weight to be attached to the private right of the applicant which has been infringed with the competing public interest justification for infringing that right, without being involved in some adjudication of the merits of the state’s action. The proportionality test is, therefore, a more searching method of review than the irrationality test, the latter simply requiring the executive decision-maker to remain within an area of rational responses.

The most famous application of the proportionality test to date by the House of Lords was probably in *Regina (A) v Secretary of State for the Home Department*,²³ which Feldman has described as “perhaps the most powerful judicial defence of liberty since [1772]”.²⁴ By a majority of 8–1 an unprecedented panel of nine Law Lords quashed the derogation order issued by the UK government under Article 15 of the ECHR,²⁵ in relation to the Part IV provisions of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), the indefinite detention of foreign individuals suspected of international terrorism. The court held that the provisions were disproportionate to the existing terrorist threat as they were not strictly required by the exigencies of the situation as required by Article 15,²⁶ thus exposing ATCSA to a declaration of incompatibility with Article 5 of the ECHR, the right to liberty and security of the person. Lord Hoffmann said: “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these”.²⁷ His Lordship even went as far as stating

²¹ [2001] UKHL 26, [2001] 2 AC 532.

²² *Ibid.*, at 544.

²³ [2004] UKHL 56, [2005] 2 AC 68.

²⁴ D Feldman, “Proportionality and Discrimination in Anti-Terrorism Legislation” (2005) 64 CLJ 271, at 273. Hickman – T Hickman, “Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism” (2005) 68 MLR 655 – also states: “Both the constitutional significance and impact of the decision are... of the highest order.” (at 668).

²⁵ Article 15(1) of the ECHR states: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

²⁶ Because, for example, the legislation targeted only foreigners suspected of terrorism, not British suspects; and the detainees could be released if they left the UK (so in theory could continue their terrorist activity abroad). In this regard the ruling was perhaps unsurprising, as Starmer – K Starmer, “Setting the Record Straight: Human Rights in an Era of International Terrorism” [2007] EHRLR 123 – argues: “Against this background it can hardly be suggested that their Lordships were mischievously dismantling the Government’s anti-terrorism strategy. They were simply pointing that the Government’s approach was discriminatory, irrational and, worst of all, ineffective.” (at 124).

²⁷ [2004] UKHL 56, [2005] 2 AC 68, at para 97.

that there was no war or public emergency threatening the life of the nation which justified the derogation under Article 15.²⁸

Clearly, therefore, a review of merits by domestic courts is justified where they employ the proportionality test to certain breaches of “Convention” rights. However, in the international sphere the ECtHR has adopted the “margin of appreciation” principle. This reflects a degree of latitude to be shown by the court to the signatory states of the ECHR (the Council of Europe) on account of the social and cultural differences which exist between them. This margin of appreciation is not necessarily evident in the various Articles of the ECHR under consideration but often the context in which an Article arises such as economic factors (the raising of taxes and the allocation of national resources) or public morality.

In *Handyside v United Kingdom*,²⁹ for example, the ECtHR ruled that the decision of the UK to prosecute the distributor of the Little Red Schoolbook under the Obscene Publications Act 1959 for the purpose of protecting public morals was lawful. Yes, the court applied the proportionality test – a proportionate balance had been struck by the state between the private right of the applicant to freedom of expression under Article 10(1) and the public interest to protect the morals of children and young people under Article 10(2)³⁰ – but it is submitted that the court did not do so to any great degree. The margin of appreciation shown by the court in *Handyside*, notwithstanding that the book was freely available in other European countries, signifies a willingness not to engage in a *significant* review of the merits of the UK’s activities in curtailing the book’s distribution. Herein lies a contradiction. The author asserts at the beginning of this article that questions about the legality of administrative decision-making do not involve a reviewing court in a consideration of merits. However, at this point it is implied that high standards of proportionality are lawful, though the very nature of the test does entertain the notion of balance.

In assessing in this third article the constitutionality of low standards of judicial intervention since the coming into force of the HRA, there is a need to explore more fully the meaning of merits-review which has not been required in this study hitherto. The traditional view of judicial review is that the courts are concerned only with the lawfulness of an administrative decision rather than its merits. This is perhaps reflected in traditional definitions of unreasonableness. In the *GCHQ* case, it will be recalled, Lord Diplock described an irrational decision as being “so outrageous in its defiance of logic and accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”.³¹ However, even when employing orthodox standards of irrationality there must still be some reviewing of the merits of a decision; traditional conceptions of legality must still require a consideration of competing factors supporting or not supporting a particular course of administrative action. With irrationality the measure of discretion is clearly in the executive’s favour but determining whether a decision was “outrageous in its defiance of logic” must still require some assessment of merits, albeit not to any great degree. For the purposes of this article, therefore, where standards of judicial intervention are examined, and some of these standards are found to be particularly intensive, strictly

²⁸ *Ibid.*, at para 96. Lord Hoffmann was the only judge to believe this. It has, therefore, been argued that the majority of the House of Lords retained its deference with regard to the initial question of the existence of a public emergency threatening the life of the nation: M Cohn, “Judicial Activism in the House of Lords: a Composite Constitutionalist Approach” [2007] PL 95, at 103.

²⁹ (1976) 1 EHRR 737.

³⁰ *Ibid.*, at para 48.

³¹ *Council of Civil Service Unions and Others v Minister for the Civil Service* (the “*GCHQ*” case) [1985] AC 374, at 410.

speaking, low thresholds involve the courts in a *greater* consideration of merits than would otherwise categorise a customary application for judicial review.

Despite the margin of appreciation principle being applicable in a supra-national context there may a margin of appreciation of sorts – either “a discretionary area of judgment”, “a margin of discretion” or “judicial deference”³² – adopted by the UK courts when considering infringements of the ECHR under the HRA. In this regard, it is unlikely that a significant examination of the merits of suspected breaches of Convention rights will take place in domestic law where a balance is to be struck between private and state interests such as public morality. To support this submission there is the ruling of the House of Lords in *Belfast City Council v Miss Behavin’ Limited*.³³ Here a decision by Belfast City Council not to grant licenses to sex shops in a specific area of Belfast was not unlawful, the courts held. The House of Lords ruled that that this was an interference with Article 10(1) of the ECHR, the right to freedom of expression, but was a proportionate response to a legitimate aim identified in Article 10(2), the protection of public morals. For example, Lord Hoffmann said:

The right to vend pornography is not the most important right of free expression in a democratic society. . . This is an area of social control in which the Strasbourg court has always accorded a wide margin of appreciation to member States, which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights. That was not the case here.³⁴

The courts’ employment of the proportionality test here arguably did not involve it in examining the merits of the council’s decision with any great intensity. The public interest of the state so obviously outweighed the private right of the applicant to such a degree that the standard of proportionality adopted by the House of Lords was a high one. To this end, compelling the council to give a *strong* justification for infringing freedom of expression, where the court was satisfied that a reasonable nexus has been shown to arise between the infringement of the right and the objective of protecting the public morals of individuals living in Belfast, would therefore not have been a legitimate judicial exercise.

In summary, the courts are justified in adopting low standards of intervention when assessing, for example, the engagement of qualified rights of the ECHR, since to do so necessitates the employment of the proportionality approach. However, it has also been shown that contextual factors such as the protection of public morals do limit the degree to which the courts should adopt the intensity of proportionality. In this respect, there are boundaries to a *greater* judicial review of the merits of executive decisions affecting qualified rights. In ECHR law some rights do not employ a proportionality type of review. For example, there are rights which are categorised as “absolute”. Do these rights justify low standards of judicial intervention?

³² Lord Hoffmann in the House of Lords in *Regina (Pro-Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 said that use of the word “deference” was inappropriate because of its “overtones of servility, or perhaps gratuitous concession” (at para 75). Furthermore, in the later ruling of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11 Lord Bingham stated: “The giving of weight to factors... is not, in our opinion, aptly described as deference: it is a performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed.” (at para 16).

³³ [2007] UKHL 19, [2007] 1 WLR 1420.

³⁴ *Ibid*, at para 16.

The legitimacy of low standards of intervention and “absolute” Convention rights

Article 2 of the ECHR, the right to life, Article 3 of the ECHR, the prohibition on torture or inhuman or degrading treatment or punishment, Article 4(1) of the ECHR, the prohibition on slavery and forced labour, and Article 7(1) of the ECHR, the prohibition on punishment without law, are unique in Convention law in that they are absolute. That is, there are no qualifications such as the objective of either protecting national security or preventing disorder or crime justifying their infringement. Moreover, Article 15(1) of the ECHR – the right to derogate from some Articles of the Convention in times of war or public emergency threatening the life of the nation – does not apply to them.³⁵

Since these rights are unqualified, they exclude the employment of the proportionality test.³⁶ This may explain why Howell *et al* argue that the courts are unlikely to defer to the opinion of a public body where the right involved is absolute.³⁷ Indeed, in the House of Lords in *Regina v DPP, Ex parte Kebilene*³⁸ Lord Hope said: “It will be. . .much less [eas[y] for an area of judgment to be recognised where the Convention right itself]. . .is stated in terms which are unqualified”.³⁹ As a practical example of the legitimate low standards exercised by the courts where absolute Convention rights are at issue, there is the ruling of the Administrative Court in *Regina (Bennett) v Inner South London Coroner*,⁴⁰ which involved the fatal shooting by police of Derek Bennett. It was stated above that the proportionality test is excluded from reviews of absolute rights. However, Article 2(2) of the ECHR permits agents of the state to exercise lethal force where it is “absolutely necessary” and for a legitimate aim, such as the protection of individuals from unlawful violence. This is certainly a balancing exercise – but one in which the balance falls very firmly in favour of the person whose life has been denied. In *McCann v United Kingdom*⁴¹ the ECtHR said:

The use of the term “*absolutely necessary*” in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 of the Convention. In particular, *the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2*.⁴²

Specifically, the court in *Bennett* was assessing two issues: first, the reasonableness of the coroner’s decision not to leave open to the inquest jury a possible verdict of unlawful killing by the police; and secondly, the compatibility of the defence of self defence in UK criminal law with Article 2.⁴³ However, in so doing, the court did recognise the applicability of the *McCann* principles to domestic law. That is, where the right to life is at issue, and indeed in situations where a person has been fatally shot, the court will examine very closely the justifications given by the police for the “absolute need” to kill someone.

³⁵ Article 15(2). In reference to Article 2, the right to life, however, Article 15(2) does permit some derogation: those deaths resulting from lawful acts of war.

³⁶ This is not strictly correct as references in the main text to the positive obligation imposed on a state by Article 2(1) of the ECHR and the state’s justification in using lethal force against a person under Article 2(2) illustrate.

³⁷ J Howell and D Elvin, “Introduction to the Convention” in R Drabble *et al* (eds), *Local Authorities and Human Rights*, (Oxford University Press, 2004), at 21–63, at 30.

³⁸ [2000] 2 AC 326.

³⁹ *Ibid*, at 381.

⁴⁰ [2006] EWHC 196 (Admin).

⁴¹ (1995) 21 EHRR 97.

⁴² *Ibid*, at para 149.

⁴³ This case was subject to an appeal – [2007] EWCA Civ 617 – but the issue relevant to this article was not pursued.

In illustrating further the legitimacy of low standards of review when considering breaches of absolute rights of the ECHR, specifically Article 3, the ruling of the House of Lords in *Regina (Limbuela) v Secretary of State for the Home Department*⁴⁴ can also be identified. Here the court had to consider the lawfulness of refusing three asylum seekers state support, since they had failed to make a claim for asylum as soon as reasonably practicable after arriving in the United Kingdom under section 55(1) of the Nationality, Immigration and Asylum Act 2002. (Of the three claimants the longest delay in making an application for asylum was one day. Two of the claimants were forced to sleep rough and the third claimant was on the verge of doing so. All the claimants suffered a deterioration in health.) Although, Lord Bingham said that the threshold was high in a context such as this where the case did not involve the deliberate infliction of pain or suffering,⁴⁵ he did state, importantly, that the threshold did not have to be crossed before there was an infringement of Article 3. It would occur “when it appears that on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life”.⁴⁶ Therefore, subject to what the judge said about the high threshold to be overcome in circumstances such as these, in rejecting the “wait and see” argument of the Secretary of State he was, arguably, confirming an exacting nature to Article 3. Indeed, if this finding is incorrect, the judge was obviously implying that the threshold was low where the state had deliberately inflicted pain or suffering against an individual.

However, notwithstanding the conclusions drawn about the justifiability of the courts conducting a greater review of the merits of suspected breaches of unqualified rights than perhaps other rights protected by the ECHR, others commentators, such as Clayton⁴⁷ and Havers and English,⁴⁸ have taken a different view concerning the intensity with which judges examine infringements of absolute rights. Clayton refers to the ruling of the Court of Appeal in *R (Bloggs 61) v Secretary of State for the Home Department*.⁴⁹ Here the claimant prisoner contended that, having informed on a well known drugs trafficker, he was entitled to be detained in a protected witness unit and that removal from the unit would place his life at risk. His application was rejected. Although Auld LJ said that any potential interference with the right to life required the most anxious scrutiny by the court,⁵⁰ it was still appropriate to show some deference to the special competence of the Prison Service.⁵¹

In further reference to the right to life, and the possible high standards of review exercised by the courts, there is the recent ruling of the House in Lords in *Van Colle v Chief Constable of the Hertfordshire Police*.⁵² Here the deceased, Giles Van Colle, had been shot dead by a former employee, Daniel Brougham, just days before he was due to give evidence for the prosecution at Brougham’s trial for theft.

⁴⁴ [2005] UKHL 66, [2006] 1 AC 396.

⁴⁵ *Ibid*, at para 7.

⁴⁶ *Ibid*, at para 8.

⁴⁷ R Clayton *et al*, “Key Human Rights Act Cases in the Last 12 Months” [2004] EHRLR 614, at 621; and R Clayton, “Judicial Deference and ‘Democratic Dialogue’: The Legitimacy of Judicial Intervention Under the Human Rights Act 1998” [2004] PL 33, at 34.

⁴⁸ P Havers and R English, “Human Rights: A Review of the Year” [2003] EHRLR 587, at 592.

⁴⁹ [2003] EWCA Civ 686, [2003] 1 WLR 2724.

⁵⁰ *Ibid*, at para 62.

⁵¹ *Ibid*, at para 64.

⁵² [2008] UKHL 50, [2008] 3 WLR 593.

Article 2(1) of the ECHR imposes a positive or substantive obligation on the state to protect life: “Everyone’s right to life shall be protected by law”. The House of Lords ruled that the Hertfordshire police had not acted unlawfully in failing to protect the life of Giles. It reached its conclusion by reference to the earlier ruling of the ECtHR in *Osman v United Kingdom*.⁵³ In *Osman* the ECtHR had said:

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.⁵⁴

Although the author stated above that proportionality review is excluded from considerations of Article 2, the positive obligation under Article 2(1), following *Osman*, does require the courts to entertain the notion of balance: even if there is an identifiable risk to the life of a person, this will not engage the positive obligation to protect life if it imposes a disproportionate burden on state authorities. To this end, a reviewing court is obliged to weigh up a risk to life with the potential financial resources needed to prevent it. In confirming that this balance favours the state, Lord Brown in *Van Colle* said:

The test set by the European Court of Human Rights in *Osman* and repeatedly since applied for establishing a violation of the positive obligation arising under Article 2 to protect someone . . . is clearly a stringent one which will not be easily satisfied. . . It is indeed some indication of the stringency of the test that even on the comparatively extreme facts of *Osman* itself. . . the Strasbourg court found it not to be satisfied.⁵⁵

The same conclusion about the potential high standard of intervention employed in *Van Colle* can be drawn about cases involving Article 3. In *N v Secretary of State for the Home Department*⁵⁶ the government sought to deport an illegal immigrant back to Uganda. The applicant had been receiving treatment for an AIDS related illness in the UK. Uganda could not provide equivalent medical treatment to that which she was receiving in this country. She alleged that if she continued to have access to drugs and medical facilities available here, she should remain well for decades. But without the drugs she would die within a year. Lord Hope said that aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional.⁵⁷ The fact, therefore, that the applicant’s deportation to Uganda would result in her death within a year clearly illustrated the court setting a high threshold for Article 3 here.

The courts do afford the executive a little discretion when assessing infringements of absolute rights, as fatal shootings by the police illustrate. However, notwithstanding this finding, low standards of intervention are not always constitutionally justifiable:

⁵³ (2000) 29 EHRR 245.

⁵⁴ *Ibid*, at para 116.

⁵⁵ [2008] UKHL 50, [2008] 3 WLR 593, at para 115. In *Osman* the police had allegedly failed to protect Ahmet Osman and his father from being shot by Paul Paget-Lewis, Ahmet’s former school teacher. Paget-Lewis had formed an obsessive, non-sexual attachment to Ahmet, one of his pupils. 18 months or so later he went to Ahmet’s home, shot him and shot and killed his father.

⁵⁶ [2005] UKHL 31, [2005] 2 AC 296.

⁵⁷ *Ibid*, at para 48. The ruling of the ECtHR in *N (N v United Kingdom (Application Number 26565/05))* has since been published: the court, like the House of Lords, held that *N* did not infringe Article 3 of the ECHR because the circumstances were not exceptional.

contextual matters such as the financial costs involved arguably affected the rulings of the judges in *Van Colle* and *N*. In the case of the latter, for example, the resource implications of allowing the applicant to stay in the UK were not lost on Lord Hope. He said:

It must be borne in mind. . .that the effect of any extension. . .would. . .afford all those in the appellant's condition a right of asylum in this country until such time as the standard of medical facilities available in their home countries for the treatment of HIV/AIDS had reached that which is available in Europe. It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the states parties to the Convention would ever have agreed to.⁵⁸

Continuing the theme of this article, what is the legitimate standard of merits-review adopted by the courts if they are examining breaches of other Articles of the ECHR, which, like absolute rights, do not permit the courts to employ a proportionality type of approach? There are, of course “special” rights, meaning that they can be restricted in the public interest but only to the extent provided by the ECHR.

The legitimacy of low standards of intervention and “special” Convention rights

Klug states that Article 5, the right to liberty and security of the person, and Article 6, the right to a fair trial by an independent and impartial tribunal, have given rise to the least judicial deference.⁵⁹ Following the ruling of the House of Lords in *A* (see above) the government allowed ATCSA to lapse in March 2005 (the legislation had a “sunset clause”, requiring it to be renewed, otherwise it would cease). It replaced ATCSA with the Prevention of Terrorism Act 2005 (PTA), introducing “control orders” for all terror suspects whether they were British or foreign. The PTA allows the state to impose “non-derogating control orders” on individuals which include electronic tagging, curfews, restrictions on visitors and meeting others, a ban on the use of the internet and limits on phone communication. According to section 2 the Home Secretary can apply ‘non-derogating control orders’ to persons whom he reasonably suspects of involvement in terrorism and that the order is necessary to protect the public. Section 3 says that the reasonable suspicion must be approved by the High Court after the period of seven days. The PTA also allows for the provision of ‘derogating control orders’ (from Article 5 of the ECHR, for example), which amount to house arrest. These orders can be issued only by the High Court under section 4 and the rules for their issue are stricter than those for “non-derogating control orders”. Within hours of the passing of the PTA the Home Secretary applied “non-derogating control orders” to ten men previously certified under ATCSA as terrorism suspects, some of whom had been detained without trial since December 2001.

The issuing of some “non-derogating control orders” under 2 section of the PTA is now unlawful as being contrary to Article 5 of the ECHR, the House of Lords has held: *Secretary of State for the Home Department v JJ*.⁶⁰ Here the conditions depriving

⁵⁸ [2005] UKHL 31, [2005] 2 AC 296, at para 53.

⁵⁹ F Klug, “Judicial Deference Under the Human Rights Act 1998” [2003] EHRLR 125, at 129. However, this is not to be taken as Klug’s opinion – it is more of a summary of what is happening in practice since she believes if the scheme of the HRA under ss3 and 4 is correctly applied, there is no need for a further doctrine of judicial deference by the courts.

⁶⁰ [2007] UKHL 45, [2008] 1 AC 385. Less onerous conditions are lawful, however: *Secretary of State for the Home Department v AF* [2007] UKHL 46, [2008] 1 AC 440 and *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499.

the liberty of the six applicants included: residency at a one bedroom flat, away from one's normal home, for 18 hours every day (1600 to 1000); electronic tagging; compulsory attendance at a police station twice a day; visitors to have been approved by the Home Office; limited use of the telephone; and a ban on the use of the internet. In holding that the conditions were unlawful, Lord Bingham likened the conditions to prison but without the benefit of association with others.⁶¹ Lord Brown said: "Article 5 represents a fundamental value and is absolute in its terms. Liberty is too precious a right to be discarded except in times of genuine national emergency. None is suggested here".⁶²

On average there are only about 15 individuals subject to "non-derogating control orders" at any one time. This very small number suggests that these orders are reserved only for those terrorist suspects who pose a critical threat to national security. To this end, the House of Lords could very easily have upheld the existing conditions attached to the orders, deferring to the executive's duty to protect the community from acts of terrorism. However, in relaxing the deprivations of liberty conferred on the suspects by the state, the court chose to subject the orders to particular scrutiny, it is submitted.

The issue of the admissibility of evidence against suspected terrorists held under the PTA, for example, where it is possibly gained through torture (thus arguably compromising Article 6 of the ECHR) was addressed by the House of Lords in *A v Secretary of State for the Home Department (No2)*.⁶³ Here the court held that evidence procured by torture, whether of a suspect or witness, was not admissible against a party to proceedings in a British court, irrespective of where, by whom or on whose authority the torture had been inflicted.⁶⁴ In so doing, the House of Lords reversed the ruling of the Court of Appeal⁶⁵ which had said that evidence obtained under torture in third countries could be used in special terrorism cases, provided that the British government had neither procured it nor connived at it. This was because it was unrealistic to expect the Home Secretary to investigate each statement with a view to deciding whether the circumstances in which it was obtained involved a breach of the ECHR.⁶⁶ The fact that the House of Lords rejected this approach by the Court of Appeal suggests that a low standard of review was adopted.

More recently, in *Regina v Davis*⁶⁷ the House of Lords had to assess the fairness of the defendant's trial for murder in the context of Article 6 of the ECHR and the common law. Seven witnesses had claimed to be in fear for their lives if it became known that they had given evidence against the defendant. Among them were three witnesses, the only witnesses in the case who were able to identify the defendant as the killer. These claims about risks to personal safety were investigated and accepted as genuine by the trial judge and the Court of Appeal. To induce the witnesses to give evidence, the trial judge ordered that: 1) they were each to give evidence under a

⁶¹ *Ibid*, at para 24.

⁶² *Ibid*, at para 107.

⁶³ [2005] UKHL 71, [2006] 2 AC 221.

⁶⁴ The House of Lords ruled that once the appellant had argued a tenable reason why evidence might have been procured by torture, the burden of proof was on the Special Immigration Appeals Commission (SIAC): it was obliged to establish the fact by means of such diligent inquiries into the sources that it was practicable to carry out. As for the standard of proof, SIAC should refuse to admit evidence if, on a balance of probabilities, the evidence relied on by the Secretary of State had been obtained through torture. If SIAC were left in doubt, they should admit it and bear their doubt in mind when evaluating it. There is concern about this test for excluding evidence adopted by the majority of judges in this case – see, for example, N Grief, "The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law" [2006] EHRLR 201. Does this therefore signify an interest more beneficial to the state rather than the individual?

⁶⁵ [2004] EWCA Civ 1123, [2005] 1 WLR 414.

⁶⁶ *Ibid*, at para 129.

⁶⁷ [2008] UKHL 36, [2008] 3 WLR 125.

pseudonym 2) their addresses and personal details were to be withheld from the defendant and his legal advisers 3) defence counsel was not permitted to ask any questions which might enable any of the three witnesses to be identified 4) they were to give evidence behind screens so that they could be seen by the judge and the jury but not by the defendant and 5) their natural voices were to be heard only by the judge and the jury.⁶⁸ The House of Lords held that no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses. The reason was that such a conviction results from a trial which could not be regarded as fair.⁶⁹

The author believes here that the House of Lords in these three cases, *JJ, A (No 2)*, and *Davis*, signified a willingness to adopt an intensive standard of intervention – even to the point in allowing the possible collapse of a murder trial (in *Davis*), notwithstanding the fact that the defendant was a dangerous individual who had been identified by three witnesses as a killer. A greater judicial review of the merits of administrative decisions where special rights of the ECHR are at issue is therefore arguably legitimate.

However, as regards Article 6 of the ECHR, for example, the degree of deference accorded to the executive is sometimes high: *Regina (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*.⁷⁰ Here the House of Lords was assessing the legality of the “calling-in” procedure exercised by the Secretary of State under section 77 of the Town and Country Planning Act 1990. The court said that although the Secretary of State was not independent and impartial, decisions taken by him were not incompatible with Article 6(1), provided they were subject to review by an independent and impartial tribunal which had full jurisdiction to deal with the case as the nature of the decision required. Furthermore, when the decision under consideration was one of administrative policy, the reviewing body was not required to have full power to redetermine the merits of the decision and any review by a court of the merits of such a policy decision taken by a minister answerable to Parliament and ultimately to the electorate would be profoundly undemocratic.

In a similar context – the possible lack of independence and impartiality of a local authority officer reviewing a decision to house a homeless person in a location which the applicant had considered unsuitable for her and her family – Lord Bingham in the House of Lords in *Runa Begum v Tower Hamlets London Borough Council*⁷¹ also said:

I can see no warrant for applying in this context notions of ‘anxious scrutiny’. . . I would also demur at the suggestion of Laws LJ in the Court of Appeal in the present case. . . that the judge may subject the decision to ‘a close and rigorous analysis’ if by that is meant an analysis closer or more rigorous than would ordinarily and properly be conducted by a careful and competent judge determining the application for judicial review.⁷²

The courts are arguably justified in a greater review of the merits of administrative decisions affecting special rights of the ECHR but, similar to the findings above in relation to qualified rights and absolute rights, the employment of low standards of intervention are not unfettered. Some contextual factors such as the availability of traditional irrationality review as a fail safe against the unlawful exercise of statutory

⁶⁸ *Ibid*, at para 3.

⁶⁹ *Ibid*, at para 25.

⁷⁰ [2001] UKHL 21, [2003] 2 AC 295, at para 54.

⁷¹ [2003] UKHL 5, [2003] 2 AC 430.

⁷² *Ibid*, at para 7.

powers of Ministers in planning law, for example, ought to limit the courts' discretion to assess special rights with any great intensity.

Questions about the degree to which the courts legitimately review the merits of Articles of the ECHR under the HRA do not stop there: what would be the legitimate standard of intervention if a court was not necessarily assessing the lawfulness of executive action by reference to a particular Article of the ECHR under section 6(1) of the HRA but was exercising its obligation to interpret statutes in line with Convention rights under section 3(1) of the HRA, or was considering a declaration of incompatibility under section 4(2) of the HRA? These questions are addressed in the next two sections.

The legitimacy of low standards of intervention and section 3(1) of the HRA

It will be recalled that section 3(1) of the HRA is an interpretative obligation. It requires the courts in any proceedings, whether they be civil or criminal, private or public, to interpret primary and secondary legislation "so far as it is possible to do so" in line with Convention rights. In *Regina v Lambert*⁷³ Lord Woolf observed:

It is...important to have in mind that legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention.⁷⁴

This quote by Lord Woolf is a reminder to the judiciary of the respect that should be owed by them to Parliament when they are interpreting primary legislation in line with a Convention right under section 3(1) of the HRA (or issuing a declaration of incompatibility under section 4(2) of the HRA – see below).

There has been much debate about the exact meaning of section 3(1) of the HRA. Does the obligation give the court the power to interpret a statute in such a way that its meaning is contrary to the will of Parliament? Remember, the words "so far as possible to do so" mean that the obligation is not absolute: if a court cannot interpret the statute "so far as possible" it may issue a declaration of incompatibility under section 4(2). However in *Regina v A (No 2)*⁷⁵ the House of Lords significantly altered the effects of section 41 of the Youth Justice and Criminal Evidence Act 1999 – the general prohibition on the cross examination of a complainant in a rape case about their previous sexual history – to achieve compatibility with Article 6 of the ECHR, the right to a fair trial by an independent and impartial tribunal. Lord Steyn said: "[It] will sometimes be necessary to adopt an interpretation which linguistically may appear strained".⁷⁶ Nicol has described this as "...[straying] far from the wording of the provision and Parliament's clear intention in introducing it" and "[t]his clarity of parliamentary purpose in no way inhibited the House of Lords. Nor did the fact that the words of the statute were as plain as day".⁷⁷

The courts seemed to retreat from this approach – even Lord Steyn – in *Regina (Anderson) v Secretary of State for the Home Department*.⁷⁸ In this later case Lord

⁷³ [2002] QB 1112.

⁷⁴ *Ibid.*, at 1120.

⁷⁵ [2001] UKHL 25, [2002] 1 AC 45.

⁷⁶ *Ibid.*, at para 63.

⁷⁷ D Nicol, "Statutory Interpretation and Human Rights After Anderson" [2004] PL 274, at 276 and at 275. However, Kavanagh says – A Kavanagh, "Unlocking the Human Rights Act: The "Radical" Approach to Section 3(1) Revisited" [2005] EHRLR 259 – that Lord Steyn did not say that such a construction will always be necessary or possible – simply that it would sometimes be so (at 266).

⁷⁸ [2002] UKHL 46, [2003] 1 AC 837.

Steyn said: “... section 3(1) is not available where the suggested interpretation is contrary to express statutory words or by implication necessarily contradicted by the statute”.⁷⁹ In the light of this, and other speeches in the House of Lords such as those in *Re S*⁸⁰ and *Bellinger v Bellinger*,⁸¹ Nicol has therefore argued that the House of Lords is less inclined to find a Convention compliant interpretation of the statute (and more inclined to declare an Act of Parliament incompatible under s4(2) of the HRA – see below).⁸² This has been criticised by Kavanagh who persuasively argues that the context and individual circumstances are more likely to explain judicial approaches to s3(1), rather than any fundamental change of mind about the section.⁸³ For example, she refers to the potential for legal reform as a factor in the courts deciding whether to exercise their powers under s3(1) or s4(2). In *Bellinger* the House of Lords declined to interpret “male” and “female” in s11(c) of the Matrimonial Causes Act 1973 to include a transsexual female under s3(1) of the HRA for the purposes of marriage. Rather than arguing that this signaled a judicial retreat from s3(1), which was Nicol’s argument, Kavanagh said one of the justifications for the courts issuing a declaration of incompatibility was because the particular change in the law was inappropriate for the judiciary: it required extensive inquiry and the widest public consultation and discussion, so was more suitable for Parliamentary reform.⁸⁴

The interplay between sections 3(1) and 4(2) of the HRA seems to have been settled for the foreseeable future by the House of Lords in *Ghaidan v Godin-Mendoza*.⁸⁵ When amending provisions of the Rent Act 1977 to make them comply with Articles 8 and 14 of the ECHR, thus allowing a surviving gay partner to inherit his deceased lover’s tenancy, Lord Nicholls said:

[The] intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation.⁸⁶

The courts are therefore prepared to assess the merits of legislation to some degree to make it interpretively Convention compatible. However, it will be recalled that this obligation under s3(1) of the HRA is not absolute: it is qualified by the phrase “as far as possible to do so”. To this end, there should still be judicial restraint into the merits of a statute’s compliance where an interpretation would clearly contradict the ethos of the legislation.

⁷⁹ *Ibid*, at para 22.

⁸⁰ [2002] UKHL 10, [2002] 2 AC 291.

⁸¹ [2003] UKHL 21, [2003] 2 AC 467.

⁸² D Nicol, *op cit*.

⁸³ A Kavanagh, “Statutory Interpretation and Human Rights After Anderson: A More Contextual Approach” [2004] PL 537. She argues: “[The] fact whether an interpretation under s3(1) HRA is ‘possible’ will depend in part on contextual factors, such as (crucially) the terms of the legislation under scrutiny, as well as the impact and consequences of the proposed interpretation.” (at 539).

⁸⁴ *Ibid*, at 541. Kavanagh also justifies the courts’ preference for a declaration of incompatibility in *Bellinger* by reference to the ruling of the ECtHR in *Goodwin v United Kingdom* (2002) 35 EHRR 447, which had found the lack of legal protection of transsexual people in the UK to contravene Articles 8 and 12 of the ECHR. Since this ruling by the ECtHR, Kavanagh said, the government had signalled its intention to reform the law so there was little need for the House of Lords in *Bellinger* to find a Convention compliant interpretation under s3(1). (The discriminatory provisions of the legislation have now been addressed by the Gender Recognition Act 2004.)

⁸⁵ [2004] UKHL 30, [2004] 2 AC 557.

⁸⁶ *Ibid*, at para 33.

The legitimacy of low standards of intervention and section 4(2) of the HRA

Section 3(1) of the HRA is not unqualified. Where a Convention compliant interpretation of a statute is not possible a court may issue a declaration of incompatibility under s4(2) of the HRA. Some guidance as to the exercise of this judicial power has recently been given by the House of Lords in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*.⁸⁷ Here the court was considering whether the ban on political advertising on television and radio in sections 319 and 321 of the Communications Act 2003 was incompatible with Article 10 of the ECHR. Despite Lord Bingham saying: “the importance of free expression is such that the standard of justification required of member states is high and their margin of appreciation correspondingly small, particularly where political speech is in issue”,⁸⁸ the court still held that the ban was not unlawful. In determining that ultimately the balance favoured the state here, Lord Bingham observed:

The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it should in my opinion be given great weight, for three main reasons. First, it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so. Secondly, Parliament has resolved, uniquely since the 1998 Act came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed. . . The judgment of Parliament on such an issue should not be lightly overridden. Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules. . . A general rule means that a line must be drawn, and it is for Parliament to decide where. . .⁸⁹

Arguably, therefore, a particularly wide area of discretion was seemingly afforded to the statute by the House of Lords.⁹⁰ Lord Bingham had said that this depended on the circumstances and subject matter of the case. As a general rule what might these be? The earlier case of *International Transport Roth v Secretary of State for the Home Department*⁹¹ offers some explanation. Here the Immigration and Asylum Act 1999 had imposed penalties on those who allowed illegal entrants into the UK. The usual penalty was £2000 per entrant payable within 60 days, subject to some exceptions such as the defence of duress, which the carrier had to prove. The burden of proof was therefore reversed, that is, it was the responsibility of the defence, the carrier, to prove innocence rather than the prosecution to prove guilt. Furthermore, the carrier could be detained until the fine had been paid, and no compensation would be paid to an innocent carrier who had been detained because of an unreasonable penalty notice.

The Court of Appeal ruled that the reversal of the burden of proof, coupled with the further sanctions, was unfair and incompatible with Article 6 of the ECHR, the right

⁸⁷ [2008] UKHL 15, [2008] 2 WLR 781.

⁸⁸ *Ibid*, at para 26.

⁸⁹ *Ibid*, at para 33.

⁹⁰ The ruling of the House of Lords in *Ghaidan v Godin-Mendoza* has caused one commentator to note that the courts might be falling into a “deference trap” by deferring twice over – A Young, “*Ghaidan v Godin-Mendoza*: Avoiding the Deference Trap” [2005] PL 23: “[Once] at the rights stage, when interpreting the scope of the Convention right, and again at the interpretation stage, when ascertaining whether a Convention-compatible interpretation is possible.” (at 28) Perhaps this was the approach of the House of Lords in *Animal Defenders International*? In holding that the ban on political advertising did not infringe Article 10(1) of the ECHR no more than was absolutely necessary, Lord Bingham, of course, recognised the competence of Parliament in this area. However, he also said that a wide margin of appreciation is accorded to states by the ECtHR in assessing breaches of this nature under Article 10(1) (at para 33), implying deference was shown twice.

⁹¹ [2002] EWCA Civ 158, [2003] QB 728.

to a fair trial by an independent and impartial court or tribunal.⁹² In so doing, Laws LJ argued that a greater degree of deference should be accorded to Acts of Parliament than to subordinate legislation or a decision of the executive.⁹³ Of course, other issues pertaining to the circumstances and the subject matter of the case (to use the words of Lord Bingham in *Animal Defenders International*) may outweigh the respect shown by the judiciary to the legislation at issue. To this end, Laws LJ identified other factors which were relevant to the degree of deference shown by the courts. Judges were more likely to interfere where the right under consideration was an absolute right such as the right to life rather than a qualified right such as freedom of expression,⁹⁴ and the subject matter was more within the competence of Parliament than the judiciary, such as the defence of the realm.⁹⁵ Although this was a dissenting judgment by Laws LJ, it has received much attention and seems to be an accepted view that a degree of deference should be shown by the courts to statutes when issuing a declaration of incompatibility under s4(2) of the HRA.⁹⁶ Is an intensive process of merits-review here therefore justified?

Degrees of deference shown by judges when assessing infringements of the ECHR and sections 3(1) and 4(2) of the HRA, illustrating the intensity with which the courts review merits, inevitably differ depending upon which Article is under consideration, and the context in which it arises. Indeed, standards differ between judges in the same case⁹⁷ and between judges more generally.⁹⁸ Such an argument leads one to question when the courts are, categorically, acting unconstitutionally in reviewing the merits of executive action? This is maybe an impossible question to answer. For example, Allan has argued:

The boundaries [of executive]...autonomy...cannot be settled independently of all the circumstances of the particular case; for only the facts of the particular case can reveal the extent to which any individual right is implicated and degree to which relevant public

⁹² The offending legislation was later amended by s125 of the Nationality, Immigration and Asylum Act 2002.

⁹³ [2002] EWCA Civ 158, [2003] QB 728, at para 83.

⁹⁴ *Ibid.*, at para 84.

⁹⁵ *Ibid.*, at para 85. For an important critique of the deference approach employed by Laws LJ in this case see: M Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2004), pp 337–370. Hunt says: "Laws LJ's approach leads him to a conclusion which is striking in its submissiveness to Parliament." (at 358) Dyson LJ also is critical of the approach adopted by Laws LJ here (but is perhaps more forgiving in the context of his whole article) – Lord Justice Dyson, "Some Thoughts on Judicial Deference" [2006] JR 103: "It may be said that all matters on which Parliament legislates and on which the executive makes decisions fall within [the judiciary's] constitutional responsibility." (at 104).

⁹⁶ Clayton – *op cit* (2004a) – has argued generally that the doctrine of deference is overstated (at 620). He justifies this by stating that the HRA has been drafted to ensure Parliamentary sovereignty trumps the judicial interpretation of human rights, thus allowing the legislature or the executive a second bite of the cherry. Clayton explains in greater detail why the principle is overstated elsewhere: *op cit* (2004b) at 40.

⁹⁷ For example, Jowell – J Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] PL 592 – and MacDonald – A MacDonald, "Political Speech and the Standard of Review" [2003] EHRLR 651 – draw attention to the varying standards of review adopted by judges in the same case: the ruling of the House of Lords in *Regina (Pro-Life Alliance) v BBC* [2003] UKHL 23.

⁹⁸ Lester – A Lester, "The Human Rights Act 1998 – Five Years On" [2004] EHRLR 258 – has gone as far as comparing the degree of deference accorded to the executive and legislative branches of the state by some of the Lords of Appeal in Ordinary in different cases. He says that Lord Hoffmann has tended to be more deferential than Lords Bingham and Steyn (at 266). The latter two judges have been described by Dickson – B Dickson, "Safe in Their Hands? Britain's Law Lords and Human Rights" (2006) 26 LS 329 – as "consistently [being] the Law Lords in favour of a rights-based solution to the cases at hand" (at 343). (In the case of the former judge Dickson says that he appears "to blow hot and cold on rights issues". (at 344)) Dickson's statement about Lord Steyn is not altogether surprising as the judge's participation in *Regina (A) v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 was challenged because of his stated opposition to the indefinite detention provisions under ATCSA 2001 (see: Lord Steyn, "Human Rights: The Legacy of Mrs Roosevelt" [2002] PL 473) and (possibly) America's detention of Al-Qaeda suspects at Guantanamo Bay, Cuba (see: Lord Steyn, "Guantanamo Bay: The Legal Black Hole" (2004) 53 ICLQ 1). Lord Steyn has articulated similar thoughts about Guantanamo Bay in Lord Steyn, "Our Government and the International Rule of Law Since 9/11" [2007] EHRLR 1.

interests may justify the right's curtailment or qualification . . . There is . . . no means of defining the scope of judicial powers, or prescribing the limits of official discretion, as regards the details of any particular case, without examination of the specific legal issues arising in all the circumstances.⁹⁹

However, the author is uncomfortable with proceeding on this basis as it affords no certainty to the executive about the boundaries of its power. For constitutional reasons the executive must surely be permitted some latitude in its decision-making – whatever the context.

Substitution of judgment as a limit to the judicial review of merits

In arguing that English law should recognise the proportionality test as a stand alone ground of review, Craig does not go as far as advocating a standard of intervention equivalent to judicial substitution of judgment.¹⁰⁰ He defines this approach as the substitution of choice as to how the discretion ought to have been exercised for that of the administrative authority. The courts would in other words reassess the matter afresh and decide, for example, whether funds ought to be allocated in one way rather than another.¹⁰¹ There are other commentators such as Clayton who support the view that substitution of judgment is an absolute limit to the judicial review of merits¹⁰² – even when applying the proportionality test, which by its very nature increases the likelihood of a reconsideration of the merits of an administrative decision. He argues that despite varying standards of the principle applied amongst Commonwealth jurisdictions, there is universal acknowledgment that the court is exercising a review function and is not substituting its own judgment for that of the original decision-maker.¹⁰³ From a domestic law perspective, Hickman, in an excellent assessment of the proportionality test, analyses the different approaches to the principle that the UK courts have employed. He finds that the test is still one of review.¹⁰⁴ Where the ECHR right is absolute and unqualified, meaning proportionality is generally excluded, Sayeed impliedly agrees about the minimum standard of judicial intervention to be employed: he states that the judiciary would never usurp the executive by substituting the latter's decision.¹⁰⁵

⁹⁹ T Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671, at 676.

¹⁰⁰ P Craig, *Administrative Law*, 6th ed. (Sweet and Maxwell, 2008), at 614.

¹⁰¹ *Ibid.*, at 609. Craig has described substitution of judgment as "extreme merits" – P Craig, "Unreasonableness and Proportionality in UK Law" A paper presented at a conference at the Institute of European Law, The University of Birmingham on 20th March 1998. (The substance of Craig's conference paper is published in P Craig, "Unreasonableness and Proportionality in UK Law", in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe*, (Hart Publishing, 1999) at 85–106.) Substitution of judgment has also been described as "primary-facts review of executive action" – F Klug and C O'Brien, "The First Two Years of the Human Rights Act" [2002] PL 649, at 659; and "pure appeal" – M Beloff, "The Concept of 'Due Deference' in Public Law" [2006] JR 213, at 216.

¹⁰² However, there are instances where the courts do substitute their judgments for those of the executive but these pertain generally to factual issues rather than a reconsideration of administrative powers. For example, Craig says – *ibid.*: "It is clear that the courts do substitute judgment on certain issues under the HRA. This is so in relation to the meaning of many of the Convention terms that arise before the courts pursuant to the HRA. Thus the courts decide for themselves what constitutes speech, an assembly or one of the plethora of other interpretive issues that arise under the legislation." (at 592) Furthermore, Fordham – M Fordham, "Judicial Review Cheat Sheet" [2003] JR 131 – states: "A claim based on procedural fairness/impartiality [will result in judges substituting] their view as to whether the process was fair. . . [though] this will constrain only the process not the substantive action." (at 134)

¹⁰³ R Clayton, "Regaining a Sense of Proportion: the Human Rights Act and the Proportionality Principle" [2002] EHRLR 504, at 512.

¹⁰⁴ T Hickman, "The Substance and Structure of Proportionality" [2008] PL 694. However, Hickman does talk in less optimistic terms: first, he does recognise the limited applicability of substitution of judgment (at 696–700) (see more on this in footnote 102 above); secondly, he states that the domestic approaches to the proportionality test oblige positive actions by the courts to "prevent [a] collapse into 'full' merits review." (at 700) He ultimately concludes that a clear and principled approach to proportionality is required (at 715).

¹⁰⁵ S Sayeed, "Beyond the Language of 'Deference'" [2005] JR 111, at 111.

The courts are also unequivocal in their assertions that judicial review for suspected breaches of the ECHR does not involve them in substitution of judgment. For example, when discussing the adoption of the proportionality principle to breaches of qualified rights under the HRA, Lord Steyn in *Daly* said that intervention by the courts was still one of review rather than appeal: "The differences in approach between the traditional grounds of review and the proportionality approach may... sometimes yield different results... This does not mean that there has been a shift to merits-review".¹⁰⁶

In the context of this article where degrees of intervention on the merits are examined, the phrase "merits-review" used by Lord Steyn may not necessarily imply judicial substitution of judgment. The later ruling of the House of Lords in *Huang v Secretary of State for the Home Department*¹⁰⁷ clarifies what Lord Steyn was saying. Here the court had to decide on the intensity of the proportionality test to be employed by an immigration appeal adjudicator, meaning: the issue which separated the applicants and the Secretary of State was whether or not the adjudicator should decide for himself, on the merits, whether the removal was proportionate or not. The Secretary of State had argued that the adjudicator's assessment of proportionality should be limited to a review of his decision, and only ask whether or not it was within the range of reasonable assessments of proportionality.¹⁰⁸ In rejecting the argument of the latter, Lord Bingham maintained:

[Lord Steyn's] statement has, it seems, given rise to some misunderstanding... The point which, as we understand, Lord Steyn wished to make was that, although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker.¹⁰⁹

The message is therefore clear: the judicial review of discretionary powers, whatever the circumstances, is still a supervisory function of the courts. Although a greater judicial consideration of the merits of administrative decisions affecting rights is permitted since the coming into force of the HRA, the executive reserves the right not to have their judgments substituted by the courts; this is the limit of judicial power.

CONCLUSION

Orthodox principles of public law prescribe that judicial review is not an appellate jurisdiction. The courts are merely supervising the lawfulness of administrative decision-making, that is, they are ensuring that the executive is working within the implied boundaries of a discretionary power conferred on it by the Legislature. The administrative decision-maker has been granted a discretion as a constitutional recognition that s/he is in the best position to act in most circumstances. The irrationality ground of review is defined in a way that acknowledges this so (in theory) provides the executive with the latitude to decide upon several courses of action within a particular discretion. Intervention by a reviewing court under this head of challenge should therefore be undertaken only when a decision is not within a range of options available to a rational decision-maker.

However, the first article in this study found that the courts were in fact adopting low standards of irrationality and thus were reviewing the merits of administrative

¹⁰⁶ [2001] UKHL 26, [2001] 2 AC 532, at para 28.

¹⁰⁷ [2007] UKHL 11, [2007] 2 AC 167.

¹⁰⁸ M Amos, "Separating Human Rights Adjudication from Judicial Review" [2007] EHRLR 679, at 680.

¹⁰⁹ [2007] UKHL 11, [2007] 2 AC 167, at para 13.

activity. Therefore, the second article in this study set out to examine the constitutionality of these low standards of judicial intervention. It concluded that some of these merits-reviews previously identified had in reality been legitimate by reference either to the actual test of review employed by the court (proportionality instead of irrationality, for example) or because the fundamental rights of the applicant had been unjustifiably infringed. With the advent of the HRA, this article has found that the constitutionality of the judicial review of the merits of discretionary powers has obviously widened: assessing the engagement of “qualified” rights of the ECHR demands a proportionality type of approach, for example. The very nature of this test is the notion of balance, a consideration of two competing interests: the private right of the applicant to privacy, expression, association etc and the public duty of the state to protect national security, prevent disorder and crime and so on.

Qualified rights are not the only rights which legitimately engage low standards of review: some absolute rights of the ECHR like Article 2, the right to life, also employ the proportionality test. In cases of fatal shootings by the police, for example, Article 2(2) permits the intentional deprivation of life but only where the use of lethal force is for a legitimate object like prevention of unlawful violence and “absolutely necessary”. In assessing a potential unlawful breach of Article 2(2), a reviewing court must adopt a strict proportionality approach, that is, the justifications by the state for the killing must be subjected to particular scrutiny. A low standard of judicial intervention in this context is therefore justifiable. However, the adoption of proportionality review does not necessarily engage a significant review of the merits of executive action. For instance, where certain justifiable state aims like public morality are being pursued, the intensity with which the courts review merits should be smaller. Furthermore, in other situations the courts should also adopt a degree of restraint over the control of executive powers: exercising their interpretive obligation under s3(1) of the HRA and issuing a declaration of incompatibility under s4(2) of the HRA being obvious examples.

The legitimate standards of judicial intervention under the HRA do therefore differ depending on the Article of the ECHR under assessment, the context in which the Article arises and even the nature of the remedy claimed. This is arguably unsatisfactory from the executive’s perspective: there must still be a region of administrative decision-making from which the courts are excluded. In this regard, a secondary purpose of this third article in the study of irrationality has been to evaluate this constitutional repositioning of the judiciary, with a view to establishing where this new ‘fault line’ lies between it and the executive. The growth in the power of the courts at the expense of the executive, especially since the coming into force of the HRA in 2000, has made substantial in-roads into the merits of administrative decision-making, to the point where substitution of judgment is now the absolute limit of the courts’ power. In a subsequent article the author will question whether this boundary of judicial decision-making affords the executive an appropriate degree of latitude to undertake its governmental duties. The author suspects that this smaller zone of lawful administrative activity is too narrow. To this end, for reasons of democracy, it will be argued that legitimate standards of judicial intervention on the grounds of irrationality should therefore be raised so that the executive is permitted a sufficient measure of discretion from which to exercise fully the responsibilities conferred on it by the Legislature.

CASE AND COMMENT

The address for the submission of material for this section is given at the beginning of this issue

DEFAULTING STRUCTURED INVESTMENT VEHICLES: ARE SOME CREDITORS MORE EQUAL THAN OTHERS?

In the matter of Sigma Finance Corporation (in Administrative Receivership)
[2008] EWCA Civ 1303 (CA)

(Lord Neuberger, Lloyd and Rimer LJ)

The Facts and Decision

Sigma Finance Corporation (“Sigma”) was a structured investment vehicle (“SIV”) incorporated under the laws of the Cayman Islands. Sigma invested in asset backed securities and other financial instruments and issued or guaranteed US dollar and Euro Medium Term Notes (“MTNs”) to Noteholders to fund itself. It had a number of other creditors under liquidity facilities, hedging agreements, repurchase and securities lending agreements (“repos”) as well as holders of Capital Notes in issue. Apart from the Capital noteholders and the counterparties to the repos, all were secured creditors under the terms of an English law Security Trust Deed (“Trust Deed”).

As a result of the turbulent financial markets in 2008, the value of the securities held by Sigma fell by a substantial amount and the market for these securities became increasingly illiquid as fewer investors wished to buy such instruments. This also meant that fewer investors wished to buy new notes from Sigma with the result that Sigma had insufficient cash to meet its payment obligations under the notes it had already issued. Despite its attempt to raise cash by other means, on 30 September 2008, Sigma was declared insolvent and Administrative Receivers were later appointed.

Sigma’s assets were insufficient to meet its liabilities with a total deficit of US\$9 billion and a deficit of US\$5.5 billion in respect of secured creditors.

The court had to consider the construction of the Trust Deed as a whole and the wording of the Enforcement clause in particular (clause 7), in determining the rights of secured creditors.

Clause 7.6 required the Trustee to set up pools of assets to match the liabilities of specific classes of creditor. Each class of creditor could then only make recoveries from the assets allocated to its particular pool. If the assets in a particular pool proved to be inadequate, then the creditors entitled to recover from that pool would be paid *pro rata*. The Trust Deed did not, however, accelerate the liabilities nor did it provide that all liabilities were to be discharged *pro rata* out of all available assets.

The Trustee was required to establish the pools within the Realisation Period. This was a period of 60 days starting on the Enforcement Date (2 October) and ending on

29 November 2008. Three pools were required: Short Term (for liabilities arising within 365 days of the Enforcement Date), Long Term (for liabilities arising 365 days or more from the Enforcement Date) and Residual Equity.

Four classes of creditors were represented before the court. Party A's debt was the first debt due during the Realisation Period. Party A claimed that the proper construction of clause 7.6 meant that debts arising during the Realisation Period had to be paid in the order in which they fell due, which meant that it was entitled to first call on all the available assets. Party B's debt also fell during the Realisation Period, but later than Party A's. If Party A were paid in full, there would be no assets left meaning that Party B would receive nothing. Party B argued that all Realisation Period creditors were entitled to share *pari passu* in the available assets. Party C was a Short Term creditor and Party D a Long Term creditor: they would receive nothing on a "pay as you go" construction. Parties C and D argued that all creditors should be paid *pari passu*.

The judge at first instance agreed with the construction proposed by Party A. The proper construction of clause 7.6 required the Trustee to pay liabilities as they fell due during the Realisation Period (the "pay as you go" approach) rather than on a *pari passu* basis. Parties B, C and D appealed to the Court of Appeal which dismissed their appeals by a majority ruling (Lord Neuberger dissenting).

Lloyd LJ gave the leading judgment. He held that the judge was right to accept Party A's argument. The Trust Deed was a commercial document prepared by skilled lawyers for financially sophisticated and properly advised parties and its intention should be understood by reference to the clear and natural meaning of the words used. There was a clear obligation for the short term liabilities to be paid on the due dates so far as possible and this indicated a "pay as you go" approach.

The argument for *pari passu* distribution placed a meaning on the words "so far as possible" that they could not bear. The effect of reading the words differently would be to create a set of obligations which the Trust Deed did not contain in order to avoid what might appear an unfair and unexpected result in what were extreme economic circumstances.

It was clear that the Trust Deed only allowed *pari passu* distribution to take place after the pools of assets had been constituted to meet the obligations owed to particular classes of creditors. It was also clear that this mechanism had been carefully drafted. His Lordship did not, therefore, find it possible to conclude that a general *pari passu* distribution could be imposed by the wording in clause 7.6.

Comment

There are a number of points of interest arising from this case. First is the fact that Lloyd and Rimer LJ were both very clear that they were simply identifying the bargain that the creditors had made and not the bargain that they may have wished they had made with the benefit of hindsight. The effect of the decision was that Party A took everything and Parties B, C and D had to go without, despite the fact that they were all secured creditors. For insolvency lawyers who are used to dealing with creditors of the same class on a *pari passu* basis, this decision may seem counter-intuitive.

Rimer LJ noted that although *pari passu* distribution has obvious appeal, this case was not about applying any conventional insolvency regime.

The [Trust Deed] reflects a commercial bargain made . . . Party A's successful argument can, on one view, perhaps be regarded as having achieved an unfair result. But any such assessment necessarily assumes that the parties had made some different bargain which is

not being respected. This litigation is concerned with ascertaining the bargain they in fact made. . . the court's duty is to give effect to it. It is not the court's function to re-write it.¹

The difficulty that Lord Neuberger had with this approach was that the outcome was one which "would surprise (or more than surprise) reasonable people in the commercial world: accordingly it is not an outcome which I regard it at all likely as having been intended".² In his view, Sigma's assets should have been made available to all the secured creditors who should then have shared them *pro rata*.

This discussion leads into the second point of interest, which is to consider where this case fits in with recent cases involving structured investment vehicles in receivership such as *Re Cheyne Finance plc (in receivership) (No 1)* ("*Cheyne No 1*"),³ *Re Cheyne Finance plc (in receivership) (No 2)* ("*Cheyne No 2*")⁴ and *Re Whistlejacket Capital Ltd (in receivership)* ("*Whistlejacket*").⁵

In *Cheyne No 1*, following an enforcement event, receivers were appointed over the business and assets of Cheyne in accordance with the security trust deed. The receivers did not consider that Cheyne was insolvent at that time, but recognised that illiquidity in the market for some of Cheyne's investments meant that it was likely to become insolvent in the future as the value of its assets deteriorated. The receivers had sufficient cash available to pay obligations as they fell due in the short term, but in the medium to long term would have to sell assets to meet those liabilities. The receivers asked the court to determine the order of priority to be applied to moneys coming into their hands during the period between enforcement and insolvency. The issue was whether the terms of the security trust deed required them to pay secured obligations as they fell due (the "pay as you go" construction) or to make provision for all the secured creditors and, if that did not leave sufficient funds to pay everyone in full, to pay each creditor a reduced sum *pari passu*. The court concluded that the pay as you go approach applied.

Cheyne No 2 saw the receivers returning to the High Court for help in determining whether an insolvency event had actually arisen. The receivers had assumed that because they could pay their debts as they fell due (so called "cash flow" insolvency under section 123(1)(e) Insolvency Act 1986) they had not triggered an insolvency event under the documentation as this definition did not require them to consider whether their assets met their liabilities in the medium to long term ("balance sheet" insolvency under section 123(2) Insolvency Act 1986), even though the receivers were very clear that balance sheet insolvency was inevitable. The judge considered that the cash flow insolvency test should be likened to the Australian statutory commercial test for insolvency which allowed future debts to be taken into account when determining insolvency. The effect of *Cheyne No 2* was to trigger an insolvency event enabling all the secured creditors to be paid *pari passu*.

In *Whistlejacket*, the issue was whether a priority clause in a security trust deed established not only priority as between classes of creditors but also priority within the defined class of senior creditors on the company's insolvency. The senior creditors held medium term notes with different maturity dates and consequently, there was a risk that those notes with later maturity dates might not get paid in full. At first instance, the court held that the "pay as you go" approach was the correct one, enabling notes

¹ *In the matter of Sigma Finance Corporation (in Administrative Receivership)* [2008] EWCA Civ 1303 at paragraph 92.

² *Ibid*, para 132.

³ [2007] EWHC (Ch) 2402 2, [2008] 1 BCLC 732.

⁴ [2007] EWHC (Ch) 2402, [2008] 1 BCLC 741.

⁵ [2008] EWCA Civ 575.

with early maturity dates to be paid in full. The receivers appealed. The Court of Appeal allowed the appeal, holding that the documents established an order of priority between successive classes of creditors, but imposed no other obligation regarding payment. On insolvency, the receivers would use their discretion in making payments to creditors to ensure that each class of creditors would be paid *pro rata* and *pari passu*.

Lloyd LJ distinguished *Cheyne* and *Whistlejacket* on the basis that the terms of the documents in those cases were very different from the terms of the Trust Deed in this case, stating that “they are of assistance only at the highest level of generality... the differences [are]... more notable than the similarities”.⁶ Yet Lord Neuberger cited *Cheyne* in support of his contention that the “pay as you go” approach was unattractive for reasons of business common sense. He pointed out that this approach could require assets to be realised on a “fire-sale” basis at any price in order to meet liabilities as they arose. This point had been made by the judge in *Cheyne No 2* who had noted that in order to pay a short term liability of £1bn, a portfolio worth £6bn would have had to be sold urgently with the effect that it would only raise £3bn: an outcome which he thought would not have been the commercially rational intention of those drafting the trust deed.⁷

The third point of interest is that this was a case where the judge at first instance was commended by the Court of Appeal for dealing with the matter swiftly to enable a decision to be reached before the end of the Realisation Period. When SIVs get into financial difficulties, vast amounts of money are involved and much is at stake for creditors. Where institutional investors are involved, the question as to whether they are likely to be paid is a commercially sensitive one (particularly in the wake of the global recession) and legal issues which may arise on default need to be dealt with quickly and discreetly. *Sigma* is another case in the series of SIV cases that started with *Cheyne* where the courts have been at great pains to act quickly. Barry Isaacs⁸ believes that this has been made possible by the use of receivership for SIV restructurings. Isaacs notes that receivers can act quickly because they can apply to the court for directions under s35 Insolvency Act 1986. The courts have also shown an increasing willingness to allow creditors to remain anonymous: in *Cheyne*, *Whistlejacket* and *Bank of New York v Montana Board of Investments*,⁹ the courts took the view that the identity of the noteholders bore no relevance to the contractual issues before them. Isaacs considers that these cases demonstrate that receivership a highly relevant process, notwithstanding the Enterprise Act 2002 and its focus on administration.

Since this article was first written, *Sigma* has been taken to the House of Lords. It will be interesting to see whether the Court of Appeal’s interpretation of clause 7.6 and, in particular, the words “so far as possible” will be upheld or whether this clause could be construed to enable *pari passu* distribution. Judgment is anticipated in the autumn.

PAULA MOFFATT*

⁶ *In the matter of Sigma Finance Corporation (in Administrative Receivership)* [2008] EWCA Civ 1303 at paragraph 40.

⁷ [2007] EWHC (Ch) 2402, [2008] 1 BCLC 741 at paragraph 65.

⁸ “SIVs, insolvency and receivership”, by Barry Isaacs in 3–4 *Digest*, November 2008.

⁹ [2008] EWHC 1594.

*Solicitor, Senior Lecturer Nottingham Law School. A shorter version of this article was first produced in January 2009 under contract for Lovells.

BOOK REVIEWS

*Book reviews and books for reviewing should be sent to
the address given at the beginning of this issue*

PROPERTY LAW

Property Law: Commentary and Materials by ALISON CLARKE and PAUL KOHLER, Cambridge, Cambridge University Press, 2005, xivi + 775pp, Paperback, £37.00, ISBN 978-0521614894.

This book is a joy. The authors present an intelligent and intelligible account of property law. This is not property law as arcane rules and crabbed reasoning, but property law as a vital and contentious area of legal and human culture. They achieve this task without ascending to levels of generality so abstract that one is left giddy, returning again and again to the law mediating real conflicts over real resources. There is no adoption of any *a priori* philosophical or ideological posture. With humility too often absent in academe the authors open up for the reader possible ways of understanding property law, rather than trying to impose any particular one. The book is clearly and well written. Both the exposition and arguments are rigorous: there is no substitution of colourful language for precision and regard for logic. The authors confront the reader again and again with novelty of example, and an awareness of the importance of value judgments in the evaluation of property law. In short this book succeeds in introducing property law as a subject area that can be reflective and considered. It is mature and magisterially well informed about the law of property in the common law world.

There is always some difficulty in reviewing a book made up of selected readings, essentially a book constructed from excerpts from the works of other authors. Indeed, in a very real sense such books are collaborative in nature, built upon the efforts of many authors over time. The quality of authorial and editorial performance could be measured by several criteria: the selection of materials to be excerpted; the editing of the excerpts; the ordering of the excerpts; the commentary and articulated structure of the book; the guidance for further reading of the excerpted materials and other suggested materials; and the suggestions or prompts, designed to help the reader to take the most from the excerpted material by inviting analysis and reflection. For the record, the standards met by *Property Law* on all of these criteria are of the highest. However, it is the particular genius of this book to blend, explain, bring into contrast, and order materials of the highest quality, until the resulting whole is far more than the disassembled parts. It is often hard to articulate the nature of the intellectual operation termed “synthesis”. This book is an exemplar of synthesis of the highest quality, and to achieve this the authors have made themselves unassuming. As with craftsmanship generally the virtue of the craft worker is the greater the less it draws attention to itself. Hence, an adjective used in praise of craft work is “seamless”. *Property Law* is crafted to the highest standards; the book is a seamless exposition and arrangement of materials embedded in a very soundly constructed conceptual structure.

A few caveats need to be made. The book is predominantly devoted to land law, although there is also significant and valuable material on goods. There is very little material on intangible property. The book is not complete in itself. An oddity of the book is that few edited judgments or statutory provisions are reproduced. These sources, the mainstay of most legal books of materials, are reproduced on a website, in an effort to keep the book to a manageable length. As the book approaches 800 pages this was probably a necessary recourse. Access to the website is not problematic, but the web address given: www.cambridge.org/propertylaw was not functional when last accessed. It seems to be necessary to navigate via the web page on the book hosted by the publisher, Cambridge University Press. Finally, the work is often demanding of the reader. Most students will require significant support in dealing with the book, however, the benefits it offers to readers more than return the costs of reading the book.

In *Property Law* the reader is led from the general and theoretical to the practical and applied. The basic structure of the book is to start with the broadest questions of justification and purpose of the law (Part 1); then, move on to the specific concepts and discriminations necessary for an intelligent account of the law (Part 2); and finally, to give an account of aspects of the law that illustrate and use the theoretical tools, criteria for evaluation, and insights, that have been provided (Parts 3 and 4). Thus, the aspiration is to introduce the law at levels of very high generality in the service of analyses operating at relatively low levels of generality. This movement can also be described as from the theoretical to the doctrinal: in such a manner that the theoretical informs, structures, and illuminates the doctrinal. Where wholly successful the book produces an account of the common law of property that manages to integrate exposition and analysis. At the same time it provides an articulation of the social and formal limitations on property law, and an account of evaluative criteria applicable to the law. Such an attempt represents a combination of intellectual ambition and maturity of approach that is all too rare.

Part 1 is concerned with general issues: matters of definition, analytical terms of art, theoretical perspectives, and moral or ethical justifications for the recognition of property rights. Included in the four chapters of Part 1 is a consideration of the initial acquisition of property rights. These issues are introduced through such topics as the dispute between the fox hunt and an interloper, the legal “systems” created by whale hunters to resolve conflicting claims to harpooned whales, the legal reflections of bruising conflicts over meaning and claims to land use between indigenous peoples and European conquerors in Australia, and the often fierce debates between advocates of free markets and defenders of alternative means to manage scarce resources. Whilst some passages are demanding, the authors have clearly paid great attention to grabbing, and keeping, the interest of the reader.

Part 1 introduces the reader, *inter alia*, to John Locke and Felix Cohen, Bernard Rudden and Wesley Hohfeld. Of particular value is an extensive and extremely readable introduction to writers in the tradition generally described as “law and economics”: an introduction supported in the commentary by a very useful account of terms such as “transaction costs” and “Kaldor-Hicks efficiency”. There is a lot of valuable work that is obscure to many lawyers due to unfamiliarity with economic terminology. *Property Law* provides an excellent introduction to this literature for the lawyerly economics novice. Finally, there is an interesting and practicable classification of types of property regimes into “private”, “communal” (open or limited access), “state”, and “no property”. This classificatory system promotes clarity of thought when considering “tragedy of the commons” problems, and is well thought out

and explained. Legal discourse will be improved if the system becomes generally adopted.

Within Part 1 property law is viewed in several contexts. Property law is viewed as part of economic systems, as an institutional tool that generates, or impedes, economic efficiency. Property law is described as a means to make its subject matter multi-purpose, expanding the potential usefulness of the physical and social world through fragmentation of ownership. Property law is recognised as an area of ideological dispute. Concrete examples are used to illustrate for the reader the legitimate range of diversity of approach when considering property law. The commentary supports the reader, explaining terms used and the context of an author's work, identifying key strengths and weaknesses of the excerpted pieces.

Part 2 (chapters 5 to 9) has a more restricted ambition than Part 1. It attempts to identify and explain the key concepts needed for an intelligent reflection upon property law. Thus, we have the distinction between personal and property rights; accounts of "ownership" and of "possession", reflection on the restrictive attitude of the law to novel property interests, and an introduction to that most distinctive aspect of common-law systems the "fragmentation" of ownership. There is no doubt that the constitutive chapters all deal with vital concepts. However, it might be worth reconsidering the relatively central role given to, and the extensive contents of, Chapter 6 on ownership.

Undoubtedly, the exposition of Honore's description of the *indicia* of ownership in Chapter 6 is of great value. However, the emphasis on ownership as a central concept in property law rather minimises the role of fragmentation, which is almost treated as an irritating complication that has to be dealt with. Further, there is relatively little attention given to the problems posed by identification of the subject matter of established species of property. The reification of rights by the common law, that shifting of property claims from things (that physically exist) to claims to things that have juridical substance alone (reified "estates", "interests", and "property in"), is not fully explored. This comparative neglect of the peculiarity of the subject matter of property law means there is no consideration of the dividing lines of property law (between land and other; between choses in action and in possession; between negotiable and non-negotiable). This neglect of divisions means that there is no recognition of the tendency of some legal institutions to operate across such divisions (such as the trust), and of others to be restricted to one type of property (such as the restrictive covenant). This neglect in turn obscures the need to consider how far it might be possible to forge a unified law of property, rather than accepting that we must have laws of properties. One of the real strengths of a fragmentation approach to property law is the very bright light it shines upon the patently artificial nature of the subject matter of property law. A concentration upon ownership as a central organising concept leaves the artificial nature of what is owned somewhat in the shadows.

Chapter 6 also carries a heavy load of law and economics scholarship. The discussion of law and economics in relation to nuisance is perhaps a little hard going – a lot of material is introduced, leaving the reader struggling to assimilate everything. Even if the present balance between ownership and fragmentation is retained it might be better to introduce the Calabresi and Melamed analysis of different types of legal response to disputes over land use elsewhere. Ownership and nuisance do not necessarily have to be dealt with in the same place. Given the wealth of analysis directed by law and economics scholars to the conflicting pressures on utilisation of land, perhaps this material could have been given independent development elsewhere. Perhaps, nuisance could be considered in a chapter that introduces a distinction between legal problems

of physical use and legal problems of value (or property as wealth, investment, or even as “capital”, as that idea is expounded by De Soto in *The Mystery of Capital*). This distinction could then be utilised when considering the problems the law faces when dealing with ownership of the family home. The contrasting nature of a predominantly financial claim against land, such as a typical mortgage, and a predominately functional claim, such as a right of occupation derived from status, would also resonate with some of the discussions dealing with nuisance, and appropriate remedies for interference with the enjoyment of land.

Part 2 is a very ambitious attempt to describe the key concepts needed to describe property law, and to give a law and economics view of the same. Such ambition must involve a Sisyphean undertaking, and no arrangement will meet with universal acclaim. Company law is introduced within the treatment of fragmentation. This further weakens any focus on the solely jural nature of the subject matter of property, as it suggests fragmentation is about control, rather than being about what is owned. Ultimately, Part 2 is partially successful, definitely useful, and a reminder of just how difficult it is to identify the crucial concepts for an analysis of law. Chapter 7, on possession, is quite doctrinal in tone, and a very good account of what has always been a central concept in the common law of property. Chapter 9, on the recognition of new types of property claim, is a particularly valuable account of this important aspect of the law.

Parts 3 and 4 are directed towards the application of the theoretical material of Parts 1 and 2. Thus, they are more doctrinal in focus. Together they make up less than half of the book. However, the first chapter in Part 3, Chapter 10 on title, makes a good link with Part 2, having a concept for its subject matter. It is a very valuable account of the concept of title; the principles of *nemo dat*, and relative title; and the need for rules to determine priority between interests. The breadth of kinds of property considered is unusually broad, including money as well as land and goods. The remaining chapters of the book are focussed on specific doctrinal problems.

Chapter 11, which is largely devoted to adverse possession, is sound in its law and well integrated with Chapter 4 on the allocation of property rights. The discussion of justifications for adverse possession is unusually well argued and discriminating. The critical account of the Law Commission’s discussion of the same is persuasive. The chapter is a very valuable exploration of a subject that is rarely dealt with in such clear terms. Chapter 13, which is concerned with prescription, is shorter and less concerned with integration. The chapter is a solid account of the relevant law, but not related back to the discussion on nuisance and restrictive covenants in Chapter 6 as strongly as one would have expected. The use by a landowner of a neighbour’s land (an easement or profit), and restrictions imposed by a landowner on the use of a neighbour’s land (a restrictive covenant, right of light, or easement of support), are fairly obviously linked to disputes over the uses of neighbouring plots of land. The easement and covenant are the institutional embodiment of the settlement by negotiation of disputed land use so beloved of the economic analysis. The protective attitude of the law towards long established use effects the transformation of nuisance or trespass into claim of right, but stops short of allowing a claim to grow from mere absence of use by a neighbour. Surely, this aspect of the law emphasises the problematic aspect of using property law to resolve a use dispute, as former usage is given priority over future usage, a problem as inherent in grant as in prescriptive acquisition. It is here that the material in Chapter 6 should bring illumination, but, to be brutal, it does not.

Chapter 12, on grant and transfer, is extremely clear and useful. In particular the discussion of formalities is very good. It is the law of formalities that many people

think of when they think of property law, and this account is unusually articulate and informative. Chapter 14, on the enforceability and priority of interests is also useful. The very distinction in the title of the chapter between “enforceability” (against the grantor or someone who acquires the interest of the grantor) and “priority” (against competing interests amongst one another) is a helpful distinction. The distinction clarifies the nature of some potentially confusing problems of property law. The explanation that often the problem faced by property law is one of balancing legitimate interests is clear and cogent. Both chapters are valuable, although not firmly embedded in the theoretical material that preceded them. They are both examples of good doctrinal exposition and analysis, combined with an acute policy analysis of the law.

Chapter 15, on registration, is surprisingly open textured. It incorporates elements of comparative law, and, as one would expect, clearly explains that registration systems have to balance legitimate interests. The treatment is at an unusually general level for a discussion of registration, and is very interesting. Chapter 15 is the final chapter in Part 3. Part 3 is overwhelmingly focussed on land law, although there is some material relevant to goods included.

The final part, Part 4, comprises just three chapters. None of the final chapters are well integrated into the theoretical discussion that formed Parts 1 and 2. Chapter 16 is concerned with co-ownership. It is pedestrian on co-ownership of land, and perhaps a little too speculative on the possible application of the *Re Denley*¹ principle. Chapter 17 is devoted to leases and bailment. It is a little odd that the discussion of some of the more bizarre developments in leasehold law is not related back to the concerns of Chapter 9. After all, the legal context of the developments is the restrictive attitude taken to the lease, and the denial of contractual freedom to develop non-leasehold residential arrangements that avoided statutory provisions (*Street v Mountford*).² Such subsequent monsters as the “tolerated trespasser” and the “non-proprietary lease” are, at least in part, the courts failing to find a methodology for dealing with pressure from the social housing sector for non-traditional proprietary solutions. It is an inherent limitation of property law that a restrictive attitude to novel claims needs to be maintained, as is so well explored by Chapter 9. The discussion and exposition of the law of bailment are extremely useful and informative. Finally, Chapter 18 is concerned with security interests. The material is not limited to doctrinal law, but again is not supported by the earlier theoretical discussions. As with everything else in this very impressive book the chapter repays the effort of reading. It provides a conceptualised exposition of the law that reflects a wealth of intelligent reflection of the problems posed to property law by security interests.

The successes that *Property Law* achieves are inspirational. The authors demonstrate that it is possible to be in command of the detailed developments in the law, and to approach analysis with useful insights gained from scholarly efforts. They repeatedly show that it is possible to do more than develop a one-dimensional analysis, whether of the doctrinal or theoretical mode. The authors manage to combine an inside perspective of the law, lawyers’ law or doctrine, with an outside perspective of the law, law as evaluated by non-lawyers and judged by non-legal criteria. As such *Property Law* bears witness to an immense achievement of synthesis. We now know it is possible to achieve such a synthesis, because this book manages to do so.

GRAHAM FERRIS*

¹ *Re Denley's Trust Deed* [1969] 1 Ch 373.

² [1985] 2 WLR 877; [1985] AC 809.

*Nottingham Law School, Nottingham Trent University.

HIV LAW

Legal Responses to HIV and AIDS by JAMES CHALMERS, Oxford,
Hart Publishing, 2008, xx + 174 pp, Paperback, ISBN 978-1-84113-726-1.

In the comparatively short period of time since the Human Immunodeficiency Virus (HIV) was first “discovered”, jurisdictions across the world have responded in a variety of means. A number of these have been sympathetic to People living with HIV and Acquired Immune Deficiency Syndrome (AIDS), for example attempting to guarantee confidentiality or prevent discrimination. Others have been more controversial and have sought to use law as a tool to limit the spread of HIV by, for example, imposing liability for transmission of the virus. In addition as knowledge of the virus has improved and treatments developed, responses and interventions have evolved and matured with time as attitudes towards those affected have altered.

It is against this background that Chalmers’ work attempts to examine legal responses to HIV and AIDS within the UK in a variety of contexts. The book draws on legal responses to other sexually transmitted infections (and contagious diseases), but primarily concentrates on HIV and AIDS. However, as acknowledged by the author, it is not a textbook on HIV and AIDS law offering a comprehensive review of all legal issues which arise in this context; instead it examines a number of specific legal issues that have arisen in the context of HIV and AIDS. After an introductory chapter which introduces the reader to a number of recurring themes throughout the book, specific legal issues are dealt with in a number of self-contained chapters.

Chapter two investigates the legal and ethical issues surrounding testing for HIV infection. Referring to both legal and non-legal sources Chalmers explores the issue of consent to HIV testing, asking does mere consent to testing suffice or must an individual specifically consent to an HIV test? The historical development of legal and professional opinion is clearly documented, as is the possible alteration to the law by the Human Tissue Act 2004. As well as examining consensual testing, the book also investigates unlinked anonymous testing, antenatal testing, premarital testing and the possibility of compulsory testing following alleged criminal activity. Whilst examining compulsory testing following criminal activity, Chalmers draws upon the experience in Scotland and in particular the consultation paper published by the Scottish Executive in 2005¹ concerning this issue. He skilfully examines the weaknesses of the proposed Scottish position by reference to both medical evidence and the potential conflict with the Convention for the Protection of Human Rights and Fundamental Freedoms.

Chapter three examines the issue of confidentiality and discusses the circumstances in which a duty to breach confidentiality might arise, whilst chapter four examines measures which have been either taken or proposed in order to reduce the spread of HIV. Here Chalmers concentrates on harm minimisation in relation to injecting drug users and examines the legal issues surrounding two topics – community needle exchange schemes and harm reduction measures in prisons. He acknowledges that harm reduction measures in prisons, most notably the provision of condoms and needle exchange, have faced opposition from some prison authorities. These authorities are opposed to the provision of condoms, believing that sexual activity in prison should be discouraged rather than condoned; whilst needle exchanges have faced opposition for similar reasons and for the fact that needles have the potential to be used as weapons within the prison environment. It is against this backdrop that Chalmers conducts an

¹ Scottish Executive, *Blood testing following criminal incidents where there is a risk of infection: Proposals for Legislation*, 2005, Astron B39808 02/05, ISBN: 0-7559-4531-X.

interesting examination as to whether harm reduction measures in prison might be compelled by the exercise of Tort law.

The next chapter outlines the circumstances in which an individual's HIV-positive status may form the basis for a claim that they should not be deported from the United Kingdom when they have no other basis for remaining in the country. Chalmers recognises that as treatments for HIV have developed, to the extent that for many HIV is a chronic disease rather than an inevitably fatal condition, the legal system has been presented with new challenges. Due to the fact that these treatments are expensive and not widely available in those parts of the globe where HIV infection is most widespread, there has been significant tension over issues such as asylum, immigration and deportation. Chalmers does an exemplary job of analysing the law in this area, making reference to the wider social constraints which inevitably shape the thought processes of the judiciary. There is discussion and analysis of the decisions in both *D v United Kingdom*² and *N v Secretary of State for the Home Department*,³ and also an interesting examination of whether, as an alternative approach, people living with HIV/AIDS might seek to resist deportation by asserting a claim to refugee status under the 1951 Convention relating to the Status of Refugees. There is however no discussion of the European Court of Human Rights' stage of proceedings in *N v Secretary of State for the Home Department*,⁴ although one suspects this is due to editorial timelines rather than conscious omission.

Chalmers next tackles the thorny issue of the criminalisation of HIV transmission and traces the development of the law in this area from the decision in *R v Clarence*.⁵ He examines the uncertainties that persist in this area including whether the *mens rea* requirement for a prosecution under the Offences Against the Person Act 1861, section 20, necessitates a positive HIV test and what is required for consent to operate as a defence. The case against criminalisation is examined and a number of key arguments of those who argue against criminalisation are tackled and rebutted. This chapter ends with a brief examination of the Crown Prosecution Service's guidelines covering prosecutions in this area which are, in Chalmers's opinion, a "missed opportunity" as they neither provide guidance as to when the power to prosecute will be used or offer any contribution to consistent decision-making within this area. The book then ends with a brief note on patent law in the area of access to treatment.

In sum, Chalmers is to be commended on an admirable work. His book presents the reader with an excellent introduction to a number of topics of key importance within this area. However he then attempts, and succeeds, in analysing those topics in greater depth and from a number of different perspectives. It is apparent that Chalmers appreciates that the law in this area is shaped by a variety of conflicting external sources and does a commendable job of conveying this message. Those seeking an introduction to this area would be hard pressed to find a better work.

PETER McTIGUE*

² (1997) 24 EHRR 423.

³ [2005] 2 AC 296.

⁴ *N v United Kingdom*, 27 May 2008, no 26565/05 (Grand Chamber).

⁵ 5(1889) 22 QBD 23.

*Solicitor and Senior Lecturer in Law, Nottingham Law School.

PRACTICAL APPLIED LEGAL THEORY

PALT aims to publish material that is about law or legal education, but which looks to sources outside of the core body of legal texts (*eg* case reports, legislation, law reform proposals) for illumination. A broad view is taken of what might constitute legal theory for this purpose, and “coherent thought about law or legal education” might be a reasonable account. Finally, we hope to publish here work that we feel is valuable, but that might be difficult to categorise for submission elsewhere. With these factors in mind we have decided to publish a piece by an American academic, Professor Scott Taylor, which might be described as a sketch of the role religious faith can (or should) play in legal education.

We are inviting the submission of reactions to Professor Taylor’s essay. It has already sparked informal debate amongst those who have considered it prior to publication. The essay has an immediacy that is unusual in an academic publication, and it also has a certain protean feel to it. Clearly, it has not been written defensively, in a manner calculated to anticipate criticism. Neither do we feel it has been written in a deliberately provocative manner, with an eye to gaining impact through notoriety. Rather, it seems to be an honest attempt to open up a discourse on issues that many may find uncomfortable, but which are potentially of great importance for the practice of legal education.

These qualities make the piece very valuable as a spur to thought and reply. We hope that we will be able to publish responses in the near future, written not polemically but not necessarily sympathetically either. Professor Taylor manages to raise in a short article a host of issues concerned with the role of values in legal education. Thus, amongst the issues raised are the role of religion as a source for values in legal education, and of the appropriate role of the teacher – in particular what we should take into the classroom or lecture hall with us, and what we should leave at the door as baggage. Further, he also raises issues about the “parts” of a student we should be concerned with. Is it enough to claim that our role is changing cognitive states, or should we be concerned in any manner with the ethical or religious beliefs of our students? Is such interest intrusive, or is it the indicator of a fully humane interest in those we have responsibilities for? In an age in which Higher Education is becoming more impersonal questions over the appropriate level of concern and interest of staff in students can hardly be left for natural informal processes to resolve.

GRAHAM FERRIS

THE RELEVANCE OF FAITH INTEGRATION

*SCOTT A TAYLOR**

For the last seven years, I have been teaching law at a Catholic law school, the University of St Thomas (Aquinas), in Minneapolis, Minnesota (USA). When the University of St. Thomas School of Law opened its doors in 2001, it did so with a pledge to students that they would not need to leave their religious identities at the door. One of our central educational goals has been to help students to integrate their religious identities into their developing professional identities as future lawyers. To accomplish this faith integration goal, our law school has been purposeful in hiring faculty who endorse this goal and who are willing to make meaningful efforts in their teaching to further this faith integration.

The purpose of this essay is to consider the question of whether faith integration in a legal education is worthwhile. My starting point has to do with my core definition of the work of a lawyer. A lawyer's work is essentially problem solving with a moral compass in a legal context. The legal context means that the client's particular problem might reach an acceptable solution through the services of a lawyer. The need for a moral compass arises because most legal work requires prudential discernment to make sure that possible solutions acceptable to the client are within the bounds of the law. Moreover, the law as a system of norms expressed with words inevitably produces ample uncertainty. In these instances, legal boundaries may be so elastic that moral reasoning (the process of using one's moral compass) is necessary to identify good solutions and to differentiate them from bad solutions. Both the lawyer and the client have a moral compass that each uses to evaluate the moral quality of possible solutions. A lawyer's advice is an essential service. The moral quality of this service is better when the lawyer and the client use their individual moral reasoning.

For many people in the United States and in Britain, a substantial part of a person's moral sense and thinking comes from religious teachings and traditions. Obviously, secular morality plays an important role and may be the primary source for others. In legal education, secular norms receive extensive and continuous consideration. Religious norms, however, receive little or no consideration except when law and religion intersect to create a dispute.

Very few law schools in the United States view a student's religious identity as a relevant individual characteristic. Instead, religious identity is treated more like a personal interest in a type of music, field of sport, or genre of literature. Virtually all of our teaching staff attended law schools where irrelevance of religious identity was the norm. Many of them experienced the sense that part of their legal education was missing. I tell them that they missed out on nurturing the religious part of their moral compass.

A significant number of our founding faculty had been on the teaching staff at the University of Notre Dame School of Law in Indiana. The University of Notre Dame, as a whole, and its law school in particular, was then and is now very Catholic in tradition, culture, and academics. Notre Dame actively promotes ecumenical perspectives.

Our law school, then, continued in the Notre Dame tradition but also wanted to create an educational space in which law students of all faith traditions would find themselves in a learning environment that openly and explicitly welcomed them and

* Professor of Law, University of St Thomas, Minneapolis, Minnesota USA.

their faith. Part of the mix would include serious and committed atheists along with students whose religious identity was uncertain or in a state of flux. This multi-religious community would exist in a welcoming environment that remained visibly and purposefully Catholic.

Our practice reflects these goals. We have set aside the time from noon to 12:30 pm as a period for worship and reflection. Our chapel hosts Catholic Mass every day at noon during academic terms. The chapel, however, is open to all at other times for adherents of other faith traditions. In addition, numerous student groups meet at noon for prayer, meditation, discussion, and readings. I am not a Catholic and usually spend the time in reflection. Should a friendly soul pass my way, I will use the time to engage in discussions about faith, religion, belief, morals, or ethics. These activities say to all members of the community: 'Your religious identity is a part of you that this institution thinks is important.'

In my seven years at the law school, I have had illuminating discussions about religion with atheists, Hindus, Buddhists, Muslims, Jews, agnostics, Catholics, Lutherans, Methodists, and members of other faith traditions. For me personally, I find such an environment especially enriching. I grew up as a Jehovah's Witness and am currently a student of Christian Science (often confused with Scientology). Christian Science, a Christian denomination founded by Mary Baker Eddy in the latter part of the nineteenth Century, has a universality that connects with all faith traditions. In my faith-connected conversations with members of our community, I have no goal of conversion. Instead, my aim is to listen to faith stories and to learn how religious beliefs are part of the human condition and ultimately connect to the Divine.

One conversation with an agnostic, who is leaning towards atheism, is especially memorable. As we spoke about religion, he told me. "Yes, I see how religion can be a source of comfort. But I listen to the description of this God: all knowing, all powerful. He created the universe. He is filled with compassion for all His children. He is forgiving. And... He needs money." I took the point of his story to be an assertion that some parts of organized religion operate primarily as a con game constructed to fleece worshippers, many of whom are poor and without substantial means. Organized religion, at its worst, can involve financial exploitation of worshippers. But at its best, it can provide food, shelter, clothing, medical care, education, inspiration, community, and hope. Indeed, many of the students at our law school are extremely generous with their time, donating hundreds of hours volunteering to help those in need. Many plan to work as lawyers in public service.

Another conversation with a student struck me as very profound. He had previously shared with me parts of his faith story, which had included two years helping a pastor engage in a ministry that reached out to the urban poor who suffered from alcoholism or drug addiction. He had grown up as an Evangelical Protestant but was then regularly attending Sunday services at a nearby Catholic basilica. He liked the basilica's priest whose sermons focused on social and economic justice. He also liked the diversity of this mostly urban congregation. The preceding Sunday the student had gone to Mass and had sat near the rear of this large basilica and had begun thinking about the hundreds of other worshippers he could see. He told me: "I was convinced that each person worshipping in the basilica had a particular view of God different from everyone else." A smile came to his face, which meant to me that he felt a unity in all of the theological diversity that he sensed.

These short narratives, however, do not connect legal education with religious identity. These stories merely show that the environment at our law school encourages conversations about faith more so than at a law school that is secular.

What, if anything, happens as part of learning the law and acquiring the professional skills and values of being a lawyer? When I started teaching at St Thomas, I began studying the Catholic Intellectual Tradition and the principles of Catholic Social Teaching. It soon became obvious to me that the Catholic Intellectual Tradition included the jurisprudence of Natural Law. Natural Law was at the heart of the political theory of John Locke and was a fundamental assumption of William Blackstone. In turn, the constitutional theory of the early United States relied on Natural Law. One can argue, and I would, that the broad concept of international human rights in the twenty-first century derives from Natural Law and not from the Legal Positivism of John Austin. This jurisprudential context, given more force at a Catholic law school that claims to be an integral part of the Natural Law tradition, informs our learning environment and our legal discussions. The backdrop of Natural Law helps us look at and evaluate the moral foundations of law.

In my own teaching, this view of Natural Law allows me to introduce the concept of “core-consensus” principles. For example, I assert that gender equality, at least under the law, is a twenty-first century core-consensus principle on which most of the world now agrees. It is clear that much debate remains on what constitutes effective gender equality. In addition, most people can see that the ideal of gender equality has not yet produced actual equality in most places around the world. But world consensus on the ideal leaves legitimate hope that actual gender inequality will continue to lessen as time passes. I am able to make the same assertion about racial equality. Again, we have a world consensus around a legal ideal that we hope over time will lessen race-based inequality. From the point of view of Catholic Social Teaching, the ideal of equality under the law derives from the importance of human dignity. Each and every person possesses human dignity that deserves respect and deserves to be honored. The moral compass of almost everyone in our community endorses the core principle of equality. This moral consensus is important in problem solving. Its source is worthy of exploration.

Catholic Social Teaching also includes the special option for the poor. This special option requires, as a matter of morality, that we as individuals and as members of a community undertake efforts to meet the needs of the poor. I teach the law of income taxation. Virtually all income taxes around the world are progressive, which means that those with little or no income pay little or no income tax. In contrast, those with higher incomes pay a higher percentage of tax. This system is based on ability-to-pay principles. Both the British and American income tax systems use explicit redistribution from the wealthy to the working poor. In the United Kingdom, this feature is known as the Working Families Tax Credit and in the United States we call it the Earned Income Tax Credit. These tax credit systems provide government payments to the working poor. The 2009 American economic stimulus legislation included an increase in the amount of the earned income tax credit under the theory that during financial hard times those with low incomes need even more resources. Consistent with redistribution, those American taxpayers with incomes above \$250,000 received no tax cuts under this legislation. The structure of the tax law allows me to discuss in my tax class the fairness of government mandated wealth redistribution.

Some students, especially those who are politically conservative, insist that taxation should be rigidly equal; something as extreme as a poll tax. Each citizen should pay the same amount of tax. My follow-up question is: “Even if a particular taxpayer has no ability to pay?” That question usually yields a concession, which then leads to consideration of differing abilities to pay. But if the student persists in asserting that only a poll tax is a fair tax, I first raise Margaret Thatcher as the prototypical thinker

on this and discuss the 1990 poll tax riots in London. I suggest that a universal sense of unfairness led to the riots. I then ask the student if he or she is Catholic. If yes, then I reassert the principle from Catholic Social Teaching regarding the special option for the poor. This then enriches the discussion because it boldly presents the problem of how to help those who need help. Sometimes, a student will suggest that private charity can and should be sufficient to help those in need. The discussion then turns to the adequacy of private charity in meeting the needs of the poor. Some students assert that private charity is inadequate precisely because everyone expects the government to step in and provide the necessary assistance through the revenues it raises through taxation. We do reach a consensus that people in need require and deserve our help and our assistance.

The role of the nation state and the competing or complementary role of the charitable sector then becomes the focus of discussion. In the United States, the income tax system accommodates the charitable sector by allowing charitable contributions to reduce income tax liability. In addition, the profits and income of charitable organizations are exempt from the income tax. In this way, the state and the charitable sector work in tandem. The state, then, encourages charitable giving and charitable activities. Catholic Social Teaching values subsidiarity: the idea that governments and communities work best at the local level. This actually makes sense to most students without regard to religious tradition. We then discuss how governmental encouragement of charitable activities through the tax system makes space for subsidiarity. Nonetheless, the national tax system effectively lessens the tax base of local governments and reduces their financial ability to address local concerns. In the end, students generally agree that a national government is needed for some functions but that community and local government should have primary responsibility for most aspects of a civil society. Something of a consensus forms around the ideal, but differences of opinion arise around the details.

This backdrop of the Catholic Intellectual Tradition and Social Teaching, then, provides a springboard for discussions about justice, fairness, tax law, and the state through the lens of a faith tradition. Other faith traditions and secular humanism are welcome perspectives. Discussing moral foundations as part of the legal system and as important in each field of law provides law students with the opportunity to improve and enhance their own moral reasoning. I contend that these discussions enhance the growth of the moral compass of each student. Some students contest the appropriateness of using Catholic Social Teaching as a starting point because it effectively prefers one faith tradition over another. My response is: 'this is a Catholic law school. What did you expect? But it is a Catholic law school that invites consideration of all perspectives.' I then invite a discussion to consider alternative first principles that may be wholly secular or from a different faith tradition.

These discussions, if done well, should model civil discourse. The civility of the discourse promotes further discussion and, I maintain, enhances the growth of each student's moral compass. The evidence suggests that we are succeeding in encouraging moral reasoning through civil discourse. Data from the national Law School Survey of Student Engagement (2008) show that our law students at the University of St Thomas, when compared to students from other law schools, reported remarkably higher ethical, moral, and spiritual development and a greater desire to contribute to the welfare of their communities. Admittedly, the survey asks students about their own sense of growth. Nonetheless, this self-assessment, especially when compared to thousands of law students from other American law schools, paints a pretty positive picture of our institutional success (333 St Thomas respondents in a total survey pool of 28,889 from numerous institutions).

But what about religious identity? How and when does the religious identity of students and teaching staff become relevant? The Catholic identity of the University and the law school, as I have said, is the backdrop. Many of the non-Catholics who join our community have never attended a Catholic Mass or attended a Catholic educational institution. As a result, they come to the community not sure what this institutional Catholic identity will mean for them and their legal education. Most become comfortable quite quickly.

This comfort, however, does not translate into religious self-identification within the classroom for most members of our community. In the course of a classroom discussion about Catholic Social Teaching or any other faith perspective, I almost never hear a student openly disclose his or her faith identity. In the classroom, I have never heard a student say, “As a Catholic, I think that . . .” or “from my tradition as a Muslim, I believe that. . .” The cultural norm in the United States is to refrain from discussing one’s religious identity except in the community of fellow adherents. Our community of law students is, by self-identification on a confidential admissions form, less than half Catholic. The next largest group is comprised of those who choose not to disclose their religious identity. Other Christian denominations make up the bulk of the rest with a small number of Buddhists, Hindus, Jews, and Muslims scattered through the population. Our teaching staff is comprised of a slight majority of Catholics. This is by design so that the starting reference point is more likely to be the Catholic Intellectual Tradition and Catholic Social Teaching.

Because of the cultural social norm against religious self-identification, I learn about student faith identity outside of class. Recently, I spoke with a student about spirituality and learning. In that context, I asked him his faith identity, which he disclosed as “Evangelical Presbyterian.” I reiterated my own religious identity to him, and then asked him to describe the core features of his religious identity. The exchange transcended the norm because it was within a group of three. The other person was a close friend of his. This will probably be the beginning of additional conversations; something I enjoy and find professionally enriching. My hope is that he and other students will feel the same.

Navigating through this cultural norm of keeping faith identity in the closet is probably the greatest impediment that we face in our broad goal of helping law students to integrate their religious identities into their professional identities of being lawyers. In the United States religious pluralism has been a fact of life for a long time, with religious tolerance being a legal norm expressed as the right of “free exercise of religion” in the First Amendment of the Constitution. Similarly, Britain has endorsed religious pluralism for a long time and has enacted laws mandating tolerance and rights of free exercise.

Given religious pluralism and religious tolerance as an important hallmark of a free and civil society, why do we refrain from discussing religion, theology, and faith when we are in mixed company? Religious differences can lead to the ultimate form of disrespect of one human being for another. An adherent of religion X may very well believe that life after death is only available to fellow adherents who follow prescribed norms. This viewpoint, by definition, will exclude an adherent of religion Y. In fact, this viewpoint excludes all non-X individuals. It is unsettling to learn from a religiously different member of my community that I am going to Hell. In fact, a common insult is to tell someone to “Go to Hell!” Imbedded in religious differences, then, is the implication that someone is going to Heaven and someone is going to Hell.

Religious differences have led to an entire vocabulary of common insults. An atheist is godless. A bad person is unchristian. A non-believer of Islam is an infidel. Likewise,

a Christian may call a Muslim an infidel. Adherents of some religions, especially non-Christian indigenous peoples, are referred to as heathens. English Protestants during the 17th and 18th centuries referred to Catholics as papists, a term having a very negative connotation. Religious differences, then, may promote conflict. By sublimating our religious identities we lessen conflict and promote harmony.

Learning how to deal with religious differences, however, may actually be beneficial. Talking about religious differences enables us to practice tolerance. Tolerance enables us to have difficult conversations. These conversations may actually enable us to explore common ground. Listening replaces shouting. Discord is avoided. Problems may actually be addressed with possible solutions. Moral reasoning through civil discourse is a legitimate approach for many problem solving contexts. This style of reasoning takes us back to “problem solving with a moral compass in a legal context.”

By way of conclusion, let me consider the relevance of the religious identity of the law teacher. If I were a law student, I would want to know the religious identity of my teacher as a way of gaining a fuller understanding of the underlying legal knowledge. Let me provide an example. I met a British law teacher who had been selected as a National Teaching Fellow. Her theories of learning were informed in an important way by her experiences in a Jewish women’s reading group and by her husband, a rabbi. These perspectives about her and her religious identity, especially the emphasis on community and mutual support, helped me understand much of her learning theory. I have learned much from her, and this has improved my own law teaching.

Similarly, if I were fortunate enough to have Charles Darwin, Joseph Ratzinger (Pope Benedict XVI), or Richard Dawkins as my teacher, I would want to know their thoughts about creation, God, religion, sin, culture, evolution, and genetics. I think that Darwin continued to think about his work on evolution and its effect on his own religious beliefs, leading ultimately to agnosticism. Darwin saw natural selection as a cruel and brutal force that seemed inconsistent with an intelligent supreme being. His reflections would have been important for me to consider.

I would have wanted to ask Professor Ratzinger, when he was a professor at the University of Münster, what he thought about Galileo and his problems with the Vatican. In particular, I would have wanted to know how he saw the interaction or compatibility between science and theology.

If Richard Dawkins were my teacher, I would be interested in knowing more about what he thinks about religion and its connection to evolutionary biology. In his book *The Selfish Gene* he considered how culture or religion could spread through human populations because human brains allow ample learning to augment or replace genetically inherited traits. I would like to know Dawkins’ thoughts about the possibility that the human brain is genetically wired to believe in God. Science could actually attempt to test this hypothesis. Whether the experiments would yield any persuasive results is another matter. Finally, I would want to know his own narrative about religion in his life and how this may have affected his own moral compass. What kinds of feelings did he have toward religion?

I actually think that these three teachers, like my friend the National Teaching Fellow, would welcome considerations of faith and religion in their teaching which, in turn, would have enhanced their teaching and my learning. This would strengthen my moral compass and later make me a better lawyer: one who undertakes “problem solving with a moral compass in a legal context.”

NOTTINGHAM MATTERS

This section documents major developments and research projects within Nottingham Law School together with responses to public consultation exercises and other public contributions made by its staff.

This edition's Nottingham Matters takes the form of an article contributed by Keith Gaines, Dean of Nottingham Law School.

A CORPORATE APPROACH TO LEGAL PRACTICE

Fundamental and unparalleled change to legal practice and to the delivery of legal services to the public and to businesses is looming in the next few years. At Nottingham Law School we provide thought leadership to the regulators and to the professions as regards those changes and, at the same time, must be fleet of foot to offer cutting edge, innovative educational courses and research to service the needs of individual students and institutional legal service providers. Nottingham Law School can be at the centre of these fundamental changes; but what might legal practice look like in the future?

If it was possible to capture services on film, then now would be the moment to “snap” legal services and secure an impression of something which is destined to change dramatically in the next few years.

The now familiar mix of high street legal practices and major City commercial powerhouses with lawyers performing the traditional adviser / client role will be the stuff of memory.

The change which is already beginning to reshape the legal sector is driven both by market and economic forces, and by Parliament through the Legal Services Act (which received its Royal Assent on 30 October 2007).

Change brings opportunities for those who are alert and willing to grasp them. But change may also be the death knell for those already struggling to compete or blind to the challenge marching towards them.

There seems little doubt that the legal sector will undergo significant consolidation in the next few years; that it will see an increase in “new kids on the block” as some non-legal businesses develop commercial legal service offerings; that in-house legal teams will continue to evolve; and that the ownership of law firms will no longer rest solely in the hands of lawyers.

Competing forces drive change

Change is happening against a backdrop of at least two, potentially competing, dynamics. First, there is an ever-growing body of law; law increasingly affects us all each day, whether in our work, business or personal lives. Many people, who do not actually practice law in the sense of giving legal advice, use law every day in their work and business.

Second, the historic and classic means of delivering legal advice through solicitors' firms and the Bar is under siege. Fees are constantly being driven down, while costs rise inexorably. The current credit crunch merely serves to exacerbate the position. Doubtless some solicitors' firms might prosper but others will struggle as the classic lawyer-led partnership structure becomes increasingly outdated.

So how will the increasing demand for legal services be met and by whom? In my view, the commoditisation of services we are seeing already will accelerate and ultimately affect the whole profession. More straightforward work will be done by highly competent but less qualified staff at lower rates, utilising technology. There will be a need to look for new products.

Of course, not all legal services can be commoditised. Precisely what can and cannot be commoditised will depend on a number of factors, and indeed those factors will change with time. A key business decision will be to know what to commoditise and when. Much advisory work relating to, for example, divorce, employment and wills will be capable of being commoditised, whilst work before the courts will not.

New operating structures

The legal practice of the future might well be led by a triumvirate consisting of a Director of Product Development and Sales and Marketing (the different functions not to be confused), a Director of Finance and a Director of Law. Each would contribute to the business in their own discipline, albeit working closely together as a seamless team. The prime function of the Product Development Director will be to identify the products which consumers need or want – this is complex. Then, his or her responsibility will be for marketing and sales. The Director of Finance will be responsible for ensuring products are sold at a competitive price capable of yielding the necessary profit. The Director of Law will be responsible, primarily, for product delivery at appropriate skill levels. IT will play a vital part in all service delivery.

Each of these three principal functions will have a similar equity stake in the business – whether held in partnership, if permitted under new rules eventually, or through shares. Only by sharing profit and risk would this more corporate-type form be realised. This is very different to the current classic model where Partners hold the equity and are expected to deal with all aspects of the business, in general through other employees.

The consequences of a new business model are far reaching. Market research and product development will play a much greater role than hitherto if, indeed, they have had much of a role so far. It is likely that the legal advice providers will have to be of a significant size to achieve the necessary economies of scale.

Tomorrow's providers may well be located, at least in part, on out-of-town sites offering lower rents and easier transport access. The classic career structure for lawyers may not be available – but this could be an advantage in terms of attracting staff, particularly in terms of work-life balance, and providing different career progression. Much more advice will be provided online, with coverage in evenings when required.

Fee structures will be more flexible: there might be, for example, downloadable packages available for a one-off fee; a “top up” type card where specific advice based on hourly rates might be required; and packages paid for by banks and other businesses to be added to their other offerings, such as, say, a premier banking account or an insurance scheme.

Timing

Change is afoot. In March 2009, firms (except sole practitioner firms) were “passported” to the SRA, so that firms themselves will be “recognised bodies” for regulatory

purposes. In July 2009, sole practitioners were “passported” to become “recognised sole practitioners”.

March 2009 also saw a change to the traditional structure of the modern law firm. subject to approval by the SRA, non-lawyers will be able to join with lawyers in a legal disciplinary practice, or LDP, with a maximum of 25% non-lawyers.

The “Tesco Law” formula, which may permit the kind of structure outlined above to be adopted, is due to be permitted in possibly 2011 or, more likely, 2012. These are the alternative business structures (ABSs). ABSs will allow lawyers to form multi-disciplinary practices offering legal services in conjunction with non-legal services. They will also allow non-lawyers, including commercial organizations, to own firms that provide legal services.

Our Educational Response

From the first year undergraduate law student to the managing partner of an LLP law firm, Nottingham Law School provides education and thought leadership that bridges the perceived divide between the academic and the professional. We are exceptionally well positioned, therefore, to respond to this revolution in legal service provision. Material steps have already been taken. For example, our role in running a key pilot on Work Based Learning for the SRA; the introduction in October 2009 of our new 4 year Exempting Law Degree (comprising a qualifying law degree, a one year placement and the LPC); and the development phase of an award bearing management programme aimed specifically at Corporate Counsel. With more than 80% of staff professionally qualified as solicitors or barristers, we understand the impending changes and are well equipped to deal with them. Nottingham Law School has the depth and the breadth in our offerings to respond to the challenges. We will equip our students for the new world of legal services and the opportunities which it creates.

There will also be opportunities to partner and work with new, probably much larger, legal services providers. To provide training and continuing education not only to the more classic legal practices, but also to new corporate-type entrants into the legal services market. We will have to identify the emerging types of services in the market, design sector-leading educational responses and teach them to the highest market-leading standards. Our teaching will be underpinned by leading research and will embrace IT.

Despite the inherent volatility of the new regime, the educational possibilities it engenders will be limited only by our own imagination and ambition.

KEITH GAINES*

*Solicitor, Dean of Nottingham Law School.

TABLE OF CASES

A v Secretary of State for the Home Department, (No.2) [2005] UKHL 71, [2006] 2 AC 221	28, 29
AG's Reference (No. 26 of 2003) sub nom R v M, [2003] EWCA Crim 2736	2
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB	18, 19
Bank of New York v Montana Board of Investments [2008] EWHC 1594	40
Belfast City Council v Miss Behavin' Limited [2007] UKHL 19, [2007] 1 WLR 1420	23
Bellinger v Bellinger [2003] UKHL 21, [2003] 2 AC 467	31
Council of Civil Service Unions and Others v Minister for the Civil Service [1985] AC 374	19, 22
D v United Kingdom (1997) 24 EHRR 423	47
DPP v K and C [1997] Crim LR 121	2
Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557	31, 32
Goodwin v United Kingdom	31
Handyside v United Kingdom (1976) 1 EHRR 737	22
Huang v Secretary of State for the Home Department [2007] UKHL 11	23, 35
In the matter of Sigma Finance Corporation (in Administrative Receivership) [2008] EWCA Civ 1303 (CA)	37
International Transport Roth v Secretary of State for the Home Department [2002] EWCA Civ 158, [2003] QB 728	32
McCann v United Kingdom (1995) 21 EHRR 97	24
N v Secretary of State for the Home Department, [2005] UKHL 50, [2005] 2 AC 296	26, 27
N v Secretary of State for the Home Department, 27 May 2008, no. 26565/05 (Grand Chamber)	26, 27, 47
Osman v United Kingdom (2000) 29 EHRR 245	26
R (A) v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68	21, 27, 33
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 21, [2003] 2 AC 295	29
R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46, [2003] 1 AC 837	30
R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] 2 WLR 781	32, 33
R (Bennett) v Inner South London Coroner [2006] EWHC 196 (Admin)	24
R (Bloggs 61) v Secretary of State for the Home Department [2003] EWCA Civ 686, [2003] 1 WLR 2724	25
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532	21, 35
R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66, [2006] 1 AC 396	25
R (Pro-Life Alliance) v BBC [2003] UKHL 23, [2004] 1 AC 185	23
R v A (No 2) [2001] UKHL 25, [2002] 1 AC 45	30
R v Billam (1986) 82 Cr App R 347	2
R v Bree [2007] EWCA Crim 256	11
R v Clarence (1889) 22 QBD 23	47
R v Cornwall County Council, Ex parte Cornwall and Isles of Scilly Guardians Ad Litem and Reporting Panel [1992] 1 WLR 427	19
R v Davis [2008] UKHL 36, [2008] 3 WLR 125	28, 29
R v DPP, Ex parte Kebilene [2000] 2 AC 326	24
R v Guttridges, Fellowes and Goodwin (1840) 9 Car & P 471	14
R v Guttridge, Guttridge, Goodwin and Fellows (1840) 9 Car & P 227	14
R v Hallett (1841) 9 Car & P 748	6
R v Lambert [2002] QB 1112	30
R v Secretary of State for the Home Department, Ex parte Bugdaycay [1987] AC 514	19
R v Secretary of State for Trade and Industry, Ex parte Lonrho PLC, The Times, 18 January 1989	19

Re Cheyne Finance plc (in Receivership) (No 1) [2007] EWHC (Ch) 2402 2, [2008] 1 BCLC 732	39, 40
Re Cheyne Finance plc (in Receivership) (No 2) [2007] EWHC (Ch) 2402, [2008] 1 BCLC 741	39, 40
Re Denley's Trust Deed [1969] 1 Ch 373	45
Re S [2002] UKHL 10, [2002] 2 AC 291	31
Re Whistlejacket Capital Ltd (in Receivership) [2008] EWCA Civ 575	39, 40
Runa Begum v Tower Hamlets London Borough Council [2003] UKHL 5, [2003] 2 AC 43	29
Secretary of State for the Home Department v AF [2007] UKHL 46, [2008] 1 AC 440	27
Secretary of State for the Home Department v E [2007] UKHL 47, [2008] 1 AC 499	27
Secretary of State for the Home Department v JJ [2007] UKHL 45, [2008] 1 AC 385	27, 29
Street v Mountford [1985] 2 WLR 877; [1985] AC 809	45
Van Colle v Chief Constable of the Hertfordshire Police [2008] UKHL 50, [2008] 3 WLR 593	25, 26, 27
West Glamorgan County Council v Rafferty and Others [1987] 1 WLR 457	19
Wheeler and Others v Leicester City Council [1985] AC 1054	19

TABLE OF STATUTES

1856 County and Borough Police Act	13	2002 Enterprise Act	40
1861 Offences Against the Person Act .	14, 47	2002 Nationality, Immigration and Asylum Act	
1885 Criminal Law Amendment Act.....	14	s 55(1).....	25
1959 Obscene Publications Act	22	s125.....	33
1973 Matrimonial Causes Act.....	31	2003 Communications Act	
1977 The Rent Act.....	31	s 319	32
1986 Insolvency Act		s 321	32
S 123(1)(e)	39	2003 Sexual Offences Act	
S 123(2)	39	s1.	2
1990 Town & Country Planning Act	29	s 4	2, 16
1998 Human Rights Act.....	18, 20, 34, 36	2004 Gender Recognition Act.....	31
S 3(1).....	30, 33	2004 Human Tissue Act.....	46
S 4(2)	30, 31, 33	2005 Constitutional Reform Act.....	18
1999 Immigration and Asylum Act	32	2005 Prevention of Terrorism Act.....	27, 28
1999 Youth Justice & Criminal Evidence Act	30	2007 Legal Services Act	55
2001 Anti-Terrorism, Crime and Security Act	21, 27, 33		

TABLE OF EU LEGISLATION

EUROPEAN CONVENTION ON HUMAN RIGHTS

Art 2.....	24, 26, 36	Art 8.....	20, 21, 31
Art 3.....	24, 25, 26, 30, 32	Art 9.....	20
Art 4.....	30, 32, 36	Art 10.....	20, 22, 23, 32
Art 5.....	21, 27	Art 11.....	20
Art 6.....	18, 28, 29, 30	Art 14.....	18, 31
Art 7.....	24	Art 15.....	21, 22, 24