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Article 10 and Restrictions on Pornography: Shifting the Rationale from the Protection of Morals to Cultural Harm

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INTRODUCTION

The right to freedom of expression is considered a cornerstone of any modern-day democracy. The European Convention of Human Rights provides for the protection of this right in paragraph 1 of Article 10, while paragraph 2 specifies a number of 'legitimate aims' which may justify its restriction. Restrictions on pornography have aroused considerable debate as unjustified limitations on freedom of expression. This essay will consider the United Kingdom's approach to legislating against pornography, and its interpretation of the legitimate aim of 'protection of morals'. It will be argued that the purpose of these laws is to regulate individual morality, and that this cannot be a valid interpretation of the 'protection of morals'. It will also be argued that the criminalisation of possession of pornography does not serve this legitimate aim and that it would nevertheless be a disproportionate measure not sanctioned by Article 10. Thus it will be shown that restrictions on pornography falling within these criteria are incompatible with Article 10 of the Convention. The final part of this essay will attempt to offer a more principled approach, based on the prevention of harm, as a more desirable and effective justification than a moralistic approach, and as an alternative compatible with Article 10.

Different meanings have been attached to the term pornography, thus a definition will be established to avoid later confusion. Pornography can firstly refer to sexually explicit material – that is to say materials which break certain taboos in different contexts and cultures. This is considered a necessary but not sufficient condition, and is often coupled with the second requirement that the primary motive of the material is to induce sexual arousal, as reflected in many statutory definitions. A third proposed element of pornography is that the material be 'bad' in some way, whether due to its intrinsic content or its contingent effects on society. For the purposes of this essay, this third condition will not form part of the definition of pornography, although the issues raised by it will be subsequently discussed in depth.[1]

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1. West C., 'Pornography and Censorship', *The Stanford Encyclopaedia of Philosophy* (2009) <http://plato.stanford.edu/entries/pornography-censorship/#1> accessed 18 January 2012.

WHY PROTECT FREE SPEECH?

In *Handyside v United Kingdom,*[2] the European Court of Human Rights stated that "[f]reedom of expression constitutes one of the essential foundations of [a 'democratic society'], one of the basic conditions for its progress and for the development of every man." The Court continued to say that the right "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[3] This extract provides a basic summary of the Court's general approach to the Article 10 right to freedom of expression. It is interesting to note that the State's obligation to protect freedom of expression extends to speech which 'offends, shocks and disturbs' the population, which includes pornography, and this may at first appear perplexing; thus, it is of use to begin with an examination of why freedom of expression should be protected at all.

Eric Barendt proposes three possible justifications for the protection of free speech.[4] The first theory he presents is J.S. Mill's 'argument from truth', which emphasizes the importance of open discussion for the discovery of truth. The government can only be confident of the correctness of its policies if people have the freedom to express their opposition; indeed, the prohibition of possibly true speech would entail an "unwarranted 'assumption of infallibility' on the part of the state".[5] This argument provides the traditional justification for freedom of expression; however, it can only plausibly support free political speech. It provides no distinction between disclosure of facts and expressions of opinion, and thus cannot be extended to forms of expression such as pornography, where no coherent proposition is asserted and there are no claims which can be objectively tested.[6] The second theory addresses citizen participation in a democracy. This argument again stresses the importance of free speech for the understanding of political issues leading to effective participation in the working of a democracy; as with the first justification, it similarly cannot provide a valid objection for the censorship of pornography.[7]

The third theory put forward by Barendt is the most pertinent to the issue of the protection of pornography under the right to freedom of expression. The argument sees free speech as an 'integral aspect of each individual's right to self-development and fulfilment'; people cannot develop intellectually and spiritually unless they can formulate their beliefs through public discussion. Thomas Scanlon proposes an 'autonomy thesis', under which people must be free to weigh for themselves the different courses of action put before them.[8] This theory focuses primarily on the interests of the recipient, and is the most suitable

2. (1976) 1 EHRR 737.
3. ibid 49.
4. Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press, Oxford 1996) 8.
5. ibid 8-9.
6. ibid 10-11.
7. ibid 20.
8. ibid 14, 17.

justification for the extension of the right to freedom of speech to other unconventional materials such as pornography. Indeed David Feldman writes that "self-expression is a significant instrument of freedom of conscience, personal identity, and self-fulfilment"; he claims that from the perspective of civil liberties, this is the most important justification that can be offered for free speech, and confers it more importance than instrumental arguments relating to the circulation of ideas and political discourse.[9]

The controversy raised by pornography in relation to free speech is apparent. Traditional arguments focus on freedom of political speech as an essential element of democracy, while the self-development and fulfilment argument places little emphasis on the interests of the speaker. Indeed, while providing strong support for the circulation of controversial material for the benefit of the recipient's self-fulfilment, this theory encounters problems when the free speech principle is applied to the disclosure of news or information, or when the speaker is a legal person or the press.[10]

Nonetheless, there are convincing arguments for the protection of pornography under the right to freedom of expression. A complete censorship on obscenity entails the probable risk of a 'chilling' effect on the publication of innovative literature and other material.[11] Some commentators suggest that pornography should not receive constitutional protection because it possesses solely commercial motives; however, this consideration has been disregarded by the British legislature.[12] Indeed, s 2(1) of the Obscene Publications Act 1959 specifies that commercial gain is an irrelevant factor in the publication of obscenity. Professor Ronald Dworkin offers two further arguments to why a prohibitive regime is not desirable. He claims that, were genuinely valuable materials to be caught by a restriction, the possibility of their exclusion from the exchange of ideas would nevertheless be smaller than under a complete prohibition, thus encroaching less on freedom of expression.[13] He also argues that the public/private distinction in society is "more threatened by any legally enforced freeze on the boundaries set at any particular time than by allowing the market of expression constantly to re-examine and redraw those boundaries".[14] Nevertheless, the issue of whether obscene materials qualify for protection under the freedom of speech principle is outside the scope of this article, and the following discussions will proceed on the premise that pornography falls within the definition of speech.

DOMESTIC RESTRICTIONS: LAWS OF THE UNITED KINGDOM

The approach followed by the European Court of Human Rights has been to extend the

9. David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press, Oxford 2002) 762.
10. Barendt (n 4) 17.
11. ibid 250.
12. See the following section on 'Domestic restrictions'.
13. Ronald Dworkin, 'Is there a right to pornography?' (1981) 1(2) *Oxford Journal of Legal Studies* 177, 183.
14. ibid 185.

scope of Article 10 to obscene publications, and subsequently allow restrictions under the heads outlined in paragraph 2. In the judgment of *Handyside v UK,*[15] the most relevant justification for the restriction of obscene publications permitted by Article 10(2) was held to be the 'protection of morals'.[16] The Court stated that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals", and "[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements".[17] Thus, to establish whether domestic laws on pornography are compatible with Article 10, it is necessary to investigate the bases with which domestic laws support these restrictions, and whether they consist of moralistic arguments. Moreover, a detailed examination of the requirement of the protection of morals is required to determine exactly what this prerequisite demands.

In the United Kingdom, the three main statutes which impose restrictions on pornography are the Obscene Publications Act 1959, the Criminal Justice and Immigration Act 2008, and the Protection of Children Act 1978. To determine whether the relevant restrictions on pornography enunciated by these laws are compatible with Article 10 of the Convention, it is necessary to examine what bases the legislation adopts.

The test of obscenity detailed in section 1(1) of the Obscene Publications Act 1959 is if the effect of the material in question is to 'deprave and corrupt' persons 'likely' to see it. The Act provides no guidelines as to what constitutes depravation or corruption, as emphasized by Lord Wilberforce in *Director of Public Prosecutions v Whyte,*[18] where he states that "[n]o definition of 'deprave and corrupt' is offered" and "no definition of deprave and corrupt can be provided".[19] His Lordship discusses the potential ambit of this test:

> Is it criminal conduct, general or sexual, that is feared … , or departure from some code of morality, sexual or otherwise, and if so whose code … , or the arousing of erotic desires, 'normal' or 'abnormal,' or … 'private fantasies'….[20]

In his concurring judgment, Lord Pearson holds that 'deprave and corrupt' refers to the "effect of an article on the minds (including the emotions) [of the reader] but it is not part of the statutory definition of an obscene article that it must induce bad conduct".[21] His Lordship was of the opinion that the material in question was depraving and corrupting because it "suggested to the minds of the regular customers 'thoughts of a most impure and libidinous character'".[22] It is important to note that Lord Wilberforce also held that the 1959 Act's test of obscenity "does not hit 'articles' which *merely shock* however many people".[23]

15. (1976) 1 EHRR 737.
16. para 46.
17. para 48.
18. [1972] AC 849.
19. ibid 862.
20. idem.
21. ibid 864.
22. ibid 866.
23. ibid 861 (emphasis added).

These judgments suggest various possible objectives of the restrictions generated by the 1959 Act. It is clear that the 'deprave and corrupt' test is not aimed at material by which people may be offended or disgusted; instead the legislation endeavours to restrict material which stimulates 'impure' thoughts in the reader, perhaps inspiring similar personal fantasies. Thus, it can be said that the 'deprave and corrupt' test has a broad objective comprising the protection of some sort of moral values. Noting Lord Pearson's observation that the legislation does not aim to prevent any bad conduct, it can also be drawn that the concern is not of any harm to society flowing from the reader's thoughts, but it is protection of the reader's morality itself. Rather than an external effect, the legislation seeks to regulate the internal effect on the individual.

It is important also to consider the nature of the offence created by the 1959 Act. Section 2(1) establishes liability for "any person who, whether for gain or not, publishes an obscene article or who has an obscene article for *publication* for gain" (emphasis added). With emphasis on publication, the legislation attempts to indirectly protect society by preventing access to material which could lead individuals to hold 'impure' thoughts.

The Criminal Justice and Immigration Act 2008 has stimulated more controversy. Section 63(1) reads: 'It is an offence for a person to be in possession of an extreme pornographic image', giving rise to various definitional issues. Firstly, s 63(6) defines 'extreme' as 'grossly offensive, disgusting or otherwise of an obscene character', and as falling within the categories of extreme portrayal in s 63(7).[24] Clare McGlynn and Erika Rackley argue that the inclusion of this element to the definition of 'extreme' is 'retrograde'; they maintain that the terminology 'obscene character' is an express link to the existing 1959 Act, and that the addition of 'grossly offensive' and 'disgusting' adds little more to this existing notion.[25] Secondly, s 63(3) defines 'pornographic' as material 'produced solely or principally for the purpose of sexual arousal'. In relation to the 1959 Act, on the one hand it can be said that the 2008 Act has widened the category of obscenity. Whereas the former legislation was limited to protecting an individual's internal morality, the latter has ventured into the realms of offense and disgust, areas which Lord Wilberforce in Whyte had expressly excluded. On the other hand, the requirement that the primary purpose of such materials be sexual arousal means the 2008 Act can also be said to regulate the internal effect on the reader, preventing the stimulation of 'impure' fantasies, and hence 'protecting' some sort of sexual morality.

Again, the nature of the offence created by the 2008 Act must be examined, in particular because it is this provision which generated most debate; s 63(1) criminalises the mere possession of an extreme image. This shift of focus to the consumer, from the producer or distributor, suggests that, as opposed to the 1959 Act, the 2008 Act is more concerned with protection of individual rather than public morality.

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24. The four categories are: (a) an act which threatens a person's life, (b) an act which results in serious injury to a person's genitals, (c) sexual interference with a human corpse, or (d) sexual intercourse with an animal.
25. Clare McGlynn and Erica Rackley, 'Criminalising extreme pornography: a lost opportunity' (2009) 4 *Criminal Law Review* 245, 252.

The third United Kingdom statute to regulate pornography is the Protection of Children Act 1978. Section 1 makes it an offence for a person to take or make, or distribute or show 'any indecent photograph or pseudo-photograph[26] of a child'. As with the 1959 Act, the 1978 Act provides no definition of 'indecent'. In *R v Graham-Kerr,*[27] Stocker LJ suggested approaching this test by "applying the recognised standards of propriety" and that it is a "matter for the appraisal of the Jury applying those standards";[28] indeed, in *R v Stamford*,[29] Ashworth J refers to the jury as the "custodians of the standards for the time being".[30] In terms of content of material, the 1978 Act establishes a threshold of indecency, which is to be defined by the jury, and thus will reflect the conventional moral values held by society. Consequently, it can be said that by presenting a test for indecency, the 1978 Act attempts to advance the morals of society by preventing individuals from viewing material judged to be indecent according to conventional standards of morality. As with the 2008 Act, here the similar possession offence[31] again attempts to impose these conventional standards on the individual.

LEGITIMATE AIMS: THE 'PROTECTION OF MORALS'

Article 10(2) of the Convention states that the right to freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of ... morals'. As mentioned above, the European Court has delegated the task of interpreting the content of this requirement to the domestic courts.[32]

The 'protection of morals', where here the term 'morality' is used in its descriptive sense,[33] is subject to a plethora of possible interpretations. A major distinction would be between the protection of society's morals and the morality of an individual. Society's morals, or public morality, is defined by Harry Clor as: "... a morality with public status, recognized as an ethos of the community per se; a body of norms inherent in the traditions and supportive of or presupposed by major institutions of the society".[34] According to Clor, a public morality encompasses "standards of value deemed important for the well-being of the community";[35] it is an "ethic of decency, socially recognized as a matter of communal concern".[36] Steve Foster argues that to justify a restriction on these grounds "there should be evidence that there is a public morality worth protecting and that the

26. Defined in s 7(7) as 'an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph'.
27. [1988] 1 WLR 1098.
28. ibid 1105.
29. [1972] 2 QB 39.
30. ibid 399.
31. The possession offence for child pornography is created under s 160 of the Criminal Justice Act 1988.
32. supra, n 15.
33. Bernard Gert, 'The Definition of Morality', *The Stanford Encyclopaedia of Philosophy* (2011) <http://plato.stanford.edu/entries/morality-definition/> accessed 18 January 2012.
34. Harry M Clor, *Public Morality and Liberal Society* (University of Notre Dame Press 1996) 13.
35. ibid 22.
36. ibid 24.

publication is capable of harming that morality, as opposed to offending it".[37] Conversely, individual morality involves the inner convictions of specific people; it refers to 'that guide to behaviour that is regarded by an individual as overriding and that he wants to be universally adopted'.[38] Note that this is not the same as the justification for protecting individuals from 'shock or offence'; there, restrictions are to prevent upsetting "public morality or the sensibilities of individual citizens",[39] while individual morality is concerned with personal inner convictions.

As discussed above, British legislation has taken an individualist approach to the protection of morals. The tests for obscenity in the 1959 and 2008 Acts concern the effect of the material on the reader's thoughts and emotions, as confirmed by Lord Pearson in *Whyte*,[40] and not on the effect of such materials on public morality. The question is whether this is a valid interpretation of the 'protection of morals'.

Dworkin has suggested approaching this issue following a rights-based argument. He suggests the existence of a putative right to moral independence, which he defines as a person's

> ... right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong.[41]

He continues to assert that a government violates such a right when

> ... the only apparent or plausible justification for a scheme of regulation of pornography includes the hypothesis that the attitudes about sex displayed or nurtured in pornography are demeaning or bestial or otherwise unsuitable to human beings of the best sort ... [and] ... when that justification includes the proposition that most people in the society accept that hypothesis, and are therefore pained or disgusted when other members of their own community ... do read dirty books or look at dirty pictures.[42]

This right to moral independence emphasizes the public/private divide, over which the state cannot interfere. It appears to be a subset of the right to self-development and fulfilment (one of Barendt's three justifications for free speech[43]) – people must be free to weigh for themselves the different courses of action put before them – and so is a necessary element of the right to freedom of expression. It follows that the state cannot extend its control over individual morality without violating the principles of free expression, and

37. S Foster, 'Possession of extreme pornographic images, public protection and human rights', (2010) 15(1) *Coventry Law Journal* 21, 24.
38. Gert (n 32).
39. Foster (n 36) 24.
40. supra, n 18.
41. Dworkin (n 13) 194.
42. ibid 195.
43. ibid n 8.

thus this cannot be a valid interpretation of the 'protection of morals'.

Another argument warranting consideration is that advanced by Professor Stephen Guest in relation to the 'right to bad thoughts'. Guest begins his reasoning by asserting that at the core of human moral judgment there is a 'principle of reciprocity'; that we recognize other humans to be 'like us' because we draw on our internal knowledge of ourselves to understand others.[44] We thus understand that it is both acceptable for others to think differently and for us to encourage them to change their views; "the ground for correcting others lies in some sort of respect for their ability to change themselves".[45] Guest contends that the freedom of thought is a "fundamental criterion of what it is to be human" and must be respected, regardless of what bad thoughts may ensue.[46] Furthermore, Guest makes an important distinction:

> Explaining, persuading, correcting and educating are not the same as conditioning a person, or forcing or coercing or punishing them, to make them change their behaviour. To correct a mistaken thought requires that the person being corrected understands from within how the process has gone wrong. ... So while we may explain, persuade, correct and educate, to make a person see what we believe to be sense, we must stop short of taking that person's judgement away from them. We cannot take away someone's right to think whatever they like.[47]

This suggests again that there is a threshold over which the state cannot cross in influencing morality; through legislation it may endeavour to propagate its preferred standards of decency, ethics and acceptability, but if an individual decides to pursue a different personal morality, the state cannot coerce him otherwise. Following this argument, the House of Lords' interpretation of the 'deprave and corrupt' test in *DPP v Whyte*[48] is unacceptable. The right to bad thoughts appears to be an extension of Scanlon's 'autonomy thesis'[49] and thus another prerequisite of the freedom of expression. Therefore, the same conclusion is reached that the 'protection of morals' cannot involve the regulation of individual morality.

The conclusion drawn from the above arguments is not one restricted to the bounds of academic discussion; similar views have been expressed very recently by the courts of the United Kingdom. In *Mosley v News Group Newspapers*,[50] in considering the balance to be struck between Article 10 and the Article 8 right to respect for private life, Eady J states:

> The modern approach to personal privacy and to sexual preferences and practices is very different from that of past generations. First, there is a greater willingness, and especially in the Strasbourg jurisprudence, to accord respect to an individual's right to conduct his or her

44. Stephen Guest, 'Respect for Bad Thoughts', [2008] *UCL Human Rights Review* 118, 122-3.
45. ibid 124.
46. ibdi 126-7.
47. S Guest, 'The right to obscene thoughts' (2009), *UCL lunch-hour lecture – 8th December 2009*, 3 <http://www.ucl.ac.uk/~uctlsfd/scholarship.html> accessed 18 January 2012.
48. ibid n 18.
49. ibid n 8.
50. [2008] EWHC 1777 (QB).

> personal life without state interference or condemnation. It has now to be recognized that sexual conduct is a significant aspect of human life in respect of which people should be free to choose.[51]

He continues:

> Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behaviour are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practise them or to detract from their right to live life as they choose.[52]

This extract reflects the very court's acknowledgement of the obsoleteness of previous approaches to obscenity and the need for modernisation, and yet again leads to the conclusion that the 'protection of morals' cannot include the regulation of individual morality.

PROPORTIONALITY

For the qualification of the right to freedom of expression, Article 10(2) requires the legislative restrictions to be 'necessary in a democratic society'; this is essentially a requirement for an element of proportionality in the measures employed by the contracting states. Although the judgment of *Handyside v UK*[53] established a wide margin of appreciation for contracting states to determine the exact requirements for the protection of morals, this discretion is not unfettered; this is asserted in *Open Door Counselling and Dublin Well Woman v Ireland*,[54] where the Court reserved the ultimate authority to "supervise whether a restriction is compatible with the Convention".[55]

Regarding the question of 'necessity', the Court stated in *Arrowsmith v United Kingdom*[56] that, to fail the test of proportionality, the State measure must be "so clearly out of proportion to the legitimate aims pursued that this severity in itself could render unjustifiable such an interference".[57] As mentioned above, the nature of restrictions on pornography in the United Kingdom is of two types: offences for dissemination of obscene material (1959 Act) and offences for the possession of obscene material (1978 and 2008 Acts).

On the topic of 'bad thoughts', Guest claims that the respect for a person's thoughts must necessarily extend to the expression of their thoughts.[58] Brian Simpson corroborates this by holding that "[t]he externalisation of the fantasy provides it with a 'reality' – an existence

51. ibid para 125.
52. ibid para 127.
53. (1976) 1 EHRR 737.
54. (1993) 15 EHRR 244.
55. ibid para 68.
56. (1981) 3 EHRR 218.
57. ibid para 99.
58. Guest, 'Respect for Bad Thoughts' (n 43) 121.

outside the mind and so capable of receiving disapproval".[59] Indeed, the possession of a pornographic image for sole personal use and with no intent of dissemination is merely an externalisation of a fantasy, and an extension of thought. A criminal offence for possession of pornographic material therefore becomes grounded in the activity of thought, and is a sanction for "harming the notion of what is to be regarded as appropriate thought".[60] Abhilash Nair expresses a similar concern: "A simple possession offence ... has the effect of the State creating a thought crime and imposing a positive duty on everyone to 'think good'".[61] Eady J shared the same view in Mosley (where the case concerned actual sexual practices) in stating that "[w]here the law is not breached ... the private conduct of adults is essentially no one else's business".[62] Therefore, recalling from the above discussion that the 'protection of morals' cannot include the regulation of an individual's morality, the criminalisation of possession of pornographic material for private use is not only disproportionate to the legitimate aim provided by Article 10(2), but wholly unjustified. As Guest comments on the 2008 Act, "the reality is that this offence creates a right in the state to punish people for merely having a thought".[63]

However, an argument grounded in the right to bad thoughts is not the only one critical of the possession offence. McGlynn and Rackley argue that, although offence and disgust can be bases for the regulation of explicit material, they are not sufficient bases for a criminal possession offence.[64] Indeed, restrictions on the consumer rather than the source give rise to much graver implications for the freedom of expression. Jacob Rowbottom observes that "[a]n ill-defined possession law could potentially discourage individuals from viewing legal material if those individuals want to be sure not to commit a criminal offence";[65] this will produce an extensive 'chilling' effect, striking primarily consumers and consequently, by reducing demand, producers. Scanlon's 'autonomy thesis' cannot be satisfied, because people will not be free to weigh the different courses of action before them in fear of criminal sanctions. Both the Article 10 rights to 'receive and impart' information and ideas will be affected disproportionately by this chilling effect to achieve the legitimate aim of the protection of public morals.

The possession offence for pornography can be considered a corollary of the Internet. Nair observes that, while the regulation of pornography through traditional media such as print and video was successfully tackled at the production and distribution stage, the Internet has changed this approach by disposing of geographical boundaries. Thus, content can be uploaded and viewed from anywhere in the world, while content hosting providers can easily relocate to other jurisdictions to avoid liability; it was hence considered more practical to shift liability from producer and distributor to consumer. However, the

59. Brian Simpson, 'Controlling fantasy in cyberspace: cartoons, imagination and child pornography' (2009) 18(3) *Information & Communications Technology Law* 255, 264.
60. ibid 256.
61. Abhilash Nair A, 'Real Porn and Pseudo Porn: The regulatory road' (2010) 24(3) International Review of Law, Computers & Technology 223, 231.
62. para 128.
63. Guest, 'The right to obscene thoughts' (n 46) 7.
64. McGlynn and Rackley (n 24) 252.
65. Rowbottom J, 'Obscenity laws and the internet: targeting the supply and demand' (2006) Feb *Criminal Law Review* 97, 102.

State has ignored the essential point that practicality of enforcement does not entail proportionality or legitimacy.[66] Targeting the consumer is not the only method of handling the regulation of pornography in the Internet age. Less restrictive alternatives exist, such as the approach taken by the Internet Watch Foundation. The IWF is a UK hotline which relies on the public to report illegal content which it assesses, and, if necessary, issues a notice to the hosting provider to remove the content at its source. This approach has proved successful in reducing child sexual abuse content hosted in the UK from 18% in 1997 to less than 1% since 2003.[67] Rowbottom argues that, while the legitimate aim could be served by less restrictive means such as ISP-based controls, a court will not require this given the difficulty of implementation of such measures.[68] This argument is unacceptable. As seen above, it is clearly possible to achieve the legitimate aim of protecting public morality through less restrictive means, directed for example at the distribution phase; thus the criminalisation of possession of obscene images does not meet the requirements of proportionality.

In conclusion, various points emerge. Firstly, although the European Court of Human Rights has allowed a wide margin of appreciation to domestic courts for the interpretation of the Article 10(2) legitimate aim of the 'protection of morals', this discretion is not unfettered. It has been argued that an interpretation of this legitimate aim which encompasses the protection of individual morality undermines the essential justifications for a right to freedom of expression, namely the right to self-development and fulfilment; thus any restriction on pornography purporting to protect morality in this way, such as the Obscene Publications Act 1959, is incompatible with the Convention. Consequently, it is proposed that the legitimate aim of 'protection of morals' extends only to the protection of public morals. Secondly, Article 10(2) states that the right to freedom of expression may be subject to such restrictions as are 'necessary in a democratic society'. It is argued that an offence for the possession of pornographic material for mere private use with no intention of dissemination – such as those created by the Criminal Justice and Immigration Act 2008 and the Protection of Children Act 1978 – equates to criminalising the thoughts of individuals; since the 'protection of morals' cannot extend to individual morality, such an offence does not serve this legitimate aim and is thus wholly disproportionate. Furthermore, given the existence of practicable alternatives to the restriction of pornography in the Internet age, a possession offence is clearly a disproportionate measure to pursue the protection of public morals. Following the above arguments, any restrictions on pornography which target individual morality or create an offence for mere possession of such material are incompatible with the Convention right to freedom of expression.

66. Nair (n 59) 230.
67. ibid 225.
68. Rowbottom (n 63) 108.

A DIFFERENT JUSTIFICATION: HARM

The conclusion stated above may at first appear abhorrent, especially when concerning pornographic material involving children or depicting violence and rape; indeed it must be noted that absolute permissiveness is not what is advocated. On the contrary, regulation of such material is wholly desirable; however, it is argued that the bases and justifications adopted by current regimes are misconceived.

In his essay 'On Liberty', Mill discusses the relationship between state and individual concerning personal freedom, and posits that an individual is not accountable to society for his actions which affect his own interests, but only for actions which affect the interests of others.[69] Under this 'harm principle' therefore, the state is not justified in punishing an individual unless his actions cause harm to others. In the debate on pornography, there are three possible categories of 'harm' which result, articulated by McGlynn and Rackley as 'cultural harm', direct harm and disgust.[70] Disgust has already been discussed above as an insufficient justification for the restriction of speech, and was explicitly recognized as such by the Court in *Handyside*.[71]

Direct harm can be divided into two categories. The first refers to the harm suffered by individuals directly involved in the production of pornographic material. The example of child pornography is most related to this type of harm; given that children cannot give legal consent, a strong argument can be made on this basis against prohibitive measures for the production and dissemination of such material.[72] Similarly, materials where the participants are physically harmed would also involve this type of direct harm. The second category refers to instances concerning the connection between the viewing of pornography and committing acts of sexual violence.[73] There is considerable disagreement amongst commentators over the existence of an actual causal link,[74] without which a restriction would clearly be unjustified. If the existence of such a link could be proved in respect of certain pornographic material, there would be strong grounds for its prohibition under the harm principle; however, conclusive evidence is yet to be obtained.

'Cultural harm' is less concerned with a direct link to acts of sexual violence, focusing instead on an indirect form of harm. Numerous commentators have explored various possible classifications of harm which may fall under this rubric. McGlynn and Rackley describe instances of cultural harm as when materials "contribute to a cultural context in which violent sexual activity is encouraged or legitimated".[75] The cultural harm argument is based on the concern that some material "may encourage an interest in 'violent or aberrant sexual activity' and, in so doing, contribute to a climate in which sexual violence

69. Steven Balmer, 'The Limits of Free Speech, Pornography and the Law' [2010] *Aberdeen Student Law Review* 66, 68.
70. McGlynn and Rackley (n 24) 256.
71. ibid note 3.
72. Nair (n 59) 229.
73. McGlynn and Rackley (n 24) 258.
74. Balmer (n 67) see discussion 70-74.
75. McGlynn and Rackley (n 24) 257.

is not taken seriously".[76] This argument is invoked mostly in debates about restrictions on violent and extreme pornography. Steven Balmer states that "violent pornography [rebrands] these crimes simply as sex, which veils the inherent wrongs portrayed in these materials, leading to an unconscious acceptance of these practices".[77] Cultural harm, in this sense, therefore refers to the impact that violent pornography has on values considered important for the foundations of a society, in this case the attitude towards sexual violence.

Another interpretation given to cultural harm is one prevalent in feminist jurisprudence, namely that certain attitudes portrayed in or through pornography conflict with the "ideas of equal worth and equal protection that are basic to a liberal social order".[78] Catharine MacKinnon suggests treating pornography as a form of defamation and discrimination;[79] through the subordination of women in pornography, she argues, women are treated as a secondary class in society, and therefore their social equality as a group is undermined.[80] She therefore proposes pornography legislation to take the form of a law against group defamation promoting the right to equality.[81] While this view has been subject to debate and discussion,[82] it is a powerful argument in cases of depictions of violent and child pornography, especially where the direct harm principle does not apply, such as pornographic scenes of simulated sexual violence involving consenting actors. In this example of cultural harm the value under threat is equality, an essential basis of democratic society that warrants protection; thus, restrictions would be justified in preventing this form of harm.

A third interpretation of cultural harm is given by Clor in response to the feminist argument discussed above. Clor favours what he calls an 'ethic of decency' over the feminist 'ethic of equality', arguing that the latter fails to encompass a vital category of harmful material. According to Clor, the real harm caused by pornography is the objectification of human sexuality: "[t]he purpose [of pornography] – to arouse an elemental passion for other people's bodies independently of any affection or regard for a particular person – virtually guarantees that human beings will be represented as instruments".[83] He argues that the feminist antidiscrimination theory, while identifying the subordination of women as a valid wrong, fails to recognize the additional dehumanizing effect of pornography as a further element of harm.[84] For Clor, "the systematic degradation of human, interpersonal sexuality to a subhuman, merely animal or mechanistic sexuality"[85] undermines the values

76. ibid.
77. Balmer (n 67) 74.
78. McGlynn and Rackley (n 24) 257, citing Nussbaum.
79. C MacKinnon, 'Pornography as Defamation and Discrimination' (1991) 71 *Boston University Law Review* 793, 807.
80. MacKinnon (n 77) 802, 809.
81. ibid 810.
82. In 1983, Catharine MacKinnon and Andrea Dworkin drafted the Antipornography Civil Rights Ordinances, a series of laws treating pornography as a violation of women's civil rights. In 1984, the ordinances were incorporated into Indianapolis law, but were soon overturned by the Seventh Circuit Court of Appeal's judgment in *American Booksellers v Hudnut* 771 F.2d 323 (7th Cir. 1985), where Easterbrook J held that a definition of pornography referring to the portrayal of women is unconstitutional, since "the First Amendment means that government has no power to restrict expression because of its message [or] its ideas".
83. Clor (n 33) 192.
84. ibid 193.
85. ibid 197.

of human dignity indispensable to a civilised society, and is thus a value which ought to be protected in the public interest. In these three examples of cultural harm, the concern is to protect the "standards of value deemed important for the well-being of the community"; what Clor referred to as public morality.[86] Thus the prevention of cultural harm, understood as the undervaluing of principles essential to civilised society, adopts the same meaning as the protection of public morality, the latter a valid interpretation of the Article 10 legitimate aim of the 'protection of morals', as discussed above. However, it is apparent from current legislation that legislators fail to distinguish between the protection of individual and public morality; thus it is argued that cultural harm comprises a more principled justification for restrictions on pornography.

To illustrate the broader scope of a harm-based approach, the difference in outcome from a moralistic approach will be demonstrated with four categories of pornography: child, violent, extreme, and pseudo/virtual child pornography. As discussed above, any restrictions based on obscenity, depravity, indecency, or any similar concept would be invalid for all of these categories, since this method inevitably becomes a regulation of individual morality. However, a law restricting pornography with the aim of preventing direct harm to participants will encompass child and non-simulated violent material. Furthermore, the prevention of cultural harm would include within its scope simulated violent pornography and some forms of degrading extreme pornography. Pseudo and virtual[87] child pornography would not implicate direct harm, since no real children are involved in its production; however, its regulation would similarly be justified for the prevention of cultural harm.

In conclusion, it is suggested that, given the aforementioned difficulties with a moralistic basis for pornography laws, a harm-based approach to these restrictions is less likely to challenge the essence of the right to freedom of speech. It is submitted that the legitimate aim of the protection of morals, when restricted to the protection of a public morality, is compatible with the right to freedom of speech, but that legislators are incapable of fulfilling this distinction, thus encroaching on individual morality. By using Mill's harm principle in conjunction with the definitions of cultural and direct harm, restrictions on pornography will be formulated on a basis which does not conflict with the right to self-development and fulfilment, by circumventing the issue of the right to moral independence and bad thoughts. Moreover, it is contended that the concept of cultural harm successfully encompasses a protection of the values deemed important for a civilized society without having recourse to the problematic notion of morality. In essence, it is submitted that the 'protection of morals' is not the most suitable legitimate aim with which to qualify the right to freedom of expression for the purpose of restrictions on pornography; conversely, a harm-based approach is less problematic, and provides grounds for legislation compatible with Article 10 of the Convention.

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86. ibid n 33.
87. Nair (n 59) 224: 'Virtual pornography ... typically includes computer generated images, cartoons, digitally created images, etc.' See also ss 65(2) and (6) of the Coroners and Justice Act 2009.

Tort, Justice and Wrongful Conceptions: A 'Pure' Rights-based Approach

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INTRODUCTION[1]

There exist two competing analytical explanations of the law of torts. The first has been described as the 'loss-based model',[2] where the loss suffered by the claimant, in the absence of justification, provides the reason for the action against the responsible party. Baroness Hale characterised this approach accurately in stating that "damage is the gist"[3] of liability in negligence. In opposition to this view sits the 'rights-based model',[4] in which the availability of an action in tort flows from the infringement of a right. This approach views a tort as a type of wrong.[5] In summarising this side of the debate, I can improve little upon Robert Stevens' explanation that "[t]he law of torts is concerned with the secondary obligations generated by the infringement of primary rights".[6] The constant goal of the advocates of both sides of the debate is to apply their model to case law in the most convincing way possible. I shall attempt to follow the rights-based model to its logical conclusion and propose an analysis of negligence in particular and the law of tort in general from a 'pure' rights-based perspective. The aim of such an analysis will be to categorise torts based on their effect upon individuals' rights, without other irrelevant (from a rights-based perspective) considerations. Such considerations shall be shown to include the type of harm caused or the manner in which a right was violated. The proposed analysis will focus on which rights are violated and the subsequent justification for the law's intervention.

My enquiry will begin with an analysis of the decision of the House of Lords in *McFarlane v Tayside Area Health Board*[7] and *Rees v Darlington Memorial NHS Trust*.[8] The role played by the concepts of loss and justice in these decisions will be examined, with particular focus on the relationship between corrective and distributive justice. It shall be submitted that a rights-based approach precludes distributive justice from playing a role in tort law, being relevant only in determining primary duties, the breach of which gives rise to secondary obligations in tort.[9] From this conclusion, the appropriateness of

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1. I am grateful to Richard Tur for his comments on an earlier draft of this paper. The usual disclaimers apply.
2. R Stevens, *Torts and Rights* (OUP 2007) 2.
3. *Greg v Scott* [2005] UKHL 2 [99].
4. R Stevens, *Torts and Rights* (OUP 2007) 2.
5. P Birks, 'The Concept of a Civil Wrong' in D Owen (ed) *Philosophical Foundations of the Common Law* (1995) 29.
6. R Stevens, *Torts and Rights* (OUP 2007) 2.
7. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59.
8. *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52.
9. R Stevens, Torts and Rights (OUP 2007) 2.

losses as a determinant of liability will be examined. It shall be submitted that a rights-based approach to the law of tort necessitates a two-stage structure based upon rights alone and not on the presence of losses. To find a principled basis for this new analysis, an examination of the Thomist conception of commutative justice in John Finnis' *Natural Law and Natural Rights* will be undertaken and the idea contrasted with the concepts of both corrective and distributive justice. Corrective justice shall be shown to concern the distribution of the central stock of entitlements in a society while commutative justice relates to that behaviour which is proper in human relationships. This theoretical base will lead to the drawing of a distinction between those torts that are actionable per se[10] and those which are actionable because of their losses.[11] The goal of this new approach will be to describe the law of torts by reference to the rights that have been breached (and the resulting obligations) and not by using a categorisation that focuses on the nature of the loss or the fault that has occurred.

THE ROLE OF LOSS IN 'WRONGFUL CONCEPTION' CASES

McFarlane and *Rees* are both cases concerning so-called wrongful conceptions, where vasectomies have been carried out negligently, resulting in unwanted pregnancies. The action in negligence in these cases is based either upon the doctor's failure to correctly perform the sterilisation or to appropriately warn the patient of the remaining risk of conception.[12] Lord Millett's judgment in *McFarlane* took a view of the law of negligence which relied upon a distinction between legal wrongs and loss. This approach has been praised for its conceptual clarity.[13] His Lordship held that: "In the present case the injuria occurred when (and if) the defenders failed to take reasonable care to ensure that the information they gave was correct. The damnum occurred when Mrs McFarlane conceived. This was an invasion of her bodily integrity and threatened further damage both physical and financial".[14] The two propositions in this passage are clear: firstly, that the doctor's failure to take reasonable care in his/her treatment of the claimant constituted a legal wrong. Secondly, it can be seen that a loss was required in order for the action in negligence to be made out. In this case it took the form of the conception of a child. Whether or not these propositions hold up to careful analysis is what must now be determined.

The identification of the presence of a legal wrong in these cases is clearly correct. In *Parkinson v St James and Seacroft University Hospital NHS Trust*, Hale LJ (as she then was) recognised that a negligently caused unwanted pregnancy violates a woman's right to bodily integrity.[15] In *Rees* Lord Millett recognised that such an occurrence violated the

10. For example, a trespass that does not cause the defendant to suffer loss but is actionable none the less.
11. For example, where property has been negligently damaged and is lost to the claimant.
12. A Beever, *Rediscovering the Law of Negligence* (Hart 2009) 386.
13. ibid 389.
14. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59.
15. *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266 at 63-68.

individual's "right to limit the size of their family".[16] This is also a wrong that has been recognised in other jurisdictions, notably, by McHugh and Gummow JJ in the Canadian case *Cattanach v Melchior* where the parents in a similar case were recognised as having an interest in their "reproductive future".[17] From a rights-based view of tort law this is an entirely acceptable state of affairs; tort law, including the law of negligence, is concerned with addressing legal wrongs and the vindication of rights.[18] While the identification of a legal wrong is not controversial, it is the role played by loss in these cases that causes the most difficulty, both in general and for the rights-based position in particular.

In the preceding extract it was noted that the presence of a loss is viewed as an integral part of the courts' determinations as to whether or not an action in negligence for a wrongful conception should be successful. This is inconsistent with Lord Millett's conclusion regarding the worth of an unwanted child in the eyes of the law: "[s]ociety itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth".[19] If a child must always be regarded as a benefit, then it is difficult to see how its conception can be viewed as a loss. Similarly, Lord Slynn refused to treat the situation as representing a personal injury.[20] Furthermore, Witting has also argued that pregnancy cannot represent harm in the conventional sense because pregnancy is a condition natural to the human female body that it is designed to accommodate.[21] It is submitted that this line of judicial and academic authority reflects recognition of the inherent value and potential of a human life that is intuitively satisfying and should be preserved.

Alan Beever has provided a sophisticated critique of this interpretation in which he seeks to distinguish between the value of the human life concerned and the effect it has upon the claimant.[22] In effect, he argues that a child may still be seen as valuable while inflicting loss upon the claimant.[23] This argument seeks to reconcile Lord Millett's use of legal reasoning which relies upon the presence of a loss with his remarks concerning the value of a child. Beever's project is unsuccessful. Beever's argument is based upon a separation of the effects that a child has and the child itself and this is drawn from a misreading of Lord Millett's judgment. The House of Lords did not view the baby's existence in isolation in reaching its decision; it took into account the variety of interactions between infant and parents, observing "[i]n truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility".[24] Ultimately this conclusion is one made on the balance of all the effects created by the existence of the child and therefore includes any losses caused to the parent. To argue that a child's conception (a necessary feature of its existence) constitutes

16. *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52, [2004] 1 AC 309 at 123.
17. *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1 at 66.
18. R Stevens, *Torts and Rights*, (OUP 2007) 2.
19. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59.
20. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59, 76.
21. C Witting, 'Physical Damage in Negligence' [2002] *CLJ* 189, 192-193.
22. A Beever, *Rediscovering the Law of Negligence* (Hart, 2009) 390.
23. A Beever, *Rediscovering the Law of Negligence* (Hart, 2009) 390.
24. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59.

loss, it must be accepted that the child itself is a loss. This position is unacceptable if one is to agree, in a Kantian sense, that humans have dignity rather than price[25] and that they should be seen as ends in themselves and not as means to an end. By way of analogy, it 'costs' time and effort to go to a bank in order to cash a cheque but one would not say that the cashing of a cheque constitutes a loss. In the same way, the pain and discomfort caused by a conventional childbirth cannot be separated from the child that it produces and to do so would be, I suggest, artificial and flawed. Beever's approach overlooks both this causal connection and Lord Millett's explicit consideration of child and birth together.

At this point, it could be said in reply that in caesarean births or surrogacy situations the pain and suffering of birth can be separated from the birth of the child itself. These points need not trouble the argument that has been advanced. The caesarean example still causes what would normally be considered harm to a mother, in the form of incisions and scarring. Indeed, only the surgical context of the situation prevents such harms from amounting to a criminal assault, even if consent was present.[26] As for the question of surrogate mothers, such cases do not represent the central example of childbirth and in such situations the issue of liability for unwanted conception and childbirth does not arise. In a surrogacy context, neither party is seeking to characterise the process of childbirth and the resulting child as a loss. There is no question of individuals failing to meet the standards that govern their relationships with one another – one cannot negligently cause the conception and birth of a child who is desired.

So how did the House of Lords deal with negligence claims in which a legal wrong had been committed against the claimant but no loss had been caused? In *Rees*, their Lordships followed their previous decision in *McFarlane* in making a 'conventional award' and increased its size from the £5,000 in *McFarlane* to £15,000. Lord Bingham recognised that this award would "afford some recognition of the wrong done" and seemingly abandoned Lord Millett's previous search for an identifiable loss.[27] Lord Millett was also sitting in this case and did not depart from Lord Bingham's position. This presents a problem: if losses were such a crucial aspect of the structure of the law of negligence and this was identified by the court as not being present, then how could the action succeed and justify such an award? Nolan has recognised that this rights-vindication approach has the possibility of furthering the cause of rights-based tort lawyers, although he himself rejects that position.[28] How then can this area of the law of tort be explained without resorting to the fiction of classifying the birth of a child as a loss to its parents or adopting a contradictory position, as the House of Lords has done in *McFarlane*?

25. I Kant, 'Groundwork of the Metaphysics of Morals' in M Gregor (ed), *Practical Philosophy* (Cambridge University Press, Cambridge, 1996) 84, 434-435.
26. *R v Brown* [1994] 1 AC 212.
27. *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52 at 8.
28. D Nolan, 'New Forms of Damage in Negligence' (2007) 70(1) *MLR* 59 79.

CORRECTIVE JUSTICE AND TORT LAW

We are then left in a position where no loss has been caused and yet the courts have still seemingly required both a legal wrong and loss to be caused in order to allow an action in negligence to succeed. To proceed, it will therefore be necessary to examine the role played by loss and how its relevance may be justified on a principled level. Beever has argued that "[c]orrective justice provides the most abstract explanation of the law of negligence".[29] On this approach, when one individual causes another a loss and wrongly upsets the pre-existing distribution of resources in society, an action in tort may be seen as justified in order to restore that distribution. This pre-existing distribution can be seen as placing the affected parties on a footing of notional equality and it is the validity of this prior state which justifies the corrective effect of tort law.[30] It is from this theoretical basis that so called 'mid-level principles' are derived which make up the law of negligence.[31] Following my earlier discussion of *McFarlane* and *Rees*, this approach is now confronted by a principled inconsistency. Corrective justice is based upon a pre-determination of what groups or individuals are entitled to following distributive considerations.[32] The award made in *Rees* was made in the absence of loss being inflicted on the claimants. If the distribution of goods has not been altered by dealings between individuals, then no principled justification for the award of damages can be drawn from corrective justice. An alternative will be required to justify the wrongful conception case law.

If the award of a conventional sum of £15,000 cannot be justified by reference to corrective justice, then how can it be accounted for? The rights-based model of tort law views the claimants in such cases as possessing a right to the money, flowing from the breach of a primary obligation owed to them.[33] The determination of the existence of rights and the corresponding obligations represents the allocation of something advantageous or disadvantageous and as such falls within the province of considerations of distributive justice.[34] Furthermore, corrective justice is not a suitable alternative as a basis for these rights because it is dependent on a logically prior distribution in a manner which a primary right cannot be.[35] The question remains: where does this secondary right come from? If this cannot be adequately explained, the rights-based approach will fail to explain the law in this area.

Although corrective justice does not provide a solution, the possibility still to be considered is whether or not distributive justice can also be deployed to provide a principled basis for the secondary rights which flow from the infringement of primary rights. In his judgment in *McFarlane*, Lord Steyn claimed that the "truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven"[36] and this followed

29. A Beever, *Rediscovering the Law of Negligence* (Hart, 2009) 47.
30. E J Weinrib, 'Corrective Justice in a Nutshell' (2002 52 *University of Toronto Law Journal*) 349.
31. A Beever, *Rediscovering the Law of Negligence* (Hart 2009) 47.
32. J Finnis, *Natural Law and Natural Rights* (Clarendon 1986) 178-179.
33. R Stevens, *Torts and Rights* (OUP 2007) 2.
34. J Rawls, *A Theory of Justice* (Belknap Harvard 6th Ed 2003) 7.
35. P Cane, 'Distributive Justice and Tort Law' (2001) *NZLR* 401.
36. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59.

Lord Hoffmann's use of considerations of distributive justice in previous decisions.[37] If a primary right is determined by what is distributively just and secondary obligations flow from a breach of this distribution, then these rights seem to be founded just as equally on distributive justice.[38] This approach has been rightly dismissed as ignoring the distinction between societal and interpersonal morality which divides the concepts of distributive and corrective justice.[39] While distributive justice can explain why a right to plan one's family life exists, it cannot offer guidance as to how individuals are to behave towards each other; it is this which limits the usefulness of distributive justice. Distributive justice and corrective justice may be inextricably linked but they are not interwoven and should be kept conceptually separate, even if only for analytical convenience.[40]

JUSTICE AND THE RIGHTS-BASED VIEW OF TORT

A right exists because of a determination that a given matter of special concern to the right-holder requires particular protection against other reasons or considerations.[41] The protection and vindication of that right follows logically from the determination of its existence.[42] Using distributive justice to justify these secondary obligations ultimately results in the adoption of a loss-based approach. Such an approach would be in danger of constantly taking every loss as its starting point and then deciding how to distribute it. In contrast, the rights-based approach begins its inquiry with the existence of a right and then determining whether or not it has been violated. When a court is determining whether or not an action for conversion will be successful, it will accept that the owner of the property in question has a right to it and that it cannot be disposed of against his wishes by a third party with a weaker title. The court will not engage in an analysis of the capitalist principles of our society and consider how and why individuals are entitled to own property; it will simply enquire as to whether or not the defendant has disturbed this pre-existing entitlement. A position which claims that both primary and secondary obligations may be explained by distributive justice collapses the two-stage structure of the rights-based analysis and results in a loss-based, entirely distributive analysis of tort law. This is an unacceptable outcome for a paper which is seeking to strengthen the rights-based approach.

The necessity of separating the concepts of distributive and corrective justice within the rights-based approach emerges from an analysis of the substantive content of the rights that are created by considerations of interpersonal morality (this includes both corrective and commutative justice). Interpersonal morality must be kept conceptually separate from distributive justice. Although corrective justice is primarily dependent on distributive

37. *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, 503-504.
38. P Cane, 'Distributive Justice and Tort Law' (2001) *NZLR* 401, 413.
39. A Beever, *Rediscovering the Law of Negligence* (Hart 2009) 68.
40. J Finnis, *Natural Law and Natural Rights* (Clarendon 1986) 179.
41. P Eleftheriadis, *Legal Rights* (OUP 2008) 1.
42. J Finnis, *Natural Law and Natural Rights* (Clarendon 1986) 178.

considerations for its content, it still retains a minimum content based on the recognition of the individual's personality which is presupposed in the field of interpersonal morality.[43] Corrective justice therefore has a necessary minimum content. Distributive justice in contrast, is essentially devoid of necessary substantive content.[44] Therefore, considerations of corrective justice are not a necessary feature of distributive justice (even though the majority of formulations include it). It is logically necessary that the two concepts are kept separate; a concept with no necessary substantive content would lose its uniqueness if coupled with a concept that did contain such a minimum necessary content.

This conclusion highlights how the justification of secondary obligations with reference to distributive justice is incompatible with the rights-based approach to the law of torts. Rights may not be justified by reference to utilitarian or consequentialist goals; they have peremptory force[45] and a failure to recognise this would represent a wholesale rejection of the concept of a framework of rights.[46] This can be explained through two slightly divergent viewpoints. Firstly, in a hypothetical situation in a cannibal community, we would not say that an individual has a right to life and then permit eating them in order to feed a group of people. What we would say is that they have a right to life only in so far as the individual is not needed for food. Rights must determine whose entitlements win and whose lose in any given situation.[47] A slightly different analysis would say that rights may conflict with each other and that one may override another.[48] The disagreement between these two views comes down to competing understandings of entitlement theory and need not trouble us here. Either way, what is crucial is that the justification for the existence of a right is not a single objective test but is based upon the individual importance of the competing rights (or reasons) themselves. Once it is accepted that a violation of a primary right has occurred, it would therefore be inappropriate to reassess the reasons for the existence of that right. Such an investigation would only confirm the existence of the primary right and would offer no guidance as to the content of the obligation entailed by the primary breach. This can be seen in my earlier discussion of the hypothetical claim for conversion. This demonstrates how the award of damages in no-loss cases cannot be explained solely by way of distributive justice and how such an approach is incompatible with the rights-based model.

COMMUTATIVE JUSTICE

So where does this conclusion leave us? Thus far we have seen that, in cases of a wrongful conception where an individual's right to plan their life is violated, a £15,000 award may still be made. This award is made in the absence of any recognisable loss; if anything,

43. P Benson, 'The Basis of Corrective Justice and its Relation to Distributive Justice', (1991) 77 *Iowa Law Review* 515, 607.
44. J Gardner, 'The Virtue of Justice and the Character of Law', *Current Legal Problems* 53 (2000) 19.
45. P Eleftheriadis, *Legal Rights* (OUP 2008) 125.
46. R Stevens, *Torts and Rights* (OUP 2007) 333.
47. P Eleftheriadis, *Legal Rights* (OUP 2008) 71.
48. J Waldron, 'Rights in Conflict', (1989) *Ethics* 99, 503.

the benefit of a new child has been gained by the claimant. The problem that we are then confronted with is how to construct a principled justification for a rights-based view of tort law that takes into account cases where damages have been awarded in the absence of loss. On a principled level, our solution requires a justification for secondary obligations which does not rely on loss as a corrective explanation and does not conflict with the rights-based view in the same manner as a distributive explanation. Furthermore, this justification must be grounded in interpersonal morality because of the necessarily interpersonal nature of the breach of a primary right that is encountered in tort law. The solution may be found in a re-examination of the concept of corrective justice. Aristotle's original separation of distributive justice (*dianemetikon dikaion*) and corrective justice (*diorthotikon dikaion*) views corrective justice narrowly, in so far as it is limited to the remedying of disruptions to the distribution of the common stock of society's resources.[49] It is this narrowness that led Aquinas to reinterpret and distinguish corrective justice from commutative justice in order to include dealings between individuals which did not necessarily involve distributions of the common stock of resources.[50] Commutative justice is therefore focused on the individual's well-being and how this is affected by interactions with others.[51] From this account, it seems that while all considerations of corrective justice are concerns of commutative justice, only those commutative considerations which concern the distribution of common stock are properly called considerations of corrective justice.

The Thomist conception of commutative justice relies upon an overly narrow idea of what constitutes the common stock which is capable of distribution. The precepts of distributive justice and commutative justice are both requirements of practical reasonableness.[52] Distributive justice is therefore capable of determining how common stock must be distributed as well as determining how individuals should behave towards one another in the absence of concerns regarding the common stock of resources. The Thomist approach seeks to confine distributive justice to determining issues of common stock while overlooking the fact that the same processes of distributive justice also determine the existence of the rights and obligations that people owe commutatively, such as basic human rights.[53] In order to resolve this classificatory instability, it must be accepted that practical reason determines primary obligations which concern both the distribution of common stock and the distribution of purely commutative obligations between individuals. The distinction to be drawn is therefore between secondary obligations which concern the distribution of common stock (justified by corrective justice) and those obligations which only concern the violation of rights, without a disruption to the distribution of resources (justified by commutative justice).[54] This distinction can then serve as the foundation of the new analysis being advanced.

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49. J Finnis, *Natural Law and Natural Rights* (Clarendon 1986) 178.
50. ibid 179.
51. ibid 166.
52. ibid 161.
53. J Finnis, *Aquinas* (OUP 1998) 215.
54. It should be noted that here I use commutative justice to refer only to those considerations which cannot also be said to concern corrective justice. It is commutative justice in its 'purest' sense.

A NEW ANALYSIS OF THE RIGHTS-BASED APPROACH

This principled distinction between correctively just and commutatively just secondary obligations may now be applied to the law in practice. There can be said to be a principled justification for secondary obligations where the primary right has been violated despite no loss actually being inflicted on the claimant. There is a distinction between torts which are actionable per se and those which are actionable as a result of the loss they cause.[55] This distinction is not a new one, although when it has been made previously, it has been dismissed because the line that it drew ran through the middle of negligence and disrupted attempts to categorise torts by the nature of the loss inflicted and not the nature of the right that has been breached.[56] This analysis is beneficial for the rights-based approach because it focuses our attention on the principled justification for the existence of the secondary obligation which flows from the breach of a primary right. Those torts that are actionable per se exist because of the violation of a primary right which gives rise to a secondary obligation of commutative justice which allows for the vindication of a right in the absence of loss. In contrast, those torts which are actionable on their loss exist because the primary right that was breached concerned the distribution of the common stock of society's resources and the secondary obligation is therefore one of corrective justice. This corrective explanation justifies why damages for damage to property may vary while a fixed sum of £15,000 in a wrongful conception case is appropriate. Those torts that are actionable per se bear their harm on their face while those actionable on their loss may vary in their harmfulness because they are dependent on the degree to which the distribution of the common stock of resources has been disrupted.

Both types of tort are based upon a primary right whose existence is determined by what is distributively just. The proposed analysis seeks to describe the content of secondary obligations based upon the substantive content of the obligations and the principled reasons for why these obligations arise. This framework provides a clearer understanding of secondary obligations. This approach enables a rights-based reappraisal of the approach taken by Lord Millett when he required that both a wrong (*damnum*) and a loss (*injuria*) be present for an action to be made out.[57] While this would be necessary for a tort actionable on its loss, it is not for a tort actionable per se, which only requires the infringement of a right in its 'pure' sense; only the legal wrong is required for such an action to be made out. The category that a tort falls into is determined by the substantive content of the primary right, formulated from principles of distributive justice. It is submitted that this framework enables decisions such as those made in *McFarlane* and *Rees* to be understood without resorting to a fiction that loss has been caused (as Beever does[58]) or making an internally inconsistent decision (as Lord Millett did[59]) The advantage of this to the rights-based project is clear: it removes the supposed reliance on the presence of loss unless the

55. D Nolan, 'New Forms of Damage in Negligence' (2007) 70(1) *MLR* 59-88, 79.
56. ibid 79.
57. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59.
58. A Beever, *Rediscovering the Law of Negligence* (Hart 2009) 390.
59. *McFarlane v Tayside Area Health Board* [2000] 2 AC 59.

content of a primary right allows for a right to have a loss corrected. In cases where losses have been inflicted, the loss only serves to be the means by which the primary right is breached. The primary right is a right to a share of the common stock of resources and the loss represents the breach of this right. The loss in such cases is therefore inseparable from the legal wrong.

The title of this paper promises a 'pure' rights-based theory of tort law and that is what this new analysis provides because considerations such as loss only become relevant in so far as a claimant has a right for them to be considered. The wrong/loss distinction is not necessary: wrongs are either actionable in themselves and losses do not come into play or losses form the subject matter of a wrong and may be subsumed within the legal wrong identified. This analysis is not designed to replace existing classifications of tort but instead is designed to complement them as a useful heuristic for understanding the rights-based view of tort law and appreciating the conceptual clarity that commutative justice can bring to both wrongful conception cases and the law of tort in general. It should be noted that the new framework draws its dividing line down the middle of the law of negligence. Wrongful conception cases as well as negligent imprisonment claims (where losses are not caused) would be taken out of the law of negligence and viewed in the actionable per se category along with actions for trespass, where previously the fiction of loss being 'assumed' was utilised. The new framework is a 'pure' rights-based theory of tort law because liability is determined only by the rights possessed by the individuals involved in the claim; the type of loss and the manner in which it is inflicted are treated as less important than the rights that have been infringed.

CONCLUSION

This paper began its enquiry with the decisions of the House of Lords in *McFarlane* and *Rees* and from this has sought to outline a new explanation of tort law from the rights-based viewpoint. It is now possible to review and summarise my main arguments and conclusions. The examination of wrongful conception cases demonstrated that an action in negligence could succeed without there being any loss inflicted on the mother. This became apparent after it was clear that it was unsustainable to treat the birth of a child as constituting a loss to its mother. The lack of loss in such a situation precludes corrective justice from providing an explanation as to why liability exists – this was shown to be because of corrective justice's focus on the distribution of the entitlements to the common stock of resources in a society. If nobody has suffered a loss, then there is no need for corrective justice. Furthermore, distributive justice cannot fill the gap left by corrective justice's failure to be of assistance because such an explanation would be incompatible with the type of inquiry that is undertaken by the courts in such cases as well as being incompatible with a rights-based approach. The solution provided was a modification of the Thomist conception of commutative justice espoused by John Finnis. This revised theory of commutative justice recognises that duties of commutative and

corrective justice both exist within the sphere of interpersonal morality and both have their substantive content determined by what is distributively just based on the demands of practical reasonableness. This view of commutative justice can then be used to explain why recovery is permitted in the absence of loss. A violation of an individual's right that does not cause loss still represents a disregarding of the duties of commutative justice that are owed to other people. In the case of negligent sterilisations, this takes the form of an infringement of the right to plan one's life and have due respect shown to their rights. These requirements are requirements of commutative justice because they concern what behaviour is proper in human relations. From this explanation I have sought to draw a distinction between those torts actionable per se and those that are actionable on their losses. This distinction rests upon the difference between corrective and commutative justice that exists within the sphere of interpersonal morality. Such a distinction will allow for a consistent account of why recovery is permitted in some cases and not in others. From this position it is clear to see that the distinction between wrongs and losses drawn by the courts is unnecessary when using this new analysis. It is hoped that this approach will strengthen the rights-based view of tort law by providing a principled basis, grounded on a consistent account of principles of justice, on which to view the secondary obligations that flow from the violation of primary obligations. This account does not look to the existence of losses to begin its enquiry but instead seeks to ascertain what rights and obligations come into play in any given situation. Loss only becomes relevant when a claimant has a right that it should be so.

Retention Remedies in Comparative Perspective

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INTRODUCTION

One of the most effective remedies available to a party for breach of contract is to refuse to perform his own obligations under the agreement. The expediency of such a remedy is that it functions as a type of self-help, the innocent party requiring no recourse to the courts before using the remedy. The nature of such remedies, however, entails that they are susceptible to being misused.[1] Whether it is termed the right to withhold, suspend, or retain performance, the development of the idea is most commonly linked with the Latin maxim known as *exceptio non adimpleti contractus*[2] (the defence of the unperformed contract). The rule is enshrined in many modern legal systems, and it is for this reason that a comparative account of how the *exceptio* and analogous rules have developed and function is a fruitful exercise.

Firstly, it is important to clarify the scope of these comparisons. Thus, for the purposes of this paper I will limit myself to a discussion of four different regimes. The first of these systems, and the primary focus of this paper, will be on Scotland, and indeed the recent Supreme Court case on retention of *Inveresk Plc v Tullis Russell Papermakers Ltd*[3] provides the impetus for this analysis. The next system that will be considered is English law. Although this system has no developed scheme of withholding performance[4] it will become apparent that the rules it has developed in relation to the order of performance provide sufficient "analogues",[5] such that its inclusion in this essay is justified. Comparisons will also be drawn with the law of South Africa, the instructive value of which is unsurprisingly endorsed in Scots case law.[6] The final model that I will look at will be the recently published *Draft Common Frame of Reference (DCFR)*.[7]

I will begin with a brief consideration of the general principles relevant to each system

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1. D Harris, D Campbell, R Halson, *Remedies in Contract and Tort* (2002) 62-64.
2. See R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 801 esp note 133; See also *BK Tooling v Scope Precision Engineering* [1979] (1) SA 391 per Jansen JA paras 415-418.
3. *Inveresk Plc v Tullis Russell Papermakers Ltd* [2010] UKSC 19.
4. See generally, JW Carter, 'Suspending Contract Performance of Breach' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (1995) 485.
5. HL MacQueen, 'Scots Law and the Road to the New Ius Commune', *Electronic Journal of Comparative Law* vol 4.4 (December 2000) at A.5, available at <http://www.ejcl.org/44/art44-1.html>.
6. See, for example *ESE Financial Services (Pty) Ltd v Cramer* [1973] (2) SA 808 (C) and *BK Tooling v Scope Precision Engineering* [1979] (1) SA, cited by Lord Rodger in *Macari v Celtic Football Club* [2000] SLT 80 at paras 87-88.
7. C von Bar, E Clive, H Schulte-Noltke (eds), *Draft Common Frame of Reference (DCFR)* (2009).

followed by an in-depth consideration of the principle areas of difficulty in this sphere. The first of these difficult areas is the deceptively simple question of 'reciprocity' of obligations. Essentially, which obligation must the other party breach before the innocent party may withhold his own obligations? The innocent party has the difficulty of ascertaining whether or not he may withhold in a specific situation,[8] therefore, legal systems must exhibit a certain degree of clarity as to when obligations will be deemed reciprocal. The second issue relates to the extent of this breach. This problem is most commonly associated with defective performance, where in an all too common situation a party seeks to withhold payment in response to what is perceived by the other party to be a minor breach.[9] It will be seen that the legal systems in question have employed a range of tactics to combat this.

Ultimately, it is a question of striking the correct balance. If a legal system seeks to employ a wide concept of reciprocity, then it requires to carefully define the material extent to which a party must breach these obligations, or alternatively, mitigate the potentially unfairness in some other way. I will seek to show that the Scots law of retention as it currently stands does not strike this fair balance. A wide right of retention provides an incentive for parties to make more use of the remedy, and although frivolous pleas may fall for want of reciprocity, the onus falls upon the courts to be clear as to when they will determine obligations to be reciprocal. With this said, an examination of the relevant distinctions, terminology and general principles of each system is required.

A. POSITIONS, TERMINOLOGY & GENERAL PRINCIPLES

(i) Terminology and Pattern of Remedies

In Scots law, withholding performance is known as the right of retention. It is based upon the concept of mutuality and exists alongside the remedy of rescission. It is a feature of the common law tradition that the distinction between the rules relevant to these remedies is often blurred.[10] Although this concept of mutuality existed long before the remedy of rescission,[11] it has been used to justify both. Consequently, certain principles relevant to the latter have become associated with the former. English law displays a similar trait to the law of Scotland, in that the rules relating to withholding performance and termination are associated – in fact they are said to depend on the same principles.[12] The English legal system does not have a developed concept of withholding performance, however, its rules on order of performance and termination can be utilised to similar effect. In determining whether a party may terminate the contract under this rubric of conditions, English law

8. WW McBryde, 'Remedies for Breach of Contract' 1996 1 *Edinburgh Law Review* 43 at 58.
9. See for example, *Aberdeen Joinery Windows and Doors Limited v Salaam*, Aberdeen Sheriff Court 16th October 2009, available at <http://www.scotcourts.gov.uk/opinions/A259405.html>; *Steel v Young* [1907] SC 360.
10. GH Treitel, *Remedies for Breach of Contract* (1988) 245-246.
11. WW McBryde, 'The Scots Law of Breach of Contract: A Mixed System in Operation' 2002 Edinburgh Law Review 5, 12.
12. H Beale, *Remedies for Breach of Contract* (1980) 48.

uses the ideas of condition precedent, concurrent condition, and independent covenant.[13] Although these rules are primarily directed towards termination and damages, refusal to perform may be sought at an earlier time than that of termination.[14] Thus, a party may at least withhold in the situation where the time for performance has not yet occurred, provided the breach in question would have allowed him to terminate the contract had the time limit expired.[15]

The civil jurisdictions differentiate rather more sharply between the rules relating to the *exceptio* and termination.[16] The role of termination as a self-help remedy is somewhat diminished in these systems, and as a result the scope for confusion with principles relevant to the *exceptio* is lessened. Similar to English law, order of performance is integral to the rules on withholding performance. In fact the provisions laying down the rules on the *exceptio* are generally fused with those relating to order of performance.[17] Finally, the civil law uses the idea of the 'synallgamatic' contract to define those contracts in which obligations may be withheld.[18] South Africa similarly makes a distinction made between the rules relevant to the *exceptio* and those on cancellation.[19] In order for the *exceptio* to be available the contract must be subject to the principle of reciprocity, and in order for this principle to be applicable obligations under the contract must be undertaken in exchange for each other.[20] Similar distinctions between contracts to be performed simultaneously (sometimes called synallgamatic contracts), and those where one party is to perform first[21] are also to be found here.

(ii) General Principles

The landmark case of *Bank of East Asia v Scottish Enterprise*[22] provides the first detailed judicial discussion of the principle in Scots law, where it clarified two important propositions. The first is that for mutuality to apply there must be some link between the obligation breached and that withheld; in other words, they must be counterparts. The second is that in order for retention to be justified the two obligations must arise contemporaneously or, put another way, the corresponding obligations must arise at the

13. *Kingston v Preston* [1773] 2 Doug KB 689, per Lord Mansfield; see generally Treitel, *Remedies* (n 10) 255-257 and further 276-279; D Nyer, 'Withholding Performance For Breach In International Transactions: An Exercise In Equations, Proportions or Coercion?' 2006 18 *Pace International Law Review* 29, 53-56; K Zweigert and H Kotz, *An Introduction to Comparative Law* (3rd edn 1998) 505-506.
14. Treitel, *Remedies* (n 10) 306.
15. A Apps, 'The Right to Cure Defective Performance' (1994) *LMCLQ* 525 at 532; Beale, *Remedies* (n 12) 20-21 and 35-38.
16. BGB sec.326; see further Zweigert & Kotz, *Comparative Law* (n 13) 492-496; see further on French law French CC Art. 1184; see further Zweigert & Kotz, *Comparative Law* (n 13) 496-499.
17. D Nyer, 'International Transactions' (n 13) at 48-49.
18. H Beale, D Tallon, B Fauvarque-Cosson, S Vogenauer, J Rutgers, *Cases, Materials and Text on Contract Law* (2nd ed 2010) 894 & 902-904; Synallgamatic, bilateral and reciprocal tend, however, to be used interchangeably; see Treitel, *Remedies* (n 10) 249.
19. Nyer, 'International Transactions' (n 13) at 50; See also H MacQueen, 'Remedies for Breach of Contract: The Future Development of Scots Law in its European and International Context' (1997) 1 *Edinburgh Law Review* 200 at 206; For a historical perspective see, A Cockrell, 'Breach of Contract' in R Zimmerman and D Visser (eds) *Southern Cross: Civil and Common Law of South Africa* (1996) 320-325.
20. S Van der Merwe (et al) *Contract: General Principles* (3rd ed 2007) 388; BK Tooling (n 2) 415G-H; the *exceptio* is said to have the same effect in the civil law, see Nyer, 'International Transactions' (n 13) at 46 esp note 44.
21. E Bonthuys, 'Reciprocity in Relation to The *Exceptio Non Adimpleti Contractus*: The Intentions of the Parties' (2001) *TSAR* 180 at 182-183.
22. *Bank of East Asia v Scottish Enterprise* [1997] SLT 1213; see also WW McBryde, 'Mutuality Retained: *Bank of East Asia Ltd v Scottish Enterprise*' (1997 1 Edin LR 135); see also *Macari v Celtic Football Club* [2000] SLT 80.

same time. The court treated the contract as a divisible entity, rather than as unity, emphasising the fact that each and every obligation on either side of a contract was not necessarily the counterpart of the other. It was stated earlier that similar rules are applied to both retention and termination, which can lead to misunderstanding. Indeed, Lord Jauncey in the *Bank of East Asia* case endorsed a long line of case law linking the two remedies.[23] When one accepts that retention is not justified for each and every breach of contract, it becomes necessary to define the types of breaches that do warrant retention.[24] As a result, requiring a material breach would appear to lessen the sometimes unfair effects of the rule. A developed concept of reciprocity in English law is not all that apparent. However, in discussing the condition precedent of ready and willingness to perform, Carter highlights that such rules can provide some protection against the risks of extending credit.[25] The English courts have shown a preference for classifying obligations as concurrent, emphasising the undesirable consequences that requiring one party to perform in advance may have.[26] The courts have sought to deal with this in two ways: the first is to classify the obligation in question as an independent covenant,[27] and the second is the doctrine of entire and severable obligations.

The civil law and DCFR also utilise a distinction between contracts in which obligations are to be performed simultaneously and those in which one party is to perform in advance.[28] The notes to the DCFR provision highlight both the presumption in favour of concurrent performances, and the fact that where this presumption is entertained, the right to withhold is widely accepted.[29] Given that these presumptions are inextricably linked with the provisions pertinent to the *exceptio* itself a party is, prima facie, always entitled to withhold his performance, unless he is required to perform in advance.[30] The *exceptio* is also available where a party has performed defectively or partially. In light of this, paragraph four of the DCFR provision introduces an overarching reasonableness test predicated upon good faith and fair dealing.[31] In South Africa the overarching principle of reciprocity bears striking similarities to the concept of mutuality in Scots law. Both the principles of reciprocity and mutuality respectively justify the use of the *exceptio* and retention. Similarly, a pre-requisite of each principle is that the obligations within the contract in question are reciprocal. Furthermore, in line with the English and DCFR position, there is a general rule that parties must perform simultaneously unless the

23. *Bank of East Asia* (n 22) at paras 1216-1217 per Lord Jauncey; see *Wade v Waldon* [1909] SC 571 on the idea of material breach; see also *Turnbull v Maclean & Co.* [1874] 1 R 730.
24. D Johnston, 'Breach of Contract' in K G C Reid & R. Zimmermann (eds), *A History of Private Law in Scotland* (2000) 175 at 180; See also WW McBryde, *The Law of Contract in Scotland* (3rd edn 2007) para 20-47.
25. Carter, 'Suspension of Performance' (n 4) at 496.
26. Treitel, *Remedies* (n 10) 279-281; See also Sale of Goods Act (1979) s 28; note, that if a party chooses to retain a defective performance and later terminates the contract, a certain amount of recompense is owed. This important rule was laid down in *Sumpter v Hedges* [1898] 1 QB 673; see also Beale, *Remedies* (n 12) 30.
27. Treitel, *Remedies* (n 10) 281-284; H Beale (et al) *Cases, Materials and Texts on Contract Law* (2010) 897-899.
28. Noltke (et al) DCFR (n 7) III-3:401(1).
29. Noltke (et al) DCFR (n 7) III-3:401 Comments at paras 1-7.
30. Nyer, 'International Transactions' (n 13) at 49; see also Beale (et al), *Cases, Text and Materials* (n 27) 895; see for specific examples of the rule; German BGB sec. 320; Greek CC arts. 374 & 378; Italian CC art. 1460(1); French CC art. 1184, and in relation to sales art. 1651; see also Noltke (et al) DCFR (n 7) III-2:401.
31. Noltke (et al) DCFR (n 7) III-3:401 & notes para 8.

parties have agreed otherwise.[32] Moreover, the scope of the *exceptio* is again wide enough to act as a defence with regards to incomplete performance. The now rejected doctrine of substantial performance[33] and the concept of reduced contract price are common law theories that have developed in response these issues. With these general principles in mind said, I will now turn to examine reciprocity and the case of *Inveresk* more deeply.

B. RECIPROCITY OF OBLIGATIONS

(i) *Inveresk*: The Dispute

Inveresk concerned the conclusion of a sale between two companies constituted in two separate contracts. The first of these contracts provided for the sale by Inveresk to Tullis Russell of intellectual property rights, customer information and related assets, termed the 'Asset Purchase Agreement' for an initial consideration. There was also an additional consideration to be paid, contingent upon the volume of sales made by Tullis Russell in the coming year. The second contract concerned a 'Services Agreement' under which Inveresk was obliged to manufacture, distribute, and sell specific products of the brand for a period subsequent to the sale. This was to be for further payments on the part of Tullis Russell. The dispute arose because Inveresk raised an action for payment seeking the additional consideration, which Tullis Russell defended on two grounds: firstly, that the additional consideration had not been determined correctly under the contract, and secondly, that even should this debt be due, they could withhold payment on the basis of breaches by Inveresk of the Services Agreement.[34]

The judgement in the case was handed down by Lord Hope and Lord Rodger, and although each agreed that the additional consideration had in fact not been determined in accordance with the contract,[35] their obiter remarks on the right of retention are what is important. Tullis Russell was contending that even should the additional consideration be due, they could still utilise retention pending resolution of a separate damages claim against Inveresk. In other words, they were asserting that they could retain an already liquid debt till such time as their illiquid damages claim for breaches under the Services Agreement was ascertained. When a party seeks to withhold a debt in this way there is some scope for confusion with the law of compensation, which allows parties to set off liquid debts they owe to each other.[36] This issue, however, concerned the retention of a liquid debt pending resolution of an illiquid claim. Lord Rodger dedicated his judgement to expounding a second type of retention based upon the law of set-off existing in Scots law. On the other hand, Lord Hope's opinion is of doctrinal significance for its elucidation

32. Van Der Merwe, *General Principles* (n 20) 390; D Hutchison C-J Pretorius (eds) *The Law of Contract in South Africa* (2009) 315.
33. BK Tooling (n 2) at paras 436G-437A.
34. M Godfrey, 'Mutuality, Retention and Set-Off: *Inveresk plc v Tullis Russell Papermakers Ltd*' [2011] 15 *Edinburgh Law Review* 115 at 116.
35. *Inveresk* (n 3) at paras 15-25 per Lord Hope & at para 49 per Lord Rodger.
36. McBryde, *Contract* (n 24) paras 20-63-20-65.

of the mutuality principle, concentrating initially upon the question of whether or not this principle could apply across two contracts, and going on to consider how the courts determine reciprocity. It is to this judgement we turn first.

(ii) Retention Across Two Contracts

Although as a general rule a party cannot withhold payment of a liquid debt pending ascertainment of an illiquid claim, Tullis Russell sought to rely on certain exceptions to this rule enunciated by Gloag and Irvine in their treatment of retention of debts.[37] Lord Hope drew attention to the fact that Tullis Russell were seeking to invoke the second of these exceptions, in that if the debts arose out of the same mutual contract retention could be justified.[38]

Authority was scarce, but the most important authority relied upon by Lord Hope is the case of *Claddagh Steamship Co v Steven*.[39] The defender sought to withhold his obligation to pay for a ship under one contract, in response to the fact the pursuer had breached his obligations to provide another ship under a separate contract. The court found a sufficient degree of interconnectedness between the two contracts to allow retention, with Viscount Finlay remarking that it is always a matter of inquiry whether the documents executed by the parties represented the entire bargain.[40] Although this case has been used as authority to support the application of mutuality across two contracts, it is arguable that the case involved only one contract. The Extra Division in *Inveresk* stated:

> ... it is, in our view, important to recognise a distinction between an agreement set out in several documents which fall to be read together and, if so read together, constitute one legal contract ... and, on the other hand, two or more legal agreements executed between two or more parties which have their different legal consequences and purposes and which are contained in separate documents.[41]

The court was keen to emphasise that the mechanisms of drafting in no way constituted a new agreement between the parties for two ships at two separate prices,[42] and it is therefore arguable that the court was in fact dealing with a single contract of sale, preserved in two documents. Notwithstanding the questionable judicial authority, and the fact that the agreement was made up of these two nominate contracts, Lord Hope still felt able to assert that the principle of mutuality applying to the overall transaction was 'inescapable'.[43] Lord Hope emphasised the irrelevancy of form and the transactions overall purpose as supporting his conclusions.[44] This latter point is the most important, and I would like to look at this in more depth.

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37. WM Gloag, JM Irvine, *Law of Rights in Security* (1897) 304.
38. *Inveresk* (n 3) at para 32 per Lord Hope.
39. *Claddagh Steamship co v Steven* [1919] S.C. 184, 1919 S.C. (HL); *Inveresk* (n 3) at para 35 per Lord Hope.
40. *Claddagh* (n 39) at 135 per Viscount Finlay.
41. *Inveresk plc v Tullis Russell Papermakers Ltd* [2009] SC 663 at para 50.
42. *Claddagh* (n 39) at 136.
43. *Inveresk* (n 3) at para 38 per Lord Hope.
44. para 38.

What does the word 'transaction' entail in Lord Hope's formulation? Godfrey questions whether the term may lead to new areas of ambiguity,[45] and such a view is corroborated by the fact that Lord Hope indicates no quantitative or temporal limit to this concept. If the overall commercial purpose of the contract is the vital factor then there appears no justifiable reason to limit the concept with regards to the number of contracts from which one can draw such inferences. Moreover, temporally speaking, although the contracts were concluded at the same time here,[46] surely transaction may be understood as potentially applying to a course of dealings? Lord Glennie pinpointed the issue in the Outer House that allowing retention to operate across separate contracts may lead to a new wave of retention pleas, nevertheless, he dismissed these reservations on the pretext that such claims would fail for want of mutuality.[47] Lord Hope, however, inferred mutuality not only from certain terms of the contracts, but from the overall purpose that each was directed towards.[48] This idea of finding a commercial link between the contracts in question carries with it a certain degree of imprecision, and coupled with the undefined scope of the term transaction, the reservations dismissed by Lord Glennie now carry more force.

In this respect the similar South African case of *Wynns Car Care Products v First National Industrial Bank Ltd*[49] is instructive. The appellants in the case concluded an agreement with a company, constituted in three separate contracts for the hire, maintenance and servicing of computer equipment. They asserted that the agreement of hire was to be construed as part of an overall transaction, and as a result their obligation to pay hire was reciprocal to that of the company's obligations under the other two agreements.[50] The court stated that this argument failed to appreciate the 'clear distinction' between agreements which were for practical and commercial considerations linked, and those agreements which, in addition, the parties wished to be reciprocal in a legal sense.[51] Indeed, it was conceded that the main reason for constituting the agreement in two contracts in *Inveresk* was for certain tax advantages,[52] yet Lord Hope still felt able to conclude that the parties intended legal reciprocity. The court went on to say in *Wynns* that it is for the parties to formalise every aspect of their transaction, and given that they had chosen to constitute the agreement in three separate contracts, the courts should not infer reciprocity unless the agreement clearly evinced that intention.[53] In referring to the English case of *The Odenfeld*[54] Treitel opines that in setting up a transaction in two documents the parties had shown that their promises were intended to be independent.[55] In drafting the agreement in two contracts the intention of the parties will generally be to turn stipulations into independent covenants, but drafting does not necessarily give a promise this nature;[56] it

45. Godfrey, 'Mutuality' (n 34) at 120.
46. *Inveresk* (n 3) at para 37 per Lord Hope.
47. *Inveresk plc v Tullis Russell Papermakers Ltd* [2008] CSOH 124 at para 44 per Lord Glennie.
48. *Inveresk* (n 3) at para 37 per Lord Hope; see also *Wyman-Gordon Ltd v Proclad International Ltd* [2006] SLT 390 at para 17 per Lord Drummond Young.
49. [1991] (2) SA 754.
50. paras 757H-G.
51. paras 758B-C.
52. *Inveresk* (n 41) at para 24; *Inveresk* (n 47) at para 36 per Lord Glennie.
53. *Wynns* (n 49) para 758C.
54. *Gator Shipping Corp v Occidental Shipping Establishment (The Odenfeld)* [1978] 2 Lloyd's Rep 357.
55. Treitel, *Remedies* (n 10) 282.
56. ibid 282-283.

is a matter of commercial context.[57] It is submitted that should the parties draft their agreement in this way there should exist a strong presumption that they did not intend reciprocity. In taking commercial interconnectedness to indicate legal reciprocity Lord Hope risks introducing more complication into already intricate agreements. If parties want to ensure that retention will not apply to their transaction they must expressly draft their contracts to reflect this.[58] Turning now to the second question, Lord Hope also had to decide whether the obligations in question were in fact reciprocal.

(iii) Unity of the Contract

In deciding whether or not the obligations under the Services Agreement were the counterparts of the additional consideration due under the asset purchase agreement Lord Hope first had regard to Lord Glennie's conclusions on the matter. Drawing upon the principles of reciprocity and contemporaneity, Lord Glennie determined that at no point prior to the conclusion of the Services Agreement had the additional consideration become due. The obligations were not, therefore, contemporaneous, and this necessitated the conclusion that the Services Agreement was a wholly separate stage of the contract.[59] Lord Hope, however, was of the opinion that the Lord Ordinary had "concentrated too much on the detail", and that the guiding principle was the overall unity of the transaction.[60] Moreover, the analysis should begin from the presumption that all the obligations within the transaction are the counterparts of each other.[61] In stating this Lord Hope drew upon a historical emphasis on the unity of the contract established by Gloag, and more recently revived by Lord Drummond Young.[62] Unfortunately, there are again certain problems with this analysis.

Firstly, Gloag was writing at a time when contracts were significantly less complicated; the typical commercial contract has now become more complex. Furthermore, if each and every obligation is presumed to be reciprocal then, prima facie, retention is justified for breach of any obligation included within this undefined concept. Until such time as transaction is more clearly defined parties may be tempted to bring speculative pleas, and where perhaps it was once safer to assume that such claims would fall for want of mutuality, Lord Hope's indifference to the concept of contemporaneity will undermine such clarity. Given that the temporal extent of transaction is unclear there is potential for parties to withhold performance in respect of past debts due and prestable in response to alleged breaches an indeterminate time later in the dealings. Aside from requiring a 'clear indication to the contrary',[63] Lord Hope also provides no guidance as to when this presumption may be rebutted. Consequently, it is submitted that the *Bank of East Asia* approach is more representative of the complex nature commercial transactions now take.

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57. The DCFR is silent on the matter; however, see O Lando, H Beale, *Principles of European Contract Law* (2000) Art 9:201 & Comment at 405.
58. See the attempt to do so in *Redpath Dorman Long Ltd v Cummins Engine Co Ltd* 1981 SC 370; see also *Melville Dundas Ltd v Hotel Corporation of Edinburgh Limited* [2007] SC 12.
59. *Inveresk* (n 47) paras 41-45 per Lord Glennie.
60. *Inveresk* (n 3) at para 42 per Lord Hope.
61. para 42.
62. *Hoult v Turpie* [2004] SLT 305 esp at para 14; *Purac Ltd v Byzac Ltd* [2005] SLT 37.
63. *Inveresk* (n 3) at para 42 per Lord Hope; Godfrey, 'Mutuality' (n 34) at 121.

The commercial purpose approach is uncertain, whilst the *Bank of East Asia* approach, in looking at the agreement as a complex, divisible construct, recognises that commercial contracts have an assortment of distinct purposes and may operate in multiple stages.[64] English law has also developed rules to similar effect on entire and severable obligations which will be discussed in later.

In determining reciprocity, the South African system is rather more developed than Scots law. The principle of reciprocity only applies to a contract should the contract itself contain reciprocal obligations and reciprocal obligations are those that have been undertaken in exchange for each other. It is a matter of interpretation whether this is so and this task is assisted by two presumptions: the first being that in any bilateral or synallgamatic contract obligations are to be performed simultaneously; the second being that interdependent obligations are presumed to be reciprocal unless there is evidence to the contrary.[65] The second is similar to that upheld by Lord Hope above, and the courts have for a long time accepted the sense of this latter idea.[66] However, this presumption is rather narrower than the Scottish position. Whereas the Scottish courts consider each and every obligation within an overall transaction to be prima facie reciprocal, South Africa restricts this to interdependent promises. This makes more commercial sense, for it accepts that although certain obligations under a contract may be connected or exchanged for each other, others are in no sense associated.[67] A further clarification for parties is that, if nothing contrary is apparent, the naturalia of certain contracts such as sale will determine both the order of performance and reciprocity.[68] Finally, South African law recognises that where a party is sued for an instalment, there is no reason why he cannot invoke the *exceptio* in respect of an obligation his co-contractant must perform prior to, or on the date this payment becomes due.[69] There is no suggestion here that one may find reciprocity between obligations that party is required to perform after that date and those relating to the previous instalment. This critical discussion of the courts' approach to reciprocity has sought to highlight the merits and deficiencies indigenous to each system. It will act as an appropriate foundation to the issues we will discuss in the final section. However, prior to this, and for the sake of clarity, I would like to consider Lord Rodger's judgement in the *Inveresk* case.

(iv) A Second Type of Retention

Lord Rodger criticised counsel for overlooking what he viewed to be an entirely different type of retention existing in Scots law.[70] He was keen to emphasise that retention was

64. See McBryde, *Contract* (n 24) para 20-55: "It is, therefore, always necessary to examine the obligations ... even when the obligations are in one contract and relate to the same activity, purpose or objective".
65. *Motor Racing Enterprises (Pty) Ltd (in Liquidation) v NPS Electronics Ltd* [1996] (4) SA 950 (A) 961F-J 962A; Hutchison & Pretorious (eds) *Contract* (n 32) 316; and see RH Christie, *The Law of Contract in South Africa*, 5th edn (2006) 421 where synallgamatic is used interchangeably with bilateral to much the same effect as the civil law.
66. *Rich and Others v Lagerwey* [1974] (4) SA 748 (A) at 761-762.
67. See also *Grand Mines v Giddey* [1999] 1 SA 960 (SCA) and for comment see Bonthuys, 'Reciprocity' (n 21) esp 183-186.
68. Van Der Merwe, *General Principles* (n 20) 389; Hutchison & Pretorious (eds) *Contract* (n 32) 316.
69. Motor Racing (n 65) 961F-J 962A; *Rich and Others* (n 66) 762F-J.
70. *Inveresk* (n 3) at para 77 per Lord Rodger.

a separate doctrinal category, and not merely derived from mutuality,[71] hence it could operate outside of a contract governing claims in relation to set-off. Indeed, he draws on considerable dicta to the effect that the courts have long reserved for themselves an equitable discretion to allow a party to retain a debt due pending ascertainment of a damages claim.[72] This is nothing new, for the courts also reserve similar discretionary powers to consign sums and order delivery of property with regards to both retention of rent and special lien respectively.[73] Nonetheless, Lord Rodger's elucidation of this concept is both limited in application, and has the potential to cause further terminological misunderstanding. In terms of scope, this second type of retention only comes into operation if the innocent party elects to claim damages.[74] Furthermore, the ethos behind these two types of retention is entirely different. Retention predicated upon mutuality is directed at keeping the contract alive, whereas this second doctrinal category of retention is based upon set-off; thus it is directed towards extinguishing obligations. There is no 'right' to retain in this second situation, and it will therefore be down to the courts to emphasise that this type of 'retention' is not really a separate doctrinal category of retention, but a remedy substantively based upon the rules of compensation and set-off.

C. MATERIALITY OF BREACH

To what extent must the other party breach an obligation before the innocent party is justified in withholding performance? Scots law has also experienced controversy in this area, as it is often the case that by operation of the mutuality principle a party in breach has no remedy for the contract price until they perform in accordance with the contract.[75] This illustrates one of the central problems of mutuality identified by McBryde.[76] Although it is sensible to state that a party in breach may not enforce performance under the contract, this is often extended so as to preclude any claim at all under the contract.[77] He expresses views similar to those of Lord Rodger in that courts should make more use of the law of set-off. Thus, a party in breach of contract should not be denied a claim for damages. Indeed, if each party is in breach, this leads to the somewhat illogical conclusion that neither may constitute a claim.[78] However, such a view suffers from the same constraints in that the innocent party must actually claim damages for set off to become a possibility. Consequently, there occurs a stalemate position whereby the innocent party seeks performance under the contract, and the party in breach is entitled to nothing until such point as he performs correctly.

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71. paras 56, 57 and 59.
72. paras 82-103; H MacQueen (et al) Gloag & Henderson, *The Law of Scotland* 12th ed (2007) para 10.15.
73. See for example *Garscadden v Ardrossan Dry Dock and Shipbuilding Company Ltd* [1909] 2 SLT 436; *Earl of Galloway v M'Connell* [1911] SC 846; The fact that parties have possession whilst claiming retention may explain such powers, See McBryde, *Contract* (n 24) para 20-71.
74. *Inveresk* (n 3) at para 76 per Lord Rodger; Godfrey, 'Mutuality' (n 34) at 121.
75. See *Edinburgh University Commercial Law Blog* for discussion, available at <http://www.law.ed.ac.uk/ecclblog/blogentry.aspx?blogentryref=7985>.
76. McBryde, 'Remedies' (n 8) at 66-69.
77. The best example of this being *Graham & Co v United Turkey Red Co Ltd* [1922] SC 533; see also McBryde, *Contract* (n 24) para 20-48 esp note 167.
78. McBryde, 'Remedies' (n 8) at 67.

(i) Material Breach

The Scottish Law Commission highlighted that the remedy of retention is open to abuse, and it therefore questioned whether the remedy should be available in cases of non-material breach.[79] In the resulting report, consultees recognised that there must be some control on the remedy, with some suggesting allowing retention to operate only where there was material breach.[80] Judicially, Lord Drummond Young has proved a staunch proponent of material breach as a control on retention, and indeed, Lord Hope drew upon his views in *Inveresk* in this respect. However, the court expressed the view that this requirement is to be treated with caution, and with reference to academic authority, concluded that the breach need not be so material as to justify rescission.[81] Academic opinion is now firmly of the view that there is no justification in principle for limiting retention in this way.[82] Material breach is a legal concept, and in requiring an innocent party to determine this prior to exercising retention he may inadvertently place himself in breach. South African law expresses similar views, with Christie opining that one may raise the *exceptio* even in relation to very slight defects, subject to the de minimis principle.[83]

English law is also susceptible to the criticisms mentioned above, for we have seen already that the innocent party must categorise the breach as one permitting termination before suspending performance.[84] Finally, the DCFR position is the most liberal of all, for it does not endeavour to define the extent to which one must breach an obligation before the *exceptio* is justified. Though it requires 'fundamental' non-performance to justify termination,[85] the same is not true of withholding performance, which, as we have seen, is subject to an overarching principle of good faith and fair dealing.[86] Ergo, a requirement of materiality is not a justifiable restriction upon the remedy of withholding performance.

(ii) Alternative Methods

Aside from heavily criticised attempts to use materiality to control the remedy, Scots law has done little to address these problems. Of mention, however, is the Housing Grants, Construction and Regeneration Act 1996, which sought to amend the common law right of retention in certain ways. The most important part of the Act is that it provides for a notice of intention to withhold to be provided not later than the prescribed period allowed prior to the final date for payment.[87] The interpretation of these provisions has given rise to some questionable dicta, suggesting that they could be utilised to allow parties to render due instalments no longer payable.[88] However, the more recent case of *Westwood*

79. *Discussion Paper on Remedies for Breach of Contract* (Scot Law Com No 109, 1999) at paras 3.11-.312.
80. *Report on Remedies for Breach of Contract* (Scot Law Com No 174, 1999) at para 7.16.
81. *Inveresk* (n 3) at para 43 per Lord Hope.
82. McBryde, *Contract* (n 24) at para 20-60; Clive & Hutchison 'Breach of Contract' in K Reid, R Zimmermann and D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) at 198 esp note 126; H MacQueen, J Thomson, *Contract Law in Scotland*, 2nd edn (2007) para 5.10.
83. Christie, *Contract* (n 65) 423; Van der Merwe, *General Principles* (n 20) 392 note 73; BK Tooling (n 2) at 420A.
84. See page 3 above.
85. Noltke (et al) DCFR (n 7) III-3:502.
86. Some jurisdictions do, however, require material breach, See Nyer 'Withholding performance' (n 13) at 49-53.
87. s 111(1)-(3).
88. *Melville Dundas Limited (in receivership) and others v George Wimpey UK Ltd and others* [2007] SC (HL) 116 (Lord Mance and Lord Neuberger dissenting).

Structural Services Ltd v Blythwood Park Management Co Ltd[89] has indicated that such an approach is suspect, and that to allow an employer to defeat a claim for an instalment due under the contract by reference to events occurring some time later would be contrary to the Act.[90] In any event, though a party may be required to state his intention to withhold and his grounds for doing so, there is nothing to indicate that such grounds must, in any sense, be meritorious. What assistance then, can we draw from other regimes?

The idea of entire and severable obligations in English law now requires more attention.[91] There are inevitably cases where the obligation must be construed as entire, and it is to cater for these cases that English law uses the concept of substantial performance.[92] The thinking behind this holds that exact performance is not a condition precedent of an employer's liability to pay; rather the condition is that the work is to be substantially completed.[93] Parties may of course make exact performance a condition of the contract, however, the doctrine is limited by the fact that it may not apply in the case where some of the work is not performed at all.[94] There is some debate as to this point and Treitel opines that, by definition, one cannot have substantial performance of an entire obligation. Therefore, a party is under an entire obligation as to the quantity of a performance, but not its quality,[95] and this relates back to the problems experienced in the context of materiality. A party seeking to withhold performance still has to determine whether the defects in quality are of such a magnitude as to allow him to terminate the contract, and highlights again how England's underdeveloped regime of suspension undermines the utility of the remedy.

In South Africa emphasis is now firmly upon the right of the contractant to receive proper performance. Despite this, the courts have always reserved discretion to interject in favour of the party who renders incomplete performance,[96] and it is within the landmark case of BK Tooling that Jansen JA endeavoured to settle the difficulties in this area. The court's view was that if the defendant had utilised the defective performance they reserved the right to award the plaintiff a reduced contract price. There was a move away from the older view that such a claim was one for a quantum meruit, and emphasis was placed upon the fact that such a claim is based entirely upon the contract.[97] In exercising its discretion, the court will consider numerous factors such as the plaintiff's bona fide belief he had performed adequately, but no factor is determinative.[98] Where the court chooses to exercise this discretion one must appreciate the distinction between instances where the performance can actually be rectified, and where it cannot. Where it can, the court will award the plaintiff the contract price minus the costs of bringing the performance up

89. *Westwood Structural Services Ltd v Blythwood Park Management Co Ltd* [2008] EWCH 3138 (TCC)
90. para 23, per Lord Coulson.
91. See generally, E Peel (eds) *Treitel on the Law of Contract* (12th ed 2007) paras 17-030-17-039; Beale, *Remedies* (n 12) 29-34.
92. *Hoenig v Issacs* [1952] 2 ALL E.R. 176; Beale, *Remedies* (n 12) 38-39.
93. Peel (ed) *Treitel's Contract* (n 91) para 17-39.
94. Beale (et al) *Cases and Text on Contract Law* (n 27) 905-907.
95. Peel (ed) *Treitel's Contract* (n 91) para 17-39; Treitel, *Remedies* (n 10) 307.
96. See the famous trilogy of cases; *Hauman v Nortje* [1914] AD 293, *Breslin v Hichens* [1914] AD 312, *Van Rensburg v Straughan* [1914] AD 317; Christie, *Contract* (n 65) 424.
97. *BK Tooling* (n 2) 422-423 & see note 140 above.
98. *BK Tooling* (n 2) 434-435.

to standard, and the onus of determining these costs is on the plaintiff.[99] There are three problems with this solution.

The first relates to the idea of 'utilisation'. This concept is similar to the English idea of making voluntary use of the performance and both emphasise that a party will not be deemed to have accepted or utilised performance merely because he takes possession of his land or simply retains the performance.[100] There may, however, be cases where the employer is simply forced into using the performance. Christie considers such problems minimal, given that the court must still resolve to exercise its equitable discretion. Nonetheless, there is a certain sense in which an employer may feel justifiably aggrieved having to pay a reduced contract price as a result of being forced to use a performance that was initially defective. The court also opined that where the employer chooses not to use the performance they may in fact have to abandon this idea of utilisation, which is even more unpalatable to the employer.[101]

The second problem is a conceptual one, in that the court is awarding the plaintiff a reduced contract price, something the parties never agreed on. The plaintiff claims the contractual price, but supplements his defective performance with the sum of money required to put the defects right.[102] Reinecke opines that because the defect has been remedied this is, in a sense, not really a relaxation of the principle of reciprocity.[103] The fact remains, however, that the employer contracted to receive proper performance. He must now find another to remedy the defects, and this exposes him to further burdens and risks. The third problem relates to the situation where defective performance cannot actually be rectified. The important case of *Thompson v Scholtz*[104] is important in this regard, where a seller undertook to give the buyer possession of a farm in exchange for occupational interest. In light of the fact that the seller had failed to give possession of the farmhouse, the buyer raised the *exceptio* as a defence to the seller's claim for occupational interest. The principles of *BK Tooling* did not fit easily into this case, for the obligation was a continuous one, and as a consequence quantification of the costs of restoration was impossible. Despite this, the court used the principles relevant to remission of rent, i.e. the tenant's diminished enjoyment, to reduce the occupational interest by what was fair in the circumstances. It distorted the principles of *BK Tooling* to achieve an equitable result and opined that although an accurate calculation was impossible, nonetheless, one was necessitated in the interests of fairness.[105] This is no longer a claim based upon the contract, but one firmly based in equity. Its limits are uncertain and, overall, if the courts have discretion to move away from the principles of *BK Tooling* so readily, it is conceptually difficult to perceive of the awarded sum as having anything to do with the

99. *BK Tooling* (n 2) 435A; See also L Tager 'Remedies for Breach of Contract' in *Annual Survey of South African Law* (1979) 117 at 119-121.
100. *BK Tooling* (n 2) 422A-B; Sumpter (n 26) at 676.
101. *BK Tooling* (n 2) 436.
102. Van der Merwe, *General Principles* (n 20) 394-395.
103. M F B Reinecke, 'N Eis Vir 'N Verminderde Kontrakysprys' (1991) *TSAR* 714 (helpfully translated by Dr Paul du Plessis.)
104. Thompson v Scholtz [1991] (1) SA 232 (SCA).
105. paras 243H & 249D; see H Scher, 'Reciprocity in Contract' (1999) 7 *Juta's Business Law* 37 at 39-40.

underlying contract. Consequently, it is of little assistance here, and it is time to turn finally to the DCFR position.

Reciprocity in the DCFR context is based fundamentally on order of performance, subject to an overarching test of reasonableness.[106] The operation of this principle is most commonly illustrated in the context of defective performance,[107] and indeed, it is a principle permeating many civil codes.[108] In requiring parties to make proportional use of the remedy, they are prevented from using it in oppressive ways. The idea of fairness engendered by good faith is somewhat similar to the flexible position the courts appear to be moving towards in South Africa, however, the fact remains that the extent to which Scots law recognises good faith is highly debatable. It can reasonably be assumed that the increasing scope of the mutuality principle in Scots law will lead to more upheld retention pleas. Given that there is an unfortunate lack of adequate controls in place to keep check on the remedy, the inequity that can arise from its operation will be both highlighted and exacerbated if Scots law continues down this road. If the courts wish to take a flexible and inclusive approach to determining reciprocity then an equally flexible control on its use is necessary. Good faith would appear to provide this requisite flexibility, and there have been clamourings both here[109] and south of the border for a general notion of good faith in contract law.[110] The clear uncertainty in this area means, however, that a good faith based solution appears unrealistic for Scots law, yet, there is one final, and helpful, provision of the DCFR I would like to consider.

We have seen throughout this paper that parties may be prejudiced by having to perform in advance, and the DCFR has a provision aimed specifically at this situation.[111] Where a party is to perform first but reasonably anticipates that there will be non-performance by the debtor, he may withhold his obligation for so long as the belief continues. Of course, if the debtor indicates his willingness to perform the right is lost, and the creditor is liable for any loss caused to debtor where he does not give notice of his intention as soon as is reasonably practicable. The DCFR notes indicate that such a right is generally accepted,[112] and South African law has rules to similar effect.[113] Such a provision nips some of the problems in the bud, and the Law Commission has indicated that this is most likely the law in any case.[114] Of course, there is nothing preventing a creditor asking for an adequate assurance of performance, but placing this on firmer footing avoids the risk of that party inadvertently repudiating the contract.[115]

106. See above page 5.
107. Treitel, *Remedies* (n 10) 302.
108. See section German BGB s 320(2); Swiss CC art 82 taken together with 2; Dutch CC art 6:262(2).
109. For an enlightening collection of essays see A D M Forte (ed), *Good Faith in Contract and Property* (1999); see also MacQueen, 'The Future Development' (n 19) at 215.
110. D Friedmann, 'Good Faith and Remedies for Breach of Contract' in J Beatson & D Friedmann, *Good Faith and Fault in Contract Law* (1995); see also Harris, Campbell, Halson, *Remedies* (n 1) 64, see esp the notes on this page for a collection of papers on this topic.
111. Noltke (et al) DCFR (n 7) III-3:401(2)-(3) and Comment E.
112. ibid, Notes paras 10-17; see Beale (et al) *Cases and Text on Contract Law* (n 27) 910-912.
113. Van der Merwe, *General Principles* (n 20) 389; see also Clive & Hutchison 'Breach of Contract' (n 82) at 197.
114. SLC Report (n 80) para 7.15.
115. MacQueen, 'The Future Development' (n 19) at 223.

D. CONCLUSION

With the exception of England, the Scottish law of retention presents the most underdeveloped and uncertain scheme of withholding performance under consideration here. The English position is indicative of the fact that in order to have a useful rule on withholding performance a clear distinction is required between these rules and those relating to termination. Where English law can be of assistance however, is in its presumption in favour of simultaneous performance. Aside from Scotland, each of the regimes directs themselves toward such a presumption, and display somewhat more developed rules on order of performance. It is submitted, therefore, that Scotland would do well to develop accordingly its rules on order of performance, with a similar presumption in favour of simultaneous performance.

Once order of performance is determined there still remains the task of finding reciprocity, and *Inveresk* has shown this to be an area fraught with difficulty. The indefinite scope of the concept of mutuality will unavoidably lead to greater use of retention, and this is supported by the fact that Lord Hope now advocates a presumption in favour of the unity of the contract. Greater use of an important remedy may appear a positive development, yet its undefined scope will facilitate more challenges to its use, thus undermining its philosophy as a self-help remedy. The unity of the contract approach is out-dated, and in looking at the law of South Africa in this area, which is rather more developed, a clear distinction was highlighted between obligations parties intend to be connected in a commercial sense, and that which they additionally wish to be linked in a legal sense. *The Bank of East Asia* approach, in looking at the transaction as a divisible set of distinct obligations is more reflective of commercial parties' intentions, and though it may be artificial in some circumstances to divide a contract in this way, it at least gives parties security in knowing that they will receive payment for portions of the work already completed.

Finally, and most importantly, Scots law is conducive of great inequity where a party is to perform first, for it has no adequate controls on the remedy. If Scots law desires to have such an inclusive concept of retention it requires an equally flexible control on the remedy. The DCFR good faith based control is an adequate solution, yet Scots law's aversion to explicitly recognising the concept in contract law makes this possibility unlikely. The rule on adequate assurance of performance, also found in the DCFR, would be a useful addition to Scots law as it is again directed towards minimising the prejudice that can be caused when a party requires to perform first. If Scots law wishes to continue down its current path in extending the scope of mutuality, it may need to reconsider its aversion to a good faith based approach, for an adequate control based in our indigenous rules is severely lacking.

Reportage is a Fancy Word: An Appraisal of the Development of the Doctrine of the Reportage Defence and the Implications of the Draft Defamation Bill 2011

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INTRODUCTION[1]

> Reportage is a fancy word. The Concise Oxford Dictionary defines it as 'the describing of events, especially the reporting of news etc. for the press and for broadcasting'. It seems we have Mr Andrew Caldecott QC to thank – or to blame – for its introduction into our jurisdiction.
>
> – Lord Justice Ward[2]

This article provides a critical assessment of the reportage doctrine. Reportage is a defence to defamation which emerged as a corollary of the public interest privilege recognised by the House of Lords in *Reynolds v Times Newspapers Ltd.*[3] Reportage, as referred to herein, is where the press can, in the public interest, report allegations made about a claimant by a third party without having to prove their truth.[4]

In this interesting, if arresting, area of law it is clear that we encounter a clash between the individual right to one's reputation and the media's freedom of expression on matters of public concern.[5] If there is to be a theme of this essay, it might be the exploration of this conflict with a view to critiquing the emerging reportage defence. It does not follow from the clear need for an informed public on political matters that the press should operate with unfettered freedom. Defamation law ensures that the press remains responsible for the publication of material injurious to an individual's reputation. Ultimately, while it is proposed that it remains erroneous to suggest that one interest characteristically trumps the other, the development of reportage is symptomatic of the law's growing cultivation of the democratic importance of press freedom.[6]

In order to be able to sensibly describe and ultimately critique the doctrine of reportage, a sketch of the history of this area of defamation law will first be provided. Part I thus details the legal milieu in which the *Reynolds* privilege was recognised. Part II examines

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1. Thanks are owed to Federico Thea who provided insightful comments on an earlier draft of this paper. The author also wishes to acknowledge the contribution of Professor Eric Barendt and Professor Paul Mitchell to his knowledge of and interest in media law. The usual caveat applies.
2. *Roberts v Gable* [2008] 2 WLR 129, 34, hereinafter *Roberts*.
3. [1999] 4 All ER 609, hereinafter *Reynolds*.
4. This is congruent with the definition developed in the case-law. See below, Section II (i).
5. This is illustrated by the case-law of the European Court of Human Rights, torn as it is between wanting to fortify its protection of reputation and its belief that journalists should not be required to remain neutral when reporting defamatory matters. See below, Section II (ii).
6. This is evinced both by the development of *Reynolds* qualified privilege and the subsequent development of reportage which this paper assesses.

the emergence of reportage while also introducing a comparative element into the analysis. Part III appraises the Draft Defamation Bill 2011 and the implications of the codification of reportage contained therein. Critical reflections will permeate each part of this essay but Part IV deals expressly with some discrete challenges facing the reportage doctrine.

I. A (VERY) BRIEF HISTORY OF QUALIFIED PRIVILEGE: FROM THE VICTORIAN ERA TO *REYNOLDS* AND BEYOND

"The liability of an author of defamatory words is strict, but it is not absolute".[7] English law has long recognised that there are certain instances when defamation should be permitted. Consequently defences to defamation exist which include, inter alia, innocent dissemination,[8] justification,[9] fair comment,[10] and absolute privilege.[11] The focus in this article is qualified privilege which is a creature of the common law and is not, yet, the subject of legislation.

The common law has historically displayed zeal in its protection of reputation.[12] Qualified privilege has long been a defence in certain circumstances. A prerequisite for the defence was the existence of a duty or interest between the maker of the statement and the receiver. *Adam v Ward* is a classic authority for the duty/interest requirement between speaker and receiver:[13] "[R]eciprocity is essential".[14] The rationale for this lay with the "common convenience and welfare of society".[15] Archetypal communications attracting this classic qualified privilege are references from former employers. The previous employer has a moral duty to supply an honest reference and the future employer has a clear interest in receiving it. There is a public interest that such information be frankly transmitted without the inhibitions which might stem from fear of libel action.[16] This position, whereby qualified privilege hinged on proving the existence of a duty without regard to any public interest in the material, proved remarkably durable. In 1983 the Court of Appeal, in the *Blackshaw v Lord* case, held that "[n]o privilege attaches yet to a statement on a matter of

7. Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart, 2006), 145.
8. See Defamation Act 1996, s 1.
9. See Defamation Act 1952, s 5.
10. ibid s 6.
11. See Defamation Act 1996, s 14.
12. See for example *Hulton v Jones* [1910] AC 20. This case, which established the strict liability rule in libel cases, concerned a claim by Artemus Jones, a Welsh barrister. The Sunday Chronicle had carried a light-hearted article lampooning the lifestyle of British holidaymakers in France which used a fictional and adulterous character, a churchwarden from Peckham, whose name was Artemus Jones. The real Artemus Jones successfully sued for libel. The Lord Chancellor Lord Loreburn said "A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both", *Hulton v Jones*, 23. This case created the harsh rule which holds an author responsible for unintentional defamation and is thus illustrative of the zeal which English judges displayed in their traditional deference to protecting reputation; For more illustrations of the common law's tendency to protect reputation to the point of absurdity, see also: *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331 and *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377. See generally, L Denning, *What Next in the Law* (Butterworths, 1982), 173-178.
13. [1917] AC 309.
14. ibid 334.
15. *Toygood v Spyring* (1834) 1 CM & R 181, 193.
16. This public interest was very much a product of its time: "Character references had an important part to play in relations between masters and servants, since a servant's independence and bargaining power depended on his ability to obtain a position in another household. In the mid-eighteenth century, the huge demand for servants outstripped supply, so the employer's only means of curtailing his servants' independence was to hold over them the threat of an unfavourable reference" P Mitchell (n 7), 147.

public interest believed by the publisher to be true in relation to which he has exercised reasonable care".[17] This case illustrates the curious reluctance to extend qualified privilege to reporting by the press on current affairs which endured until well into the 20th century's last decade. This is a point illustrated by the status of *Blackshaw v Lord* as "the last major free-speech case in which nobody bothered to mention the European Convention".[18]

A further preliminary point to note is the existence of the 'repetition rule'.[19] When one reports the defamatory allegation of another, it is clearly true to state that the allegation has been made. The repetition rule limits any justification defence such that publishers need to prove the truth of the allegation, not simply that the allegation was made. This rule "reflects a fundamental canon of legal policy in the law of defamation ... that words must be interpreted ... by reference to the underlying allegations of fact and not merely by reliance upon some second-hand report or assertion of them".[20] This is because "repeating someone else's libellous statement is just as bad as making the statement directly".[21] The very fact that an absolute statutory privilege attaches to the accurate reporting of Court proceedings[22] seems to presuppose the existence of this repetition rule.[23]

In *Reynolds* the House of Lords finally expanded the common law privilege; this was, arguably, a belated move away from the previous tendency to fetishise the protection of reputation.[24] *Reynolds* was a case brought by a former Taoiseach of Ireland against the Sunday Times following its publication of an article about the fall of his government and resignation as Taoiseach. The article complained of appeared in the UK edition of the newspaper but was conspicuous by its absence from the Irish edition.[25] It alleged that he had misled 'an Tánaiste',[26] his cabinet and the 'Dáil'.[27] The article made no mention of his explanation to the Dáil. The equivalent story in the Irish edition was decidedly less incendiary. Ultimately the *Reynolds* case is momentous, not because Mr Reynolds won, which he did, but because it marked the birth of a public interest qualified privilege defence in this jurisdiction.

The House of Lords rejected calls to create a generic qualified privilege encompassing the media's coverage of all political matters. Such a category "would not provide adequate protection for reputation".[28] However, Lord Nichols, in the leading judgment, did provide

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17. [1983] 1 QB 14.
18. *Geoffrey Robertson & Andrew Nicol, Media Law* (Penguin, 5th ed, 2008), 158.
19. The rule has been described as being of considerable antiquity. See *M'Pherson v Daniels* (1829) 10 B & C. 263. See generally P Milmo and WVH Rogers, *Gatley on Libel and Slander* (11th edn, Sweet and Maxwell, 2008), 11.4.
20. *Shah v Standard Chartered Bank* [1999] QB 241 CA, 263.
21. *Lewis v Daily Telegraph* [1964] AC 234, 260 per Lord Reid.
22. Defamation Act 1996, (n 11). See also Gatley (n 19), 13.35-48.
23. A point made in *Stern v Piper* [1996] EMLR 413, 427 per Simon Brown LJ.
24. Robertson and Nicol point to a well known series of cases in the 1970s in which the former Foreign Minister of Uganda, Princess Elizabeth of Toro, was awarded substantial damages as the press had reported "verbatim Idi Amin's crazed allegations about her sexual behaviour in an airport toilet ... [H]er right to reputation would now be trumped by the need for the British public to know, of a dictator its government had helped to power, that he was mad, bad and dangerous to know". Robertson and Nicol (n 18), 169. For further examples of this tendency see above, (n 12).
25. Its headline was 'Goodbye Gombeen Man: Why a Fib Too Far Proved Fatal for the Political Career of Ireland's Peacemaker and Mr Fixit'.
26. Deputy Prime Minister of Ireland.
27. Principle chamber of the Oireachtas (Irish parliament).
28. See *Reynolds* (n 3), 625.

for a limited extension of qualified privilege to the press on an ad hoc basis. He integrated this into the previous duty based privilege deriving from the public's entitlement to know about matters of political significance.[29] This 'elastic' approach was, in his view, a satisfactory bulwark for free speech. Assessment of whether or not the defendants had established privilege is assisted by Lord Nichol's non-exhaustive list of factors, the most important of which for the purposes of this article are:

> 4. The steps taken to verify the information.
>
> 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.[30]

This distinction between reporting and adopting defamatory allegations is important in grounding *Reynolds* as an antecedent of the reportage defence. Subsequent case law makes clear that the public interest need not derive from a story of national, as opposed to merely regional or local, importance.[31] There have also been cases where the test for responsible journalism was not met on account of an article's sensationalist tone[32] or lack of neutrality[33].

II. THE EMERGENCE OF REPORTAGE

(i) A report on English law's recognition of reportage

In *Al Fagih v HH Saudi Research & Marketing (UK) Ltd*,[34] the majority of the Court of Appeal allowed a defence of qualified privilege where the defendant newspaper had made no efforts to verify the defamatory allegations, thereby spawning, for the first time, the doctrine of reportage. The defendant's newspaper, a royalist publication with a readership of 1500 Saudi expatriates, had reported, in a series of articles, details of a dispute between the claimant Dr Al Fagih (AF) and Dr Al Mas'aari (AM). Both were members of 'the committee', a Saudi dissident group in London. The publication complained of reported the emergence of a divide in 'the committee'. In particular, according to AM, AF was a purveyor of malicious sexual gossip. At trial, AF was awarded substantial damages after the newspaper's failure to meet the *Reynolds* responsible journalism test.

29. ibid 622.
30. ibid 626.
31. *GKR Karate v Yorkshire Post Ltd* [2000] EMLR 410.
32. *Grobelaar v News Group Newspapers Ltd* [2001] 2 All ER 437.
33. *Galloway v Telegraph Group Ltd* [2006] EMLR 11 hereinafter *Galloway*. This concerned allegations that George Galloway MP was in the pay of Saddam Hussein's Baathist regime. Despite the clear public interest in the story, the article lacked neutrality. It "both embraced the allegations with relish and fervour and ... went on to embellish them", 73.
34. [2002] EMLR 13.

On appeal, the majority held that the publication was privileged as the allegations had not been adopted. The paper had reported part of an ongoing political quarrel which was of justifiable interest to its readers:

> [T]here will be circumstances where, as here ... both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses ... [I]t seems to me that the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.[35]

Latham LJ's conclusion was similar:

> The paper was recording a split in a political group which was clearly of significant interest to its readers ... what is said by the one side in relation to the other is itself of considerable interest ... It is the fact that the allegation has been made which is ... important, and not necessarily its truth or falsity.[36]

Clearly, the repetition rule which applies to the defence of justification is not equally applicable to reportage. Robertson and Nichol put it nicely: "This mitigates the straitjacket of the 'repetition rule' which ordinarily requires newspapers that report another's allegations to be in a position to prove it: ... the fact that it [an allegation] has been made will, if newsworthy, obtain protection".[37]

Neutral reportage is thus a species of *Reynolds* privilege. The privilege can attach, notwithstanding the absence of verificatory attempts, provided the defamatory words are not adopted by the defendant. Passing reference was made to reportage in the *Galloway* case.[38] The Court of Appeal suggested obiter that a neutral publication of the documents on which the offending article relied, would have left Mr Galloway without a leg to stand on in his libel action.[39] The defendants in *Jameel v Wall Street Journal Europe* unsuccessfully sought to rely on reportage but there are relevant judicial pronouncements on the subject. The Court of Appeal accepted "that *Reynolds* privilege may attach to the neutral reporting of allegations made by a third party, notwithstanding that the publisher does not believe that the allegations are true".[40] Subsequently, the Lords accepted reportage in cases where "the public interest lies simply in the fact that the statement was made".[41]

The next case to deal substantively with reportage was *Roberts v Gable*.[42] The claimants in this case were brothers and active members of the British National Party (BNP). The defendant was the anti-fascist magazine Searchlight[43] which had published an article

35. ibid 52, per Simon Brown LJ.
36. ibid 65.
37. Robertson & Nicol (n 18), 169.
38. See Galloway (n 33).
39. ibid 48.
40. *Jameel (No.1)* [2004] EMLR 6, 19.
41. [2006] 4 All ER 1279, 62 per Hoffman L.
42. [2008] 2 WLR 129.
43. The magazine describes itself as anti-fascist. See <http://www.searchlightmagazine.com/> accessed 19 January 2012.

entitled "BNP London row rumbles on" in its "News from the Sewers" section.[44] The libel complained of was the publication of allegations made by different sides of a political dispute. Each side had accused the other of having misappropriated BNP funds. It also reported the allegation that the brothers had threatened to kneecap, torture and kill other BNP members and their families. Eady J upheld the defence of reportage at trial.[45]

The Court of Appeal affirmed this finding. Ward LJ provided a breakdown of what he called "the proper approach to the reportage defence".[46] His 9 factors are paraphrased below:

1. The information is in the public interest.
2. While there is no public interest in misinformation, in a true case of reportage, unlike *Reynolds* privilege, there is no need to ensure the accuracy of the published information.
3. Crucially, the focus must not be the truth of the matter but that the allegations were made.
4. Testing the overall effect of the article is an objective legal assessment which is to be made by the judge.
5. Adopting or failing to report the allegations in a neutral manner leads to losing the protection of reportage.
6. The *Reynolds* factors remain relevant in evaluating whether or not the standards of responsible journalism have been met. They may be adjusted for reportage.
7. The seriousness of the allegation is a relevant consideration.
8. In contrast to the American position, it is not a necessary precondition that the claimant be a public figure.
9. Urgency is relevant because news is a perishable commodity.[47]

The Court accepted that reportage modifies the repetition rule.[48] It held that the BNP dispute was a subject of "legitimate public interest".[49] Taking the article as a whole, notwithstanding its sarcasm, the defendants were deemed not to have adopted the allegations. All things considered, the article was held "proper reportage".[50]

The Court of Appeal again considered reportage in *Charman v Orion Publishing Ltd.*[51] The claimant, a former police officer, brought a claim for libel against the writer and publishers of 'Bent Coppers'. Ward LJ memorably described this book as "miles removed from reportage properly understood".[52] Further, he described the journalist as "acting as the bloodhound sniffing out bits of the story from here and there, from published and unpublished material, not as the watchdog barking to wake us up to the story already out

44. The complaint concerns the October 2003 issue of Searchlight and is quoted in full by Eady J in his judgment at first instance. See *Roberts v Gable* (QBD) [2006] EMLR 23, 3.
45. ibid.
46. Roberts (n 2), 61.
47. ibid.
48. ibid 74 per Sedley LJ.
49. ibid 62 per Ward LJ.
50. ibid 68.
51. [2008] All ER 750, hereinafter *Charman*.
52. ibid 49.

there".[53] The book in question was too broad for the narrow confines of reportage which concerns the neutral reporting of defamatory allegations in the public interest. It was, however, deemed within responsible journalism á la *Reynolds*.

Al Fagih and Roberts both concerned disputes. Here, the reach of reportage was liberally interpreted: "The reportage doctrine ... cannot be logically confined to the reporting of reciprocal allegations. A unilateral libel, reported disinterestedly, will be equally protected".[54]

In summary, reportage as developed in English case-law depends on the story being a matter of public interest and the effect of the article, taken globally, being to report the allegations dispassionately without adopting them.

(ii) European Court of Human Rights (ECtHR) and international perspectives

Before surveying some of the recent relevant Strasbourg jurisprudence it is worth noting the words of caution in Gatley: "there is little to be gained from a close linguistic analysis of the Strasbourg cases and it is not clear that the word reportage has any of the overtones which it appears to be acquiring in English libel law".[55] Furthermore, the Court seems torn between a position which would be a liberalising influence on English law and an alternative viewpoint which would herald a regression toward the sort of conservatism which underlined the traditional tendency in this jurisdiction to favour reputational fortification.

In *Jersild v Denmark*, concerning reportage through publication of an interview, the Court recognised that punishing reportage "would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so".[56] In *Bladet Tromso*,[57] the Court held that newspapers ordinarily have an obligation to verify defamatory factual statements, but also, that the press should be entitled to rely on government reports without having to substantiate their contents.

The European Court of Human Rights has grappled with when a journalist can be said to have adopted, not merely reported, allegations. In *Thoma v Luxembourg*[58] it held that a general requirement that journalists "systematically and formally"[59] distance themselves from allegations which they are reporting would not comply with Article 10. The journalist in Thoma was thus able to quote from a newspaper article defaming the civil service without adopting the allegations contained therein. This dictum, that journalists cannot be forced to distance themselves from defamatory content which they are reporting, was

53. ibid.
54. ibid 91, per Sedley LJ.
55. Gatley (n 19), 15.18.
56. (1994) 19 EHRR 1, 35.
57. (2000) 29 EHRR 125.
58. (2003) 36 EHRR 21.
59. ibid 64.

affirmed in the *Verlagsgruppe* case.[60] It would appear that neutrality is not required for the ECtHR so long as "the article remain[s] within the limits of acceptable comment".[61] In *Selisto*, it was held that "journalists cannot be expected to act with total objectivity".[62] These cases seem to advocate a loosening the strictness of the neutrality requirement in English law.

But there is a parallel trend pulling in the opposite direction toward protecting reputation. This is evident in a series of cases beginning with the ECtHR's recognition of reputation as a right, not merely an interest, under Article 8.[63] The more serious an allegation, the more reliable its factual foundation needs to be.[64] The recent case of *Rumyana Ivanova v Bulgaria* also champions reputation.[65] "Substantial justification" was required because of the seriousness of the allegations.[66] Journalists are under an "ordinary obligation to verify factual statements that are defamatory of private individuals".[67]

The potential influence of the Strasbourg jurisprudence on the English reportage doctrine is hard to assess. The state of paralysis ensuing from moves in opposing directions leads to the conclusion that that Court's case-law is unlikely to weigh heavily on judges deciding the English position in the near future. It seems right and proper that Europe and the UK provide redress for those who suffer reputational loss. Nonetheless, there is a strong democratic interest in a free press reporting on matters of public interest. At this point, with a view to casting light on the significance of the UK and ECtHR jurisprudence, it is worth looking further afield and to introduce a comparative element to this analysis.

In the United States,[68] *New York Times v Sullivan*[69] established that public figures cannot succeed in a libel action unless they show actual malice. The American equivalent of reportage, 'neutral reportage', thus operates in much stricter confines than does its English cousin. The *locus classicus* for the American doctrine is *Edwards v National Audubon Society, Inc.*[70] This case limits reportage to allegations which emanate from responsible organisations, such as the National Audubon Society. American reportage is a restricted doctrine; it seems to me that its application is limited to the somewhat fantastical situation of a journalist acting with actual malice while simultaneously relying on information emanating from a responsible organisation. In New Zealand, qualified privilege attaches only to information relating to persons seeking political office. The public interest in this type of information outweighs reputational loss in all instances. Williams compellingly criticises this approach for its unjustifiable singling out of parliamentary actors for special

60. *Verlagsgruppe News GmbH v Austria* [2007] EMLR 491, 33.
61. ibid.
62. *Selisto v Finland* (2006) 42 EHRR 8, 63.
63. See *Radio France v France* (2005) 40 EHRR 706; *Chauvy v France* (2005) 41 EHRR 29; *Cumpana and Mazare v Romania* (2005) 41 EHRR 200; *Lindon v France* (2008) 46 EHRR 761, and *Pfeifer v Austria App no 12566/03* (ECHR, 15 November 2007).
64. See *Pedersen and Baadsgaard v Denmark* (2006) 42 EHRR 486, 78.
65. *App no 36207/03* (ECHR, 14 February 2008), 64.
66. ibid.
67. ibid.
68. See generally M. Donnelly, 'A Newsworthiness Privilege of Republished Defamation of Public Figures,' (2009) 94 *Iowa Law Review* 1023.
69. 401 US 265 (1964).
70. 556 F2d113 (CA 2 1977).

treatment while ignoring the plethora of other 'politically significant' actors.[71]

In an ideal world, we would be able to fully uphold people's reputations while permitting the press to act with unfettered freedom in the public interest. But the reality of the situation and the inevitable conflict we face is that the more you have of one, the less you have of the other. The American position, shackled as it is to the requirements of the first amendment,[72] casts its net so wide that it provides no security against reputational loss even where there is no public interest in a story. The New Zealand position singles out political persons, but is under-inclusive because this narrow conception of what constitutes political significance leaves a great deal of political matters unprotected.

It thus appears that the British doctrine succeeds where others fail. Put more tentatively, and evoking Churchill, it seems the worst system except for all the others. Its predecessor at common law was singularly focused on reputation to the detriment of press freedom. An indictment of the American law is that the reverse is true of it today.[73] New Zealand arbitrarily adopts an unduly tapered conception of public interest in its anthropocentric focus on candidates for and holders of political office. Assessed against this background, British reportage seems to do a decent job of effectively shielding the democratic interest in a free press while avoiding the printing of gratuitously defamatory content.

III. LEGISLATION ON THE HORIZON – THE DRAFT DEFAMATION BILL 2011

A codification of reportage appears imminent. The recently published Draft Defamation Bill,[74] in clause 2.3, seeks to put the defence on a statutory footing alongside its antecedent, *Reynolds* privilege. It provides that for matters of public interest:

> [a] defendant is to be treated as having acted responsibly in publishing a statement if the statement was published as part of an accurate and impartial account of a dispute between the claimant and another person.[75]

Some elements of the draft bill have obvious and particular policy motivations. Attempts to curb 'libel tourism' fall squarely into this category and, ostensibly at least, supply much of the political capital for reform generally. The reason reportage is being codified while still a relatively immature jurisprudential creature is, at least partly, because libel law

71. K Williams, 'Defaming Polticians: The Not So Common Law' (2000) *MLR* 748, 753-754.
72. American protection for free speech is more robust than its Europe equivalent. This is due, at least in part, to the strength of language used in the First Amendment to the American Constitution: "Congress shall make no law ... abridging the freedom of speech, or of the press". See U.S. Const. amend. I.
73. Professor Barendt is critical of the US position on this point; he cites an empirical study which suggests that libel law poses no threat to media freedom in the US. He says "it is virtually impossible for public officials and figures to vindicate their right to reputation, and very difficult for others to do so". See Eric Barendt, Freedom of Speech (1st edn, OUP, 2005), 209.
74. Draft Defamation Bill, Consultation Paper CP3/11, 11 March 2011, <http://www.justice.gov.uk/downloads/consultations/draft-defamation-bill-consultation.pdf> accessed 19 January 2012.
75. ibid.

reform happens to be presently on the political agenda. There may well be merit to the argument that legislation lowers costs by simplifying the law. As detailed above, the law in this area has developed incrementally though case-law and any statutory intervention risks muddying these waters. Some clauses in the bill clearly abolish the relevant parts of the common law.[76] But clause 2, of which reportage is a part, makes no provision for abolishing the common law. This creates ambiguity. It is anyone's guess as to whether and to what persuasive extent reference can be made to the cases which developed reportage heretofore. This uncertainty may be resolved before this bill becomes law.

There is a further complaint to be made about with the bill's wording. It makes reportage contingent on the existence of a dispute. The two successful invocations of the reportage defence to date, *Al Fagih* and *Roberts*, concerned disputes between two sides making mutual allegations. But recall Sedley LJ's dictum that "[a] unilateral libel ... will be equally protected".[77] This seems the correct approach. There is nothing qualitatively different between offending material from a dispute as opposed to a unilateral source. One could argue that every claim involves a dispute as there is always bound to be a claimant and a defendant. But if that is the case then there would have been no need to use the word dispute in the first place. The stated aim of this bill is to "encapsulate the core of the law",[78] This suggests that the limiting of reportage in this way might have been an oversight. Hopefully, on further reflection, the word dispute will be removed to avoid unduly complicating, and potentially barring, the reportage defence where there happens to not to be a dispute.

IV. REPORTAGE UNDER THE MICROSCOPE – DISCRETE CRITIQUES AND CHALLENGES

(i) Is reportage doctrinally deficient?

Bosland suggests that there are doctrinal deficiencies in the development of reportage as a subspecies of *Reynolds* public interest privilege.[79] He suggests this on the basis that the *Reynolds* criteria pertain to the actions of a journalist whereas reportage hinges on the article itself and its impartiality. Public interest in case of the former is concerned with truth and the reasonable steps journalists have taken to avoid publishing falsehoods. In case of the latter, public interest is less broad and is concerned with the fact that the allegations were made and nothing more. This difference in focus leads Bosland to conclude that there is a misapprehension doctrinally in the belief that reportage is a corollary of *Reynolds* privilege.

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76. See for example clause 3.4 which abolishes the common law defence of justification, replacing it with a statutory defence of truth.
77. *Charman* (n 50), 91. This view is supported by Bosland. See J Bosland, 'Republication of defamation under the doctrine of reportage – the evolution of common law qualified privilege in England and Wales' (2011) OJLS 89, 98, hereinafter Bosland.
78. Draft Defamation Bill, (n 72), 12 of Annex B.
79. See generally Bosland, (n 76).

The significance, or even existence, of the doctrinal inconsistency Bosland posits is far from lucid. Reportage and *Reynolds* privilege share conspicuous commonalities. Bosland relies on a formulation of responsible journalism which is fixated upon verification of allegations. But surely there is more to responsible journalism than mere verification. The 9th *Reynolds* factor concerning tone of an article is but one example of something pertaining to responsible journalism without pertaining to truth. It seems unconvincing to argue that requiring neutrality is anathema to being a responsible journalist.

Reynolds privilege has at its core a broad conception of the responsible journalist. Reportage certainly differs in its approach to truth, and the stock placed on having to verify allegations prior to publishing them, but that is not to say that it is doctrinally deficient to conceive of the latter as a subspecies of the former. It merely reflects the split personhood, perhaps 'caninehood', of the media. In reportage it is a watchdog and here neutrality is important. More generally it is a bloodhound which must sniff out a story while also attempting to corroborate it.

(ii) The wisdom of neutrality?

The reportage defence exempts journalists from the liability otherwise attached by the repetition rule. Reportage does not apply when a journalist adopts, not merely neutrally reports, the allegations complained of. Busuttil points out that this undermines the policy rationale for the repetition rule.[80] Because the harm accruing from an allegation is a factor of the number of people who encounter it, mass media publication drastically increases the damage done. Reportage means that if the reporting is neutral, the defendant has no redress. A defendant has a legitimate grievance here if the distinguishing factor, whether allegations are reported or adopted, has no impact on the extent of his/her reputational loss. The question becomes whether or not, in this light, adoption is an unsound criterion for the application of the repetition rule. The damage of an allegation is unquestionably amplified by its appearance in the media and this explains the traditional repetition rule. But it is submitted that the scale of this amplification is not unaffected by whether or not the allegations are adopted. A neutral report that the allegations have been made seems less injurious to the defendant's reputation than a full blown endorsement of those allegations. The 9th *Reynolds* factor of tone is one means of separating adoption from mere reportage. It is not hard to imagine how this might play out in reality. Take a red top paper hypothetically reporting the BNP dispute at the centre of Roberts. One approach would be the dispassionate reporting of the facts of the dispute. The tone of such reporting could, although need not, be as sarcastic as that employed by the 'News from the Sewers' Column in Searchlight. But adopting the allegations could mean that the headline might read some thing like "Lying, thieving and torturing BNP brothers investigated by police".[81] For Busuttil's argument to hold, the reputational loss in each of these cases must be deemed to approach parity. This does not seem an altogether persuasive position.

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80. See Busuttil, G, 'Reportage: A Not Entirely Neutral Report', [2009] *Ent LR* 44, 48.
81. This example is merely illustrative, using only a headline. The test for defamation takes account not just of a headline, but of the publication as a whole. See *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 and more generally Gatley (n 19), 3.30.

(iii) Reportage: a recipe for 'Churnalism'?

In this article and in the case-law one repeatedly encounters the media's duality of purpose, invariably expressed in canine metaphor, as bloodhound and watchdog.[82] Reportage hinges on neutrality and non-adoption, as we have seen. But does reportage encourage the watchdog at the undue expense of the bloodhound?

Busuttil posits reportage as a mandate for 'churnalism'.[83] This is a term the investigative journalist Nick Davis coined to describe "journalists who are no longer out gathering news but who are reduced instead to passive processors of whatever material comes their way, churning out stories ... This is the heart of [the] modern journalist, the rapid repackaging of largely unchecked second-hand material".[84] Davies goes on to lambaste journalistic neutrality: "Neutrality requires the journalist to become invisible, to refrain deliberately ... from expressing the judgements which are essential for journalism. Neutrality requires the packaging of conflicting claims, which is precisely the opposite of truth telling".[85]

This criticism is well made. It appears that so long as the defence hinges on neutrality, journalists have an incentive to hide behind the veil of reportage rather than expressing their real views. However Busuttil's opinion that therefore "reportage does not serve the public interest"[86] is not entirely convincing. The public interest can be served by the bare reporting of defamatory allegations, as we have seen. It may be that further reflection and partial comment, currently not covered by reportage, would further quench the public thirst for politically significant speech. But the more we favour the free speech side of this coin, the more we neglect reputational protection. Reportage may force journalists into the straitjacket of neutrality when reporting potentially defamatory matters. But the restrictiveness of this neutrality is a matter of interpretation. It does not mean that reportage lacks justification. Recall that in *Roberts*, the caustic sarcasm with which Searchlight reported the BNP dispute was insufficient to displace neutrality. Furthermore, aside from some recent affirmations of the importance of reputation, Strasbourg's case-law may be a potential harbinger of a liberalisation of the English approach to neutrality. This stems from the dicta that journalists cannot be required to systematically distance themselves from allegations they report.

There appears little doubt that reportage encourages the media watchdog to roam freely while keeping the media bloodhound on a shorter leash. But that is an organic repercussion of the balancing act between protecting reputation and press freedom. Discouraging investigative journalism is unquestionably a bad thing.[87] But it seems that

82. See *Reynolds* (n 3), 626 and *Charman* (n 50), 49.
83. See Busuttil (n 79), 50.
84. N Davies, *Flat Earth News* (Chatto & Windus, 2008), 59-60.
85. ibid, 111-112.
86. Busuttil (n 79), 50.
87. Investigative journalism, the media as bloodhound, contributes a great deal to our democracy. A belief in its importance underlines the writings of both Busuttil and Davies. Lord Nichols has opined that investigative journalism is an important function of the modern press, "[t]his activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally". See *Reynolds* (n 3), 622. Lord Denning says that "when the newspaper or television company have investigated a matter of general public concern – such that it ought to be made known to the people – the publication of an article or film upon it is so much in the public interest that it ought not to be restrained." Lord Denning (n 12), 268.

Busuttil goes too far in saying that reportage does not serve the public interest on the back of its chilling effect on the bloodhound. Reportage is not a death knell for investigative journalism. Rather it constitutes a move in the right direction from the previous tendency to favour reputation at the unwarranted opportunity cost of press freedom. To argue that 'churnalism' is a consequence of the emergence of the reportage defence would be to fall foul of the post hoc ergo proctor hoc fallacy. 'Churnalism' has proliferated independently of, although contemporaneously with, reportage. It submitted that it is unconvincing to suggest that reportage excessively contributes to the phenomenon.

V. CONCLUSION

The various metaphors we have encountered leave me fearing that making any further use of them in this brief conclusion might result in the inadvertent construction of images of straitjacket-wearing bloodhounds and watchdogs, let alone continuing the flogging of a horse long deceased. So let me steer clear of such metaphorical indulgence.

The development of a defence of qualified privilege in this jurisdiction progressed at a glacial pace prior to the *Reynolds* case. This marked a long overdue move toward press freedom, a move bolstered by the subsequent development of a distinct reportage defence whereby defamatory allegations can be reported without the need to verify their content. Strasbourg's case-law on this point pulls in two different directions, toward dropping the requirement of neutrality on the one hand while also toward increasingly fortifying reputational protection on the other, and its influence on English law is therefore difficult to fathom.

Reportage will not be massively altered by the Draft Defamation Bill 2011 should it become law. Having said that, there are a number of areas in which the language of that bill could be tightened to provide clarity and to avoid unduly, possibly even accidentally, undermining the incremental development of reportage heretofore. This paper also suggests that reportage withstands the challenges which question its doctrinal basis as a species of qualified privilege, its use of neutrality as the decisive factor and its potential to encourage a passive breed of detached, unthinking and phlegmatic 'churnalists'.

The US approach and the pre-*Reynolds* position can be considered to constitute the opposite ends of a dialectic, the synthesis of which is a fair balance between affording redress for reputational loss while also supporting press freedom. Reportage, for all its potential flaws, does a good job of treading a neutral path between these two extremes and in so doing contributes to this balance. The press should continue to be allowed, by statute or otherwise, to report the defamatory allegations of others, provided that they remain neutral and do not adopt the allegations in question.

The Role of Judges in Political Struggles

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INTRODUCTION[1]

Over the last few decades, many modern democracies have experienced an increasing judicialization of the most fundamental political dilemmas.[2] Thus, the study of judicial behaviour has become increasingly important, not only to gain more accurate knowledge of how judges make decisions, but also to improve judicial appointments[3] and accountability mechanisms.[4] Yet, neither legal theories nor social science's empirical approaches have been able to provide a complete and coherent account of the key factors influencing judicial decisions.

On the one hand, traditional legal scholarship asserts that knowledge of judicial decision-making is exclusively linked to the study of positive law.[5] In Shapiro's words, this legalistic approach considers judges "as a unique body of impervious legal technicians above and beyond the political struggle".[6] On the other hand, "the view that ... judges are policymakers has become all but axiomatic among political scientists".[7] Although nowadays only a few legal scholars hold the traditional legalistic view,[8] the actual impact of politics in judicial decision-making is still subject to strong debate. Similarly, political scientists lack consensus on how judges' political attitudes affect their decisions, as evinced, for instance, by the different approaches of the attitudinal,[9] the strategic[10] and the connectionist models,[11] amongst others.

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1. I would like to thank Professor Cheryl Thomas, Agustina Fusco, Isaías Losada Revol and Eoghan McSwiney for their useful comments on earlier versions of this article.
2. Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 1; See also, Cheryl Thomas (trans), *The Power of Judges: A Comparative Study of Courts and Democracy*, by Guarnieri and Pederzoli (OUP 2002) 1; Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart Publishing 2002).
3. Judith Resnik 'Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure' (2005) 26 *Cardozo Law Review* 579; Cheryl Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policy and Practices* (Commission for Judicial Appointments 2005); Brenda Hale, 'The Appointment and Removal of Judges: Independence and Diversity' (2006) *Speech to the International Association of Women Judges, 8th biennial conference*, 3–7 May, Sydney, Australia; Kate Malleson, 'Creating a judicial appointments commission: which model works best?' (2004) *Public Law* 102; Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 *Journal of Law and Society* (1) 126.
4. Daniela Piana, 'Beyond Judicial Independence' (2010) 9 *Comparative Sociology* 40, 52.
5. Malcolm Feeley and Edward Rubin, *Judicial Policy-Making and the Modern State* (Cambridge UP 1999) 2.
6. Marin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (Free Press 1964) 21.
7. Anne Bloom, 'The "Post-Attitudinal Moment": Judicial Policymaking through the Lens of New Institutionalism' (2001) *35 Laws & Society Review 1*, 219.
8. Lawrence Baum, *Judges and Their Audiences* (Princeton UP 2006) 8.
9. Sheldon Goldman, 'Voting Behavior on the United States Courts of Appeal Revisited' (1975) 69 *American Political Science Review* 491.
10. Lee Epstein and Jack Knight, *The Choices Justices Make* (Congressional Quarterly Press 1997).
11. Jennifer Robbennolt, Robert MacCoun and John Darley, 'Multiple Constraint Satisfaction in Judging', in Klein and Mitchell (eds), *The Psychology of Judicial Decision-Making* (OUP 2010).

In this essay, it will be argued that the traditional assertion that judges are 'above and beyond' the political struggle is fundamentally flawed. Furthermore, the great influence of politics in judicial decisions will be highlighted, while also recognising the relevance of many other factors. In so arguing, special attention will be paid, firstly, to the main approaches to empirical judicial studies. Although none of them is able to provide a complete account of how judges actually make decisions, they nevertheless constitute an extremely useful guideline to discover, understand and critically analyse the numerous factors that may influence the judicial decision-making process. For instance, they offer key information about the judges' policy preferences, their background characteristics, institutional constraints, peer effects, their 'managerial pressures', and even the judges' relationship with their audiences, amongst many others. Secondly, a brief account of how the nature and structure of the various dissimilar judicial systems affect the political significance of courts and judicial decisions in different legal systems will be provided, as a preface to the study of three of the most recent and relevant episodes of clash between judges and politicians worldwide. Lastly, these three cases concerning judicial intervention in core political quandaries in different jurisdictions will be examined, in order to study whether in deciding such prominent political dilemmas the judges positioned themselves 'above and beyond', 'below and within', or at some point in the middle of the political struggle.

In summary, this essay will critically discuss the traditional assertion that judges limit themselves exclusively to applying the 'positive law', without being influenced by any 'external factor', in the light of the most recent and relevant empirical judicial studies; the comparative analysis of different judicial systems; and the study of three of the most important episodes of judicial intervention in core political questions worldwide. As a conclusion, it will be argued that judges are not at all 'impervious legal technicians', since there are many elements that affect the judicial decision-making process, including political factors as one of the most relevant.

I. MAPPING THE JUDICIAL DECISION-MAKING PROCESS

Over the last several decades, a growing body of descriptive accounts of judging has tried to answer the difficult question of how judicial decisions are actually made (in contrast with legal theorists' concern about how judges should make decisions), by recourse to a wide variety of empirical methods, which includes large-scale quantitative analysis of decisions,[12] attitude surveys (with and about judges), interviews with judges,[13] analysis of correspondence,[14] and case simulations,[15] amongst others.

12. Goldman (n 8); Charles Cameron and Craig Cummings, 'Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeal 1971-1999' (2003) Paper Presented at the 2003 Meeting of the *Midwest Political Science Association*.
13. Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust 2007).
14. Epstein and Knight (n 9); Feeley and Rubin (n 4).
15. Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' (2007) *Criminal Law Review* 769.

Sheldon Goldman conducted a pioneering empirical study, based on the quantitative analysis of judicial decisions, between 1965 and 1971.[16] It was also one of the first works to examine in detail the impact of judges' attitudes and personal background on their decisions. The research considered more than 2,000 non-unanimously decided cases of the United States Courts of Appeals, and labelled them into different categories, according to the topic of the decision.[17] In order to examine the impact of political attitudes in judicial behaviour, judges were scored a numerical value,[18] depending on whether their decisions on each topic had represented a politically liberal, intermediate or conservative attitude.[19] Thus, by comparing the judges' score on each topic, the author examined whether or not there was a 'politically determined' trend in their decisions. In addition, the study also tested seven background variables, to determine their association with voting behaviour, namely: party affiliation, age, religion, prior judicial experience, years on appeals court, public prosecutorial acquaintance, and experience as a candidate before the electorate for public office.[20] Hence, by comparing the score of the different judges in each category, Goldman examined whether or not their voting behaviour on one topic was associated with others, so that an attitudinal or background pattern could be inferred. The results were extremely instructive. On balance, party affiliation, age and religion appeared as the most relevant background variables. At the aggregate level, though, none of these factors was found to have an actual significant effect on judicial behaviour. Conversely, 'voting patterns ... suggested the existence of interrelated political attitudes held by judges',[21] which according to the author, allowed the interpretation of appeals court judges' decisions as 'representing gradations of broadly defined political and economic liberal-conservative attitudes'.[22] In summary, Goldman concluded that "attitudes and values defined politically rather than legally may be of prime importance in understanding appeals court voting behaviour".[23]

Notwithstanding the valuable contribution of this empirical study, it is necessary to avoid both the overestimation, as well as the undue generalisation, of its conclusions. In this regard, it has been argued that the empirical evidence is quite limited, since it does not conclusively establish that judges are motivated solely (or even overwhelmingly) by policy goals, but only shows that differences in judges' position in the same cases may be better understood as a product of different policy preferences.[24] According to some commentators, the attitudinal model appears a very straightforward and simple version of rational choice theory "because it assumes that judges can maximize their utility simply by rendering whatever decision most pleases them ideologically, without regard to other institutions or considerations".[25] Finally, as regards the research described above, it could

16. Goldman (n 8) 491.
17. ibid 491-493.
18. ibid 491.
19. It is important to stress that, in order to label a judge as liberal, conservative or intermediate regarding one topic, at least five of his decisions on that particular issue had to be calculated and analysed.
20. Goldman (n 8) 491.
21. ibid 505.
22. ibid.
23. ibid 495.
24. Baum (n 7) 20.
25. Frank Cross, 'Political science and the new legal realism: a case of unfortunate interdisciplinary ignorance' (1997) 92 *Northwestern University Law Review* 251, 265; Baum (n 7) 5.

also be argued that the conclusions inferred from Goldman's empirical evidence cannot be generalised and used to analyse all judicial decision-making processes, since it was strictly circumscribed to study the judicial behaviour of appellate court judges, and exclusively in the United States. Despite these limitations, it would also be mistaken to overlook the importance of Goldman's study.

Firstly, even when it does not provide a definite explanation of how judges actually make decisions, it nevertheless clearly demonstrates that traditional legalistic views, which categorically deny any influence of political or ideological attitudes in the judicial decision-making process, are fundamentally flawed. Secondly, not only did his study provide relevant evidence of the influence of judges' beliefs and political attitudes in their decisions, but it also led the way to further research on the impact of political attitudes in judicial decision-making, as well as to consider other possible variables, such as the judges' personal background, and to develop alternative theoretical frameworks.

A prominent example of this evolution of empirical judicial studies is the contextual approach adopted by Cameron and Cummings, in their research on 'Diversity and Judicial Decision-Making'.[26] Adopting a social economy approach, the authors focused on the peer effects in collegial courts. Thus, they distinguished between the impact of judges' personal background on their own decisions (i.e. the 'personal background effect') and its impact on others (i.e. the 'diversity effect') from the peer effect, which is "the separate impact of other judges' actions on [one] judge".[27] In other words, the authors tested whether the interaction between judges with different political attitudes and personal backgrounds, sitting in the same panel, affected their deliberations and the collegiate decision-making process.[28] The study examined more than 500 votes cast on almost 200 three-judge panels on the US Courts of Appeal, covering all affirmative action decisions from 1971 to 1999.[29] Amongst the main findings, Cameron and Cummings suggested that racial diversity had a strong peer effect on affirmative action voting.[30] According to the authors, "adding a single non-white member to a panel ... increased the probability of pro-affirmative action voting of white judges by about fifteen percentage points".[31] The few available data of gender diversity also showed "a weak relationship ... between adding a female judge to a panel and the pro-affirmative action voting of the male judges".[32] In these cases, they found "a direct 'deliberation effect' distinct from a peer pressure effect, which magnifies the influence through feedback into the other judges' votes".[33]
However, the research also suggested that ideological diversity did not increase deliberation. Although it operated through peer effect, it did not guarantee a higher degree of deliberation.[34] It had an 'adverse' peer effect, i.e. it polarised even more the divergent

26. Cameron and Cummings (n 11).
27. ibid 4.
28. ibid 1.
29. ibid 4.
30. ibid 18.
31. ibid 19.
32. ibid.
33. ibid 25.
34. ibid 26.

opinions.[35] Instead of adding deliberation, 'ideological diversity' in panel of judges seemed to increase polarisation about their political attitudes.[36] In any case, although ideological diversity did not appear to increase deliberation, it nevertheless had an impact on judges' decisions that is important to consider when studying judicial decision-making. Finally, Cameron and Cummings stressed in their conclusions the benefits of racial and gender diversity in broadening the judges' views and promoting deliberation in collegial courts.[37] Along the same line, Sir Terence Etherton has recently argued that

> [T]he analysis of social psychologists, and the examples of their empirical research ... highlight the importance on panels of appellate judges who, due to their diverse experience, can bring to bear on a case, particularly a hard case, a wider range of personal experience and judicial philosophies than would otherwise be the case. They will thereby make it more likely that the decision, and the reasoning which underpins it, will reflect the evolving values and institutions of the community, and that relevant arguments are not overlooked or brushed aside, and that insupportable preconceptions are challenged.[38]

However, it is important to note that the argument for judicial diversity is not necessarily dependent on demonstrating a contribution to the quality of justice since it is not dependent on outcomes, but there are strong arguments of equity and legitimacy to support it.[39] A usual question that arises when analysing this kind of empirical studies is whether or not their conclusions can be extended to other jurisdictions. In this regard, it is important to note, following Thomas, that the fact that this study was conducted in only one jurisdiction should not prevent the recognition of its relevance, in particular when developing the selection criteria for judicial appointment processes.[40] Nevertheless, it could also be argued that this research is limited to providing some useful, but partial, information of judicial decision-making. While the model followed by Cameron and Cummings shows why it would be mistaken to deny any 'extra-legal' influence on judges' decisions, it also lacks a full explanation of how and why judges make decisions.

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35. In this vein, a recent 'experimental investigation involving two deliberative exercises, one among self-identified liberals and another among self-identified conservatives, showed that participants' views became more extreme after deliberation'. See David Schkade, *Cass Sunstein and Reid Hastie*, 'When deliberation produces extremism' (2010) 22 *Critical Review* (2) 227.
36. Cameron and Cummings (n 11) 20.
37. ibid 28.
38. Terence Etherton, 'Liberty, the archetype and diversity: a philosophy of judging', (2010) *Public Law* 727, 746. See also Brenda Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' (2001) *Public Law* 489.
39. Kate Malleson, 'Justifying gender equality on the bench: why difference won't do' (2003) 11 *Feminist Legal Studies* 1. According to this author, "[o]ne can hope that a more diverse judiciary may include a wider range of skills and experience which will enhance the quality of its decision-making in a general sense. But the primary rationale for wishing to appoint judges from more diverse backgrounds is to strengthen the legitimacy of the judiciary. Irrespective of whether or not the inclusion on the bench of members of under-represented groups such as solicitors, women, minority lawyers and disabled lawyers will have a significant effect on the decision-making of the courts, the corrosive impact of their absence on the legitimacy of the judiciary is now too great to ignore". See Malleson, 'Creating a judicial appointments commission: which model works best?' (n 2) 106. Along the same line, Etherton argues that the composition of the judiciary, and in particular its diversity, are important in securing and maintaining their legitimacy for two reasons. Firstly, because "the composition of the judiciary can then be seen to reflect the very values of which they are the guardians – human rights and equality inherent in a liberal democracy ... And secondly, because a judiciary which is not reflective of the different elements within the community, particularly minority groups, is less likely to command their respect". See Etherton (n 37) 743-744.
40. Cheryl Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions* (n 2) 60. See also Kate Malleson, 'Promoting Diversity in the Judiciary: Reforming the Judicial Appointments Process', in Philip. Thomas (ed), *Discriminating Lawyers* (Cavendish Press 2000).

Attempting to overcome these limitations, some authors have provided a more complete and sophisticated account of judicial behaviour, based on the strategies designed by judges to master legal and institutional constraints in order to further their policy preferences in the long-term. One good example of this approach is the study conducted by Epstein and Knight, in *The Choices Justices Make*.[41] The authors examined correspondence between US Supreme Court justices, during the 1970s and 1980s, focusing on the bargaining statements and the various changes of position that occurred throughout the process of deciding landmark cases.[42] For instance, when examining the decision-making process of *Craig v Boren*,[43] the authors found that the institutional rules of the Supreme Court had a strong impact on some justices' switch of position after the conference that followed the oral hearing of the case, which could be better explained by their 'strategic' approach. For example, Justice Brennan, who was in charge of writing the opinion of the Court, initially favoured a 'strict standard' to analyse cases of laws discriminating on the basis of sex. However, he designed a 'midlevel scrutiny test' in order to get his colleagues' support to arrive to a majority opinion. Although this 'intermediate decision' was not Brennan's favourite option in terms of his 'political attitudes', it was more suitable to change the existing precedent that established a 'rational basis test', under which it would have been very hard to strike down laws containing sex-based classifications. Hence, the authors considered that Justice Brennan's behaviour could be better understood by drawing more attention to the 'strategy' he designed to change the existing precedent rather than to his 'political attitude' regarding the topic. Similarly, they explained the changes of other justices' opinions based on the strategies they designed to pursue their objectives, rather than by looking at their 'pure' political attitudes.[44]

Although it might be objected that this particular case examined by the authors is an isolated episode, their research also provides empirical evidence that justices' strategic behaviour à la Craig is not anomalous. Interestingly, Epstein and Knight found that "[i]n more than half of all orally argued cases, the justices switch their votes, make changes in their opinions to accommodate the suggestions of colleagues, and join writings that do not necessarily reflect their sincere preferences".[45] According to the authors, those cases evince the strategic behaviour of the judges, who "realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act".[46] For this reason, they contend that the attitudinal model fails to provide a complete account of judicial behaviour, since it overlooks the fact that while judges "may be motivated primarily by their policy preferences ... they plainly are constrained in their attempts to implement those preferences".[47] However, it should be noted that the strategic approach is also based on the controversial assumption that judges are motivated primarily by a desire to

41. Epstein and Knight (n 9).
42. Bloom (n 6) 221.
43. 429 U.S. 190 (1976).
44. Epstein and Knight (n 9) 9.
45. ibid.
46. ibid 10.
47. Bloom (n 6) 220.

influence public policy.[48] Moreover, neither the attitudinal nor the strategic model accounts for the different type of judges (e.g. Supreme Court justices, appellate court judges or criminal court judges), who may have very diverse goals,[49] and whose decisions may have quite a dissimilar impact on policymaking. As noted by Baum, the strategic model also fails to consider the strong difficulties in the task of predicting the long-term consequences of judicial decisions, as well as in taking into account other simpler goals that judges may legitimately have, such as gaining the approval of their audiences,[50] or reducing caseload pressures.[51] Finally, it could also be argued that since ordinarily judges do not gain much benefit from advancing their favoured policies, and their individual decisions may not have any substantial impact on the totality of the policy, it would be quite unrealistic to analyse judges as purely strategic actors.[52] Notwithstanding these observations, the strategic model throws important light on many aspects of judicial behaviour that are not usually explored by traditional legal theories, or even by other empirical judicial studies. Moreover, it provides further evidence that political factors usually have an important, though not exclusive, influence in judicial decisions.

Another excellent example of the 'post-attitudinal turn' in judicial studies[53] is the study offered by Feeley and Rubin. In Judicial Policy-Making and the Modern State,[54] the authors centred their analysis in the American 'Prison Reform Cases', in order to show how "[p]olicy making may be contrasted with interpretation, which is the process by which public officials exercise power on the basis of a preexisting legal source that they regard as authoritative".[55] This litigation saga, which took place in the United States between 1965 and 1990, is one of the most important examples of judicial policymaking. In fact, the judicial orders mandating prison reforms in different states of the Union were extremely comprehensive, and in some states the entire correctional system was designed following judicial orders.[56] Although Feeley and Rubin recognise that not all judicial decisions engage policymaking (and that the Prison Reform cases represent quite an extreme example in that regard) they claim that when judges do so "they invoke the text to establish their control over the subject matter, and then rely on non-authoritative sources, and their own judgement, to generate a decision that is predominantly guided by the perceived desirability of its results".[57] However, they argue that, not only do traditional legal scholars fail to acknowledge this contrast, but also, and more importantly, "judges continue to describe their policy-making role as an aspect of interpretation".[58] According to the authors, while legal and institutional constraints do not prevent judicial policymaking, they may nevertheless create serious problems of legitimacy for the judiciary. For instance, they argue that in the 'Prison Reform Cases', the federal courts' policymaking was contrary

48. ibid 223.
49. Robbennolt, MacCoun and Darley (n 10).
50. Baum (n 7) 15-16.
51. Robbennolt, MacCoun and Darley (n 10) 29.
52. Baum (n 7) 15-16.
53. i.e., the increasing trend to "look much further than judicial attitudes ... [and] examine how institutional structures shape and constrain judicial policymaking". See Bloom (n 6) 220.
54. Feeley and Rubin (n 4).
55. ibid 5.
56. Bloom (n 6) 224.
57. ibid.
58. ibid 11.

to the legal principles of separation of powers, federalism and the rule of law.[59] It is important to note that by so arguing, Feeley and Rubin do not criticise the decisions of the federal courts. Conversely, they stress the need to recognise that judicial policymaking is as necessary and legitimate as the other branches', and therefore it should be studied accordingly.[60]

As already noted, the leading models of judicial behaviour provide important empirical evidence against the traditional assertion that judges are not influenced by any 'extra-legal' factor. Nevertheless, they have been subject to severe criticism due to their narrow perspective to analyse judicial behaviour. For example, Baum argues that the dominant models exaggerate the assumption that judges' primary goals are grounded in their political attitudes, and he suggests that they "lack a persuasive theory of judges' motivation".[61] Hence, he proposes to expand the scope of judicial studies and provide alternative approaches.[62] In this vein, his study on *Judges and Their Audiences* aims at demonstrating that judges' interest in approval from their audiences (which may include not only their colleagues, but also the general public, other branches of government, legal policy groups, the media, etc.) has a great explanatory value to understand how judges actually make decisions.[63] Although this approach does not appear as the most attractive explanation of the judicial decision-making process, it is important to recall that it does not intend to provide a full account of judicial behaviour, but only to offer an additional alternative approach in order to broaden the analytical perspective. This view presupposes, then, that the different approaches to judicial studies should not be regarded as competing or mutually exclusive models, but as complementary perspectives, which partially capture certain features of the extremely complex judicial decision-making process.

Similarly, the more recent connectionist models recognise that a sophisticated understanding of judicial decision making "require[s] the integration of a range of disparate, and potentially inconsistent, information and objectives".[64] In this regard, Robbennolt et al stress the importance of taking into consideration that different judges may have very diverse goals. For instance, they argue that while trial court judges are likely to focus on issues of caseload management, or pre-trial settlement; appellate judges may engage in more 'policymaking' quandaries; and elected judges are probably more influenced by political concerns regarding their re-election.[65] Moreover, it could be added that there are important differences in the judges' goals depending on the structure of their respective judicial systems;[66] the jurisdictional fragmentation;[67] or on whether they are municipal judges or they sit in international courts; amongst many other possible classifications.

59. ibid 18.
60. ibid 22.
61. Baum (n 7) 19.
62. ibid 21.
63. ibid 19.
64. Robbennolt, MacCoun and Darley (n 10) 33.
65. ibid 31-32.
66. Cheryl Thomas (ed), *The Power of Judges* (n 1) 78.
67. ibid 148.

Robbennolt et al also argue that even one single judge may face many different, and sometimes contradictory, objectives. In order to illustrate their argument, the authors give as an example the many conflicting goals that a criminal judge may have to consider before deciding a motion to suppress key evidence in a difficult (but not uncommon) criminal trial,[68] and analyse this imaginary case using the theoretical tools provided by the connectionist model of constraint satisfaction. As a result, they conclude that this model may provide a better explanation of the extremely complex judicial decision-making process than research focused on only one main factor, because it offers "a set of 'goal management principles' that can describe the interrelations among the disparate goals and actions pursued by legal decision makers".[69] In particular, it examines the extent to which specific goals can be satisfied by available choices ('principle of equifinality'), how some actions are likely to fulfil goals better than others ('principle of best fit') or fulfil numerous goals at once ('principle of multifinality'), and how some goals may inevitably conflict without allowing their concurrent achievement ('principle of goal incompatibility').[70] According to the authors, this model overcomes the simplicity of other approaches, and provides a more accurate and realistic analysis of the judicial decision-making process. Nevertheless, even when it offers a wider perspective of judicial behaviour, it could be argued that it fails to explain how judges actually balance all these factors when making a decision. In any case, it should also be recognised that this alternative model provides important further evidence that judges do not pursue a single objective when making decisions, and that there are many 'extra-legal' factors that affect the judicial decision-making process.

All things considered then, it would be fair to conclude that although the most influential empirical judicial studies are not still able to offer a definite and complete explanation of how judges actually make decisions, they nevertheless provide clear evidence that judges are far from being 'impervious legal technicians'. These studies clearly show how the numerous factors that influence judicial behaviour prevent any attempt to place the judiciary 'above and beyond the political struggle'. However, a final qualification needs to be made. It is important to note that most of the empirical studies described above have been conducted in the United States. Therefore, before proceeding with the next section's case-studies on clashes between judges and politicians in different jurisdictions, it seems appropriate to briefly explore how the nature and structure of dissimilar judicial systems and the role of judges in different legal systems may also influence the political significance of courts and judicial decisions.

Firstly, it is critical to distinguish whether the courts' jurisdiction is concentrated (i.e. unitary systems, such as the judicial system of England and Wales) or separated into different hierarchical structures (i.e. fragmented systems, such as the Italian judicial system), which includes 'special courts' (e.g. administrative courts or/and constitutional

68. Robbennolt, MacCoun and Darley (n 10) 36.
69. ibid 34-35.
70. ibid 35.

courts, separated from the 'ordinary' civil and criminal courts). As explained by Guarnieri and Pederzoli, "the more far-reaching the scope of judicial decisions is the more politically significant a judge's role is likely to be".[71] Therefore, "[t]he fragmentation of the judicial system can ... be seen as a means of politically neutralizing ordinary courts while preserving their institutional independence".[72] Secondly, the internal dynamics, i.e. the interaction between the various actors of the 'judicial pyramid', also affects the significance and powers of courts in the different judicial systems. According to Guarnieri and Pederzoli, the 'hierarchical system', usually adopted in countries with bureaucratic judiciaries (e.g. Italy, Spain, France), enables appellate and supreme courts to exercise a higher degree of control over the lower courts than the 'co-ordinate system', which is normally related to professional judiciaries (e.g. United States and England and Wales).[73] In the authors' opinion, although systems with a 'hierarchical model' may provide more coherence amongst the different judges' decisions, they also reduce the political significance of ordinary courts, which in 'co-ordinate' systems is usually higher.[74]

Another important factor to consider when studying the influence of politics in different judicial systems is the openness of courts to individual and group litigants, and their perception about the relative utility of courts.[75] In this regard, Guarnieri and Pederzoli argue, on the one hand, that "[t]he lower the threshold of access, especially for interest groups, the stronger is the relative [political] 'importance of courts'".[76] On the other hand, they also suggest that "the existence of quasi-judicial institutions which can effectively process conflicts may foster court avoidance and thus dejudicialization in some policy areas".[77] In relation to the citizens' perception of the judiciary's usefulness as "a channel for the articulation of political demands", it is also important to take into account the different judicial prerogatives as regards the review of legislation. For instance, it could be argued that systems allowing diffuse review of legislation confer more power (and, consequently, more 'political relevance') to ordinary courts than centralised systems, where constitutionality issues are entrusted to a single separate court. Similarly, the differences between concrete and abstract review of legislation, and the determination of the actors allowed to trigger this review (i.e. whether there is a direct or indirect appeal to judicial review of legislation), may also affect the relationship between judges and politicians in different jurisdictions.[78]

Finally, it is important to consider how the different role assigned to other key actors of the judicial system, such as lawyers and public prosecutors, may also affect the political significance of courts and judicial decisions.[79] Firstly, as regard the latter, the civil and

71. Cheryl Thomas (ed), *The Power of Judges* (n 1) 79.
72. ibid.
73. ibid 80-81.
74. ibid.
75. ibid 103-104.
76. ibid 148.
77. ibid 104.
78. ibid 134-147.
79. See Alan Paterson, *Lawyers and the Public Good (The Hamlyn Lectures)* (CUP, 2012).

common law worlds present important differences, not only on the prosecutors' powers, but also concerning their relationship with the judges, the police and the executive branch of government.[80] As explained by Guarnieri and Pederzoli, "the more autonomy prosecutors enjoy from other political institutions the greater the political significance of the judicial system".[81] In this regard, the 'Berlusconi case', analysed below, will provide an excellent example of how the independent status of prosecutors in Italy increased their political significance. Secondly, the role of lawyers in the judicial systems also varies from inquisitorial to adversarial systems, where parties to the dispute may have more influence in the judicial decision, not only in criminal law cases but also as regards civil litigation.[82] The *Binyam* case, which will also be analysed below, provides a clear illustration of how litigant lawyers in an adversarial system (in that case, England and Wales) may affect the judicial decision-making process, even in 'politically sensible' cases.

II. JUDICIALIZATION OF POLITICS AND POLITICISATION OF THE JUDICIARY

The judicial studies accounted above, not only provide empirical evidence of the range of factors influencing judicial decisions, but they also show that "[t]he interrelationship between judicial systems, law, and politics is dynamic and constantly changing".[83] As noted by Domingo, "[t]he degree to which courts take part in policy or law making, or the extent to which political and social disputes can be resolved through legal recourse, varies greatly from country to country, and also over time". [84] Therefore, it seems appropriate to analyse recent cases concerning judicial intervention in core political quandaries from different judicial systems, in order to put the study of the judges' role in political struggles in context.

An extremely useful and rich case study to begin with is the US Supreme Court's decision in *Bush v Gore*,[85] which not only generated significant debate as to the impact of the judges' political attitudes in the final judgement, but also with regard to their partisan affiliation.[86] The case arose due to the possible miscalculation in the counting of votes in Florida, whose final result would determine the outcome of the US presidential election of 2000. Since the margin of victory of the republican candidate, George W Bush, over the democrat candidate, Al Gore, was minimal (only 327 votes), the Florida Supreme Court agreed and ordered a recount of the so called 'undervotes', i.e. the ballots in which machine counts had not detected any choice for President.[87] However, the following day

80. Cheryl Thomas (ed), *The Power of Judges* (n 1) 108-120.
81. ibid 120.
82. ibid 122.
83. Pilar Domingo, 'Judicialization of politics or politicization of the judiciary? Recent trends in Latin America' (2004) 11 *Democratization* 104, 106.
84. ibid.
85. 531 US 98 (2000).
86. Ronald Dworkin, 'A Badly Flawed Election' *The New York Review of Books* (New York, 11 January 2001) 3; Jack Balkin, '*Bush v Gore* and the Boundary Between Law and Politics' (2001) 110 *The Yale Law Journal* 1407, 1408.
87. *Gore v Harris*, 772 So. 2d 1243 (Fla.2000).

(December 9), the US Supreme Court issued a stay of the Florida Court's ruling, arguing that "[t]he counting of votes ... threaten[s] irreparable harm to the petitioner [George W Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election".[88] Finally, on December 12, the Court issued the final decision, reversing the Supreme Court of Florida's judgment of December 8, on the grounds that the recount it had ordered violated the Equal Protection Clause of the Fourteenth Amendment.[89]

From a traditional legalistic point of view, some commentators argued that the Court limited itself to applying the law, without being influenced by other factors.[90] However, the weakness of the legal arguments used by the judges does not support this thesis. Moreover, as suggested by Dworkin, it is "difficult to find a respectable explanation of why all and only the conservatives voted to end the election in this way".[91] In sharp contrast to the traditional legalistic views, other theories, such as legal realism and the critical legal studies, as well as many approaches from the social sciences, would argue that political attitudes played a key role in the decision-making, shaping the way judges interpreted the law. However, as pointed out both by Dworkin and Balkin, the conservative judges' decision did not reflect their political opinion regarding issues of federalism, judicial activism, the extension of the equal protection clause, or any other constitutional question, but quite the opposite. Consequently, these authors discard the hypothesis of the ideological attitudes' effect on the decision, and suggest instead that "this is a more overt collapse of the boundary between law and politics ...".[92] A final alternative analysis, following a pragmatist approach, would explain *Bush v Gore* considering the possible consequences of the decision for the future of the country, arguing that the Court might have chosen values such as security and legal certainty over justice.[93] However, it is certainly hard to see a plausible alternative to the crude partisan explanation of the case, which positions the Court 'below and within', rather than 'above and beyond', the political struggle. Still, as it flows from the myriad of views described above, there are many factors that could have influenced the justices' decision in *Bush v Gore*, and therefore, neither a pure legalistic nor a 'crude partisan' approach seems to provide a complete explanation of the case.

At this point, it is important to highlight that the clash between judges and politicians is a worldwide phenomenon that affects not only states with checks and balances systems, such as the US, but also states enjoying a higher degree of political centralisation, such as the UK, where the constitutional system is grounded on the doctrine of parliamentary sovereignty.[94] In fact, the UK has recently provided a good example of high profile conflict between judges and politicians in the 'Binyam Mohamed affair'. The case arose from

88. *Bush v Gore*, 531 US 98 (2000), Application for Stay (Scalia J concurring).
89. *Bush v Gore*, 531 US 98 (2000), per curiam.
90. Charles Fried, 'A Badly Flawed Election: An Exchange' *The New York Review of Books* (New York, 22 February 2001).
91. Dworkin (n 83) 2.
92. ibid.
93. Richard Posner, '*Bush v Gore* as Pragmatic Adjudication', in Ronald Dworkin (ed), *A Badly Flawed Election: Debating Bush v Gore, the Supreme Court, and American Democracy* (New Press 2002) 201; Agustin Gordillo, *An Introduction to Law* (Esperia Publications 2003), 138.
94. Cheryl Thomas (ed), *The Power of Judges* (n 1) 155. See also Stevens (n 1)

the detention by US authorities of Binyam Mohamed (BM), an Ethiopian national who was seeking political asylum in the UK since 1994, and had been given temporary leave to remain as a UK resident. In 2001, BM travelled to Afghanistan, and then moved to Pakistan, where he was arrested in April 2002, and finally sent to Guantanamo Bay two years later, where he was charged with terrorist offences.

The British stage of this affair began in 2007, when BM sought disclosure of classified documents from the UK government, which might support his defence that confessions obtained under torture by the US government were inadmissible as evidence against him. Since the British Foreign Secretary refused to disclose such information, BM applied for judicial review, relying on the 'Norwich Pharmacal principle',[95] according to which a third party who has been involved in allegedly unlawful action by somebody else should disclose relevant information in his possession to the victim. In its first open judgement, the Divisional Court held that the UK's Security Service and Secret Intelligence Service had facilitated arguable wrongdoing and therefore, an order for disclosure under the 'Norwich Pharmacal principle' would be made, albeit subject to any public interest immunity claim by the Foreign Secretary.[96] The information sought by BM was subsequently made available in the habeas corpus proceedings opened in the US, leading to his release from Guantanamo and later return to the UK in 2009.[97] However, an incidental issue concerning the final drafting of the written judgement remained open, and would generate an unprecedented clash between judges and politicians.

The seed of the conflict was the Foreign Secretary's opposition to the restoration of seven paragraphs that had been redacted from the first open judgment in Binyam, which summarised US reports concerning BM's treatment by US officials, in the knowledge of which the UK had continued to supply information for use in the interrogations. The paragraphs said, inter alia, that "the treatment reported ... could readily be contended to be at the very least cruel, inhuman and degrading treatment of BM by the United States authorities".[98] The Foreign Secretary's arguments were set out in three public interest immunity certificates, which asserted that the publication of the redacted paragraphs would violate the general control principle over intelligence arrangements and, moreover, that in the event of disclosure the US would re-evaluate its intelligence 'special' sharing relationship with the UK, which would seriously prejudice the national security. Since during the Bush administration there was strong evidence supporting these arguments, the Divisional Court held in its fourth open judgment that the redacted paragraphs would not be restored. However, Obama's assumption of the US presidential office in January 2009 would radically change the situation. In fact, evidence produced before the Court made clear that President Obama had expressed very different views on torture, interrogation techniques and transparency from those

95. *Norwich Pharmacal v Commissioners of Customs and Excise*, [1974] AC 133.
96. *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin).
97. Richard Norton-Taylor, Peter Walker and Robert Booth, 'Binyam Mohamed returns to Britain after Guantánamo ordeal' *The Guardian* (London, 23 February 2009) <http://www.guardian.co.uk/ uk/2009/ feb/23/binyam-mohamed-guantanamo-plane-lands> accessed 6 July 2011.
98. *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, 32.

of the Bush administration's officials. Consequently, the Divisional Court held in its fifth open judgement, in October 2009, that the public interest in the disclosure of the paragraphs outweighed the national security risk involved in the case.[99] However, the Foreign Secretary raised further security concerns against the draft of this judgment, which were dismissed by the Court,[100] though the redacted paragraphs would not be published yet due to the Government's appeal.

At the appellate stage, Jonathan Sumption QC, representing the Foreign Secretary, vehemently attacked the Divisional Court's judges, affirming that their attitude had been irresponsible, unnecessary and "profoundly damaging to the interests of this country".[101] Although the Court of Appeal affirmed that the Divisional Court had given insufficient weight to the PII certificates, it nevertheless dismissed the appeal.[102] However, the conflict was not over, and it would have a further twist. After distributing its draft judgment to the parties, the Court of Appeal received some suggestions by Sumption, and made further changes on a paragraph containing strong criticism of the UK's Security Service. However, counsel for BM (Dinah Rose QC) had not received the letter in time to register objections. When Rose got Sumption's letter (one day before the second draft judgment would be made public) she handed it to the press, leaking therefore many details of the conflict,[103] including the controversial paragraph 168, which read, inter alia, that "... some security services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed...".[104] Finally, on February 26, the Court of Appeal wrote a third version of the contested paragraph, restoring some criticisms but explaining their limits. More importantly, it waived the confidentiality understanding on which the first draft judgment had been circulated "in order to dispel the damaging myth or lingering public perception that a minister or his counsel had been permitted to interfere with the judicial process".[105]

Although there was some 'bad taste' surrounding this conflict,[106] the Court of Appeal tried to overcome the controversially political tone of the case with a remarkable final judgment that honoured the principle of open justice and judicial independence. However, it is difficult to see how the judges intervening in the case could have positioned themselves "above and beyond the political struggle", since the whole satellite litigation in Binyam as to the drafting, redacting, re-drafting and publication of the controversial

99. *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2549 (Admin).
100. ibid.
101. John Aston and Cathy Gordon, 'Minister's lawyers attack 'torture' case judges' *The Independent* (London, 14 December 2009) <http://www.independent.co.uk/news/uk/home-news/ministers-lawyers-attack-torture-case-judges-1840649.html> accessed 6 July 2011; Richard Norton-Taylor, 'Judges irresponsible for wanting CIA torture evidence disclosed, court told' The Guardian (London, 14 December 2009) <http://www.guardian.co.uk/world/2009/dec/14/binyam-mohamed-cia-toture-appeal> accessed 6 July 2011.
102. Binyam (n 95)
103. Katy Dowell, 'Dinah Rose QC apologises to court for handing Sumption letter to press' *The Lawyer* (London, 11 February 2010) <http://www.thelawyer.com/1003432.article> accessed 6 July 2011.
104. ibid.
105. *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158.
106. Frances Gibb, 'Analysis: victory for common sense and open justice' *The Sunday Times* (London, 26 February 2010) <http://business.timesonline.co.uk/tol/business/law/article7042626.ece> accessed 6 July 2011.

paragraphs inherently contained more political than strictly legal features. Furthermore, not only did the 'Binyam affair' concern a clash between judges and politicians, but also arguably the judicial appointment process. In fact, only a few weeks after the final judgment, a new member of the UK Supreme Court was announced (Lord Dyson),[107] after one of the allegedly main candidates had suddenly withdrawn his application in December 2009. Interestingly, the retired candidate was Sumption, who from being the favourite for the post became a reject, due to the opposition from some judges of both the Court of Appeal and the Supreme Court.[108] His appointment to the Supreme Court would have to wait until this year, when due to the retirement of Lord Saville and the imminent departure of Lord Collins, it was announced that Lord Justice Wilson and Jonathan Sumption QC would fill those vacancies.[109] From the above analysis, it is clear that many 'non-legal' factors could have influenced the different decisions in Binyam, which positioned judges closer to the middle of, rather than above and beyond, the 'political struggle'.

A final illustration of a judicialized conflict with blurred boundaries between law and politics is the 'Berlusconi case' in Italy, where unlike the UK, there is a long history of clashes and collusions between judges[110] and politicians. The tension, however, would not reach its peak until the early 1990s, when the extremely high profile of the Mani pulite (clean hands) investigations of corruption produced what has been termed a 'revolution by the judges', which led to the collapse of the hitherto dominant Christian Democracy party and its allies, and the beginning of the Second Republic.[111] In this context, the judiciary gained great popularity among the public,[112] and the degree of 'politicisation' of judges was so unusually high that even some of them resigned from the judiciary and started a political career.[113] In turn, some politicians reacted against the increasing judicial activism in the political arena, and attempted to de-legitimise the judiciary,[114] by denouncing conspiracies,[115] and generating constant confrontations. Unsurprisingly, Silvio Berlusconi played a 'leading role' in these attacks.

In this historical context, the so-called 'Berlusconi case' arose, as an extreme example of a long-term conflict between the judiciary and the political power in Italy. The case concerns a legal (and political) battle to pass immunity laws to the highest political offices, which were allegedly orientated to override the judicial investigations opened against Berlusconi

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107. Margaret Taylor, 'Dyson LJ named as final Supreme Court justice' *The Lawyer* (London, 23 March 2010) <http://www.thelawyer.com/dyson-lj-named-as-final-supreme-court-justice/1003889.article> accessed 6 July 2011.
108. Frances Gibb, 'Supreme ambition, jealousy and outrage' *The Sunday Times* (London, 4 February 2010) <http://business.timesonline.co.uk/tol/business/law/article7013960.ece> accessed 6 July 2011.
109. However, Sumption has obtained permission to delay his ascent to the Supreme Court until after the *Berezovsky v Abramovich* case is heard, in order to fulfil his litigation work for Roman Abramovitch. See Owen Bowcott, 'Supreme court judges appointed' *The Guardian* (London, 4 May 2011)<http://www.guardian.co.uk/law/2011/may/04/supreme-court-judges-wilson-sumption> accessed 14 September 2011.
110. In Italian, the term *giudice* (i.e. judge) includes investigating magistrates and judges of the bench as well as public prosecutors. Donatella Della Porta, 'A judges' revolution? Political corruption and the judiciary in Italy' (2001) 39 *European Journal of Political Research* 1, 11.
111. ibid 4.
112. ibid 8; Cheryl Thomas (ed), *The Power of Judges* (n 1) 176.
113. e.g. Antoinio Di Pietro and Luigi De Magistris.
114. Della Porta (n 107) 11.
115. ibid 10.

for corruption[116] and, more recently, for juvenile prostitution and abuse of power.[117] This conflict began in 2003, after the passing of Law No 140 ('*lodo Schifani*'),[118] which provided for an automatic, general and not-limited-in-time suspension of any criminal proceedings against the highest political offices in Italy. The Italian Constitutional Court declared this law partially unconstitutional in 2004.[119] However, the political majority insisted with a new immunity law in 2008 ('*lodo Alfano*'),[120] which was widely criticized as a copy of the previous one. Thus, in October 2009, the Italian Constitutional Court annulled the law once again.[121] Nevertheless, not only did Berlusconi repeat his furious attack against the judiciary, but he also promoted a new law to stop judicial investigations on him. The third attempt was made through the 'legitimate impediment law', passed in 2010, which provided a suspension of court proceedings for up to 18 months in the case of members of the government. However, in a new episode of the conflict, the Constitutional Court declared this law partially unconstitutional, stating that Berlusconi could not automatically invoke a 'legitimate impediment' claim exempting him and cabinet ministers from attending trials in progress because of their official duties.[122]

The 'Berlusconi case' is an extreme example of blurred boundaries between law and politics, which confirms that judges can hardly position themselves 'above and beyond the political struggle'. However, it also demonstrates that even in the most 'politicised' conflicts, political attitudes are not an exclusive factor affecting judicial decisions. For instance, it could be argued that the legal arguments based on the Italian Constitution were key factors in the decisions of the Constitutional Court. In fact, as distinct from *Bush v Gore*, Italian scholars and commentators almost unanimously agreed with the Constitutional Court that the contested immunity laws were contrary to the Italian Constitution.[123] Hence, neither political attitudes nor legal arguments were the exclusive reasons behind this case, but only some amongst many others.

III. CONCLUSION

There is great uncertainly when trying to explain how and why judges make decisions. Nevertheless, judicial studies provide enormous help to overcome the traditional

116. John Hooper, 'Silvio Berlusconi to face charges as early as next week, prosecutors say' *The Guardian* (London, 2 February 2011) <http://www.guardian.co.uk/world/2011/feb/02/silvio-berlusconi-sex-prosecution> accessed 6 July 2011.
117. John Hooper, 'Silvio Berlusconi to face charges as early as next week, prosecutors say' *The Guardian* (London, 2 February 2011) <http://www.guardian.co.uk/world/2011/feb/02/silvio-berlusconi-sex-prosecution> accessed 6 July 2011; John Hooper, 'David Mills guilty of taking bribe linked to Berlusconi trials' *The Guardian* (London, 17 February 2009) <http://www.guardian.co.uk/politics/2009/feb/17/david-mills-silvio-berlusconi-trial> accessed 6 July 2011.
118. '*Lodo*' because it was a compromise reached by the political majority and the opposition; and '*Schifani*', after its principal promoter, Renato Schifani, who at that time was President of the Italian Senate. See Giuseppe Martinico, 'The Berlusconi Judgment: A Brief Case Note on the Decision of the Italian Constitutional Court (Note 262/2009)' (2010) 16 *European Public Law* (2) 231.
119. Italian Constitutional Court, Judgment 24/2004.
120. In this case, it was named after Berlusconi's Minister of Justice Angelino Alfano. See Martinico (n 115)
121. Italian Constitutional Court, Judgment 292/2009.
122. John Hooper, 'Italian court waters down Berlusconi immunity law' *The Guardian* (London, 13 January 2011) <http://www.guardian.co.uk/world/2011/jan/13/italian-court-berlusconi-immunity-law> accessed 6 July 2011.
123. Martinico (n 115).

dogmatic and simplistic views of judicial behaviour, which prevent more realistic and accurate explanations. As described in the introduction, there are still some traditional legal approaches claiming that it is possible to predict any judicial decision, by simply applying analogical reasoning to the legal precedents and statutes; and denying the effect of any 'non-legal' factor in the judicial decision-making process. Therefore, even when the empirical judicial studies analysed in this essay did not provide a complete and definite answer about the factors that affect judicial behaviour, they nevertheless taught important lesson on the complexity of the process, which evinced the unsuitability of the traditional legalistic models. The first conclusion of this essay is, then, that simplistic explanations of judicial behaviour will never be able to provide a successful account of the judicial decision-making process.

The main argument of this essay is that the traditional characterisation of judges as "a unique body of impervious legal technicians above and beyond the political struggle" was fundamentally flawed. In arguing so, a critical account of the most recent and relevant empirical models of judicial behaviour was given, in order to show the myriad of factors that may influence judicial decisions. As already noted, while none of these studies provides definite answers, each of them throws important light on some aspects of the extremely complex process of judicial decision-making, and more importantly, they clearly demonstrate that judges are affected by many 'extra-legal' factors. Hence, it is completely misguided to consider judges as 'impervious legal technicians'. In addition, the comparative analysis of the nature and structure of different judicial systems aimed at showing that it is not possible to reach universal answers on this topic, since the factors affecting judicial behaviour also depend on the special characteristics of each jurisdiction.

Finally, the study of three cases concerning judicial intervention in core political quandaries in different jurisdictions aimed at demonstrating the increasing "judicialization of politics and politicisation of the judiciary", a phenomenon that prevents any positioning of judges "above and beyond the political struggle". Nevertheless, these cases also showed that neither political attitudes nor legal arguments were the exclusive reasons behind the respective judicial decisions, but only some amongst many others.

To conclude, judges in modern democracies are neither "a unique body of impervious legal technicians above and beyond the political struggle" nor a 'political party'. Therefore, it would also be mistaken to overvalue the influence of politics in the judicial decision-making process. As the cases commented in the last section clearly show, there are many factors influencing judicial decisions, which allow multiple and varied interpretations. This lack of certainty regarding the actual factors affecting the judicial behaviour should not, however, lead to an underestimation of the relevance of the various empirical studies and legal theories on the subject, which provide extremely useful tools to analyse judicial decisions, and to better understand how judges actually make decisions.