

# **WARWICK UNDERGRADUATE LAW JOURNAL**

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## **A Preface from Co-Editors-in-Chief**

As Co-Editors-in-Chief, we are deeply honoured to present the second edition of the Warwick Undergraduate Law Journal (WULJ). It is a unique testament to the intellectual curiosity, rigour, and passion of our undergraduate law community.

We have been overwhelmed by the response to our call for papers, and the range and depth of scholarship that has been presented to us. The effort and dedication displayed by all our contributors, who have been balancing rigorous academic commitments alongside their submissions, have been truly inspiring.

We extend our heartfelt thanks to our team of committed editors who have worked tirelessly to ensure the quality of this edition. Their efforts have been invaluable in reviewing, shaping, and refining the articles that we are proud to publish. We also want to take this opportunity to express our gratitude to everyone who submitted their work. Without your courage, willingness to share your insights, and dedication to the pursuit of knowledge, this Journal would not be possible.

This edition of WULJ features a range of thought-provoking articles that span a breadth of legal fields. We are particularly impressed by the quality and depth of analysis presented in each piece. The variety of pieces in this edition speaks to the diversity of interests and perspectives within our academic community. It is a reflection of the intellectual vibrancy and dynamism that is a hallmark of Warwick's law students.

This second edition of the Warwick Undergraduate Law Journal is a celebration of academic scholarship, intellectual curiosity, and the pursuit of knowledge. Thank you for joining us on this journey. We would like to conclude by thanking all of those who have contributed, especially our editors who reviewed each submission.

**Mr Leo Huseyin, Miss Sabah Khawaja, and Miss Mahek Bhatia**

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## Case Comment: Commission v Hungary C-66/18 Judgment and EU's Rule of Law

## Introduction

On April 4<sup>th</sup>, 2017, Hungary amended their Higher Education Act of 2011, creating stricter requirements for foreign tertiary institutions to continue to operate within the country<sup>1</sup>. This led to concerns from the EU Commission under Article 258 of the TFEU, and on October 6<sup>th</sup>, 2020, the judgment of the court was finalised, finding the new law in breach of regional and international agreements<sup>2</sup>. The member state's new requirements for foreign university institutions to now carry out teaching activities in its state of origin, and for there to be treaty on academic cooperation between Hungary and the state of origin were deemed a breach of academic freedom as part of the Charter of Fundamental Rights, amongst various other infringements, including the WTO's GATS and EU directives<sup>3</sup>. This case, *Commission v Hungary* C-66/18, dealt with new laws commonly referred to by the public as “lex CEU”, as the requirements appeared to target one particular institution, Central European University (CEU) in Budapest<sup>4</sup>. While still a relatively recent judgement, the conclusions drawn from this case has had a rippling effect on the discussions of the EU rule of law situations in Hungary, and the various types of responses to serious breaches.

The landmark *Commission v Hungary* C-66/18 case is not an isolated incident, rather, it is a culminating piece in a chain of events of Hungary's rule of law concerns. *Commission v Hungary* explores the effectiveness of the Article 258 TFEU enforcement process and has major implications on the EU's role in addressing rule of law conflicts. This essay seeks to examine the *Commission v Hungary* C-66/18 judgment's place in ongoing Hungarian rule of law concerns and its consequences, then evaluate the current actions and resolution mechanisms in place to uphold EU values.

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<sup>1</sup> Petra Bárd “A Strong Judgment in a Moot Case: Lex CEU before the CJEU” (*RECONNECT*, 12 Nov 2020) <<https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>> Accessed 31 Dec 2020.

<sup>2</sup> Case C-286/12 *Commission v Hungary* [2012] ECR I-nyr para 1.

<sup>3</sup> Ibid.

<sup>4</sup> Petra Bárd “A Strong Judgment in a Moot Case: Lex CEU before the CJEU” (*RECONNECT*, 12 Nov 2020) <<https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>> Accessed 31 Dec 2020.

## Constitutional Capture: The Lead Up to C-66/18

Concerns regarding the conflict of EU values in Hungary mostly began after the accession of Prime Minister Viktor Orbán in 2010. Hungarian philosopher Attila Ágh outlined the increasing resistance of the MS as a deliberate three-part ‘masterplan’ to diverge from EU principles, an elaborate plan that Poland began to replicate in 2015<sup>5</sup>. According to Ágh, this plan began with the corrupt, tyrannical power of the conservative Fidesz ruling party, of which Orbán has been the leader of since 1993<sup>6</sup>. Upon winning two-thirds of the seats in Parliament, Fidesz gained the ability to enact all sensitive legislative changes that required this majority<sup>7</sup>, kickstarting the ten-year dissent to constitutional capture: an extensive systematic phenomenon that gradually decays democracy within a regime<sup>8</sup>.

The second part of this ‘masterplan’ concerned the erosion of judicial independence<sup>9</sup>. Some of these issues were brought to light in the Court of Justice of the European Union (CJEU) under an Article 258 infringement, for example, the 2012 C-286/12 case regarding the lowering of retirement ages of judges as Fidesz’s attempt to dismiss particular judges and appoint new ones<sup>10</sup>. The Article 258 proceeding allowed for discourse between the Commission and Hungary, albeit a limited one that would only superficially graze the surface of Hungary’s growing rule of law concerns.

The third step involved the attack on Hungarian civil society organisations, where the *lex CEU* case is concerned<sup>11</sup>. Case C-66/18 was a deliberate attack on CEU, a liberal institution described by its founder George Soros as “a prototype of an open society”<sup>12</sup>, in order to hone the state of free thought that would conflict with Orbán’s plan of constitutional capture. As CEU is linked to many

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<sup>5</sup> Ágh, “Decline of Democracy in the ECE and the Core Periphery Divide: Rule of Law Conflicts of Poland and Hungary with the EU” (2018) *Journal of Comparative Politics*. Vol. 1, No. 2, p. 30.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Gila Stopler, “Special Symposium–Part 2 of 7: Constitutional Capture in Israel” (*Blog of the International Journal of Constitutional Law*, 21 Aug 2017) <<http://www.iconnectblog.com/2017/08/constitutional-capture-israel/>> Accessed 14 Jan 2021.

<sup>9</sup> Ágh, “Decline of Democracy in the ECE and the Core Periphery Divide: Rule of Law Conflicts of Poland and Hungary with the EU” (2018) *Journal of Comparative Politics*. Vol. 1, No. 2, p. 30.

<sup>10</sup> Case C-286/12 *Commission v Hungary* [2012] ECR I–nyr.

<sup>11</sup> Ágh, “Decline of Democracy in the ECE and the Core Periphery Divide: Rule of Law Conflicts of Poland and Hungary with the EU” (2018) *Journal of Comparative Politics*. Vol. 1, No. 2, p. 30.

<sup>12</sup> Franklin Foer, “Viktor Orbán’s War on Intellect” (*The Atlantic*, Jun 2019) <<https://www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070/>> Accessed 10 Jan 2021.

NGOs, lex CEU's effect on civil society organisations was compounded, with various NGO activities put to a halt<sup>13</sup>. *Commission v Hungary* C-66/18 is also often coupled with the *Commission v Hungary* C-78/18 judgement of a similar timeframe, a case that tackled the NGO transparency law which imposed restrictions on the financing of civil organisations, infringing upon free movement of capital<sup>14</sup>.

While Orbán has euphemistically described his plans for the Hungary as an illiberal democracy, this phrase seems to go against the EU, trampling on the values of freedom of thought enshrined in CFR Article 10<sup>15</sup>. Corruption is a major issue, with 87% of Hungarian respondents believing it is widespread within the member state<sup>16</sup>. Following the lex CEU legislation amendment, the Fidesz party's monopoly of power grew, leading to further educational reform. In 2019, Hungary's university system went through extreme privatisation, with government appointees placed on supervisory boards, while in 2020, a Hungarian colonel was placed in charge of the University of Theatre and Film Arts<sup>17</sup>. At this point, the ever-changing reform in Hungary appears to be a blatant violation of EU values, and the lack of sufficient action appears to be enabling the Fidesz party. Hungary's desire to subvert the EU is no doubt a danger to the supranational primacy of the international organisation. Primacy (or supremacy) of the EU is a core legal principle wherein EU law takes precedence over domestic laws of individual MS and is vital to ensuring the protection of liberal and humanitarian EU values across MS—especially in regards to post-communist east-central European states such as Hungary.

While the damage has been done, *Commission v Hungary* C-66/18 has allowed for a more developed evaluation on the rule of law situation in Hungary. In an article titled “Hungary's abuse of the rule of law is now incontrovertible” written by Michael Ignatieff, the president and rector of CEU, he argues that with the conclusions of C-66/18, the CJEU can now no longer deny the clarity of the

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<sup>13</sup> Ágh, “Decline of Democracy in the ECE and the Core Periphery Divide: Rule of Law Conflicts of Poland and Hungary with the EU” (2018) *Journal of Comparative Politics*. Vol. 1, No. 2, p. 30.

<sup>14</sup> Case C-78/18 *Commission v Hungary* [2020] ECR I-nyr.

<sup>15</sup> Charter of Fundamental Rights [2007] OJ C 301/01.

<sup>16</sup> Commission Staff Working Document, “2020 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary” (European Commission, 30 Sep 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0316>> Accessed 11 Jan 2021.

<sup>17</sup> Michael Ignatieff, “Hungary's abuse of the rule of law is now incontrovertible” (Financial Times, 7 Oct 2020) <<https://www.ft.com/content/de45e58c-aac7-423e-9862-142d4abee160>> Accessed 28 Dec 2020.

Hungarian rule of law conflicts<sup>18</sup>. The issue of what steps the EU is to take from here will be explored in the following sections of the essay.

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<sup>18</sup> Ibid.



## Lex CEU Judgment Implications on Rule of Law Proceedings

The Lex CEU judgment has allowed the EU to develop their response to the value conflict with Hungary, evolving from their previous surface-level approach. Past approaches to tackling the Hungarian rule of law problem have been described by Professors Mark Dawson and Elise Muir as “both firm in appearance and hesitant with regard to content”<sup>19</sup>. The 2012 European Commission Press Release addressing Hungary’s attempts of judicial dominance threatened three infringement proceedings regarding fundamental rights matters, one of which was pursued in the aforementioned Case C-286/12 on retirement ages of judges<sup>20</sup>. However, the cautious and pragmatic tone of the document did not sufficiently capture the severity of the issue in Hungary at the time, let alone the further conflicts that would ensue in the next few years. Dawson and Muir also argued that even the most well-established EU fundamental rights policies, anti-discrimination and data protection law is rarely used to address the large-scale constitutional problems arising in Hungary<sup>21</sup>, especially considering the state’s media pluralism and discriminatory LGBTQ+ laws<sup>22</sup>.

Following the start of the lex CEU case, there appears to be a more fervent attitude to tackling rule of law concerns. Lex CEU gained international attention for its attack on one of the most progressive and significant universities in east-central Europe. The 2020 Rule of Law Report Country Chapter addressing Hungary was very comprehensive in outlining issues relating to the constitutional conflicts, such as the nation’s corruption and lack of checks and balances, amongst other pressing issues<sup>23</sup>. The change in language is important to note, and reflects the impact of the *Commission v Hungary* C-66/18 on the view of the rule of law and Hungary’s constitutional capture. But even with an apparent change in view, has this led to any utilisation of appropriate EU competences? September 2018 saw the EU utilise its resolution competences, triggering Article 7(1)

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<sup>19</sup> Mark Dawson and Elise Muir, “Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law” (2013) 14 *German Law Journal* 1959. Vol. 4, No. 10, p. 15.

<sup>20</sup> European Commission Press Release, “Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary” (European Commission, 25 Apr 2012) <[https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en)> Accessed 11 Jan 2021.

<sup>21</sup> Mark Dawson and Elise Muir, “Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law” (2013) 14 *German Law Journal* 1959. Vol. 4, No. 10, p. 15.

<sup>22</sup> Commission Staff Working Document, “2020 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary” (European Commission, 30 Sep 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0316>> Accessed 11 Jan 2021.

<sup>23</sup> Ibid.

TEU proceedings against Hungary for their serious breaches of rule of law, an infringement proceeding that has never been carried out to term<sup>24</sup>. Despite this, there seems to be a slow pace to genuine change, which will be explored in the following section.

Lastly, in regards to EU subsidiarity, or limits to the EU's responsibility, it can be strongly argued that undergoing EU competences is both appropriate and necessary. The EU has a responsibility to uphold the integrity of their rules and values, as well as an independent role in protecting EU citizens. Considering the grave state of Hungary's constitutional capture, respecting Hungary's national constitutional sovereignty should come second.

### **Lex CEU, Article 258, and Other Rule of Law EU Competences**

Another way to evaluate the significance of the lex CEU case is in relation to its implications on the effectiveness of the Article 258 of the TFEU, amongst other legal tools. The use of this infringement procedure was effective for the issue at hand, as the C-66/18 judgement was the first major judicial case on academic freedom as a fundamental right<sup>25</sup>, expanding the scope of CFR Article 10's freedom of expression to include academic institutions<sup>26</sup>. It was an extensive judgement that ultimately saved one of the most significant academic institutions in east-central Europe - however, when looking at the broader idea of rule of law concerns, and the systemic breakdown of the Hungarian constitution, Article 258 of the TFEU can be quite easily contested against other EU rule of law competences.

The type of resolution mechanism is important to evaluate as each procedure has potential lasting consequences on both EU values and the MS. The Rule of Law Report 2020 clearly outlines four main EU competences to respond to breaches of rule of law and curb further damage: The Article 258 TFEU enforcement procedure for infringements of EU law, the Article 7 TEU treaty instrument for serious breaches, the Rule of Law Framework 2014 (RoLF), and a new proposed

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<sup>24</sup> Ibid.

<sup>25</sup> Renáta Uitz, "Finally: The CJEU Defends Academic Freedom" (*Verfassungsblog*, 8 Oct 2020) <<https://verfassungsblog.de/finally-the-cjeu-defends-academic-freedom/>> Accessed 11 Jan 2021.

<sup>26</sup> "Commission v. Hungary (Higher education)" (*Global Freedom of Expression*) <<https://globalfreedomofexpression.columbia.edu/cases/commission-v-hungary-higher-education/>> Accessed 30 Dec 2020.

regime of conditionality to protect the EU budget - mostly relevant to the current Poland-Hungary bloc of refusing to fund the EU Covid-19 recovery package<sup>27</sup>.

The Commission has sought multiple Article 258 enforcement procedures against Hungary, as it acts as a routine procedure to regulate breaches of EU rules<sup>28</sup>. While in C-66/18, this was seen as a relatively effective procedure that resulted in the eventual win for the institution and development in CJEU jurisdiction, there were also various weaknesses to this mechanism. The CJEU took over three years for the judgement to be finalised, and by then, the damage had already been done: CEU was forced to move its teaching to Austria, incurring nearly €200m in additional expenses in its relocation of students and faculty<sup>29</sup>. This labelled Hungary as the first European state to expel a university since the 1930s<sup>30</sup>. Even with the European Court of Justice's apparent rush in shortening Hungary's pre-litigation preparation period<sup>31</sup>, the use of Article 258 to combat lex CEU proved to be slightly overcomplicated and prolonged. Ágh even goes on to argue that such a state that consistently tries to exploit its EU membership and subvert its primacy like Hungary "would be ready and happy to engage in a friendly dialogue with the Commission", implying that such mechanism does not sufficiently hold them to account, nor yield any positive long-term consequences<sup>32</sup>. However, as described before, Article 258 is a routine procedure aimed at targeting specific breaches, and is necessary for this reason alone. *Commission v Hungary* C-66/18 shows that it is still an integral part of the EU legal framework, allowing for the actionable development of EU law.

C-66/18 appears to have somewhat paved the way for, or at the very least, contributed to the decision of the "nuclear option" of the Article 7 TEU procedure, which was triggered against Hungary in September of 2018, just a year after it was triggered for the first time against Poland<sup>33</sup>. It

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<sup>27</sup> European Commission, "Rule of Law Report 2020" (Rule of Law Mechanism Factsheet, Sept 2020) <[https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_mechanism\\_factsheet\\_en.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_mechanism_factsheet_en.pdf)> Accessed 11 Jan 2021. content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0316> Accessed 11 Jan 2021.

<sup>28</sup> Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326/46.

<sup>29</sup> Michael Ignatieff, "Hungary's abuse of the rule of law is now incontrovertible" (Financial Times, 7 Oct 2020) <<https://www.ft.com/content/de45e58c-aac7-423e-9862-142d4abee160>> Accessed 28 Dec 2020.

<sup>30</sup> Ibid.

<sup>31</sup> Petra Bárd "A Strong Judgment in a Moot Case: Lex CEU before the CJEU" (*RECONNECT*, 12 Nov 2020) <<https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>> Accessed 31 Dec 2020.

<sup>32</sup> Attila Ágh, "Decline of Democracy in the ECE and the Core Periphery Divide: Rule of Law Conflicts of Poland and Hungary with the EU" (2018) *Journal of Comparative Politics*. Vol. 1, No. 2, p. 33.

<sup>33</sup> Ibid.

is often perceived as a solution to breaches of the specific EU values enshrined in Article 2 TEU, but because it never been fully carried out, EU actors tread cautiously when using it, with no guarantee of its effectiveness<sup>34</sup>. Article 7 is often seen as a last resort for the EU, as pursuing this long, arduous dispute mechanism could cause irreparable damages to the culture of cooperation and collegiality among MS, as well as the sovereignty of Hungary. Many cautious EU members would prefer a more civil proceeding, such as the RoLF. However, with Hungary's decade-long resistance and clear systemic breakdown, it could be argued that further RoLF dialogue is not enough.

The European Council's RoLF was born out of the lack of a legal tool for a midway point between the routine Article 258 and the Article 7 procedure, and the recognition of certain long-running systemic problems of rule of law<sup>35</sup>. Rather than taking a punitive approach, RoLF attempts to neutralise ongoing threats through holistic dialogue<sup>36</sup>. While this may appear to be less political or aggressive, for authoritarian states like Hungary, it is unrealistic and likely ineffective. RoLF is premised on voluntary compliance by the offending MS, and gives recalcitrant countries the opportunity to exploit the dialogue and compromise to fit their own agenda<sup>37</sup>. Given that Hungary's resistance has spanned over a decade, RoLF appears to be a futile attempt that would only undermine the integrity of EU values. As this can enable Hungary to stall or strategise their approach, genuine improvement is further delayed<sup>38</sup>. Thus, it can argued that the September 2018 triggering Article 7 without prior RoLF dialogue was not a hasty approach at all.

Ágh argues that Article 7 is more of a symbolic event than anything, considering it has never been carried out in its entirety to date. The first preventative phase, Article 7(1) TEU, has proved to be rather fruitless so far, with little to no change on Hungary's end. On January 16<sup>th</sup> of 2020, the European Parliament claimed that the situation in Hungary as well as Poland has deteriorated<sup>39</sup>. This is due to the 'backseat' position that the EU has chosen to take, considering the lack of action-

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<sup>34</sup> Consolidated Version of the Treaty on European Union (2012) OJ C 326/15.

<sup>35</sup> Communication from the Commission to the European Parliament and the Council "A new EU framework to strengthen the rule of law" (European Commission, 11 Mar 2014) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN>> Accessed 15 Jan 2021.

<sup>36</sup> Renáta Uitz, "The perils of defending the rule of law through dialogue" (2019) *European Constitutional Law Review*. Vol. 15, Issue 1, p. 3.

<sup>37</sup> Ibid.

<sup>38</sup> Renáta Uitz, "The perils of defending the rule of law through dialogue" (2019) *European Constitutional Law Review*. Vol. 15, Issue 1, p. 12.

<sup>39</sup> European Parliament, "Ongoing hearings under article 7(1) of the TEU regarding Poland and Hungary" (European Parliament, 16 Jan 2020) <[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.pdf)> Accessed 11 Jan 2021.

forcing deadlines. The 2020 Parliament report on the proceedings suggests now is the time to increase the momentum on the Article 7 proceedings through strict deadlines<sup>40</sup>. However, even if the proceedings progress quickly to the Article 7 (2-3) sanctions mechanism, this would still require unanimity in determining the existence of a serious and persistent breach amongst MS and further majority voting to fully suspend rights, which could be difficult to ensure.

That leaves EU's latest innovation of the administrative regulation of conditional EU budget protection, which appears to be a potentially powerful mechanism to opt for. Rather than severe sanctions, it allows the bodies of the EU to suspend, reduce, or restrict access to EU funding<sup>41</sup>, and a constructive dialogue and delegation of powers between the Commission, the Parliament, and the Council to reach an agreement<sup>42</sup>. Considering that Hungary is one of the MS that receives the highest amount of EU funding<sup>43</sup>, this new proposal may be the perfect alternative to addressing the rule of law concerns in a way that will not have as severe repercussions on the collegiality between MS. The new regime of conditionality of the EU budget will be very beneficial for the protection of EU budget in the midst of other ongoing proceedings, while preventing unnecessary division among MS who are split between the importance of defending EU values<sup>44</sup>.

For the reasons of upholding states to the standard of EU's values in the short-term, Article 258 is an important tool to correct divergence in MS and EU law. The EU is in the midst of its Article 7 battle with Hungary—it appears that the best option to take from here is to utilise the various EU rule of law competences in conjunction with each other. As shown in the *lex CEU* judgement and other post-Article 7 trigger infringement proceedings, the combination of Article 7 TEU and Article 258 TFEU is necessary to correct both short-term breaches, and tackle the underlying systemic rule of law issues; meanwhile, EU budget protection discussions should take place between the EU

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<sup>40</sup> Ibid.

<sup>41</sup> European Commission, "Rule of Law Report 2020" (Rule of Law Mechanism Factsheet, Sept 2020) <[https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_mechanism\\_factsheet\\_en.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_mechanism_factsheet_en.pdf)> Accessed 11 Jan 2021.

<sup>42</sup> Nanette Neuwahl and Charles Kovacs, "How the EU can better protect the rule of law in member states" (*The London School of Economics*) <<https://blogs.lse.ac.uk/europpblog/2020/05/08/how-the-eu-can-better-protect-the-rule-of-law-in-its-member-states/>> Accessed 11 Jan 2021.

<sup>43</sup> Mark Dawson and Elise Muir, "Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law" (2013) 14 *German Law Journal* 1959. Vol. 4, No. 10, p. 15.

<sup>44</sup> Nanette Neuwahl and Charles Kovacs, "How the EU can better protect the rule of law in member states" (*The London School of Economics*) <<https://blogs.lse.ac.uk/europpblog/2020/05/08/how-the-eu-can-better-protect-the-rule-of-law-in-its-member-states/>> Accessed 11 Jan 2021.

bodies as another dispute resolution mechanism to protect not only EU funds, but also the rule of law values.

## **Conclusion**

The lex CEU case was significant in the EU's approach to rule of law proceedings and showed the need for ongoing Article 258 infringement proceedings in expanding EU law. As one of the most important cases in recent years, it led to an incontrovertible view of the severity of Hungary's systemic rule of law issues. At a glance, *Commission v Hungary* C-66/18 may have appeared to save just one institution—but in reality, it opened doors to more discussions and developments of legal frameworks to save the EU from states that intended to subvert its primacy. From here, based on the future actions of the EU, particularly the proposed regime of conditionality to protect EU budget, it may lead to effective reform through the enactment of EU competences.

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## Drugs and African Americans in a racialised America: explaining the mass incarceration of African Americans through Critical Race Theory frameworks

After 2020, the term 'Black Lives Matter' has been widely recognised as a symbol of solidarity for the racially motivated murder of George Floyd. However, according to Chloe Banks, most of us tend to ignore the preceding history and socio-economic struggles BLM aims to highlight.<sup>1</sup> BLM is 'not a moment, but a movement'; a movement that "draw[s] attention to the social, economic, and political inequalities faced by African Americans."<sup>2</sup>

Using theoretical frameworks embedded in Critical Race Theory (CRT), this article contributes to the BLM movement by developing a potential response to the question—Why are so many African Americans incarcerated? The preceding question is, however, too broad to answer in one go. Therefore, to explain this carceral injustice, this article tries to answer two sub-questions through the lens of CRT: 1) How did African Americans reach this degree of mass incarceration, and why are they racially stereotyped as drug users or criminals? 2) Why are African Americans unable to recuperate from this curse of mass incarceration?

It concludes; 1) that the differentialized racialisation of African Americans in the 1980s perpetuated misleading stereotypes into the minds of the American people. This racialisation made racism ordinary; the usual way society does business. As a result of this ordinariness, African Americans were incarcerated at disproportionate rates in America; And 2) African Americans are unable to recover from this curse of incarceration because the U.S. judiciary and legislature try to— in a society where racism is ordinary— analyse the constitution in a colour-blind manner. Colour-blindness only addresses egregious and explicit forms of racial discrimination because racism is concealed within America's laws, hierarchies, and legal systems to subordinate the black race. America seems hesitant to consider these flaws in its system because of a clear interest divergence that would cause the dispossession of a white privilege.

Before embarking on theoretical discussions concerning CRT, it is important to first describe CRT and its counter-storytelling methodology.

Mari Matsuda describes critical race theory as—

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<sup>1</sup> Chloe Banks, 'Disciplining Black activism: post-racial rhetoric, public memory and decorum in news media framing of the Black Lives Matter movement (2018) 32 Continuum 709, 711 *see also* Associated Press and Fox News, "Black Lives Matter Activists Aim To' Reclaim'MLK As Radical".(Fox News, January 16,2017) <<http://www.foxnews.com/us/2017/01/16/black-lives-matter-activists-aim-to-reclaim-mlk-as-radical.html>> accessed 13 July 2021

<sup>2</sup> *ibid*

*"The work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that work toward the elimination of racism as part of a larger goal of eliminating all forms of subordination."*<sup>3</sup>

CRT first posits that white supremacy does exist, and although not explicit in words and actions, white supremacy is systematically galvanised through the law and policies incumbent in society. Though, to really understand CRT's purpose, we must ask: can any change be achieved by discussing theories that seem abstract to countless individuals?

A CRT aims to oppose the false narrative that crime in black societies is a cultural problem; Anzaldúa explains that theories are essential tools for rewriting false histories of race, class, gender, and ethnicity perpetuated by dominant ideologies. By using various theories as categories of evaluation, we can protest false beliefs and dismantle bigoted frameworks.<sup>4</sup> Anzaldúa continues,

*"Borderland worlds of ethnic communities and academies . . . social issues such as race, class, and sexual difference are intertwined with the narrative and poetic elements of a text, elements in which theory is embedded. In our mestizaje theories we create new categories for those of us left out or pushed out of existing ones. "*<sup>5</sup>

This article utilises the methodology of 'counter-story telling' posited in CRT to explain realistic and multidimensional views of racism to its readers. As mentioned above, CRT aims to dismantle majoritarian false ideologies because they act as shields protecting the self-interest and privilege of the dominant class in U.S. society.<sup>6</sup> Counter-story telling analyses the experiential knowledge of African Americans and deems it vital to understanding racial subordination. It challenges the 'ahistoric...focus of most analyses' by analysing racism through its various historical contexts.<sup>7 8</sup> Counter-storytelling can be used to expose these majoritarian ideologies which form racist and mono-vocal assumptions about minorities; these stories and counter-narratives can then strengthen the socio-economic and political resistance against racism.<sup>9</sup>

First exploring through 'differentiated racialisation' how black people were demonised in the drug wars of the 1980s, CRT explains prejudicial perceptions about race, drug use, and drug users. This is because those prejudicial perceptions represent the "social value of drug addicts"<sup>10</sup> which allow society to rationalise and distribute socio-economic blame for drugs and crime to African

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<sup>3</sup> Mari J. Matsuda, 'Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction' (1991) 100 The Yale Law Journal 1329, 1331

<sup>4</sup> Gloria Anzaldúa, *Haciendo carás, una entrada* in Melanie Kaye/Kantrowitz (ed), *Making Faces, Making Soul = Haciendo Caras : Creative and Critical Perspectives of Feminists of Color* (1990)

<sup>5</sup> Ibid p25-26

<sup>6</sup> Daniel G Solórzano and Tara J Yosso, 'Critical race methodology: Counter-storytelling as an analytical framework for education research (2002) 8 Qualitative inquiry 23 see also for a further understanding of CRT's counter-story telling objectives— John O. Calmore, 'Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World' (1991) 65 S Cal L Rev 2129

<sup>7</sup> Ibid p26-27

<sup>8</sup> Ruben J Garcia, 'Critical race theory and Proposition 187: The racial politics of immigration law' (1995) 17 Chicano-Latino L Rev 118, applies counter-story telling to analyse proposition 187's 'ahistoric' racialisation of Latin-American immigration into the U.S.

<sup>9</sup> Daniel n(6) p 27,28,29 & 32

<sup>10</sup> Merrill Singer and J. Bryan Page, *The Social Value of Drug Addicts : Uses of the Useless* (Taylor & Francis Group 2013)

Americans.<sup>11</sup> Differential Racialisation makes racism 'ordinary'; the usual way society does business. The article then focuses on highlighting examples of 'institutional racism' perpetuated by colour-blind approaches to litigation; it uses the framework 'interest convergence' to explain this ordinariness. Further, this article also concludes that America's policies, laws, and judicial systems need to abandon the notion of 'colour-blindness' and acknowledge the existence of a white privilege. Racism truly diminishes as an evil in society when this white privilege is recognised.

### ***1) How did African Americans reach this degree of mass incarceration? and why are African Americans racially stereotyped as drug users or criminals in America?***

African Americans have long faced unjust and disproportionate incarceration rates<sup>12</sup> – the rationalisation of these facts are often equivocally attributed to the former's crime and drug abuse rates. Dr Eduardo Bonilla-Silva describes how white majoritarian elites have— over time—developed 'powerful explanations and false narratives that explain 'contemporary racial inequality', essentially allowing them to shift socio-economic responsibility for anti-social activities to African Americans.<sup>13</sup> For example, saying that the high incarceration rates amongst African Americans is attributable to a cultural problem disregards all historical and contemporary contexts of slavery and institutional racism from the narrative.

A major body of work within the CRT comprises of its criticism of modern liberalism. It posits that modern liberalism is inefficient in fighting racism. Dr Bonilla-Silva developed four central frames— abstract liberalism, naturalisation, cultural racism, and minimisation of racism— largely used by (white) U.S. society to perpetuate racial inequality while denying it concurrently.<sup>14</sup> A large amount of critique on modern liberalism is directed to the practice of abstract liberalism, which uses the political and economic ideologies of equal opportunity and free choice to avoid tackling real race-related issues like the underrepresentation of minorities in high-paying occupations.<sup>15</sup> This is done by standing behind phrases and practices such as "equal opportunity."<sup>16</sup> As mentioned before, dominant narratives form their stories devoid of any historical context of racial subordination.

On the other hand, an example of a narrative reinforced by CRT and counter-story telling would be the 1619 project initiated by the New York Times. It aimed, with the help of different essays and poems, to

*"reframe American history by ... plac[ing] the consequences of slavery and the contributions of black Americans at the very center of the story we tell ourselves about who we [USA] are as a country."*<sup>17</sup>

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<sup>11</sup> Katherine Fornili, 'Racialized Mass Incarceration and the War on Drugs: A Critical Race Theory Appraisal' [2018] 29(1) J Addict Nurs 65, 72

<sup>12</sup> Allen J Beck and Paige M Harrison, 'Bureau of justice statistics bulletin: prisoners in 2000' (2001) Washington, DC: U.S. Department of Justice tbl.16. This talks about how the rate of incarceration for African American males nationwide was 3457 per 100,000 but was 449 per 100,000 for white males.

<sup>13</sup> E Bonilla-Silva, Racism without racists: Colorblind racism and the persistence of racial inequality in America (4<sup>th</sup> ed.). Lanham, MD: Rowan & Littlefield Publishers (Inc 2014)

<sup>14</sup> Megan Allen, 'Processes of racialisation through media depictions of transracial violence' (2016) 11-13

<sup>15</sup> *ibid*

<sup>16</sup> *Ibid*.

<sup>17</sup> Nikole Hannah-Jones and others, The 1619 project : New York Times magazine, August 18, 2019 (2019) 4

The project tried to explain U.S. history through the African American perspective. The author [Nikole Hannah-Jones] believes— through her essay 'America Wasn't a Democracy Until Black Americans Made It One' – that African Americans fought for the rights and freedoms of modern America.<sup>18</sup> This project is a quintessential example of counter storytelling because it tries to change majoritarian narratives about U.S. history by placing African Americans in the spotlight.

We can now use counter-storytelling to explain untold narratives and experiences that challenge the equivocations mentioned earlier vis-a-vis the incarceration of African Americans.

In 2000, the rate of incarceration for African American males nationwide was 3457 per 100,000. In comparison, the rate of incarceration for white males was 449 per 100,000.<sup>19</sup> To explain the antecedent facts of incarceration, we must inspect the timeline of this leap in mass incarceration. In the 1980s, America witnessed heavy drug abuse from the 'crack epidemic' of cocaine spreading in their streets; the government declared a drug war in 1982.<sup>20</sup> At the time, studies conducted in New Jersey indicated that white people were twice as likely to carry drugs than black people.<sup>21</sup> In 1992, the U.S. Public Health Service Substance Abuse and Mental Health Services Administration reported that 76% of drug users were white while 14% were African American. Cocaine users were reported to be 66% white, 17.6% Black, and 15.9% Hispanic.<sup>22</sup>

When cocaine, after years, finally hit the neighbourhoods of African Americans, "the Reagan administration hired staff to publicise the rise of crack cocaine in 1985 as part of a strategic effort to build public and legislative support for the [drug] war."<sup>23</sup> The term '**Differential Racialisation**' spearheads the narrative in this area of history; prejudicial perceptions of black people were augmented by the government and media so as to allow (white) society to politicise and distribute racial-socio-economic blame for the drug war.<sup>24</sup> The American media was soon swollen with images (visual and figurative) of black men associated with drugs and crime.<sup>25</sup>

Delgado and Stefancic define '*Differential Racialisation*' as processes where "the dominant society racializes different minority groups at different times" [and] popular images and stereotypes of various minority groups shift over time."<sup>26</sup> Omi and Winant explain the term 'racialisation'

*"as: . . . the extension of racial meaning to a previously racially unclassified relationship, social practice, or group . . . Racial profiling for example, may be understood as a form of racialisation. Racial categories, and the meanings*

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<sup>18</sup> Ibid 16-22

<sup>19</sup> Allen n(12)

<sup>20</sup> Michelle Alexander, *The New Jim Crow : Mass Incarceration in the Age of Colorblindness* (The New Press, 2010) 48-49 , see also - Marc Mauer, 'The changing racial dynamics of the war on drugs' (JSTOR, 2009)

<sup>21</sup> David A Harris, *Profiles in injustice: Why racial profiling cannot work* (The New Press 2003) 80

<sup>22</sup> Sentencing Policy, 'THE CRACK/COCAINE PENALTY RATIO: RECOMMENDATIONS TO CONGRESS' (1995) 7 Federal Sentencing Reporter

<sup>23</sup> Michelle n(20) 5

<sup>24</sup> Merrill n(10) 25

<sup>25</sup> HW Wilson, *Crime coverage in media perpetuates racial stereotypes*. in Christopher Benson (ed), *The Reference Shelf: Racial Tension in a "Postracial" Age* (Grey House Publishing 2016) 10-12

<sup>26</sup> Richard Delgado and Stefancic Jean, *Critical race theory: An introduction*, vol 20 (N.U. press, 2017) 9-10

*attached to them .....have crystallised through the genealogies of competing religious, scientific, and political ideologies and projects. These are so to speak the raw materials of racialisation"* <sup>27</sup>

An essential facet of racialisation must be noted; the authors describe 'competing political ideologies' as a raw material of racialisation. One can infer that political parties use 'racialisation' as a tool to create crises that demand public intervention and governmental support. We shall see below that the events that motivated the drug war were primarily political. Ergo, we can confirm that differential racialisation is the suitable CRT framework to examine the infamous drug war. To understand the theory of differential racialisation and why African Americans were racialised by the Government, we must inquire into i) the motivations behind the differential racialisation of African Americans during the drug war and ii) how prejudicial perceptions of African Americans were formed by the American media.

White Americans would think that the drug war and the perceived affinity of African Americans to the drug war and crime has a lot to do with culture or that they are 'natural occurrences.' Bonilla-Silva describes this as Naturalization and cultural racism.<sup>28</sup> In actuality, African Americans being incarcerated in such high numbers and their perceived association with crime directly results from systematic racism **motivated** by white socio-economic and political interests. It has more to do with differentiated racialisation than any 'natural occurrence'.

Hence, to understand why African Americans have this false image of themselves with inordinate rates of incarceration, we must inquire into:

i) the motivations of this differentiated racialisation: why were they racialised by the media and the Reagan government in the first place?

According to Michael Tonry, the drug war was fought primarily for political reasons to display that the Reagan and Bush governments cared about public safety, crime prevention and drug abuse.<sup>29</sup> Many citizens viewed drugs and crime as a growing menace to society, and the same citizens were ready to vote for Reagan and (George H W) Bush. As a result, politicians tapped into this growing public sentiment against drugs.<sup>30</sup> In William Elwood's words,

*"Such rhetoric allows presidents to appear as strong leaders who are tough on crime and concerned about domestic issues and is strategically ambiguous to portray urban minorities as responsible for problems related to the drug war and for resolving such problems."* <sup>31</sup>

This growing public sentiment against drugs and crime can be viewed as epicentral to the origins of the drug war. To reach their (White dominant) vote-banks and constituencies, it was relatively convenient for Reagan and Bush to display African Americans as criminals and drug abusers who prolong anti-social activities. Elwood mentions that this prejudicial and institutional violence

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<sup>27</sup> Michael Omi and Howard Winant, *Racial Formation in the United States* third edition ed (Routledge/Taylor & Francis Group, New York 2015) 111

<sup>28</sup> Bonilla-Silva, *racism without racists: Colorblind racism and the persistence of racial inequality in America* (4<sup>th</sup> ed.), Lanham, MD: Rowan & Littlefield Publishers

<sup>29</sup> Michael Tonry, *Malign Neglect: Race, crime, and punishment in America* (Oxford University Press 1995) 82

<sup>30</sup> Steven Wisotsky, *Beyond the war on drugs: Overcoming a failed public policy* (Prometheus Books Buffalo NY 1990) 4

<sup>31</sup> William N Elwood, *Rhetoric in the war on drugs: The triumphs and tragedies of public relations* (Greenwood Publishing Group 1994) 3

amplified the worst stereotypes of black people to (white) society.<sup>32</sup>The Reagan administration essentially launched a PR campaign to change the public perception of drug use and drug users. The focal point of this public relations campaign was a new rhetorical and technological strategy, pioneered by the American media, that demonised African American drug users.<sup>33</sup>

ii) How prejudicial perceptions of African Americans were formed by the American media.

Broadcast news has transformed how Americans receive information. Before it, information was principally received by newspapers. Watching crime news has become a daily routine for many American citizens.<sup>34</sup> A study found that crimes reported by the local Baltimore media were chosen specific to their interracial magnitude (Black on white crime).<sup>35</sup> News stories were picked by how good of a story they could tell their audience. Research has also shown that race is a crucial factor in the selection of a crime story in America.<sup>36</sup> Selecting news based on the races of the victims not only racializes a specific race, but it also perpetuates prejudicial perceptions about that specific race.<sup>37</sup>

Earlier in this article, political ideology was introduced as a raw material of racialisation. According to scholars like Noam Chomsky, Edward Herman and Jason Stanley, media institutions operate as propaganda machines that produce flawed news and narratives from the perspective of powerful interest groups.<sup>38</sup> This phenomenon has been theorised as the 'propaganda model.'<sup>39</sup> Jason Stanley explains how the government and local political organisations act as nodes in the transfer of information through the media.<sup>40</sup> The media and U.S political institutions being interdependent, "allows the whole media system to be rapidly deployed in the service of propaganda in times of supposed emergenc[ies]"<sup>41</sup> like the drug war. Instead of being tools of information and investigation, the media became a propaganda machine that 'unif[ied] the masses behind the decisions' of these powerful interest groups<sup>42</sup>(U.S socio-political institutions).The media was essentially used as an ideological tool to racialize African Americans in the drug war.

The point mentioned earlier indicates that the media holds significant control over public opinion and perceptions. Jaclyn Schildkraut and Amy M Donley mention a consequence of the former: the ability of the media to influence policy decisions through its sway over public opinion.<sup>43</sup> They explain that the American media has a history misrepresenting crime and creating "a world of crime and justice that is not found in reality"<sup>44</sup> This begs a reiteration from counter-storytelling;

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<sup>32</sup> Ibid at 11

<sup>33</sup> Ibid 3

<sup>34</sup> Megan n(14) 16, see also Robert Bing, *Race, Crime and the Media*, (McGraw-Hill 2010)

<sup>35</sup> Jaclyn Schildkraut and Amy M Donley, 'Murder in black: A media distortion analysis of homicides in Baltimore in 2010' (2012) 16 *Homicide Studies* 175

<sup>36</sup> Jeff Gruenewald, Steven M Chermak and Jesenia M Pizarro, 'Covering victims in the news: What makes minority homicides newsworthy?' (2013) 30 *Justice Quarterly* 755

<sup>37</sup> Megan n(14) 15

<sup>38</sup> Edward S Herman and Noam Chomsky, *Manufacturing consent: The political economy of the mass media* (Random House 2010)

<sup>39</sup> Jason Stanley, *How propaganda works* (Princeton University Press 2015) 241

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Ibid 242

<sup>43</sup> Jaclyn n(35)

<sup>44</sup> Ray Surette, *Media, crime, and criminal justice: Images and realities*. Pacific Grove, CA: Brooks (Cole Publishing Company 1992) 242

*"they [told] us how to think about crime by showing it to us in blackface. Mug shots and orange jumpsuits are more likely to be shown in T.V. reports when the accused is a person of color"*<sup>45</sup>

The use of Willie Horton in the presidential campaign of 1988 was an example of how African Americans were racialised for white political and social interests. Willie Horton was a convicted criminal who was used by the Bush campaign in 1988 to play directly into the 'dog whistling' strategy of political campaigning to secure white votes.<sup>46</sup> Adverts containing a picture of his black and white mugshot were injected into the screens of white Americans. The adverts conveyed a suggestive message of crisis without declaring one: that Bush's opponent (Dukakis) was ineffective in dealing with violent crime.<sup>47</sup> However, in this process, African Americans were stereotyped as violent criminals. In Willie Horton's words:

*"[I] was created to play on racial stereotypes: big, ugly, dumb, violent, black — 'Willie'. I resent that. They created a fictional character — who seemed believable, but who did not exist."*<sup>48</sup>

At this time, false assumptions about African Americans were being adopted, and cognitive links between drugs and African Americans were being developed in the minds of the American people. It was not long before African Americans were seen as stereotypical drug dealers and criminals. Again, this is an operational example of cultural racism being reinforced in the minds of the American people. The former results in the thinking that African Americans being associated with drugs is a 'natural occurrence'. As elucidated above, they are not natural occurrences but a result of systemic racism.

Thus began the racial profiling practices, heavy policing, and the tragic mass incarceration of African Americans. During this time, the incarceration rates of coloured people skyrocketed, and in less than 30 years, America had imprisoned more than 3 million people while leading the world in the imprisonment of its minorities<sup>49</sup>. As Michelle Alexander notes, America has imprisoned more black people than South Africa in the peak of its apartheid<sup>50</sup>

## ***2) Why are African Americans unable to recover from this curse of incarceration?***

This differentialized racialisation of African Americans during the 1980s woefully made racism (vis-à-vis prejudicial perceptions about drug abuse, crime and African Americans) ordinary in U.S. Society. **Ordinariness** is defined as the 'usual way society does business.'<sup>51</sup> It was ordinary to see

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<sup>45</sup> HW Wilson, Crime coverage in media perpetuates racial stereotypes. in Christopher Benson (eds), The Reference Shelf: Racial Tension in a "Postracial" Age (Grey House Publishing 2016) 10-12

<sup>46</sup> Ian Haney López, Dog Whistle Politics : How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class (Oxford University Press, Incorporated 2014) 105-107

<sup>47</sup> *ibid*

<sup>48</sup> Tony Platt, Beyond these walls: Rethinking crime and punishment in the United States (St. Martin's Press 2019) 208

<sup>49</sup> Marc Mauer, Race to Incarcerate revised ed. (The New Press, 2006), 33

<sup>50</sup> Michelle n(20) 6

<sup>51</sup> Richard n(26) 8



African Americans as drug users, when in fact, white Americans used and sold more drugs than the former.<sup>52 53</sup> According to Stabile:

*"Mass media representations of black and white criminals and black and white victims gave new life to forms of institutionalised racism and reinvigorated an array of racist narrative practices that had lain dormant for a decade."*<sup>54</sup>

A survey in 1995 asked the following question to Americans: "Would you close your eyes for a second, envision a drug user, and describe that person to me?"<sup>55</sup> Ninety-five per cent of participants pictured an African American<sup>56</sup>, when drug use rates, as stated before, were the highest amongst white Americans. Minorities were then naturally exposed to ordinary and subtle forms of everyday racism. Chandra L. Ford, and Collins O. Airhihenbuwa, explain that in response (to the ordinary forms of racism), minorities learn how to ignore certain acts of racism because of how frequently they are exposed to it.<sup>57</sup> It becomes ordinary. For example, Craig Futterman at the University of Chicago would describe the experiences of his students who spectated in police patrols to black neighbourhoods:

*"Each time we drove into a public housing project and stopped the car, every young black man in the area would almost reflexively place his hands up against the car and spread his legs to be searched. And the officers would search them. The officers would then get back in the car and stop in another project, and this would happen again. This repeated itself throughout the entire day. I couldn't believe it. This was nothing like we learned in law school. But it just seemed so normal—for the police and the young men."*<sup>58</sup>

Critics of CRT like Jeffrey J. Pyle argue that CRT undermines the rule of law because it precludes the guilty agent of the crime from the causal narrative of carceral injustice.<sup>59</sup> They argue that CRT fails to account for the African American criminals who have disregarded the rule of law by committing crimes. Again, indicating that crime in African American communities is a 'cultural' issue. A popular critique of CRT by Farber and Sherr asked a similar question: If the game is rigged against minorities, what about the success of Jews and Asians in America?<sup>60</sup>

To respond directly to Farber and Sherr, CRT scholars in the Harvard Law Review argue that it is one thing to critique an unfair system, but quite another to critique people who do well inside that unfair system.<sup>61</sup> Let us take a step back and consider the historical circumstances African Americans had to endure. Aside from being enslaved and segregated, African Americans were also wrongly demonised by U.S. institutions. The previous point is precisely what this paper explains: that

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<sup>52</sup>David n(21)

<sup>53</sup>Kenneth B Nunn, 'Race, crime and the pool of surplus criminality: or why the war on drugs was a war on blacks' (2002) 6 J Gender Race & Just 381, 395

<sup>54</sup>Carol A Stabile, White victims, black villains: Gender, race, and crime news in U.S. culture (Routledge 2006) 150-160

<sup>55</sup>Betty Watson Burston, Dionne Jones and Pat Roberson-Saunders, 'Drug use and African Americans: Myth versus reality' (1995) 40 Journal of Alcohol and Drug Education 19, 20

<sup>56</sup>ibid

<sup>57</sup>Chandra L Ford and Collins O Airhihenbuwa, 'Critical race theory, race equity, and public health: toward antiracism praxis' (2010) 100 American journal of public health S30, S34

<sup>58</sup>Michelle n(20) 125

<sup>59</sup>Jeffrey J Pyle, 'Race, equality and the rule of law: Critical race theory's attack on the promises of liberalism' (1998) 40 BCL Rev 787,788

<sup>60</sup>Daniel A Farber and Suzanna Sherry, 'Is the radical critique of merit anti-Semitic' (1995) 83 Calif L Rev 853

<sup>61</sup>Richard n(26) 103-104

through the differentialized racialisation of African Americans in the 1980s, an 'internalised fear of young black men' was created by the media and the government, reinforcing the image of the black man as a criminal. Practices like racialisation and racial profiling made incarcerating African Americans ordinary, the usual way society does business.

Consequently, 80 per cent of all black people in major cities ended up with criminal records and, 75 per cent of all black youths were likely to be imprisoned in their lives.<sup>62</sup> African Americans were the most oppressed minority in America; they were led into the curse of incarceration by white America. Therefore, it is fallacious to apportion blame for mass incarceration to the guilty African American fugitive.

CRT also uses the framework of 'ordinariness' to criticise 'colour-blindness': a way of the law and government to reaffirm that their constitution sees no colour while guaranteeing equal civil rights for its citizens.<sup>63</sup> It is onerous to curb racism because, being ordinary, it is often not recognised or acknowledged in a colour-blind society.<sup>64</sup> In its introduction, this article claimed that racism would truly mitigate as an evil when colour-blindness is abandoned. Many judges, authors and race scholars claim that the key to fighting racism is to not see race in any circumstance. Michelle Alexander notes: "Civil rights leaders are quick to assure the public that when we reach a colourblind nirvana, race consciousness will no longer be necessary or appropriate."<sup>65</sup> However, this ideology is coincidentally a force that perpetuates and maintains racism in U.S. society.<sup>66</sup> To say that racism can be solved by not seeing race is to imply that racism is a visual phenomenon that can be eradicated by being blind to the concept of race. This is a flawed ideology. Racism is fuelled by a certain structural ignorance which leads to the subordination of a particular class.

Martin Luther King Jr once noted that the people who decided the Jim Crow laws and declared slaves three-fifths of a man were not 'evil' men.<sup>67</sup> They were decent men intoxicated by a certain ignorance: "They were victims of a spiritual and intellectual blindness. They knew not what they did. The whole system of slavery was largely perpetuated through spiritually ignorant persons."<sup>68</sup> This ignorance is, of course, the bigoted belief that the white class is superior to the coloured class and should have privileges conserved by racial segregation, slavery and racial subordination. Therefore, by staying colour-blind, we keep the superficial evils of racism at bay but turn a blind eye to the ignorance that causes people to be racist. Colour blindness hinders us from considering the institutional racism that exists in society, the segregated schools that existed, jobless black communities, and "the segregated public discourse—a public conversation that excludes the current pariah caste."<sup>69</sup> The preceding is what makes colour-blindness unfair and, in a way – racist. It does not seem just to racially subordinate a class for centuries and then not see race all of a sudden. Doing so would disregard the socio-economic conditions that African Americans have endured for centuries. Most importantly, it makes us blind to the injustice that they face.

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<sup>62</sup> Michelle n(20) 7

<sup>63</sup> Richard n(26) 27, see also *Plessy v. Ferguson* 163 U.S. 537, (1896) per J Harlan

<sup>64</sup> Ibid 8

<sup>65</sup> Michelle n(20) 240

<sup>66</sup> ibid 240-245

<sup>67</sup> Ibid 241

<sup>68</sup> ibid 241-242

<sup>69</sup> ibid

Take the example of Justice Harlan (dissenting) in *Plessy vs Ferguson*. (1896):

"(O)ur constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law..... The law regards man as man and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." <sup>70</sup>

Justice Harlan declared the constitution colour-blind to all 'men'. However, he looked past the fact that until 28 years ago, article 1, section 2 of the U.S. Constitution would have considered enslaved men— mostly African Americans— three-fifths of a man.<sup>71</sup> This is yet another example of a-historic narratives being formed by the dominant group. A more polar example of the former would be the comments made by Justice Clarence Thomas in 1995:

*"As far as the constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged... In each instance, it is racial discrimination, plain and simple."* <sup>72</sup>

Justice Thomas essentially tries to be objective towards race in litigation. Katzenbach and Marshall reply to Justice Thomas's comments:

*"It is very nearly as if this court has simply mandated that what is the country's historic struggle against racial oppression and racial prejudice cannot be acted upon in a race-conscious way—that the law must view racial problems observable by all as if oppression and prejudice did not exist and had never existed."* <sup>73</sup>

There are several problems with the line of thought laid down by the courts above. Neil Gotanda in 1991 explained that to ignore racial difference and race, one must first recognise its precursory existence.<sup>74</sup> This is because, although race is not recognised in America, one cannot unrecognize something without first accepting a virtue of recognition. In other words, non-recognition does not exist in a vacuum, it derives from a previous form of recognition. Hence, if a subject is defined by its negation or non-recognition, it implies a previous phase of recognition and discrimination.<sup>75</sup> By not recognizing race and racism, we cannot truly solve racial discrimination as a social evil. We simply close our eyes to the superficial aspects of racism and allow its structural aspects (the ignorance which MLK talked about) to continue. To see racial classifications as objective, according to Gotanda, deprives race of its 'highly contextualised' and 'deeply embedded political meanings'.<sup>76</sup> Colour-blindness discounts the historical fact that since the founding of America, race has been an

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<sup>70</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)

<sup>71</sup> Staughton Lynd, 'The compromise of 1787' (1966) 81 *Political Science Quarterly* 225

<sup>72</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–1 (1995)

<sup>73</sup> [Nicholas Katzenbach and Burke Marshall, "Not Color Blind: Just Blind." in N. Katzenbach, and B. Marshall (eds), *Sex, race, and merit: Debating affirmative action in education and employment* (University of Michigan Press 2000)]

<sup>74</sup> Neil Gotanda, 'A Critique of "Our Constitution is Color-Blind"' (1991) *Stanford Law Review* 1,23

<sup>75</sup> *ibid*

<sup>76</sup> *Ibid* 6

indicator of property and privilege, not a neutral category as it has recently become.<sup>77</sup> Therefore, the analysis of the constitution in a colour-blind manner, as Gotanda states—

*"fails [in] recogniz[ing] connections between the race of an individual and the real social conditions underlying a litigation or other constitutional dispute"*<sup>78</sup>

There have been numerous instances where a colour-blind approach in litigation and legislation has barred the emergence of serious legal reforms vis-a-vis African Americans. Consider *McCleskey v Kemp*<sup>79</sup>, where although the defendants had shown an amplitude of evidence and statistics to indicate that black people were subjected to disproportionate rates of death sentences, the court impractically demanded evidence of conscious and explicit racism to scarcely consider the appeal.<sup>80</sup> Or the discriminatory '100 to 1' laws mandated by congress, where the sale of five hundred grams of powder cocaine triggered a five-year sentence, while only five grams of crack triggered the same sentence.<sup>81</sup> In a fairer context, one would have to consider that 93% of all 'crack' dealers were black while powdered cocaine dealers were principally white.<sup>82</sup> Nevertheless, the Eighth Circuit Court of Appeals found no credible evidence ascertaining racial bigotry in said laws<sup>83</sup> per *McCleskey v. Kemp*. The courts have also gone so far as to require evidence of racial discrimination as a prerequisite to sanctify an inquiry which was dedicated to finding the former.<sup>84</sup>

The preceding facts indicate that racism is not egregious in day-to-day America but enforced through its laws, courts, and police systems; racial discrimination is institutionalised in America. Nonetheless, U.S institutions seem hesitant to consider these flaws and lacunas in their system. This reluctance can be explained using CRT. The term '**Interest convergence**' was propounded by Derrick A. Bell in his critique of the *Brown v Board* decision. It posited that "The interest of blacks in achieving racial equality will be accommodated, only when it converges with the interests of whites."<sup>85</sup> Derrick Bell explained how declaring racial segregation in schools unconstitutional did not mitigate the existence of racism or white privilege. Racial reform, according to him, can be classified as i) Direct reform and ii) Spatial and Accessory reform.<sup>86</sup> Justin Stec adds that spatial reform is

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<sup>77</sup> Sabini Ancy Annamma, Darrell D Jackson and Deb Morrison, 'Conceptualising color-evasiveness: Using dis/ability critical race theory to expand a colorblind racial ideology in education and society (2017) 20 Race Ethnicity and Education 147, 149

<sup>78</sup> Neil n(74) 6

<sup>79</sup> 481 U.S. 279(1987)

<sup>80</sup> Michelle n(20) 109-112

<sup>81</sup> Anti-Drug Abuse Act of 1986 Pub. L. 99-570, 100 Stat. 3207, now made 18 to 1 by The Fair Sentencing Act of 2010 Pub.L. 111-220

<sup>82</sup> Michelle n(20) 113

<sup>83</sup> *United States of America v. Edward James Clary*, 34 F.3d 709 (8th Cir. 1994)

<sup>84</sup> *United States v. Armstrong*, 517 U.S. 456 (1996) see also Michelle n(18) 115,117

<sup>85</sup> Derrick A Bell Jr, 'Brown v. Board of Education and the interest-convergence dilemma' (1980) Harvard law review 518, 523

<sup>86</sup> Ibid see also Justin Stec, 'Deconcentration of Poverty as an Example of Derrick Bell's Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities' (2007) 2 Nw J.L. & Soc Poly 30,

*"based on denied material goods because of earlier spatial exclusion. To 'fix' the historical problem of denial was to change a spatial aspect of inequality, pushing it toward the notion of assimilation or integration as a paradigmatic (and correct) norm."*<sup>87</sup>

Bell posited that only spatial and accessory reforms take place for minorities as the primary beneficiaries of such reforms are the whites.<sup>88</sup> For example, Mary Dudziak, while carrying out archival research in the Department of State and Justice, discovered countless memos that indicated the motivation of the Brown case to be "the United States' interest in improving its image in the eyes of the Third World."<sup>89</sup> It must be noted that the opposite definition of interest convergence irrefutably holds; that when the interest of the dominant white group diverges with that of the black group, petitions for reform are resisted by the former. A momentary example of this 'interest divergence' would be the resistance towards affirmative action (from white America) during the civil rights movement

Bell argues that direct reforms cause an interest divergence; this is because direct reforms happen on an institutional level and require the dispossession of a certain privilege held by the dominant group. Cheryl Harries argues that whiteness is a form of property that white people own and would not like to give up.<sup>90</sup> She embodies white privilege into property, which has its interests and benefits.<sup>91</sup> This interest divergence hinders any progressive constitutional analysis that could lead to reforms for African Americans. White America realises that to eradicate institutional racism, they would have to give up this white privilege. To really mitigate racism as an evil in society, the U.S legislature and judiciary must first recognise white privilege as a force that hinders reforms for African Americans. Once white privilege is recognised, reforms can be introduced in the appropriate context of who it benefits. In conclusion, African Americans are unable to recover from this curse of incarceration because the U.S. judiciary and legislature try to— in a society where racism is ordinary— analyse the constitution in a colour-blind manner.

## Conclusion:

In his trial, Derek Chauvin had his lawyer bring up George Floyd's opioid addiction to defend what he did. However, the critical question remains, was the death of George Floyd a result of his opioid addiction? Or was he a tragic consequence of institutional racism in America? Through the lens of CRT, we see that the American carceral system is systemically flawed against African Americans. The American government and the media in the 1980s had first differentially racialised the African American community to 'shift and rationalise' socio-economic blame for the drug war. This led to a situation of ordinariness, with blacks being demonised and portrayed as stereotypical drug dealers

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<sup>87</sup> Stec J, 'Deconcentration of Poverty as an Example of Derrick Bell's Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities' (2007) 2 Nw J.L. & Soc Poly 30, 31

<sup>88</sup> *ibid*

<sup>89</sup> Richard n(26) 23 see also Mary L Dudziak, 'Brown as a Cold War case' (2004) 91 The Journal of American History 32

<sup>90</sup> Cheryl I Harris, 'Whiteness as property' (1993) Harvard law review 1707

<sup>91</sup> *ibid*

and criminals. This ordinariness and institutional racism remain due to the lack of an 'interest convergence' between the whites and the blacks.

America's policies, laws, judicial systems, and social structures need to abandon notions of 'colour-blindness' and acknowledge the existence of a white privilege to eradicate the evil of racial discrimination. White privilege endorses structural racism, not egregious racism. By staying blind to the long-term consequences of structural racism, America allows its black community to suffer under the carceral state. The carceral state has historically been prejudiced against African Americans and left the latter worse off than they would have been. This mass incarceration of African Americans by the white class has trapped the black community in a socially deteriorating cage. After serving time, "a wide variety of laws, institutions, and practices—ranging from racial profiling to biased sentencing policies, political disenfranchisement, and legalised employment discrimination" <sup>92</sup> quash any socio-economic effort of rehabilitation for African Americans.

The First, and perhaps most crucial step towards true socio-economic rehabilitation lies in the hands of the U.S judiciary. The U.S. judiciary must contextualise its law with regards to the centuries of institutional racism and subordination against African Americans. It must recognise why<sup>93</sup> and how<sup>94</sup> African Americans are more likely to be incarcerated. Doing so would assure equity for African Americans, not institutional racism hidden behind the cloak of equality.

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<sup>92</sup> Michelle n(20) 184

<sup>93</sup> By this I mean the mass racialisation of African Americans which made racism institutional and ordinary in U.S. society.

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# A critique of Commodity-Form theory as an explanation of legal relations and legal equality in today's world

## Introduction

The work of Evgeny Pashukanis is arguably the most influential contribution to our understanding of the legal form underlining our democratic capitalist society. My aim is to establish Pashukanis' commodity-form theory as a cogent explanation for the foundations of modern-day society, and demonstrate the theory's enduring ability to explain legal relations and maintain legal equality in our twenty-first century.

Postulated in his 1924 work *The General Theory of Law and Marxism*, Pashukanis' commodity-form theory draws its foundations from the extensive work of Karl Marx. The theory rests on two premises: (1) that every legal relation within our system of democratic capitalism only exists because of and is governed by the relationship formed through the exchange of commodities between two 'legal subjects'<sup>1</sup>, and (2) the concept of a legal form in any capacity could not have been formulated without the commodity-form of exchange as a prerequisite<sup>2</sup>.

In its search to explain legal relations and legal equality, commodity-form theory, therefore, aims to provide answers for two fundamental questions that continue to dominate the field of legal theory today. The first queries whether it is economic conditions that have historically given rise to the existence of a legal system or vice versa. The second concerns the extent to which the legal relations created within this legal form lend themselves to advancing international law as an influential force in the global sphere. The latter has been built upon by the likes of China Mieville and Wolfgang Streeck, and I will be using this critique to establish Pashukanis' contribution as the pinnacle of Marxist legal theory.

## Marx and Pashukanis: *Capital* and Commodity-Form Theory

An integral element within the field of legal theory is the use of abstractions to encourage evolution of the system of law. Through analogisation, theorists such as Marx and Pashukanis have been able to translate concepts into theories without overlapping with the 'concrete totality' of society, population and the state – which Pashukanis proposes should be the final stage of our conclusions rather than the starting point<sup>3</sup>.

In his seminal work *Capital*, Marx demonstrates the significance of the **commodity** within bourgeois capitalist society. He defines the commodity as 'a thing that by its properties satisfies

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<sup>1</sup> E Pashukanis, *The General Theory of Law & Marxism* (3rd edn, Transaction Publishers 2003) 68.

<sup>2</sup> *ibid* 12.

<sup>3</sup> E Pashukanis, *The General Theory of Law & Marxism* (3rd edn, Transaction Publishers 2003) 66.

human wants of some sort<sup>4</sup>, and suggests that, in order for a good to be classed as a commodity, it must qualify based on how much value can be attached to the good. These are divided into three sub-categories: use value, exchange value, and labour value.

The **use value** of a commodity is 'limited by the physical properties of the commodity' and only comes into the equation 'by use or consumption' of the commodity<sup>5</sup>. The use value of a commodity is arguably the most basic measure of the object's value, and therefore holds no weight independently of the exchange and labour values. The **exchange value** of a commodity derives from the value attached to the object when it is to be exchanged with another, and the corresponding values are often in proportion to each other. As a result of this principle, independent of any knowledge we may possess of how the market functions, the assumption is that there must be proportionate exchange values attached to various quantities of each commodity in order for there to be barometers of value in the market.

To understand the value of the commodity within the context of the market, therefore, it is more effective for us to assess the **labour value** - and, specifically, the *human* labour (in order for an object to be classed as a commodity, it must be the yield of human labour<sup>6</sup>). Marx proposes that, within the market, the commodity develops a value that isn't necessarily proportional to the amount of labour put in, and the commodity would be better described as a 'social thing whose qualities are at the same time perceptible and imperceptible by the senses'<sup>7</sup>. By this, he is referring to the way commodities are *fetishised* once their life cycle reaches the stage of creating social relations by transaction.

This concept of **commodity fetishism** - the imposition of a market value on a commodity that far exceeds its factual labour value - happens most often when disproportionate emphasis is placed on the exchange value of the commodity, and creates increased demand in the market. This naturally leads to an increase in the price of the commodity<sup>8</sup>, creating artificial scarcity in order to drive up the exchange value of a commodity.

When aligned with Marxist theory at its core, the values of democracy appear inherently contradictory with the above principles of exchange under a capitalist system; this has been addressed by Pashukanis' commodity-form theory. The theory asserts that our legal system rests upon the requirement of a pre-existing economic system; law and order is derived from the need for regulation of the market. Legal relations are afforded a central role within the economic form, as the autonomous legal subjects under this system are using their free will to create contracts between each other. These contracts are predicated on the desire to trade the yields of their respective labour for money - the most valuable commodity in our society<sup>9</sup>.

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<sup>4</sup> K Marx, *Capital: A Critique of Political Economy* (1st edn, Progress Publishers 1887) 27.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid* 29.

<sup>7</sup> K Marx, *Capital: A Critique of Political Economy* (1st edn, Progress Publishers 1887) 48.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid* 60.

Pashukanis' commodity-form theory is already an analogy explained through parallels drawn between objective legal form and Marx's economic theory of commodity form, all contextualised within our capitalist society. Nevertheless, further analogising this theory aided me in my own pursuit of understanding what Pashukanis is proposing:

Imagine the idea in the context of a playground. Two children are playing with toys in a playground – Child A has a toy that Child B wants, and Child B begins to demand or even tries to snatch the toy out of Child A's hands. An adult onlooker of this exchange would mediate the interaction by telling Child B that he must give Child A something in return for the toy, in order for both of them to play *fairly*. Child B's desire for Child A's toy *necessitated* the need for the adult to impose some sort of regulation in order to maintain an objectively equitable relationship between both children.

According to Pashukanis' theory, man's innate desire for various objects necessitated the need for an external evaluation of the 'value' of objects. This led to the creation of laws to govern the equitable exchange of goods and the competing rights which arise from this exchange.

Pashukanis' commodity-form theory came at a time of pivotal socio-economic evolution. Its positive reception was already guaranteed by the conditions of a bourgeois capitalist society in its infancy following the Russian Revolution of 1917. While criticism of Pashukanis is sparse and he is even referred to as “*the Marxist theoretician of the law*” by R. Koen<sup>10</sup>, there are a few potential criticisms.

Firstly, the legal form created by Pashukanis is only applicable to legal relations created between *individuals* through the exchange of commodities in the market, ignoring the unalienable rights and civil liberties endowed to citizens by their government. By arguing that all forms of legal relations in a bourgeois capitalist society flow from the existence of a contract which testifies this exchange<sup>11</sup>, his theory fails to account for the relationship between the individual and the state. Arguably this relationship is based on an *unspoken* contract, in which one party owes a duty (to respect civil liberties) to the other in reliance of reciprocated cooperation (adhering to the legal limits of such liberties), so this definition within the theory is still sound.

Another common criticism identifies the lack of reference to any substantive law, with Pashukanis' theory only identifying areas of private law. However, this evaluation is unfounded, as Pashukanis' premise is founded on the suggestion that society has evolved as “the precipitation of a political authority as a separate power, functioning alongside the purely economic power of money”<sup>12</sup>. His theory inherently acknowledges this criticism by explaining that our society has evolved to derive legal relations out of human relations based on how we interacted with each other to keep up with the inevitable evolution of a capitalist society in Europe and the West.<sup>13</sup>

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<sup>10</sup> R Koen, 'In Defence of Pashukanism' [2011] 14(4) Potchefstroomse Elektroniese Regsblad (PER) 107.

<sup>11</sup> E Pashukanis, *The General Theory of Law & Marxism* (3rd edn, Transaction Publishers 2003) 43.

<sup>12</sup> *ibid*, 40.

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

However, to posit a nuanced interpretation of the theory, it is commodity production rather than commodity exchange that forms the basis of the legal form. While Pashukanis contends that the legal form is found within the exchange of commodities, in light of Marxist propositions, it may be more accurate to trace this back to commodity production. Marx's emphasis on human labour as a vital metric for value implies that the true, *unfetishised* form of the commodity - and therefore the corresponding legal form - is what lays the foundations of human interaction. As a result, it should in fact be the social relations created by trading individual labour that parallel legal relations created between legal subjects, and not the exchange of the physical commodities.

### **Miéville and Streeck: Commodity-Form Theory of International Law**

China Miéville has been described as a “doctrinaire Marxist”<sup>14</sup>; his work falls in line with the views of Marx and Pashukanis, but translates commodity-form theory into the field of international law.

To Miéville, law is an essential element within capitalism<sup>15</sup>. Taking the common consensus that the rule of law maintains peaceful coexistence under capitalist democracy, Miéville subverts this to instead suggest that the field of international law is dominated by whichever imperial power exercises the superior amount of force, because ‘the exchange of commodities is itself a process fraught with coercion, as each subject struggles to take advantage of the other and thus seizes goods rather than pay a fair exchange value’<sup>16</sup>. As supremacy in our market-based society derives from who is able to accumulate the greatest amount of wealth in the form of commodities, supremacy within the sphere of international law is awarded to whoever aggressively pursues this accumulation of wealth. Marx's explanation of commodity fetishism is therefore laid bare as the process by which the powerful who have control over the markets maintain their supremacy – through creating artificial scarcity in order to keep the upper hand.

Miéville agrees with Pashukanis' position that the development of a capitalist society necessitated the development of a legal system, tying into Streeck's analysis of why capitalism emerged as the triumphant legal ideology in the face of communism. Other legal scholars, namely B. S. Chimni, voice similar doubts about the solvency of international legal theory. Chimni queries the extent to which imperialism is still a relevant force today, and therefore the extent to which it has the power to shape the nature and character of international law in the twenty-first century<sup>17</sup>.

### **The Status of Commodity-Form Theory Today**

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<sup>14</sup> A Carty, 'Review: Marxist International Law Theory as Hegelianism' [2008] 10(1) International Studies Review 122.

<sup>15</sup> C Miéville, 'The Commodity-Form Theory of International Law: An Introduction' [2004] 17(2) Leiden journal of international Law 107.

<sup>16</sup> A Carty, 'Review: Marxist International Law Theory as Hegelianism' [2008] 10(1) International Studies Review 124.

<sup>17</sup> BS Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' [2012] 14(1) Oregon Review of International Law 18.

At the most fundamental level, commodity-form theory can be critiqued on the basis of how seamlessly we can apply it to society today. This can be assessed by examining the factors required for democratic capitalism to thrive, and the extent to which these factors remain a secure element in modern economic conditions and legal relations.

To begin with, the commodity must be established as a central constituent to the modern legal form – this is easy to prove when viewed in light of both Marx and Pashukanis' commentary on the legal relations arising from the exchange of commodities. Firstly, it is clear that every relationship created by these contractual transactions requires regulation by the law. Often, we consent to the creation of certain rights and obligations through contracts we may not even be explicitly aware of. I recall observing this in everyday life when an image of Diane Abbott drinking alcohol on a Transport for London (TfL) overground train went viral. Though drinking on public transport is not explicitly made illegal by the state (i.e. by statute), it is illegal to drink on TfL trains by virtue of TfL rules, and we consent to adhering to these rules as if they were laws when we purchase a ticket to make use of the company's services. In this instance, we exchange money (a yield of our human labour) for the right to use TfL's services (the 'commodity'), and the exchange and accompanying creation of rights/obligations is embodied in the train ticket which acts as a contract.

Furthermore, the necessity of the 'commodity' in our modern legal form is also demonstrated through the necessity to be in possession of a commodity in order to participate in the market in the first place. Possession of a commodity is meaningless unless there are legal rights dictating your relationship with the commodity.

Pashukanis proposes equality and free will as factors ingrained at the heart of commodity-form theory. When two legal subjects enter into a transaction of commodities, they "enter a relationship of equality" with a mutual "recognition of free will" from both parties.<sup>18</sup> . The issues facing equality today imply that the theory is contradictory to Marxist principles and our system of democratic capitalism. On its surface, inequality is often dealt with as an ethical issue, but when viewed through the lens of commodity-form theory, we learn that it is in fact an important, even essential element for the market to operate. When everyone has the power to be a buyer and a seller, the market flourishes. Instead, inequality of wealth, opportunity, and legal rights all mean that the market today cannot thrive to its maximum capacity<sup>19</sup>.

Streeck suggests that the qualities of capitalism are intertwined with the values of equality and fairness intrinsic to democracy. This, he argues, has resulted in our modern day system of democratic capitalism, a consequence of economic progress which has made it possible for more people to participate in the market<sup>20</sup>. However, despite market participation being intrinsic to a

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<sup>18</sup> E Pashukanis, *The General Theory of Law & Marxism* (3rd edn, Transaction Publishers 2003) 'Introduction to the Transaction Edition' xiii.

<sup>19</sup> W Streeck, 'How Will Capitalism End?' [2014] 87(3) New Left Review 37.

<sup>20</sup> *ibid* 40.

flourishing market, commodity fetishism has in part led to a deficit in widespread public participation in the market due to the extortionate exchange values of many commodities.

In recent history, long periods of austerity in the UK have further compromised potential for social economic equality and independence for large amounts of the population. As a result of the decision to take austerity measures to balance the national deficit, the country's welfare system has taken a hit. To achieve this, in 2019, the government made an estimated £30 billion worth of spending reductions to welfare payments, housing subsidies and social services<sup>21</sup>, which has in turn led to compromised government protection of equality in the market.

This has opened the current system up to increased criticism as it is seen as an authoritarian decision, and has therefore brought the fundamental functionality of democratic capitalism into question. When fewer people have the means to participate in the market due to surges in inflation and the price of quotidian commodities, the market cannot thrive to meet its potential, because – put simply – when people have less, they spend less. In this way, the government's austerity measures have induced compromised public confidence in a system which should champion legal equality, in addition to a disintegration in the practical factors required for the market and system to remain functional.

The disarray that Brexit has left the economy in has yielded diminished trust in the sovereignty of parliament. The indecisiveness of government has precipitated not only depleted confidence of the electorate, but also market uncertainty. When the economic system is in flux, the integrity of the government of the day is brought into question; they are seen to be undermining innumerable legal obligations owed to the electorate - for example, the duty to honour a swift execution of the electorate's will to exit the European Union. This results in the compromised reputation of democratic capitalism throughout the world, as Britain is one of the nations regarded as a proponent of a regulated free market.

## **In Conclusion**

At a fundamental level, the question to answer is whether Pashukanis' commodity-form theory was devised with enough substance to have accurately described and even potentially driven the development of bourgeois capitalist society into our modern-day system of democratic capitalism.

From my own reading of his work, I am tempted to come to the conclusion that a significant element of why Pashukanis' theory was received so positively, why it has been so convincing, and why it has endured, is the humble charm with which it was posited. While numerous theorists have lauded his work as exemplifying, in his own words, he maintains that, "the basic thesis, namely that the legal subject of juridical theories is very closely related to the commodity owner, did not, after Marx, require any further substantiation."<sup>22</sup>

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<sup>21</sup> B Mueller, 'What Is Austerity and How Has It Affected British Society?' (The New York Times, 24th February).

<sup>22</sup> E Pashukanis, *The General Theory of Law & Marxism* (3rd edn, Transaction Publishers 2003) 38.

As a theorist, Pashukanis has sensibly and successfully submitted an informed explanation of the legal skeleton upon which our society rests. By grounding his ideas in established Marxist principles and theory, Pashukanis has created an elaborate theory which has stood the test of time by continuing to be an applicable ideal for legal relations and equality under the law today. I believe that any of the modern issues that I have explored in this essay can be attributed to a failure to translate this theorised legal form into reality, and honour the rule of law as it should be, rather than any inherent flaw in Pashukanis' work.

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# “These are Unprecedented Times” The Position of the Clinical Negligence System in the UK in Light of the COVID-19 Pandemic

## Abstract

The COVID-19 pandemic has posed new challenges to many areas of English law, not least the established clinical negligence system. As the virus continues to circulate 18 months after first arriving in the UK, with health staff operating under immense pressure, it is inevitable that mistakes by medical professionals will have transpired. Currently, patients can utilise the clinical negligence system to claim redress if they can prove they were owed a duty of care, this duty of care has been breached and has resulted in foreseeable harm. Whilst such a system may have previously proved effective in ensuring medical professionals are held accountable for their shortcomings, with a potential influx of claims facing an already strained redress system, it is clear that measures need to be taken to rectify the current procedure. Government legislation as well as additional guidance have been issued in order to provide some additional protection to medical professionals, with calls even emerging to grant immunity from arising claims. However, these are all temporary quick fixes. This paper seeks to demonstrate that given the rise in clinical negligence claims prior to the outbreak of the pandemic, it would appear reform of the current system would be a more sustainable long term solution.

## Introduction

“These are unprecedented times”<sup>1</sup> is a phrase we have all become accustomed to hearing since the outbreak of the SARS-CoV-2 pandemic (COVID-19) in December 2019. The impact of the pandemic has been huge, with hospitals in the UK filled to capacity and major challenges unfamiliar to the NHS. Under such pressure, and with finite resources, it is arguably inevitable that mistakes will have materialised<sup>2</sup>. In ‘normal’ times, patients on the receiving end of such errors can claim redress through the established clinical negligence system if they can prove a medical professional owed them a duty of

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<sup>1</sup> M Hancock, ‘Health and Social Care Secretary’s statement on coronavirus (COVID-19): 2 April 2020’ (2 April 2020) <<https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-COVID-19-2-april-2020>> accessed 22 February 2021.

<sup>2</sup> W Teo and others, ‘Medicolegal Sidebar: Legal Immunity for Healthcare Workers During COVID-19’ (2020) 478 Clinical Orthopaedics and Related Research 2218, 2218.

care, this duty of care was breached, and this breach caused the patient's suffering. But since the emergence of COVID-19, times have hardly been 'normal'. Consequently, there have been calls from medical professional groups and many medico-legal academics for the government to rectify the present system to adapt to the current climate. However, concerns about the suitability of the clinical negligence framework are not unique, with extensive scholarship exploring the issue, alongside discussions of reform in Parliament.<sup>3</sup>

This article analyses the UK clinical negligence landscape in the context of COVID-19 to consider whether the existing framework is sufficient to meet the challenges presented by the pandemic or whether reform is necessary. It will do so by first providing a background of how the current system operates, and then offering a critical analysis of the existing legal framework to understand why reform may be necessary. Finally, reform options will be explored to question whether are adequate to amend the current systems weaknesses, before concluding with suggestions for the future in a post COVID-19 world.

## **I. Background**

In the UK, clinical negligence law is generally the exercise of the tort of negligence, defined by Winfield as "the breach of a legal duty to take care by an inadvertent act or omission that injures another"<sup>4</sup>. The legal system surrounding medical malpractice performs a variety of functions. Not only do such proceedings seek to ensure that the party injured as a result of negligence receives compensation for any losses, where successful, they provide a way of holding professionals accountable for their actions, acting as a deterrent against poor medical practice. Unfortunately, these two different functions are not always compatible, particularly when challenging clinical circumstances disrupt the balance between a patient's needs and a clinician's other competing professional demands<sup>5</sup>. The variety of circumstances surrounding COVID-19 have clearly challenged this balance, placing a significant strain on health

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<sup>3</sup> HL Deb 31 January 2018, vol 788, cols 1586-1588.

<sup>4</sup> P Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 LQR 184, 184.

<sup>5</sup> *Morrison v Liverpool Women's NHS Trust* [2020] EWHC 91 (QB) [24].

systems globally by demanding large and rapid changes to address increased demands to inpatient care, alongside continuing care for patients with conditions other than COVID-19.

It is important to recognise that while the law of negligence imposes a reasonable standard of care on the defendant, this is not a standard of perfection<sup>6</sup>. We can therefore infer that context aside, there exists some scope for error, which should be embraced during the COVID-19 crisis. As a novel disease, the treatment of which is both labour and resource intensive, there have been many concerns proposed by doctors about what consequences they could face should mistakes be made. In a survey conducted around the peak of the virus's second wave, a study of over 2400 Medical Protection Society members revealed that 61% of participants were concerned about potentially facing investigation due to clinical decisions made whilst working in the high pressure environment of the pandemic<sup>7</sup>. This indicates that the steps in establishing a claim for negligence in the current system could benefit from review to address these concerns.

## **II. Legal Framework**

### **II.I DUTY OF CARE**

As with other cases alleging negligence, to establish liability in a clinical negligence claim, claimants must establish they were owed a duty of care by the defendant, which was subsequently breached, causing foreseeable harm<sup>8</sup>. The existence of a duty of care for patients who have suffered harm within the NHS by a doctor in practice “is seldom challenged”<sup>9</sup>, since the common law holds that once a doctor accepts responsibility for a patient, a duty of care is imposed<sup>10</sup>. Therefore, finding a duty of care owed by a medical professional to a patient in emerging cases is unlikely to be problematic.

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<sup>6</sup> R Mulheron, *Principles of Tort Law* (2nd edn, Cambridge University Press 2020) 288.

<sup>7</sup> Medical Protection Society, ‘UK healthcare leaders unite in call to protect doctors as pressure on health service grows’ (*Medical Protection*, 16 January 2021) <<https://www.medicalprotection.org/uk/articles/uk-healthcare-leaders-unite-in-call-to-protect-doctors-as-pressure-on-health-service-grows>> accessed 15 February 2021.

<sup>8</sup> *Burton v Islington HA* [1993] QB 204.

<sup>9</sup> Department of Health, *Making Amends: A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS* (Department of Health Publications 2003) 51.

<sup>10</sup> *Barnett v Medway NHS Foundation Trust* [2017] EWCA Civ 235.

However, whilst it may be established that doctors owe their patients a duty of care, with the changing conditions brought by COVID-19, discussion has arisen in scholarship as to whether the final year medical students and retired doctors, recruited to provide additional manpower, actually owe such a duty. Particularly in the case of retired clinicians, Johnson and Butcher note professional obligations “would be an unduly extensive duty if understood as a lifelong commitment lasting beyond a professional career”<sup>11</sup>. Although English tort law does not endorse the duty to rescue, requiring all individuals in a position to render aid to those needing help to do so<sup>12</sup>, this does not mean a duty of care cannot be imposed on retired doctors and final year medical students. The leading case of *Caparo Industries Plc v Dickman*<sup>13</sup> provided that a duty of care may arise in an instance where there is foreseeable damage, sufficient proximity between the parties, and imposing such a duty is just and reasonable. Since retired and almost qualified doctors are being ushered onto hospital wards with the purpose to treat patients, which carries a risk of harm occurring, the courts will likely be able to satisfy this test.

Additionally, the General Medical Council (GMC) has stipulated its’ members “must offer help in emergencies”<sup>14</sup>, indicating that it is morally correct for a rescuer type duty to be imposed on all medical professionals. While such guidance illustrates that all medical professionals should expect to owe a duty of care at this time, the guidelines explicitly mention that when undertaking such a duty, one must primarily take account of one’s own safety<sup>15</sup>. This is contentious in the context of the COVID-19 pandemic, since many medical professionals have been placing themselves at risk on a daily basis, particularly pre-vaccination and when Personal Protective Equipment (PPE) was compromised, in order to care for patients<sup>16</sup>. While extensive literature exists on questions regarding when exactly a duty

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<sup>11</sup> S Johnson and F Butcher, ‘Doctors during the COVID-19 pandemic: what are their duties and what is owed to them?’ (2020) 47 Journal of Medical Ethics 12, 13.

<sup>12</sup> D Anantham and others, ‘Clinical review: Influenza pandemic - physicians and their obligations’ (2008) 12 Critical Care 217.

<sup>13</sup> *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

<sup>14</sup> General Medical Council, ‘Good medical practice’ (*General Medical Council*, 25 March 2013) <<https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/good-medical-practice>> accessed 24 March 2021.

<sup>15</sup> *ibid.*

<sup>16</sup> C Pelkas and M Boisseau, ‘Unmasked: A comparative analysis of the physician’s ethical and legal duty to treat during a pandemic’ (2020) 20 Medical Law International 211.

of care is owed by medical professionals, particularly in the context of a pandemic<sup>17</sup>, the remainder of this piece focuses on the controversy of when a duty of care falls below what is expected, and how the COVID-19 pandemic has challenged this perceived standard.

## II.II BREACH OF DUTY OF CARE

COVID-19 is a novel disease. Thus, it presents a set of challenges unique to the clinical setting<sup>18</sup> with discoveries about the spread, effects and treatments ever evolving. In this sense, any disputes arising about a medical professional's standard of care during this time should be treated with special consideration. While there is nothing to indicate that the outlook and approach of medical professionals to their work and patients has changed under the pandemic<sup>19</sup>, it is without question that the clinical environment has altered significantly. As a result, whilst there may exist precedent for dealing with the breach of duties of care that arise during the course of the pandemic, it is unclear how suitable these precedents are for ensuring a fair outcome in light of the current circumstances. Such concerns surrounding the standard of care at this time need to be addressed, both from a patient perspective, as reassurance for the standard of care they receive, and from a doctor's perspective, to know what is expected from them<sup>20</sup>.

The traditional standard of care for medical professionals was established in the *Bolam* case<sup>21</sup>, where McNair J held that a doctor "is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art"<sup>22</sup>. This means

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<sup>17</sup> A Shwartz, 'Doubtful Duty: Physicians' Legal Obligations to Treat during an Epidemic' (2007) 60 Stan.L.Rev 657.

<sup>18</sup> L Stride, 'Clinical negligence in the time of coronavirus' *Hospital Times* (London, 8 April 2020) <<https://www.hospitaltimes.co.uk/clinical-negligence-in-the-time-of-coronavirus/#>> accessed 10 January 2021.

<sup>19</sup> K Duignan and C Bradbury, 'COVID-19 and medical negligence litigation: Immunity for healthcare professionals?' (2020) 88 *Medico-Legal Journal* 31.

<sup>20</sup> I Hogarth, 'Standard of care in a clinical setting during the COVID-19 crisis' (12 *King's Bench Walk Clinical Negligence Law*, 1 June 2020) <<https://clinicalnegligence.blog/2020/06/01/standard-of-care-in-a-clinical-setting-during-the-COVID-19-crisis/>> accessed 17 February 2021.

<sup>21</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

<sup>22</sup> *ibid*, [587] (McNair J).

that the standard expected of a medical profession is not one formulated by a judge<sup>23</sup>, who arguably has limited knowledge and experience of working in a medical setting to be able to give a fair judgement, but is instead one composed by a body familiar with the realities of the frontline care of patients<sup>24</sup>.

While such an objective standard of reasonableness has been widely accepted, it is questionable how a sufficiently consistent and fair level of objectiveness is achievable in the context of COVID-19, given the differing impact on hospitals across the country and throughout the course of the pandemic<sup>25</sup>. One could also query whether the doctors acting as expert witnesses are in the right position to make such a decision, if they themselves have not operated under such extreme conditions. These conditions have resulted in many medical professionals being redistributed outside their specialist area to assist in overcrowded wards, which the *Bolam* principle does not expressly cover<sup>26</sup>. As such, these factors question the suitability of *Bolam* as a precedent for the standard of care to be applied in any claims arising from the COVID-19 period.

Stride observes how the standard of care may not only be questionable to displaced medical professionals working during COVID-19 but also expresses scepticism over the standard of care applicable to the ‘recruits’<sup>27</sup> on the wards, whose training has either not been completed or is potentially outdated<sup>28</sup>. While such measures may not have been taken previously, one cannot assume the situation is unprecedented from a legal perspective. For example, in *Junor v McNicol*<sup>29</sup>, a house surgeon labelled as a ‘comparative beginner’ was deemed a relevant factor by the court. In contrast, the case of *Wilsher v Essex AHA*<sup>30</sup> held that inexperience should not reduce the standard of care expected of a junior doctor.

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<sup>23</sup> Note, a judge may override a decision of a professional body if the practice accepted as proper is not based on logical and defensible grounds. See *Bolitho v City and Hackney Health Authority* [1998] AC 232.

<sup>24</sup> N Poole, ‘Coronavirus and Clinical Negligence’ (2020) 25 *Journal of Patient Safety and Risk Management* 97.

<sup>25</sup> D Hardstaff, ‘Protecting the protectors: Calls for emergency legislation to prevent the prosecution of healthcare professionals when treating COVID-19 patients’ (*BCL Solicitors LLP*, 20 January 2021) <<https://www.bcl.com/protecting-the-protectors-calls-for-emergency-legislation-to-prevent-the-prosecution-of-healthcare-professionals-when-treating-covid-19-patients/>> accessed 26 March 2021.

<sup>26</sup> (n 21).

<sup>27</sup> The standard of care of other ‘recruits’, such as NHS volunteers and volunteer vaccinators, could also be questioned, but this is beyond the scope of this essay.

<sup>28</sup> (n 18).

<sup>29</sup> *Junor v McNicol* [1959] 3 WLUK 103.

<sup>30</sup> *Wilsher v Essex AHA* [1987] QB 730.

Glidewell LJ took a “draconian”<sup>31</sup> view that an inexperienced doctor should be held to the same standards of his experienced colleagues<sup>32</sup>, thereby suggesting that everyone acting on the wards during the COVID-19 pandemic will be held to the same standard of care, including final year medical students. Meanwhile, Mustill LJ’s view that the standard of care was determined by the post a medical professional occupied, not in relation to individuals or their experience<sup>33</sup>, has been endorsed subsequently. In *FB v Princess Alexandra Hospital Trust*<sup>34</sup>, LJ Jackson held that ““relatively inexperienced” [...] does not diminish the required standard of skill and care”<sup>35</sup> whilst in *Darnley v Croydon Health Services NHS Trust*<sup>36</sup> Lord Lloyd-Jones declared that “the standard required is that of an averagely competent and well-informed person performing the function [of the role which is being fulfilled]”<sup>37</sup>. From these cases, we can therefore conclude sufficient precedent exists to hold individuals, whether new, retired or working outside their normal field, to the objective standard of care should mistakes be made during the pandemic.

This gives rise to the subsequent question of whether the current standard of care is fair, or whether it should be amended to take into account changing circumstances. Mulheron notes that only exceptionally do circumstances where the alleged breach occurred impact upon the standard of care expected of medical professionals<sup>38</sup>. On this point, it would not be unreasonable to argue that we are living in rather extraordinary circumstances<sup>39</sup>. To some extent, such statements are supported by the court. Mr Justice Green stated in *Mulholland v Medway NHS Foundation Trust*<sup>40</sup> that “the standard of care owed by an A&E doctor must be calibrated in a manner reflecting reality”<sup>41</sup> indicating that the scenario context must always be taken into account when determining negligence.

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<sup>31</sup> (n 6) 290.

<sup>32</sup> (n 30) 774 (Glidewell LJ).

<sup>33</sup> *ibid*, 751 (Mustill LJ).

<sup>34</sup> *FB v Princess Alexandra Hospital Trust* [2017] EWCA Civ 334.

<sup>35</sup> *ibid*, [63] (LJ Jackson).

<sup>36</sup> *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50.

<sup>37</sup> *ibid*, [25] (Lord Lloyd-Jones).

<sup>38</sup> (n 6) 291.

<sup>39</sup> C Tomkins and others, ‘Should doctors tackling covid-19 be immune from negligence liability claims?’ (2020) 370 BMJ <<https://www.bmj.com/content/370/bmj.m2487>> access 2 November 2020.

<sup>40</sup> *Mulholland v Medway NHS Foundation Trust* [2015] EWHC 268 (QBD).

<sup>41</sup> *ibid*, [101] (Mr Justice Green)



We can take reference from the sort of behaviour expected of medical professionals in a global pandemic from the *Pope v NHS Commissioning Board*<sup>42</sup> case, considering a clinical negligence claim in the context of the H1N1 influenza outbreak in 2009. In *Pope*, it was decided the courts' approach to the issue of clinical negligence remains consistent, even in an unprecedented health crisis<sup>43</sup>. One could argue this is conflicting with the judgement in *Mulholland*, as it suggests context need not be accounted for. Instead, the decision rests solely with whether a reasonable body of medical practitioners would have acted in the same way. Furthermore, it must be recognised that the challenges to medical practice presented by the COVID-19 pandemic are far more extreme than those of the H1N1 influenza outbreak, suggesting the *Pope* judgement lacks applicability in the context of COVID-19.

Additional guidance can be taken by reference to the *Wilsher* case, where Mustill LJ vocalised that the “flexibility inherent in the legal test does cater for such “battle conditions”[...] we are not really looking at a different set of standards”<sup>44</sup>, implying context will always be taken into account, albeit not expressly stated. Indeed, such statement was said in *obiter* so has no binding effect, but nonetheless could still prove influential.

Ultimately, while context may act as a mitigating factor, we can anticipate the expected standard of care to be based on the medical post fulfilled at the time of the alleged negligence and therefore will be no lower than usual. This could be problematic; given the uncertainty of these extraordinary times, it is vital for medical professionals to be granted reassurance that in such challenging conditions, the decisions they make will not come back to haunt them. Scholars have expressed concern that any doubt could give rise to more defensive practices<sup>45</sup>, with doctors subjecting patients to excessive tests and treatment in an attempt to avoid litigation. Badenhoch argues that defensive medicine could actually be

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<sup>42</sup> *Pope v NHS Commissioning Board* [2015] 9 WLUK 380.

<sup>43</sup> *ibid.*

<sup>44</sup> (n 30) 749 (Mustill LJ).

<sup>45</sup> N McBride and R Bagshaw, *Tort Law* (6th edn, Pearson 2018) 95.

regarded as a positive thing, suspecting “many patients would welcome an extra layer of caution in their care and treatment if it reduced the risk of harm”<sup>46</sup>. However, this argument overlooks the fact that such practice places the parties to the doctor-patient relationship in an adversarial stance<sup>47</sup>, not to mention the additional cost incurred<sup>48</sup>, money that could be utilised elsewhere within the health service.

Arguably, this is one of the most compelling arguments for lowering the existing standard of care at this time - to prevent further overwhelming the NHS<sup>49</sup>. Not only will the financial burden arising from claims reduce the funding of vital resources, an additional burden is placed on tax payers, many of whom will already be enduring the harsh economic consequences of the pandemic<sup>50</sup>. Furthermore, any claims risk damaging the morale of staff and will create a huge clinical and administrative burden at a time when NHS worker’s should be celebrated, not degraded. Legal reassurance could preserve such morale, considered to correlate with a higher quality of care<sup>51</sup>.

It must be remembered doctors themselves are not an inexhaustible resource<sup>52</sup>. This is a particularly important point to make when questioning the standard of care in relation to the COVID-19 pandemic, considering the number of clinicians who have been impacted by ill-health or other caring responsibilities, hindered by the fact the NHS was underprepared to deal with a crisis of this scale when referring to the availability of resources<sup>53</sup>. This links back to earlier discussion in part II of this article, as to whether a duty of care is owed in a pandemic. If we are to assume that a duty of care is owed, then the limited resources, such as beds, ventilators and medical staff themselves must be accounted for.

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<sup>46</sup> J Badenhoch, ‘I sue doctors. Why do I sue doctors? Should I sue doctors?’ (2013) 4 Trends in Urology & Men’s Health 8, 9.

<sup>47</sup> G Laurie, S Harmon, E Dove, *Mason and McCall Smith’s Law and Medical Ethics* (11th edn, Oxford University Press 2019).

<sup>48</sup> US Congress Office of Technology Assessment, *Defensive Medicine and Medical Malpractice* (US Government Printing Office 1994).

<sup>49</sup> (n 39).

<sup>50</sup> D Harari, M Keep, P Brien, ‘Coronavirus: Economic impact’ (House of Commons Library, 09 April 2021) <<https://commonslibrary.parliament.uk/research-briefings/cbp-8866/>> accessed 21 April 2021.

<sup>51</sup> A Cioffi and R Rinaldi, ‘Covid-19 and medical liability: A delicate balance’ (2020) 88 Medico-Legal Journal 187.

<sup>52</sup> (n 12).

<sup>53</sup> R Horton, ‘Offline: COVID-19 and the NHS - “a national scandal”’ (2020) 395 The Lancet <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)307273/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)307273/fulltext)> accessed 24 March 2021.

It should also be noted that the question of what constitutes a breach of care during this time extends beyond patients on hospital wards. Thousands of appointments, investigations and treatments have either had to be cancelled or postponed to enable a redirection of resources towards treating those with COVID-19<sup>54</sup>. As a result, many could suffer harm in future from a failure of the health service to adequately care for everyone. However, given the context, it is suggested that so long as reasonable steps to avoid suffering were taken, liability will be avoided, as declared recently in *University College London Hospitals NHS Foundation Trust v MB*<sup>55</sup>, clarifying that where a decision to discontinue in-patient care involves allocation of scarce public resources, a positive duty can only be to take reasonable steps to avoid such suffering<sup>56</sup>

Overall, despite a substantial body of precedent available to refer to when questioning the standard of care in a doctor-patient setting, the COVID-19 crisis has presented a number of scenarios whereby it is unclear to what extent existing precedent may apply. While the test of fair, just and reasonableness could be used to allow the courts to take into account policy considerations and wider context, as done previously to address unprecedented situations<sup>57</sup>, this article seeks to argue that, given the possibility of excess errors occurring, generating a flood of claims in the aftermath of the pandemic, imminent clarification is needed.

To summarise, analysis of existing precedent suggests that it is rather ambiguous as to what standard of care medical professionals should be held to in the context of the COVID-19 crisis, alongside implying that existing precedent may provoke an unachievable standard for doctors to reach at this time.

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<sup>54</sup> A Pritchard and P Phillip, 'Operational performance update' (NHS, 18 March 2021) <<https://www.england.nhs.uk/wp-content/uploads/2021/03/agenda-item-5.1-operationl-performance-update.pdf>> accessed 22 March 2021.

<sup>55</sup> *University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB).

<sup>56</sup> *ibid.*

<sup>57</sup> For example see *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 considering whether those who suffer psychiatric harm from witnessing an event for which they are not physically present are sufficiently proximate for a duty to be owed.

While it has been suggested that clarification of the standard of care is not necessary on the basis that any claims emerging from the redeployment of clinicians and the use of pre-qualified and retired doctors are likely to fail even in the absence of any change to the law<sup>58</sup>, nevertheless, the government has intervened with statutory legislation. In March 2020, the Coronavirus Act 2020 was enacted to provide some sense of security to those on the frontline<sup>59</sup>, with Clauses 11-13 including the powers to grant indemnity for health care workers and others performing NHS activities in relation to COVID-19 in the event of clinical negligence<sup>60</sup>. Such revision ensures medico-legal support for final year and retired medical professionals should errors occur, thereby clarifying their legal position as analogous to that of existing medical professionals. However, the indemnification of staff that would ordinarily not be operating within the NHS comes with the risk of a wide range of cases involving clinical negligence going undetected and therefore unchallenged.

### **III. Discussion**

#### **III.I GOVERNMENT LEGISLATION AND MEDICAL GUIDANCE**

The indemnity granted by the Coronavirus Act provides a safety net in instances where the clinical negligence that may arise would not be covered by pre-existing indemnity arrangements provided to medical professionals. As the Act fails to provide any additional protection, a number of medical bodies have acted to reassure their members that their concerns are being listened to. The National Institute for Health and Care Excellence (NICE) produced a series of COVID-19 “Rapid Guidance”, compiled into a singular document in March 2021<sup>61</sup>, designed to support decision making<sup>62</sup> and advise doctors acting outside their area of specialism. The guidance proposes that the ill-health of patients should be assessed irrespective of COVID-19 status, implying that the presence of the virus alone will not

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<sup>58</sup> H Charles, M Brace, L Boulden, ‘COVID-19 and Clinical Negligence Claims’ (*12 King’s Bench Walk Clinical Negligence Law*, 5 May 2020) <<https://clinicalnegligence.blog/2020/05/05/covid-19-and-clinical-negligence-claims/>> accessed 24 January 2021.

<sup>59</sup> Coronavirus Act 2020.

<sup>60</sup> *ibid*, s11-13.

<sup>61</sup> National Institute for Health and Care Excellence, ‘rapid guideline: managing COVID-19’ (*NICE*, 23 March 2021) <<https://www.nice.org.uk/guidance/ng191/resources/covid19-rapid-guideline-managing-covid19-pdf-66142077109189>> accessed 15 March 2021.

<sup>62</sup> *ibid* - Previously guideline NG159.

eliminate a duty of care, nor will it justify a reduction in the expected standard, regardless of the resources and protection available. Since steps have been taken to accommodate and adapt to the difficult environment and decisions that have arisen as a result of COVID-19, it could be further suggested that there is therefore no need for the standard of care to be reassessed. It should be noted that although the NICE guidelines may be beneficial in justifying decision making, departure from such guidelines is not *prima facie* evidence of negligence<sup>63</sup>. Thus, there could still emerge scenarios falling outside the realm of such guidance where questions about the standard of care still need to be addressed and perhaps refined to suit the current circumstances.

The GMC professional guidance also applies during this time, expressing that regardless of existing precedent, the context of COVID-19 will be taken into account when considering complaints brought against medical professionals<sup>64</sup>. In the peak of the outbreak, this may include departing significantly from established procedures. However, this is ambiguous since it is unclear whether such guidance should apply throughout the course of the pandemic or solely to the points where the NHS was most overwhelmed. While the Medical Defence Union (MDU) has acknowledged that doctors should remain accountable for their actions<sup>65</sup>, the GMC has recognised that special considerations will be applied when investigating claims. Together, these approaches would appear to be a constructive course of action, taking account of the emergency situation but not at the expense of patient safety. These statements do however lack legal certainty, vital to enabling medical professionals to exercise autonomy when treating patients. This is of particular importance given the uncertainties surrounding the health effects and treatment of COVID-19.

### **III.II EXPLORING PROPOSALS FOR IMMUNITY LEGISLATION**

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<sup>63</sup> *Price v Cwm Taf University Health Board* [2019] EWHC 938 (QB).

<sup>64</sup> General Medical Council, 'Joint statement: Supporting doctors in the event of a COVID-19 epidemic in the UK' (*General Medical Council*, 11 March 2020) <<https://www.gmc-uk.org/news/news-archive/supporting-doctors-in-the-event-of-a-covid19-epidemic-in-the-uk>> accessed 27 February 2021.

<sup>65</sup> MDU, 'Coronavirus: medico-legal update' (*MDU*, 06 April 2020) <<https://www.themdu.com/guidance-and-advice/latest-updates-and-advice/coronavirus-medico-legal-update?Region=England>> accessed 27 February 2021.

The steps taken by the government and various medical bodies to provide reassurance to medical professionals is positive to see, but it would appear such strategies are insufficient to erase the fear of clinical negligence claims from arising. In a letter to the Health Secretary, several medical organisations criticised measures for not answering their concerns<sup>66</sup>, emphasising that “while doctors have a range of valuable guidance they can refer to [...] this guidance neither provides nor claims to provide legal protection”<sup>67</sup>. Additionally, the guidance fails to take into account factors distinct to the COVID-19 pandemic, such as the strain on resource demand and supply.<sup>68</sup> As a result, emergency legislation has been proposed to protect medical professionals at risk of legal challenge from treating COVID-19 patients in circumstances beyond their control, reassuring doctors they are legally protected if forced to make fateful decisions in challenging conditions, so long as this decision falls within best interest of practice<sup>69</sup>.

While critics have condemned such calls for disrupting the power balance between doctors and patients<sup>70</sup>, to prevent abuse of the power granted, it has been proposed that immunity only apply to “decisions made in good faith, circumstances beyond [a medical professionals control] and in compliance with relevant guidance”<sup>71</sup>, departing from the traditional reasonable test for standard of care<sup>72</sup>. This proposition is analogous to the approach ratified by other nations, also struggling with the impact COVID-19 has had on their health services. In the United States, emergency legislation has been enacted in several states<sup>73</sup> granting temporary immunity to medical professionals from civil and criminal liability, as long as they have acted in good faith. In Italy, a legal shield was also proposed for

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<sup>66</sup> Letter from President of the Medical Protection Society and others to Matt Hancock (14 January 2021).

<sup>67</sup> *ibid.*

<sup>68</sup> C Dyer, ‘Covid-19: Doctors’ call for legal protection against claims of unlawful killing is rejected’ (2021) 372 BMJ <<https://www.bmj.com/content/372/bmj.n164>> accessed 19 January 2021.

<sup>69</sup> J Hyde, ‘Doctors plead for legal protection from Covid judgement calls’ (*The Law Society Gazette*, 18 January 2021) <<https://www.lawgazette.co.uk/news/doctors-plead-for-legal-protection-from-covid-judgement-calls/5107056.article>> accessed 17 February 2021.

<sup>70</sup> (n 39).

<sup>71</sup> J Dacre, ‘Doctors must be protected as pressure on health service grows’ (*thebmjopinion*, 16 January 2021) <<https://blogs.bmj.com/bmj/2021/01/16/jane-dacre-doctors-must-be-protected-as-pressure-on-health-service-grows/>> accessed 15 February 2021.

<sup>72</sup> (n 21).

<sup>73</sup> New York ‘Emergency Disaster Treatment Protection Act 2020.

health workers<sup>74</sup>. However, although the provision was praised due to the reassurance provided to healthcare workers, thereby improving mood and the quality of care provided to patients<sup>75</sup>, the Italian government dismissed the suggestion in favour of placing clinician's decisions and treatments under examination<sup>76</sup>. These contrasting approaches between nations demonstrate the difficulty in ensuring legislation is created in a way that proves effective to protecting medical professionals, without losing sight of why the clinical negligence system exists - to hold such personnel accountable for their actions.

It is important, as Hogarth notes, that any legislation should be narrowly construed so not to curtail the rights of patients<sup>77</sup>, especially in circumstances where obvious signs and symptoms are missed. Since claims will not arise imminently, there is a worry that clinicians may not be judged fairly for the environment they were working in and the difficulty of the decisions they had to make at the peak of the pandemic.<sup>78</sup> Despite questioning whether retrospective legislation may be contrary to a patient's human rights, Hogarth suggests the protection of the NHS and its workers is of sufficient public interest to justify such retrospective effect<sup>79</sup>. The question still remains of how long such immunity would last for due to uncertainty over when, or if, we will ever truly see the end of COVID-19. As a result, providing immunity risks diluting duty and inducing a lower standard of care for an indefinite period of time, potentially placing patient safety at risk in the longterm.

A further concern is to whom the immunity legislation applies. While it would appear legislation is primarily aimed at those healthcare workers acting on the frontline, Tomkins points out that due to staff and resource shortages, hospital managers will also be tasked with making difficult decisions<sup>80</sup>.

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<sup>74</sup> F Marozzi, 'Medmal COVID-19: the jungle of amendments' (*SIMLA*, 05 April 2020) <<https://www.simlaweb.it/medmal-covid-19-la-jungla-degli-emendamenti/>> accessed 26 January 2021.

<sup>75</sup> (n 51).

<sup>76</sup> E d'Aloja and others, 'COVID-19 and medical liability: Italy denies the shield to its heroes' (2020) 25 *EClinicalMedicine* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7378462/>> accessed 26 January 2021.

<sup>77</sup> (n 20).

<sup>78</sup> C Kenny, 'The exceptional circumstances of dealing with covid-19 must not be forgotten' (*thebmjopinion*, 04 September 2020) <<https://blogs.bmj.com/bmj/2020/09/04/the-exceptional-circumstances-of-dealing-with-covid-19-must-not-be-forgotten/>> accessed 19 January 2021.

<sup>79</sup> (n 20).

<sup>80</sup> (n 39).

Would this qualify them for immunity? Any differentiation between which healthcare staff fall under such legislation risks polarising and demoralising the workforce<sup>81</sup> at a time when cooperation and optimism are of great importance, including in reducing the likelihood of errors occurring.

Tingle affirms that faith in the current clinical negligence system be maintained during COVID-19<sup>82</sup>, arguing that immunity calls overlook a “patient’s right to claim compensation for negligent injuries caused to them by those who were meant to care for them”<sup>83</sup>. It is true that in the absence of redress, the consequent burden of granting immunity would fall on social care, who would potentially be tasked with caring for an increasing number of patients falling victims of clinical negligence. It would therefore appear that immunity legislation is an unsuitable long term sustainable solution.

Ultimately the current proposals for emergency legislation fail to acknowledge that regardless of the circumstances, patients still have a right to claim for any medical mishaps that may be inflicted upon them, whilst the current negligence system fails to adequately provide security for medical professionals operating in challenging circumstances. Hence, it is argued in this article that rather than emergency legislation, the current status of the clinical negligence system should be looked at to determine whether reform can achieve a balance between protecting doctors and a patient’s right to claim.

#### **IV. Future Directions and Proposals for Reform**

Given the limits of the new legislation and the criticisms of the existing standard of care, it could be argued that to address the current failures in the clinical negligence system further reform is needed. Mehta, Szakmany and Sorbie argue the “focus on temporary statute immunity is a distraction from pre-existing concerns that several aspects of the current medico-legal system are not fit for purpose”<sup>84</sup>.

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<sup>81</sup> (n 19).

<sup>82</sup> J Tingle, ‘COVID-19 and clinical negligence litigation, law reform’ (*University of Birmingham*) <<https://www.birmingham.ac.uk/research/perspective/covid19-clinical-negligence-litigation.aspx>> accessed 19 January 2021.

<sup>83</sup> *ibid.*

<sup>84</sup> A Mehta, T Szakmany, A Sorbie, ‘The medicolegal landscape through the lens of COVID-19: time for reform’ (2020) 114 *The Royal Society of Medicine* 55, 55.



Thus, rather than pursuing temporary immunity legislation, now is the time for more substantive longterm action. This stance can be validated by reference to the excessive number of clinical negligence cases recorded prior to the outbreak of the pandemic<sup>85</sup>. A NAO report forecasted payouts to reach £3.15bn in 2020-21<sup>86</sup>, despite consistent quality and safety of healthcare. While critics have speculated that the “litigation crisis” constitutes a myth employed by the medical profession to evade proper legal scrutiny<sup>87</sup>, the very real risk of an avalanche of possible claims in upcoming years, despite continuous focus on patient safety, would appear to justify modifying the current system.

This article supports the argument that now is the time for the NHS to “look beyond safety and reduction of harm and look to legal reform”<sup>88</sup>. However, finding an alternative system that accommodates openness and opportunities to learn from past mistakes, whilst still holding professionals responsible for their wrongdoing, has proved somewhat “elusive”<sup>89</sup>. Reform of the system is not a new concept. As the head of the MDU acknowledges, “The NHS went into the pandemic burdened by an outdated legal system for clinical negligence litigation [...] that is unfair and unsustainable [...] a balance needs to be found that is affordable and fair”<sup>90</sup>. Presently, the NHS bears the brunt of costs arising from claims brought against their workers for negligent acts. This money could instead be used to improve the service, perhaps preventing such errors from reoccurring in future, alongside benefitting patients who, due to harm, are reliant on health and social care, yet cannot prove negligence. Pattison states, as things stand, “civil liability for clinical negligence is more about compensating victims than punishing culpable doctors or nurses”<sup>91</sup>. Whilst not necessarily a negative, it

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<sup>85</sup> Department for Work and Pensions, ‘Compensation Recovery Unit performance data’ (GOV, 17 July 2020) <<https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data>> accessed 16 February 2021.

<sup>86</sup> Controller and Auditor General, *Managing the costs of clinical negligence in trusts* (HC 2017-2019, 305).

<sup>87</sup> A Simanowitz, ‘Editorial’ (1998) 4 AVMA Medical & Legal Journal 90, 90.

<sup>88</sup> C Dyer, ‘Government considers legal reforms to resolve high cost of clinical negligence claims’ (2019) 364 <BMJ <https://www.bmj.com/content/364/bmj.11362?hwshib2=authn%3A1619254147%3A20210423%253A7242d284b334-4842-bda0-d39799f90ad6%3A0%3A0%3A0%3A%2FgDD93PUckaJpHKqHnqFzg%3D%3D>> accessed 02 March 2021.

<sup>89</sup> J Herring, *Medical Law and Ethics* (7th edn, Oxford University Press 2018).

<sup>90</sup> O Bowcott, ‘Union seeks legal immunity for NHS clinicians in pandemic’ *The Guardian* (London, 19 April 2020) <<https://www.theguardian.com/society/2020/apr/19/coronavirus-nhs-risks-facing-billions-of-pounds-in-negligence-claims#maincontent>> accessed 02 February 2021.

<sup>91</sup> S Pattison, *Medical Law and Ethics* (5th edn, Thomson Reuters 2017) 51.

could be argued that regardless of the setting, no compensation scheme can solely tackle operational matters in the absence of parallel reforms in education, training and openness.<sup>92</sup>

A number of reforms have been proposed over the years to address these matters, such as the NHS Redress Act 2006, a shift to a no-fault system, and a cap on tariffs, which are considered in more depth below<sup>93</sup>.

## **NHS REDRESS ACT 2006**

The NHS Redress Act 2006 was proposed with the aim of providing remedies in a more efficient and effective manner than the current negligence system, through supplying claimants with an alternative route to litigation and capping the costs to compensation<sup>94</sup>. The government argued the scheme would attempt to move away from focusing on attributing blame, instead focusing on preventing harm, reducing risks and learning from mistakes<sup>95</sup>, with remedies including payment of compensation (up to £20,000), an investigation, an apology, or remedial care<sup>96</sup>. This could be a particularly positive move in recognition of the hard work and sacrifices those working in the medical profession have made over the course of the pandemic, and would place the profession in a more stable position should a similar situation reoccur. Furthermore, by offering an alternative to legislation, alongside promoting a positive doctor-patient relationship, implementation of the Act could significantly reduce the strain on the courts should the number of claims continue to increase in the aftermath of COVID-19.

However, despite being statutory in nature, the Act stops short of departing from the common law negligence system. While providing legal certainty in relation to the fact a patient will obtain redress under the Act if the Secretary of State finds tortious liability in connection with a breach of a duty of care<sup>97</sup>, the continuing reliance on previous case law to determine such breach of duty fails to provide

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<sup>92</sup> (n 47).

<sup>93</sup> Department of Health and Social Care, 'Plans for fixed cap on legal costs for medical negligence cases' (*Gov.UK*, 30 January 2017) <<https://www.gov.uk/government/news/plans-for-fixed-cap-on-legal-costs-for-medical-negligence-cases>> accessed 2 March 2021.

<sup>94</sup> NHS Redress Act 2006, s 1 (1).

<sup>95</sup> J Roll, 'The NHS Redress Bill' (2006) House of Commons Research Paper 06/29.

<sup>96</sup> (n 94) s 3 (2)(a)-(d).

<sup>97</sup> *ibid*, s 1 (4)(a).

legal certainty to medical professionals. While following GMC guidelines can grant such certainty to an extent, compliance with guidelines is only a starting point for questioning if behaviour is reasonable. Codifying into statute could therefore increase compliance and the likelihood of the standard of care being met. This will, however, have implications on clinical freedom, which ought not to be restricted under law, given the high probability of unexpected external factors influencing the ever changing medical environment, as demonstrated by the COVID-19 crisis. In this respect, it could be argued that medical guidance should be granted more legal weight to accommodate the incremental nature of decision making in negligence, in order to consider developments in professional practice and wider societal circumstances, which statutory legislation falls short of doing.

## **NO-FAULT SYSTEM**

Despite the reasonable standard of care being met, there exists a further inadequacy under the 2006 Act, and indeed the current medical negligence system, to recognise patients who have sustained injuries. In the current context, compensation claims will almost certainly be started by those experiencing harm due to delayed treatment, with no one necessarily at fault. Currently, such individuals have no claim. This kind of scenario could be addressed by adopting a no-fault system, which has received consistent support from doctors<sup>98</sup>. Since the line between negligence and no negligence is difficult to draw<sup>99</sup>, Douglas argues there needs to be a mechanism whereby regardless of negligence, those who suffer as a result of a medical mishap during treatment can still claim compensation<sup>100</sup>. Without the requirement of legal proceedings, a no-fault scheme would avoid wasted expenditure on both sides<sup>101</sup>, appearing favourable to all parties, particularly in the COVID-19 aftermath, as well as reducing the need for the standard of care to be modified to fit the current context.

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<sup>98</sup> British Medical Association, *Annual Report of Council 1987-1988* (1988).

<sup>99</sup> (n 89).

<sup>100</sup> T Douglas, 'Medical Injury Compensation: Beyond 'No-Fault'' (2008) 17 *Medical Law Review* 30.

<sup>101</sup> Lord Woolf, *Access to justice* (1996).

There does still exist concern that a no-fault based system fails to bring medical professionals who have practiced poorly to account, since there is no differentiation between cases involving malpractice and those where an unfortunate mishap occurred<sup>102</sup>. In a fault based compensation system, bad practice costs money. While this could certainly discourage some, the significance of a monetary deterrent is arguable. As Merry and McCall-Smith state, “Human error, being by definition unintentional, is not easily deterred”<sup>103</sup>. Especially given the current indemnity measures in place under the Coronavirus Act 2020<sup>104</sup>, medical professionals do not carry the financial burden of any claims brought against them, meaning there is no monetary incentive to dissuade negligent behaviour. Thus, it would appear the money generated by these claims should instead be diverted towards preventing such errors from arising in the first place.

## CAP ON TARIFFS

The main concern with a no-fault based system is that it has the potential to be very costly. Prior to the revelation that NHS Resolution was facing substantial claims amounting to £83.4bn<sup>105</sup> the perceived inadequacy of the current clinical negligence system was debated in Parliament in 2018<sup>106</sup>. One suggestion that arose from the debate was a cap on damages, similar to reforms adopted in other countries<sup>107</sup>, meaning patients who have experienced harm in a clinical setting, regardless of fault, would still receive compensation in recognition of their suffering.

Harris also proposed such a cap to prevent a single person receiving a larger portion of NHS funds than could be given to other equally deserving patients, arguing that payment of compensation should only be given in the absence of no more urgent calls on those NHS resources<sup>108</sup>. While this situation

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<sup>102</sup> M Bismarck and others, ‘Claiming behaviour in a no-fault system of medical injury: a descriptive analysis of claimants and non-claimants’ (2006) 185 *Medical Journal of Australia* 203.

<sup>103</sup> A Merry and A McCall, *Errors, Medicine and the Law* (Cambridge University Press 2001) 2.

<sup>104</sup> (n 59).

<sup>105</sup> The Medical Defence Union Limited, *Report & Accounts 2019* (2019), 10.

<sup>106</sup> (n 3).

<sup>107</sup> World Bank, *Medical Malpractice Systems around the Globe: Examples from the US- tort liability system and the Sweden- no-fault system* (2013 World Bank, Washington DC).

<sup>108</sup> J Harris, ‘The injustice of compensation for victims of medical accidents’ (1997) 314 *BMJ* 1821.

would appear rare, particularly given the circumstances under COVID-19, if coupled with alternative remedies to compensation, such as those suggested in the NHS Redress Act 2006<sup>109</sup>, all claimants could still access redress whilst ensuring there are still adequate funds available in the NHS to help improve care going forward.

Fundamentally, reform should not be a quick response<sup>110</sup>. Although it is unclear exactly what the outcome on clinical negligence claims will be following COVID-19, with some even suggesting the pandemic may break the trend in claims arising and be lower than the levels otherwise expected<sup>111</sup>, negligence claims can contribute to improved standards and allow for better preparedness should we face similar pandemics in the future. They should therefore not be disposed of completely. Thus, any reform should focus on what must be done in terms of repairing, healing and preventing<sup>112</sup> breaches that may arise.

In terms of the context of COVID-19, it has been argued in this piece that the clinical negligence system would benefit from reform in a shift towards a no-fault based system, perhaps incorporated with the remedies offered in the 2006 Act. This would allow existing precedent surrounding the standard of care to stand in cases where gross or intentional misconduct is evident, thereby ensuring medical professionals are still held accountable for their actions. Simultaneously it would allow patients to claim redress for any harm suffered, without subjecting doctors to lengthy and costly trials. Not only should this maintain morale and allow doctors to focus more completely on caring for their patients to the best of their ability, the money saved could also be redirected towards ensuring similar errors do not reoccur in the future.

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<sup>109</sup> (n 96).

<sup>110</sup> (n 39).

<sup>111</sup> (n 24).

<sup>112</sup> NHS Resolution, *Being Fair* (2019).

## **Conclusion**

While the clinical negligence system may never have faced an event of the same scale as COVID-19, over the years it has developed a substantial body of precedents covering a wide range of scenarios, many applicable to cases potentially arising from the COVID-19 pandemic. However, strictly applying such precedents may not always equate to a fair and justifiable outcome, which the law exists to achieve. With regards to its purpose, the system of negligence exists to compensate suffering through the fault of another. In the medical context, this involves protecting the integrity of the medical profession by holding members accountable for their actions, whilst ensuring patients experiencing losses resulting from acts of clinical negligence can attain redress. The COVID-19 pandemic may not have altered the purpose of the clinical negligence system, but it has brought into question the suitability of the current framework.

This article has aimed to show why, in the present climate, applying existing precedent may not adequately recognise the challenges facing medical professionals currently, with reliance on such principles failing to provide any legal certainty to doctors about the standard of care expected of them, and whether this is even obtainable given the circumstances. Blanket immunity for medical professionals from claims arising from COVID-19 would provide this reassurance and certainty, but such emergency legislation could also open the door to abuses of power for a potentially indefinite period of time, alongside preventing patients from obtaining any reparation.

The reform options explored in this article demonstrate the array of options available to modify the current clinical negligence system to help tackle the issues exemplified by the COVID-19 pandemic, and has analysed their benefits/disadvantages in the current climate. Ultimately, the optimum solution would be to recognise and address challenges within healthcare and the difficult conditions such professionals are operating under, without prohibiting individuals who have suffered harm from claiming redress. The current system makes this hard to achieve. While it is clear there is no simple

solution, any change in law should focus on making things right with the individual, as long as this is not at the expense of the NHS.

No one can predict what will happen in the coming years, inducing an understandable hesitance to take any drastic action into reforming the clinical negligence system at present. However, with an influx of claims potentially emerging in the aftermath of COVID-19, reform should be focused on adopting a learning and preventative culture, ensuring that if placed in such unprecedented times again, the system is better prepared.

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## To what extent has the neoliberal state exploited the feminist movement to push an agenda of carceral justice?

This essay will seek to argue that the neoliberal carceral state (predominantly in the context of U.S public policy), rather than truly advocate for and empower feminism, has instead co-opted the movement by defining, regulating, and taking advantage of the victimisation of women in gender and sexual violence discourses in order to pursue an agenda of social control. Accordingly, it can be argued that the outcome of the collaboration between the feminist movement and the neoliberal state - i.e., one specifically associated with an emphasis on carceral punishment as a solution to gender and sex-related crime - has led to the formation of a social, legal and political climate where it is evident that the interests of only a select, privileged few are protected (that seem to be coded with various implications regarding topics such as race, class, gender and sexuality) and which ultimately serves to disproportionately punish vulnerable minority populations. Firstly, the essay will seek to contextualise the role of neoliberalism in affecting the feminist movement, and vice-versa as well as the significance of carceral justice and punishment. Secondly, the essay will go on to examine the specific concept of how the exploitation of the victimisation of women is sanctioned through an exploration of the various appendages of the neoliberal state, including the welfare system, political, legal and media narratives in relation to various important feminist issues; including that of domestic violence, rape, and the sex industry, as well as the therapeutic or administrative system. Finally, the essay will attempt to offer some potential solutions to this issue.

Firstly, it is essential to consider the context in which neoliberal carceral culture and feminism have interacted in order to establish the motive behind the shift to the carceral state as a tool seemingly to enforce and advance feminist goals. According to Kristin Bumiller, the feminist

movement in the 1960s started out with small grassroots campaigns that sought to call the state's attention to women's issues by identifying and highlighting the need for state-sanctioned enforcement when it came to protecting all citizens equally in issues of gender and sexual violence. Importantly, they also criticised the state itself for being complicit in oppressing women, therefore definitively grounding it as a structural and institutional issue.<sup>1</sup> However, as these grassroots organisations grew, the imposition of regulations and the need for stable funding forced them to rely more on the state, which necessitated their compromising and compliance in order to continue getting resources and providing services and thereby leaving them more susceptible to being co-opted by the rise of neoliberalism.<sup>2</sup>

Accordingly, the feminist movement in the 1960s and 70s, whilst making legally and societally significant advancements from a cultural and identity politics-centric standpoint, Schmeichel argues that this in turn has led to a kind of fragmentation of the movement wherein "focus on women's differences from each other resulted in a type of feminist identity politics [...] more focused on recognition than on redistribution or representation."<sup>3</sup> Subsequently, this has also led to a deficit in attention concerning feminist critiques of "economic and political asymmetry"<sup>4</sup> - it can therefore be argued that this overall lack of cohesion and unity within the movement, as well as the need to maintain their momentum in terms of feminist victories through focusing on defending what they had already "won" is ultimately compatible with the values of neoliberalism. A specific example of this is the introduction of women into the workforce: the ability to do so regardless of

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<sup>1</sup> Kristin Bumiller, 'Feminist Collaboration with the State in Response to Sexual Violence: Lesson from the American Experience' in Aili Mari Tripp, Myra Marx Ferree and Christina Ewig (eds), *Gender, violence, and human security: critical feminist perspectives* (New York University Press 2013), 192-194

<sup>2</sup> *ibid.*

<sup>3</sup> Mardi Schmeichel, 'Feminism, Neoliberalism and Social Studies' (2011) 39[1] *Theory and Research in Social Education*, 9-11.

<sup>4</sup> *ibid.*, 2.

race or social class thus allowed for a certain narrative wherein individual women's success stories – brought about as a result of “hard work and merit” - are amplified at the expense of the experiences of collective groups of people, effectively ignoring the political and economic critiques of potential existing structural inequalities.<sup>5</sup> An additional effect arising from this is that of a new perspective on crime, mostly driven by the rising insecurity surrounding the changes in middle-class family structures – and particularly significant, “a desire for compensatory forms of social control.”<sup>6</sup>

Therefore, it is clear that the rise of neoliberalism and its associated values (e.g., increased privatisation, development of an ethos of ‘personal responsibility’, the streamlining of the welfare system to become more efficient)<sup>7</sup> has influenced the state's more aggressive approach to crime and punishment, wherein “activities of surveillance, arrest and incarceration”<sup>8</sup> are considered the ideal form of crime control, particularly so when tackling the pervasive and volatile nature of feminist issues such as domestic and sexual violence. However, it is evident that this has created a criminal justice system more interested in punitive justice - as a mechanism for wider socio-political hegemony - than focusing on aiding and empowering victims. As per the neoliberal concept of individual responsibility, carceral justice is justified as a response to criminality being a result of a personal, inherent failing that leads to a depiction of the offender as “monstrous” or “animalistic”<sup>9</sup>; in short, necessitating their removal from civilised society. Bernstein argues that this is essentially a smokescreen by which the state capitalises on this stereotype – often with underlying gendered, racial and class implications – to enforce the ideal of the predominantly white, middle-class, nuclear

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<sup>5</sup> Schmeichel (n 3)

<sup>6</sup> Elizabeth Bernstein, ‘Carceral politics as gender justice? The “traffic in women” and neoliberal circuits of crime, sex, and rights’ (2012) 41 *Theor Soc*, 237-238.

<sup>7</sup> Sune Sandbeck, ‘Towards an Understanding of Carceral Feminism as Neoliberal Biopower’ [2012] CPSA, York University, 4 <<https://www.cpsa-acsp.ca/papers-2012/Sandbeck.pdf>> accessed 28 April 2021.

<sup>8</sup> Mimi E. Kim, ‘From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration’ (2018) 27[3] *Journal of Ethnic & Cultural Diversity in Social Work*, 220.

<sup>9</sup> Nickie D. Phillips and Nicholas Chagnon, “‘Six Months Is a Joke’: Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case’ (2020) 15[1] *Feminist Criminology*: SAGE Journals, 51.



family unit whilst simultaneously punishing those who threaten it.<sup>10</sup> On the other side of this dichotomy i.e., the main focus of this essay, the state conception of the ‘ideal victim’ too is one that plays on these stereotypes, ultimately undermining the feminist movement through controlling the narrative by which these issues of gender and sexual crime are treated.

One compelling example of this is the way the welfare system has been organised under the neoliberal regime to prioritise economic efficiency at the expense of social services created for victims of gender and domestic violence. The resulting consequence of scaling back welfare for disenfranchised populations parallels the growing need for penal system in order to “contain” these populations (the division of which is notably gendered; with the idea that vulnerable or marginalised women generally transition through the welfare system whilst men go to prison).<sup>11</sup> Under neoliberalism, the welfare system saw a change in the requirements needed for women to be able to access these benefits, one that implicitly reinforced the notion of ‘personal responsibility’ as the state saw fit to apply to women, e.g., provisions which “incentivise[d] marriage and foster[ed] responsible motherhood”.<sup>12</sup> Furthermore, there was a problematic emphasis on the victimisation of women, and the concept of who made a “good victim”. A study done in Spain (which had its theoretical roots in the American context) discussed the implementation of a new regulation wherein female victims of gender violence were obligated to file a criminal complaint in order to access women’s shelter services, thus forcing a binary choice between entering the punitive system (at possible personal risk

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<sup>10</sup> Bernstein, (n 6).

<sup>11</sup> Bernstein, (n 6).

<sup>12</sup> Bumiller, ‘Feminist Collaboration with the State in Response to Sexual Violence: Lesson from the American Experience’, 196

of violence or deportation for more vulnerable women) or not being able to access these safety nets at all.<sup>13</sup>

Another significant feminist issue that has been the centre of calls for much-needed reform is that of rape law and by extension its enforcement and prosecution. Notable American cases such as the 2015 Stanford sexual assault case and subsequent political and media attention served to highlight the outcry for increased accountability from offenders, ideally on the basis of harsher, longer punitive sentences.<sup>14</sup> On one hand it can be argued that the emphasis on carceral justice and punishment - as pushed for by some feminists - is indicative of a much-needed cultural shift in tackling rape culture wherein victim-blaming is common and the trend of racial or class privilege is evidently a contributory factor towards lighter sentences for rapists i.e., Turner in the Stanford case. Snider asserts that therefore carceral justice and punishment as an ideology is “appealing to those seeking change because they attract the attention of mass media and of political elites”.<sup>15</sup> However, this reliance on mass media has proven to have dangerous consequences, most notably in terms of the role it has played in sensationalising and narrativizing stereotypes of both the offender and the victim of rape cases to the public, which in turn has bolstered the interest of law enforcement in prosecuting them. Said narratives tend to play on the fear of criminality taking the form of the nebulous ‘deviant stranger’, an outsider posing a threat to decent society as a result of an innate wrongness. This narrative of the rapist or sex offender as ‘the other’ is one subject to gendered, class, and in particular racial typecasting (i.e., dark-skinned men as depicted by the media became synonymous with the notion of a dangerous stranger): essentially, those who do not fit into the

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<sup>13</sup> Lorena Valenzuela-Vela and Ana Alcázar-Campos, ‘Gendered Carceral Logics in Social Work: The Blurred Boundaries in Gender Equality Policies for Imprisoned and Battered Women in Spain’ (2020) 35[1] *Affilia: Journal of Women and Social Work*: SAGE Journals, 80.

<sup>14</sup> Phillips and Chagnon (n 9).

<sup>15</sup> Laureen Snider, ‘Feminism, Punishment and the Potential of Empowerment’ (1994) 9[1] *Canadian Journal of Law and Society*, 76.

conventional white middle-class family lifestyle.<sup>16</sup> The other side of this dichotomy, the representation of the victim, is significant in that they are cast in an opposing role with emphasis on traits such as being “innocent, white, and/or angelic”<sup>17</sup> and therefore characterised solely by their victimhood as defined by the prosecution and the media. Significantly, black women as victims of sexual violence have tended towards being depicted as excessively independent<sup>18</sup> in contrast to the implied passivity of white women, thus implicitly failing to live up to this idea of a sympathetic or ‘worthy’ victim as evident by the lack of media and prosecutor attention towards the rapes and murders of black women in the U.S. The feminist movement collaborating with the state and law enforcement in this regard has been heavily criticised by radical and black feminists for “selling out to the establishment” and being “driven by the interests of white middle-class women” respectively.<sup>19</sup> Consequently, it is clear to see that feminist issues are often only recognised and utilised as a prop in order to pursue and justify various measures of social control that tend to carry racial and religious connotations, thus effectively pitting one against the other. Take for example the situation in France, where feminist campaigns to end sexual violence are utilised in order to further the tensions surrounding the very divisive topic of immigration and migrants, and in a legal sense, help to lead to further reforms in border control and policing.<sup>20</sup>

It is also important to acknowledge that arguably the process of the state defining and regulating victimisation is not solely rooted in neoliberal values. According to Chasson, there is undeniably a moralistic element apparent that is characteristic of more conservative ideals, as

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<sup>16</sup> Bumiller, ‘Feminist Collaboration with the State in Response to Sexual Violence: Lesson from the American Experience’ 198-200.

<sup>17</sup> *ibid.*

<sup>18</sup> Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Duke University Press 2008) 97.

<sup>19</sup> Bumiller (n 16).

<sup>20</sup> Bernstein, 242.

evidenced by the desire to retain conventional family values<sup>21</sup>, thus necessitating strict social controls and a punitive approach to those who do not fall within these parameters. Accordingly, women are therefore characterised by their victimhood and the need for protection that is provided by a masculine force, whether it be through the family or the state.<sup>22</sup>

Bernstein reinforces the idea of the reimagining of the state as a ‘protector’ figure as a contrast to the victims of gender and sexual violence who ‘require protecting’, see “the masculinist institutions of big business, the state, and the police are reconfigured as allies and saviors [...] and the responsibility for trafficking is shifted from structural factors and dominant institutions onto individual (often racially coded) criminal men”<sup>23</sup>

The topic of sex work and trafficking in particular is very relevant, thereby necessitating greater discussion and understanding. Bernstein notes that anti-trafficking activism stands out particularly because of this idea that the morals between radical feminists and evangelical Christians are seen to have some overlap - e.g., tending towards antiquated (for example, with an emphasis on an image of heterosexuality and heterosexual relationships that the sex industry is in general seen to “erode”) concepts of being “pro-marriage” and “pro-family”<sup>24</sup> which have been popularised in the media which arguably has in turn led to the increased legal reforms surrounding trafficking – and more specifically the increased punishment of those who are involved in the industry. This example is a very good indication of how neoliberalism has helped the state to protect their own interests specifically by taking advantage of and intervening in similar contexts under a veneer of promoting and resolving feminist issues – but often don’t focus any attention on the structural factors that are in play and punishment and policing often end up targeting the more vulnerable, powerless parties.

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<sup>21</sup> Amy Masson, ‘A Critique of Anti-Carceral Feminism’ (2020) 21[3] *Journal of International Women’s Studies*, 68.

<sup>22</sup> Valenzuela-Vela and Alcázar-Campos, 81.

<sup>23</sup> Bernstein, 245.

<sup>24</sup> Bernstein, 243.

Ultimately it can be argued that anti-trafficking discourse subtly tends towards propping up the neoliberal ideal of a conventional middle-class family structure that is seen as a place of protection and refuge for women and children<sup>25</sup> but does not necessarily seek to improve the existing conditions that lead to exploitation in the sex industry itself.

Another such example of this type of conservatism taking place in the context of carceral feminism is that of anti-pornography activism, which Schneider argues is predominantly driven by a “view of heterosexual sexuality as victimization that dismiss[es] women’s participation and pleasure as sexual actors.”<sup>26</sup> It can be seen that the morals surrounding anti-pornography activism have garnered a great deal of attention - and support - in the media, which has in turn led to a backlash against the idea of ‘victim feminism’: wherein it is suggested that women are stereotypically depicted as “fragile and passive” when it comes to the narrativization of their experiences with sexual harassment, rape, pornography, etc. In return writers such as Katie Roiphe and Naomi Wolf posit a type of ‘power feminism’ as an alternative where instead of being victimised, women are characterised by their “individual agency, choice, and exercise of responsibility”<sup>27</sup> - however, there is a clear problem with the above viewpoint in that it chooses to see these cases as one or the other (i.e. either the victim or as an agent) and thereby suffers from a troubling lack of nuance - the consequences of which will most likely lead to a disproportionately extreme result which ultimately will only serve to harm women's interests further. Schneider reaffirms that under neoliberalism, victimisation claims are a double-edged sword - on one hand, they can be used as a tool to garner “sympathy, solidarity [...] and attention” (which would allow prosecutors to convict with more ease) but they are also associated with having a lack of personal responsibility and agency, and having a

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<sup>25</sup> Bernstein, 246.

<sup>26</sup> Elizabeth M. Schneider, ‘Feminism and the False Dichotomy of Victimization and Agency’ (1995) Brooklyn Law School, 391.

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

one-dimensional, limited identity - either way, the woman and her experience is solely reduced to her victimhood.<sup>28</sup>

Furthermore, another interesting argument put forward by Stringer on the nature of victimhood and rape law reform under neoliberalism is precisely her critique of the “Victim-bad/Agent-good” discourse wherein victimhood, like criminality, is considered a “quality of the sufferer, rather than [...] something that happened to them.”<sup>29</sup>, carrying the implication that victims are responsible for their suffering as result of their life choices. Conversely, it is argued that the feminist effort to overcome this notion that femininity equals vulnerability by recasting victims as free and actively resistant agents under rape law also reinforces the neoliberal agenda – by not considering the nuances of the hierarchies of gender and sexual power (for example, the idea that sex workers are “unrapeable”), it ultimately leaves more vulnerable women being ignored and marginalised by the state.<sup>30</sup>

Another aspect to consider when discussing the exploitation of the victimisation of women is that of the “therapeutic state” as described by Bumiller. As aforementioned, the criminal is often depicted as deserving serious punishment due to an inherent failing that requires their removal from the rest of civil society and is not capable of rehabilitation. Therefore, the effort instead goes to treating victims albeit with the result being “the growth of administrative power exercised over clients who experience sexual violence”<sup>31</sup> - victims essentially are “retrained” in order to become what the state conceptualises as a ‘successful survivor’. Bumiller further argues that as per the

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<sup>28</sup> *ibid.*, 395.

<sup>29</sup> Rebecca Stringer, ‘Vulnerability after Wounding: Feminism, Rape Law, and the Differend’ (2013) 42[3] *SubStance*: Project MUSE, 150.

<sup>30</sup> *ibid.*, 159.

<sup>31</sup> Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*, 64.

neoliberal idea of personal responsibility, a situation concerning domestic abuse, rape or any other form of gender violence that a woman may find herself in is a result of her inability to make good choices<sup>32</sup>. They are inducted into a system that effectively takes “women out of their gender, class, and racial situation and their problems are discussed as if all persons are equally vulnerable”<sup>33</sup>, thereby continuing to take regulated definitions of victimisation without actually engaging the input of the ‘victim’ themselves. Ultimately, there is an argument to be made that the responsibility for rehabilitation is ultimately left to the victims rather than the attackers, who are instead incarcerated and put through the prison system. There is the implication that the onus is on the woman, to either learn how to prevent themselves from being victimised, or if already so, have the ability to seek professional help under the state. Oftentimes the latter requires constant surveillance and are subjugated to various kinds of reports, check-ups, tests and more in order to get access to the help they need.<sup>34</sup>

To conclude, when considering carceral justice in the context of feminist ideology, I would argue that they are concepts that are inherently incompatible with each other. It is evident that the trend of increased incarceration and punishment in the U.S. for gender-related crime do not necessarily have the feminist movement’s best interests at heart; rather, the various institutional bodies under neoliberalism, including the criminal justice system, welfare and therapeutic systems as well as the media have contributed to the diminishment of the agency and empowerment of women and have overall undermined feminism as a whole. Therefore, there is a need to perhaps re-examine the treatment of feminist issues in the criminal justice system and look to alternative conceptions of

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<sup>32</sup> *ibid.*, 83-84.

<sup>33</sup> *ibid.*, 86.

<sup>34</sup> *ibid.*, 95.

justice, one that does not capitalise upon and exploit the victimisation of women, but rather facilitates transformative change in how gender and sexual violence is viewed in a social, political and legal context. One such example of this is the idea that the feminist movement should go back to their original roots – i.e., small local and international grassroots movements that can work together in order to tackle the root causes of gender and sexual violence, including tackling the pitfalls of state institutions such as the criminal justice system and acknowledging the intersections of racial, class, religious factors and more.<sup>35</sup>

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<sup>35</sup> Bumiller, 'Feminist Collaboration with the State in Response to Sexual Violence: Lesson from the American Experience', 206



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# SOLIDARITY AND THE NHS APP: LESSONS LEARNED FROM THE COVID-19 PANDEMIC

## Abstract

*In 2020, countries world-wide started to develop their own contact-tracing application, as a response to the COVID-19 pandemic. These technologies are important tools for disease containment as their automated system could substantially slow down the spread of Sars-CoV2. However, their efficiency relies on the willingness of individuals to use them. This article starts by examining the motivations for the NHS COVID-19 APP's low installation rates, concluding that solidarity should be foster for a widespread use. Drawing on Prainsack and Buyx, this paper continues by examining the notion of solidarity and the necessary conditions to nurture it. Through a comparison of the UK and Japan, it is argued that, to prepare for future health crises, solidarity must be developed through the establishment of institutions. The paper ends by considering potential reforms to the voluntary, informed consent-based framework of the NHS APP and concludes by critiquing Prainsack's 'Solidarity-based Data Governance'—as it arguably has the potential to develop the required solidarity for the widespread uptake of the application.*

## INTRODUCTION

With COVID-19 taking the world by surprise, governments around the world found themselves unprepared to combat and contain the spread of the virus. Although the pandemic is still ongoing, experts are already advising countries to learn from their mistakes and prepare for the inevitable future outbreaks.<sup>1</sup> Amongst many responses, Contact-tracing applications stood out as a promising solution. These mobile applications were designed to address the shortcomings of manual contact-tracing, offering an automated system which facilitates the quick isolation of infectees and their contacts. If adopted widely, this

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<sup>1</sup> Harriet Constable and Jacob Kushner, 'Stopping The Next One: What Could The Next Pandemic Be?' (Bbc.com, 2021) <<https://www.bbc.com/future/article/20210111-what-could-the-next-pandemic-be>> accessed 5 September 2021.

technology can accurately track and slow down the spread Sars-CoV2, making them a necessary asset to successfully tackle health crisis.<sup>2</sup>

Yet, the contact-tracing applications' reliance on individuals' willingness to install and utilize them, has unfortunately resulted in low installation rate world-wide. In England and Wales, the NHS COVID-19 APP (subsequently 'APP') has only been installed by 28% of the total population—which is far below the required number of installations for its efficiency.<sup>3</sup> If the UK wants to be prepared for future pandemic, it is impetus to understand the motivations for the application's low uptake, so to identify the necessary societal conditions which enable widespread usage.<sup>4</sup>

This paper will argue that the pandemic has demonstrated an absence of solidarity in the UK, exemplified by the inefficiency of public health measures, including the APP. Drawing on Prainsack's theory of solidarity, the paper recommends the development of 'solidaristic infrastructures' which foster economic and social equality, which enables people to have sufficient stability to not fend for themselves, and instead join the collective efforts—in this case download the APP.<sup>5</sup> Thus, to achieve this the informed consent regime governing the APP, must be replaced by a Framework which nurtures solidaristic values.

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<sup>2</sup> Sars-CoV2 is the aetiological agent of COVID-19 (see: 'Naming the Coronavirus Disease (COVID-19) And The Virus That Causes It' (*Who.int*, 2021) <[https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it)> accessed 28 April 2021 )

<sup>3</sup> Chris Wymant and others, 'The Epidemiological Impact Of The NHS COVID-19 App' (University of Oxford 2021).

<sup>4</sup> To conform to the existing literature on this topic, the APP will be regarded as the United Kingdom's (UK) contact-tracing application, rather than England and Wales. The APP will be the focus of this discussion.

<sup>5</sup> The word 'solidaristic' will be used throughout the text and is a word invented by Prainsack and Buyx (see Barbara Prainsack and Alena Buyx, *Solidarity In Biomedicine And Beyond* (1st edn, Cambridge University Press 2018)).

This article begins by offering an analysis of the various controversies surrounding the APP's development and the motivations for its low uptake, proposing that solidarity is the needed condition to maximise its installation rate. The paper proceeds by examining the meaning of solidarity, the reasons and consequence for its absence, contending that its replacement by individualism becomes apparent during pandemics—individuals will raise resistance to government policies, as an 'Us-vs-Them' rhetoric develops. After a comparison of UK and Japan's public health measures, this paper proposes that to achieve the widespread uptake of the APP, its voluntary informed consent-based framework must be replaced in favour of a governance module which nurtures solidarity. The article concludes by advocating in favour of adopting Prainsack's 'Solidarity-based Data Governance' Framework, as its grounding in solidarity holds the potential to encourage individuals to carry the cost of installing the APP in support of others.<sup>6</sup>

## **I. THE NHS APP: AN EFFECTIVE RESPONSE TO COVID-19**

### **1.1 Mobile Applications—A Better Tool for Containing Infectious Diseases?**

Since the early 20<sup>th</sup> Century, contact-tracing has been used as the primary method for infectious disease surveillance.<sup>7</sup> Originally used as part of the containment strategies for syphilis in the US, it was later employed to contain other sexually transmitted infections—including HIV.<sup>8</sup> Traditional contact-tracing relies solely on manual investigation, this is a meticulous process which involves: (1) the identification of the infected individual, (2) the retracing of where and with whom the infectee had contact with, and (3) informing all the

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<sup>6</sup> Barbara Prainsack, 'Research for Personalised Medicine: Time for Solidarity' (2017) 36 *Medicine and Law* 87.

<sup>7</sup> David S. Barners, 'Quarantine and The Role of Surveillance in Nineteenth-Century Public Health', *Concepts and methods* (1st edn, Wiley 2015) 27.

<sup>8</sup> Sean Bland, 'Reflections on The History of Contact Tracing | O'Neill Institute' (*Oneill.law.georgetown.edu*, 2020) <<https://oneill.law.georgetown.edu/reflections-on-the-history-of-contact-tracing/>> accessed 10 February 2021.

people, which had contact with the infectee, of their risk of having contracted the disease.<sup>9</sup> However, this method does not rapidly and reliably track population movement post-disease outbreak.<sup>10</sup> Indeed, its dependence on human memory makes this approach susceptible to bias, and is too laborious to suit the rapid spread of infectious diseases.<sup>11</sup>

As a communicable disease, COVID-19 is primarily transmitted via respiratory ‘droplets and fomites during close unprotected contact between an infector and infectee’.<sup>12</sup> To slow down the spread of the virus, the number of contacts the infected individuals have, must be reduced. Thus, the quicker they are identified and isolated, the lower the risk they infect others.<sup>13</sup> In addition, the transmission of Sars-CoV2 can occur pre-symptomatically, or when the infectee is asymptomatic—meaning she could be infected without knowing.<sup>14</sup> Thus, manual contact-tracing does not perform a quick enough identification of all the infected individual’s contacts, and as such it does not adequately contain Sars-CoV2.

Fortunately, the technological advancement in recent years has generated the potential to improve the efficiency of contact-tracing. In 2014, mobile applications were adopted to contain the spread of Ebola Virus Disease in West Africa.<sup>15</sup> An early example of this is the Guinean application. The application’s CommCare software allowed tracers to report their observations in real time, which facilitated a swift response by local and national health officials.<sup>16</sup> Lucivero argues that contact-tracing applications ‘automate a labour-intensive

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<sup>9</sup> Federica Lucivero and others, 'COVID-19 And Contact Tracing Apps: Ethical Challenges for A Social Experiment on a Global Scale' (2020) 17 *Journal of Bioethical Inquiry*.

<sup>10</sup> Linus Bengtsson and others, 'Improved Response to Disasters and Outbreaks by Tracking Population Movements with Mobile Phone Network Data: A Post-Earthquake Geospatial Study in Haiti' (2011) 8 *PLoS Medicine* 1.

<sup>11</sup> *Ibid* 2.

<sup>12</sup> World Health Organisation, 'Report Of The WHO-China Joint Mission On Coronavirus Disease 2019 (COVID-19)' (World Health Organisation 2020) 8 <[https://www.who.int/publications/i/item/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/publications/i/item/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-(covid-19))> accessed 10 February 2021.

<sup>13</sup> Leonardo Maccari and Valeria Cagno, 'Do We Need A Contact Tracing App?' (2021) 166 *Computer Communications* 9.

<sup>14</sup> *Ibid*.

<sup>15</sup> Kendra Keith and Kendra Keith, 'Why Haven'T Mobiles Solved the Problem of Ebola Contact Tracing Yet?' ( *TechChange*, 2014) <<https://www.techchange.org/2014/10/28/ebola-contact-tracing-mhealth/>> accessed 10 February 2021.

<sup>16</sup> Mariama Siré Kaba, 'Mobile App Promises to Speed Ebola Response in Guinea' ( *Unfpa.org*, 2015) <<https://www.unfpa.org/news/mobile-app-promises-speed-ebola-response-guinea>> accessed 10 February 2021.

practice' and provide instant updates (notifications) in a situation where a rapid response is essential.<sup>17</sup> Some applications' now have a system of 'proximity detection' which offers greater reliability—especially when dealing with asymptomatic infectees.<sup>18</sup> Although potential infectees have the responsibility of taking rapid diagnostic tests and self-isolating accordingly, the application offers the required accuracy and rapidity to contain viruses. Hence, contact-tracing applications should be used to contain infectious diseases, like COVID-19.

### *Contact-Tracing Applications in the COVID-19 Pandemic*

In December 2019, the first cases of COVID-19 were identified in the city of Wuhan, China.<sup>19</sup> One of the immediate responses by the Chinese government was the development of the 'Alipay Health Code'<sup>20</sup> application.<sup>21</sup> Although Sars-CoV2 emerged in China, the Chinese government has not only slowed the spread of infections, but has maintained the daily case rate close to zero.<sup>22</sup> Whilst cases in countries world-wide doubled, a similar low rate of infections was exhibited in other East Asian countries.<sup>23</sup> South Korea, Taiwan,

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<sup>17</sup> Lucivero and others (n 9) 2; Jeremy HSU, 'The Dilemma of Contact-Tracing Apps - Can This Crucial Technology Be Both Effective and Private?' [2020] SPECTRUM.IEEE.ORG 57.

<sup>18</sup> The majority of mobile applications work by 'identifying couple of devices that have been in communication range with each other for a specific amount of time'. If a person has tested positive, they can use the app to send an automatic warning to all the people they came into contact with; (see: Maccari and Cagno (n 13) 11).

<sup>19</sup> Lily Kuo, 'China Confirms Human-To-Human Transmission of Coronavirus' (*the Guardian*, 2020) <<https://www.theguardian.com/world/2020/jan/20/coronavirus-spreads-to-beijing-as-china-confirms-new-cases>> accessed 25 April 2021; In March 2020 it was discovered that the first cases of COVID-19 dated back to 17<sup>th</sup> November 2019, not December. A report in the South China Morning Post claimed that Chinese authorities had been able to retrospectively identify 266 people had contracted the virus weeks before the announcement of a new virus. For more information on this topic see: Helena Davidson, 'First Covid-19 Case Happened in November, China Government Records Show - Report' (*the Guardian*, 2020) <<https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report>> accessed 26 April 2021.

<sup>20</sup> The application's algorithm works by combining passively collected data (GPS locations) with actively collected data (self-reported symptoms) and assigns its users a colour—red, yellow, or green. This generates QR codes which determine the individual's ability to access certain public areas. (see: Paul Mozur, Raymond Zhong and Aaron Krolik, 'In Coronavirus Fight, China Gives Citizens A Color Code, With Red Flags' (*Nytimes.com*, 2020) <<https://www.nytimes.com/2020/03/01/business/china-coronavirus-surveillance.html>> accessed 10 February 2021.)

<sup>21</sup> Feng Xu and Qian Liu, 'China: Community Policing, High-Tech Surveillance, And Authoritarian Durability', *COVID-19 in Asia: Law and Policy Contexts* (1st edn, Oxford University Press 2021) p.46; Developed by Anti Financial--Alibaba's sister company.

<sup>22</sup> Michael J Parker and others, 'Ethics of Instantaneous Contact Tracing Using Mobile Phone Apps in The Control Of The COVID-19 Pandemic' (2020) 46 *Journal of Medical Ethics* 427.

<sup>23</sup> Yansheng Huang, Meicen Sun and Yuze Sui, 'How Digital Contact Tracing Slowed Covid-19 In East Asia' (*Harvard Business Review*, 2020) <<https://hbr.org/2020/04/how-digital-contact-tracing-slowed-covid-19-in-east-asia#>> accessed 25 April 2021.

Singapore and Japan, were able to flatten the curve.<sup>24</sup> Huang, Sun and Sui argue this was consequent to the effective deployment of their contact-tracing application.<sup>25</sup> Hence, inspired by the East Asian success, governments around the world started to develop their own application. Amongst them, was the UK, which was in the process of developing their first application.

## **1.2 Introducing the NHS Contact-Tracing Application**

In March 2020, the UK government announced their intention of designing their own contact-tracing application. However, the initial beta-version was later abandoned and replaced by the current APP—built on the Bluetooth technology provided by Apple and Google.<sup>26</sup> This was due to the backlash received against the application's centralised system, and the government's non-compliance with the data protection framework.

Contact-tracing relies on the collection of personal data. Public health agencies have always routinely collected Patient data as part of disease surveillance.<sup>27</sup> According to Eysenbach, the development of novel data sources has resulted in the collection of data directly from individuals' digital traces.<sup>28</sup> Although it can be argued that the APP's data collection allows the study of 'person-to-person spread' of the virus as well the infection risk factors, there are dangers associated with the storage of huge amounts of sensitive data.<sup>29</sup> In fact, privacy infringement, government surveillance, restriction of civil liberties and even

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<sup>24</sup> Yansheng Huang, Meicen Sun and Yuze Sui, 'How Digital Contact Tracing Slowed Covid-19 In East Asia' (*Harvard Business Review*, 2020) <<https://hbr.org/2020/04/how-digital-contact-tracing-slowed-covid-19-in-east-asia#>> accessed 25 April 2021.

<sup>25</sup> Yansheng Huang, Meicen Sun and Yuze Sui, 'How Digital Contact Tracing Slowed Covid-19 In East Asia' (*Harvard Business Review*, 2020) <<https://hbr.org/2020/04/how-digital-contact-tracing-slowed-covid-19-in-east-asia#>> accessed 25 April 2021.

<sup>26</sup> Jacqui Wise, 'Covid-19: UK Drops Its Own Contact Tracing App to Switch To Apple And Google Model' [2020] *BMJ*.

<sup>27</sup> Lucivero and others (n 9) 2; Marcel Salathé and others, 'Digital Epidemiology' (2012) 8 *PLoS Computational Biology* 3.

<sup>28</sup> Gunther Eysenbach, 'Infodemiology And Infoveillance: Framework For An Emerging Set Of Public Health Informatics Methods To Analyze Search, Communication And Publication Behavior On The Internet' (2009) 11 *Journal of Medical Internet Research*; An example of this would be the data collected from search engines which can alert local government agencies of respiratory illness in their community. For an in depth analysis of the benefits of health data collection (see : Lucivero and others (n 9) 2)

<sup>29</sup> Lucivero and others (n 9) 2



data breaches by third parties, are all risks associated with data storage.<sup>30</sup> Thus, data collection must be regulated by an effective legal regime.

### **1.3 Legal Background: The Data Protection Regulatory Framework**

Personal data collection is regulated by the UK General Data Protection Regulation (GDPR)<sup>31</sup> and national legislation—Data Protection Act 2018 (DPA).<sup>32</sup> The GDPR sets out the key principles, obligations, and rights for the lawful process of data. It requires the data controller<sup>33</sup> to complete a Data Protection Impact Assessment (DPIA) (Article 35). Here the privacy risks are calculated and the legal basis for processing data is established.

In February 2021, the Department of Health and Social Care (DHSC) released the DPIA for the APP.<sup>34</sup> Originally, it was presumed consent would be the lawful ground for data processing (Article 6(1)(a)).<sup>35</sup> Instead, it was held that the legal basis would be ‘exercise of official authority’ under Article 6(1)(e).<sup>36</sup> This is not a public interest test, but the legality of the data processing is considered necessary for the performance of a public interest task by public authorities. This legal basis ensures that the data processing is lawful even if the user

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<sup>30</sup> Ibid.

<sup>31</sup> Since the withdrawal of the UK from the European Union, the EU GDPR no longer applies to the UK. Thus, the majority of the regulation's content is now reflected in the UK GDPR, with the exception of certain provision which are no longer relevant. (see: 'Information Rights After The End Of The Transition Period – Frequently Asked Questions' (*Ico.org.uk*, 2021) <<https://ico.org.uk/for-organisations/dp-at-the-end-of-the-transition-period/transition-period-faqs/#:~:text=The%20EU%20GDPR%20is%20an,with%20UK%20data%20protection%20law.>> accessed 25 April 2021.); *U General Data Protection Regulation (GDPR)*: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

<sup>32</sup> Data Protection Act 2018

<sup>33</sup> The UK GDPR defines the data controller as: the natural or legal person, public authority, agency, or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data. (See: 'What Are 'Controllers' And 'Processors'?' (*Ico.org.uk*, 2021) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/controllers-and-processors/what-are-controllers-and-processors/#:~:text=The%20UK%20GDPR%20defines%20a,make%20decisions%20about%20processing%20activities.>> accessed 26 April 2021.)

<sup>34</sup> 'NHS COVID-19 App: Data Protection Impact Assessment' (*GOV.UK*, 2021) <<https://www.gov.uk/government/publications/nhs-covid-19-app-privacy-information/nhs-covid-19-app-data-protection-impact-assessment>> accessed 25 April 2021.

<sup>35</sup> 'NHS COVID-19 App: Data Protection Impact Assessment' (*GOV.UK*, 2021) <<https://www.gov.uk/government/publications/nhs-covid-19-app-privacy-information/nhs-covid-19-app-data-protection-impact-assessment>> accessed 25 April 2021. 'Ibid' for consecutive references

<sup>36</sup> 'NHS COVID-19 App: Data Protection Impact Assessment' (*GOV.UK*, 2021) <<https://www.gov.uk/government/publications/nhs-covid-19-app-privacy-information/nhs-covid-19-app-data-protection-impact-assessment>> accessed 25 April 2021.

uninstalls the application, revoking their consent. Nonetheless, consent is still necessary as the application is downloaded on a voluntary basis.

As the APP collects health data, the DHSC had to consider an additional set of conditions under Article 9. In fact, Article 9(2) lays out certain exceptions which justify the use of data in this special category (Article 9(1)). The application's DPIA outlines that the data storage was deemed necessary for the purposes of Article 9(1)(g)-(i).<sup>37</sup> This is important as it allows the data processor<sup>38</sup> to store, use and analyse data—which normally would have been unlawful.<sup>39</sup> Parker argues that privacy infringements are only justifiable where they have the potential of saving lives or reducing suffering.<sup>40</sup> In fact, personal data has become an innate part of our private life, it's unlawful access can amount to a privacy invasion—under Article 8 the Human Rights Act 1998.<sup>41</sup>

Although compliance with the GDPR limits violations, the design of contact-tracing applications also has an impact on how safeguarded the data is. This is because certain designs facilitate privacy and security. Others, like the Chinese 'Alipay Health Code', have been criticised for being too invasive—as they allow governments to collect and control excessive amounts of personal information.<sup>42</sup> In the development phase of the APP, there was

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<sup>37</sup> Article 9(2)(g) exempts processes of health data which are 'necessary for reasons of substantial public interest in the basis set out in [law]'; Article 9(2)(h) finds it 'necessary for the management of health or social care systems and services; whilst Article 9(2)(i) finds it 'necessary for reasons of public interest in the area of public health'. ( see: 'NHS COVID-19 App: Data Protection Impact Assessment' (GOV.UK, 2021) <<https://www.gov.uk/government/publications/nhs-covid-19-app-privacy-information/nhs-covid-19-app-data-protection-impact-assessment>> accessed 25 April 2021.)

<sup>38</sup> The UK GDPR defines the data processor as: a natural or legal person, public authority, agency, or other body which processes personal data on behalf of the controller. (See: 'What Are 'Controllers' And 'Processors'?' (ICO.org.uk, 2021) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/controllers-and-processors/#:~:text=The%20UK%20GDPR%20defines%20a,make%20decisions%20about%20processing%20activities.>> accessed 26 April 2021.)

<sup>39</sup> Parker and others (n 22) 428.

<sup>40</sup> Ibid.

<sup>41</sup> 'The EU General Data Protection Regulation' (*Human Rights Watch*, 2018) <<https://www.hrw.org/news/2018/06/06/eu-general-data-protection-regulation>> accessed 25 April 2021.

<sup>42</sup> Xu and Liu (n 21) 46.

an ongoing discussion about which model to employ—this was the decentralised and centralised debate.

#### **1.4 Decentralised vs. Centralised Debate**

A centralised storage system gives devices a permanent identifier (installationID), which is stored on the centralised server managed by the data processor.<sup>43</sup> This allows the data processor to store and access the information collected indefinitely, which if not adequately safeguarded, this can lead to abuses by the central agency—including human right breaches.<sup>44</sup> Additionally, the use of InstallationIDs makes the data less encrypted and thus, more vulnerable to cyber-attacks.<sup>45</sup> Originally the APP's beta-version had a centralised system, yet pressure was placed on the government to abandon it in favour of a more secure and private design—the decentralised model.<sup>46</sup>

The current version of the APP has a decentralised system which does not generate an InstallationID, but only creates an ephemeral identifier on the device's server.<sup>47</sup> This means that the data is stored locally and can only be accessed directly from the device. Although a decentralised system has a backend server, it only holds anonymised data and communicates with other applications through a 'privacy preserving gateway'.<sup>48</sup> This means that even if the server's security is compromised the user's privacy remains intact.<sup>49</sup> Furthermore, the

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<sup>43</sup> Lucie White and Philippe Van Basshuysen, 'Without A Trace: Why Did Corona Apps Fail?' [2021] *Journal of Medical Ethics* 1; The server will then create a 'frequently-changing ID-number', which will be sent to the user's phone. When the phone comes into proximity with another device, the two devices will exchange their ephemeral identifiers via Bluetooth. If a user registers herself as positive to COVID-19, the ephemeral identifiers stored on her phone are sent to the server and matched with the corresponding InstallationIDs, automatically alerting the users.

<sup>44</sup> Joyce Hakmeh and others, 'The COVID-19 Pandemic And Trends In Technology' (International Secretary Programme 2021) <<https://www.chathamhouse.org/sites/default/files/2021-02/2021-02-16-covid-19-trends-technology-hakmeh-et-al.pdf>> accessed 22 February 2021.

<sup>45</sup> Ibid 10.

<sup>46</sup> Chris Culnane and Vanessa Teague, 'Security Analysis Of The NHS COVID-19 App' (*State of IT*, 2020) <<https://stateofit.com/UKContactTracing/>> accessed 14 February 2021.

<sup>47</sup> Micheal Veale and others, 'Decentralized Privacy-Preserving Proximity Tracing' (2020) 2; Ephemeral identifiers is an alternative way of saying frequently-changing ID-number.

<sup>48</sup> Veale and others (n 47) 14.

<sup>49</sup> Serge Vaudenay argues neither the decentralised nor centralised system are infallible to hacking attacks. In fact, he contends the two systems are vulnerable in different ways. Hackers in a decentralised system, 'can expose the identities of infected users'. For example, in the eventuality where a burglary occurs where both parties have the application installed, the ephemeral identifiers retrieved from the victims phone and be used by law enforcement to identify a perpetrator. In fact, more information can be recovered when the device is hacked directly; (see: Serge Vaudenay, 'Centralized or decentralized? The contact tracing dilemma' (2020) *IACR Cryptology ePrint*.).

Information Commissioner's Office (ICO) has confirmed that ephemeral identifiers will be automatically deleted from the device after 14 days.<sup>50</sup> Hence, this system offers greater safety and protects the user's privacy.

The legal framework of the APP is only one aspect for the successful usage of contact-tracing applications, and it is not the focus of this discussion. Although there is more literature on this discourse, what is more interesting to examine are the necessary societal conditions for the APP to successfully slow-down COVID-19. Indeed, as the application is voluntarily downloaded, a critical fraction of the population must install it to substantially impact the pandemic. The Oxford Big Data Institute found this critical fraction to be at least 56% of the population.<sup>51</sup> As the APP's effectiveness relies on the willingness of individuals to utilize—the higher the installation rate, the slower the spread of the virus will be. Unfortunately, by December 2020, the application had only been installed by 21 million people—forming 28% of the total population.<sup>52</sup> Although a robust legal framework was eventually put in place, and a more privacy-favourable decentralised model was chosen, the application still exhibited a low uptake. Thus, to prepare for future health crises, the reasons for the application's low uptake must be analysed.

### **1.5 The Inefficiency of the APP—Increasing the Installation Rate**

#### *Government Failures and the Absence of Trust and Confidence*

In the initial stages of the pandemic, the plan to design a contact-tracing application was welcomed by large popular support. A study by the University of Oxford and a Isle of

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<sup>50</sup> Information Commissioner's Office, 'COVID-19 Contact Tracing: Data Protection Expectations On App Development' (Information Commissioner's Office 2021).

<sup>51</sup> Oxford University's Big Data Institute, 'Digital Contact Tracing Can Slow Or Even Stop Coronavirus Transmission And Ease Us Out Of Lockdown' (University of Oxford 2020) <<https://www.research.ox.ac.uk/Article/2020-04-16-digital-contact-tracing-can-slow-or-even-stop-coronavirus-transmission-and-ease-us-out-of-lockdown>> accessed 15 February 2021.

<sup>52</sup>This is 49% of the population with compatible phones (see: Wyman and others (n 3) 2).

Wright survey, showed that roughly 75% of respondents would download the application.<sup>53</sup> However, only 42% of the island's population installed the beta-version by the end of this trial-phase.<sup>54</sup> According to Stephan Armstrong, people were discouraged to install it due to the emergent doubt towards the application's safety and efficiency.<sup>55</sup> He argues that the government made the mistake of developing an application with a centralised system—as they were aware that the public was sceptical of its security.<sup>56</sup>

Whilst the centralised system of the beta-version contributed to the applications' inefficiency, the government's non-compliance with the data protection framework is of greater significance. In May 2020, the ICO received a legal letter from the Open Rights Group (ORG) contending the beta-version had 'failed to fulfil its GDPR requirements', as the APP was deployed without completing a DPIA.<sup>57</sup> Arguably this exemplified the existing scepticism surrounding application's safety. In fact, a study led prior to the trial-phase, found that the greatest concern held by citizens was privacy.<sup>58</sup> Knowing this, it can be argued that the government should have taken steps to cultivate trust in the application, rather than aggravating the situation.

The government could have ameliorated the situation by following the Joint Committee on Human Rights (JCHR) recommendation to enact new legislation. They argued this would provide legal clarity and certainty on how the data would be 'used, stored and

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<sup>53</sup> Johannes Abeler and others, 'Support in The UK for App-Based Contact Tracing Of COVID-19' (Department of Economics, University of Oxford 2020); according to this study 73.6% of respondents of a representative sample of 1055 UK residents, would definitely or probably install the application; Emmeline Taylor, Johathan Jackson and Julia Yesberg, 'Coronavirus: Survey Reveals What The Public Wants From A Contact-Tracing App' (*The Conversation*, 2020) <<https://theconversation.com/coronavirus-survey-reveals-what-the-public-wants-from-a-contact-tracing-app-138574>> accessed 20 February 2021.

<sup>54</sup> Stephen Armstrong, 'Covid-19: Deadline for Roll Out of UK'S Tracing App Will Be Missed' [2020] *BMJ* 1-2.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Rajeev Syal, 'UK Contact-Tracing App Could Fall Foul of Privacy Law, Government Told' (*the Guardian*, 2020) <<https://www.theguardian.com/world/2020/may/07/uk-coronavirus-contact-tracing-app-could-fall-foul-of-privacy-law-government-told>> accessed 1 March 2021.

<sup>58</sup> Simone Williams and others, 'Public Attitudes Towards COVID-19 Contact Tracing Apps: A UK-Based Focus Group Study' (*medRxiv* 2020) <<https://www.medrxiv.org/content/10.1101/2020.05.14.20102269v1>> accessed 1 January 2021

disposed of'.<sup>59</sup> Newson argues this would have increased the confidence in the application, and addressed the public's concerns, whilst developing public trust.<sup>60</sup> Public trust, is a condition that helps the law to function effectively. Citizens are more likely to install the application if they can trust the system. However, the Secretary of State for Health, Matt Hancock, held that the implementation of new legislation was unnecessary. He argued that the current data protection regime offered sufficient protection when dealing with informed consent.<sup>61</sup> The use of the application is on a voluntary basis and when users download it, they are informed and willingly agree to the data use. Thus, as long as the DPIA is completed lawfully, their consent waives their legal rights, and their data can be processed. As such, the government's decision not to enact further legislative safeguards, aggravated the existing scepticism towards the application, which meant other conditions needed to be nurtured to encourage a mass-scale installation—for instance solidarity.

Whilst there is merit in the above argument, it does not explain why people initially showed willingness to download the application despite the potential privacy risks. A study by CASS Business School suggested that 54.6% of users would use a 'big brother' app which 'did not respect privacy and civil liberties'—meaning they would have installed the application notwithstanding whether it abides to data protection law.<sup>62</sup> In fact, Horvath argues that 'citizens do not always prioritise privacy' and as such they often prefer a centralised system over a decentralised one.<sup>63</sup> This indicates that the lack of trust in the

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<sup>59</sup> Government Legal Department, 'RE: Open Rights Group And The NHS Test & Trace Programme' (UK Government 2020).

<sup>60</sup> House of Commons, House of Lords Joint Committee on Human Rights, Human Rights and the Government's Response to Covid-19: Digital Contact Tracing (May 2020); At the time, Professor Lilian Edwards and other academics, formulated 'The Coronavirus (Safeguards) Bill 2020'. The Bill proposed protections for digital contact-tracing and immunity certificates, these would have addressed all public concerns and built confidence in the APP. For example, Section 1 guaranteed that there would be no sanctions for not carrying personal devices, install or even run the application. (see Lilian Edwards and others, 'The Coronavirus (Safeguards) Bill 2020: Proposed Protections For Digital Interventions And In Relation To Immunity Certificates'.).

<sup>61</sup> Nicola Newson, 'Contact-Tracing Apps: Legislating for Data Protection?' (*House of Lords Library*, 2020) <<https://lordslibrary.parliament.uk/contact-tracing-apps-legislating-for-data-protection/>> accessed 1 March 2021.

<sup>62</sup> Caroline Wiertz and others, 'Predicted Adoption Rates of Contact Tracing App Configurations - Insights from A Choice-Based Conjoint Study with A Representative Sample of The UK Population' [2020] SSRN Electronic Journal; 54.6% of a representative sample of 2061 people.

<sup>63</sup> Laszlo Horvath and others 'Citizens' Attitudes to Contact Tracing Apps' [2020] *Journal of Experimental Political Science*

application's safety, and the aggravating government failures are merely a contributing factor, but *not* the reason why only 28% of the population downloaded the APP. Simon Williams' study indicates that people's decision to install or not install is 'heavily influenced by moral reasoning'.<sup>64</sup> Thus, an examination of users' motivations for the installation of the APP, might provide insight on the conditions required for widespread uptake.

### *Solidarity and Installing the APP*

The aforementioned study by Williams, found that the main factor motivating users to install the APP was their belief that the application was used for the 'greater good'.<sup>65</sup> Even those alarmed by the application's privacy implications, claimed they would still download it—as the potential public health benefit outweighed their concerns.<sup>66</sup> In fact, there was a recognition of the instrumental role the application could have in slowing the spread of Sars-CoV2.<sup>67</sup> However, there was no suggestion that users were motivated to install it to gain a direct benefit for its use. For example, no participant was motivated by a desire to be informed rapidly if infected by COVID-19. Consequently, it is clear that downloading the application is not a selfish action, instead the installation is seen as a means to ameliorate the severity and urgency of the pandemic. Therefore, its use is arguably 'driven by a more utilitarian evaluation of the relative costs and benefits'.<sup>68</sup>

If the installation of the application is motivated by the users' desire to slow-down the pandemic, then the low uptake of the APP suggests that people are not willing to overlook their concerns and do something costly for the greater good. In fact, by not joining in the collective efforts, individuals prioritized their own interests and rights. To encourage the

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<sup>64</sup> Williams and others (n 58) 18.

<sup>65</sup> Williams and others (n 58) 21.

<sup>66</sup> Williams and others (n 58) 18.

<sup>67</sup> Williams and others (n 58) 15.

<sup>68</sup> Williams and others (n 58) 18.

widespread uptake of the APP, a societal condition which focuses on expressing a feeling of togetherness and commitment for a common interest, must be fostered.<sup>69</sup> This paper argues this condition to be solidarity, and that its very absence is the reason for popular unwillingness to undertake the cost of installing the APP for a common goal. Before delving deeper into this analysis, we must first understand the meaning of solidarity and the reasons for its absence.

## **II. SOLIDARITY AND THE LIMITS OF TECHNOLOGY**

### **2.1 Defining Solidarity**

The term ‘solidarity’ has developed different meanings through time.<sup>70</sup> Prainsack claims that most definitions of solidarity have three commonalities: (1) they include people supporting each other, (2) the solidaristic action is taken as a result of a shared common goal, characteristic, or threat, between the people providing support and the ones receiving it, and (3) solidarity involves some level of reciprocity—it is not an isolated interaction.<sup>71</sup> For the purpose of this discussion, solidarity will be defined according to Prainsack and Buyx’s definition.

They argue that solidarity should be defined as: ‘the enacted commitment to carry costs or to assist others with whom a person or persons recognise similarity in a relevant respect’.<sup>72</sup> The relevant similarity is dependent on the specific situation in which solidarity

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<sup>69</sup> Ruud ter Meulen, 'Solidarity, Justice, And Recognition Of The Other' (2016) 37 Theoretical Medicine and Bioethics 519.

<sup>70</sup> Barbara Prainsack, 'Solidarity In Times Of Pandemics' (2020) 7 Democratic Theory 124.

<sup>71</sup> Ibid; An example of this would be Habermas characterization of solidarity as 'the other side of justice'. This epitomizes it as the adhesive between political and social institutions. Thus, solidarity is not something that can be prescribed to but is achieved through initiative and will. (see Jürgen Habermas, *Theory of Communicative Action Volume One: Reason and the Rationalization of Society* (Beacon Press 1984)).

<sup>72</sup> Ibid p 53.



occurs.<sup>73</sup> The recognition of a commonality is an active process—person A sees in person B something they see in themselves.<sup>74</sup> Thus, merely recognising ‘essentialist, or even nativist, characteristics’ will not be enough to incur solidarity.<sup>75</sup> This means that acting solidaristic involves sustaining a cost of some kind, which might be minimal or balanced to the benefit received.<sup>76</sup> Solidary has different manifestations and, therefore, they introduced a tier-system to address them.<sup>77</sup>

The ‘Three Tiers of Solidarity’ is what differentiates Prainsack and Buyx’s definition from others, making it superior for understanding the dimensions of solidarity during the COVID-19 pandemic. The first tier refers to ‘inter-personal solidarity’, this is when solidarity occurs between individual people.<sup>78</sup> When individuals’ willingness to undertake costs to help others becomes the ‘new normal’, then ‘tier 2 group solidarity’ arises.<sup>79</sup> This is when individuals practice solidarity collectively.<sup>80</sup> Once the values and principles—that emerged during group solidarity—solidify, they often become written into legal, administrative or contractual norms.<sup>81</sup> This solidification develops tier 3, which institutionalises solidarity.<sup>82</sup> An example of this would be welfare states or any publicly funded health systems, like the NHS.<sup>83</sup> Thus, the different tiers are not mutually exclusive, but instead the level of reciprocity between individuals builds from one tier to the other—meaning the higher levels cannot exist without the lower ones.<sup>84</sup> This facilitates a distinction between solidarity and other forms of

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<sup>73</sup> Ibid.

<sup>74</sup> Prainsack (n 50) 125.

<sup>75</sup> Prainsack and Buyx (n 5) p53.

<sup>76</sup> Peter West-Oram, ‘Solidarity is for Other People: Identifying Derelictions of Solidarity in Responses To COVID-19’ (2020) 47 *Journal of Medical Ethics* 65.

<sup>77</sup> Prainsack and Buyx (n 5) pp 54-57.

<sup>78</sup> Ibid.

<sup>79</sup> This must occur in a specific context or within the same community (see: Prainsack and Buyx (n 5) p 55.).

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid p56.

<sup>84</sup> Ibid p57.

pro-social practice—for instance empathy, charity or love—making this definition superior to its alternatives.<sup>85</sup>

The existence of the NHS and welfare states would suggest that solidarity is present in the UK and the rest of Europe. However, if this were true, then the absence of solidarity exhibited in the low uptake of the APP, would arguably not have occurred. As such, the existence of welfare states and publicly funded health system does not necessarily mean that solidarity is currently existing, but simply indicates that it existed when the institution was formed. Achieving all ‘three tiers of solidarity’ is *not* a onetime occurrence that lasts eternally. Instead, the lower tiers need to be constantly developed and nurtured. Thus, to understand why solidarity is currently absent, we must examine its history.

## **2.2 The Absence of Solidarity in Europe**

### *A History of Underdevelopment and Disuse*

Although the notion of solidarity has existed since the Roman Empire, its contemporary notion did not emerge until the first half of the 19<sup>th</sup> Century.<sup>86</sup> Sternø contends that *solidarité* surfaced from the combination of the idea of individual rights and liberties with the concepts of social cohesion and community developed during the French Revolution.<sup>87</sup> However, it was Auguste Comte that rendered the term visible—helping it become a ‘basic sociological concept ‘and inspiring the majority of the subsequent

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<sup>85</sup> Prainsack (n 70) 126.

<sup>86</sup> Kurt Bayertz, *Solidarity* (Kluwer Academic Publishers 1999) p 3; The etymological root of solidarity originates from the Roman Law concept of ‘*obligatio in solidum*’, whereby a family or community were jointly liable for the debt of an individual member.

<sup>87</sup> Steinar Sternø, *Solidarity in Europe: The History of An Idea* (Cambridge University Press 2005) p25.

scholarship.<sup>88</sup> Nevertheless, Bayertz contends that the term's fragmented history resulted in theoretical neglected and underdevelopment.<sup>89</sup> Unlike comparable terms like 'justice', 'liberty' or 'equality', solidarity has not been 'defined in a binding manner' resulting in a diverse and contradictory use.<sup>90</sup> Yet, the end of the Second World War attracted a new interest in solidarity.

The post-war period showcased a new sense of community—individuals had been brought together by the war. Consequently, states planned a system where all citizens would be covered equally regardless of class, biology, or fate.<sup>91</sup> This put into practices solidaristic principles and values, creating the first solidaristic infrastructures.<sup>92</sup> These European Welfare states operated on the assumption that if everyone financially contributed to an organised insurance system, then equal access to health and social care would be guaranteed to all members of society.<sup>93</sup> Although solidary was now considered 'part of the fabric' of society, Meulen argues this did not attracting new attention towards the term, which was instead taken for granted and no longer cultivated.<sup>94</sup>

### *The Rise of Individualism*

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<sup>88</sup> Auguste Comte argued that solidarity was a remedy to the 'increasing individualism and atomisation of society', which he viewed as detrimental to the 'well-being of the collective' [see: (Sternø (n 87) 25)] and (Bayertz (n 86) 3)]; This included Emile Durkheim's cardinal theory on the 'distinction between mechanical and organic solidarity' which facilitated the development of solidarity into its modern notions e.g. the development of solidarity as defined by Prainsack and Buyx.

<sup>89</sup> Furthermore, the term's 'positive obligation to act', prevented the term's integration in 'mainstream ethical and political thought' (see Bayertz (n 86) 3).

<sup>90</sup> Bayertz (n 86) p 3; Prainsack and Buyx (n 5) p19.

<sup>91</sup> Peter Baldwin, *The Politics of Social Solidarity: Class Bases Of The European Welfare State, 1875-1975* (Cambridge University Press 1990) p108.

<sup>92</sup> Prainsack and Buyx (n 5) p.52.

<sup>93</sup> Ter Meulen (n 69) 519.

<sup>94</sup> Prainsack and Buyx (n 5) p23;

The new status acquired by solidaristic values was not long-lived—by the end of the 20<sup>th</sup> Century the emergence of neoliberal value, like individualism, replaced solidarity.<sup>95</sup> Prainsack and Buyx contend that the departure from ‘a type of thinking and policy making’ which treated solidaristic societies as requirements for the well-being of its citizens, resulted in the neglect of principles protecting and guaranteeing solidarity.<sup>96</sup> Moreover, neoliberalism’s promotion of individualism encourages economic and social inequalities, as individual choices and freedoms are regarded as more important than the society they live in.<sup>97</sup> This is arguably antithetical to solidarity, as the suspicion, anger, and resentment fuelled by these inequalities fosters detachment from the *body politic* and diminishes trust—which underpins solidaristic values.<sup>98</sup> Indeed, solidarity expresses togetherness and a commitment for a common good, which is disregarded by individualism.<sup>99</sup> Thus, this emphasis on individuals replaced solidarity, by discouraging community values and social cohesion.

Although solidarity is used freely in everyday public and political discourse, its absence becomes evident in periods of unrest, crisis, or calamity.<sup>100</sup> In normal circumstances, West-Oram argues that interpersonal and group solidarity can be easily engaged by private individuals.<sup>101</sup> For example, they can avoid contact with sick people or bring groceries for an ill neighbour.<sup>102</sup> However, the situation changes during a period of unrest where these levels of solidarity are no longer enough.

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<sup>95</sup> Prainsack and Buyx (n 5) p23.

<sup>96</sup> Ibid.

<sup>97</sup> Kathleen Lynch and Manolis Kalaitzake, 'Affective and Calculative Solidarity: The Impact of Individualism and Neoliberal Capitalism' (2018) 23 European Journal of Social Theory 238; B. Amable, 'Morals and Politics in The Ideology of Neo-Liberalism' (2010) 9 Socio-Economic Review 3; Lynch and Kalaitzake,(123) 238; By focusing on the individual, people are encouraged to pursue their personal benefits rather than social equality. The consequence of this is that certain people will have greater income than others. A neoliberal system does not focus enough on equalizing these differences, and as such there will inevitably be economic and social inequalities.

<sup>98</sup> Lynch and Kalaitzake,( n 97) 249.

<sup>99</sup> Ter Meulen (n 69) 519.

<sup>100</sup> What this refers to is when the media and politicians use the term solidarity to describe instances of people supporting each other, like they did in the early stages of the pandemic (see below)

<sup>101</sup> West-Oram (n 58) 66.

<sup>102</sup> Another example would be individuals paying taxes that fund welfare state initiatives ( see: West-Oram (n 50) 67).

### **2.3 The COVID-19 Pandemic: The Problematic Consequences of a lack of Solidarity**

The Covid-19 pandemic is a ‘social problem of interconnected humanity’—the actions of one individual can have enough impact on the collective efforts to impede progress.<sup>103</sup> Hence, for health measures to be effective there has to be social cohesion. In a 2011 report, Prainsack and Buyx examined how the lack of solidarity affect pandemics.<sup>104</sup> They argued that the short timespan in which pandemics emerge is not sufficiently long for people to undergo the different stages of need and capability.<sup>105</sup> Moreover, some people will experience considerably higher costs than others, consequently affecting people’s perception of ‘sameness’ and their willingness to undertake ‘costs to assist others’.<sup>106</sup> These conditions prevent individuals from seeing commonalities across the entire population and shift the atmosphere into an ‘Us-vs-Them’ rhetoric.<sup>107</sup> This limits the likelihood that solidarity is mobilized to support public health measures. In fact, when a government calls upon individuals to do something costly, for example downloading the APP, people are likely to ‘raise resistance’.<sup>108</sup> Thus, the absence of solidarity has arguably resulted in the APP’s low uptake, as citizens inability to see commonalities with others, resulted in an unwillingness to committee to its use for the greater good. As such, to prepare for future pandemics solidarity must be fostered as it is a necessary condition for contact-tracing applications to be effective.

## **III. PREPARING FOR FUTURE PANDEMICS: DEVELOPING SOLIDARITY**

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<sup>103</sup> Muneera Bano, Didar Zowghi , and Chetan Arora, 'Requirements, Politics, Or Individualism: What Drives The Success Of COVID-19 Contact-Tracing Apps?' (2021) 38 IEEE Software 7.

<sup>104</sup> Barbara Prainsack and Alena Buyx, 'Solidarity: Reflections on an Emerging Concept In Bioethics' (Nuffield Council on Bioethics 2011) 1.

<sup>105</sup> Barbara Prainsack and Alena Buyx, 'Solidarity: Reflections on An Emerging Concept In Bioethics' (Nuffield Council on Bioethics 2011); Prainsack (n 70) 127.

<sup>106</sup> Ibid.

<sup>107</sup> Prainsack (n 70) 127.

<sup>108</sup> An example of this would be installing a contact-tracing application with potential privacy and data implications (see: Prainsack (n 70) 124)

### **3.1 Lessons learnt from the COVID-19 Pandemic**

With cases worldwide still doubling, the majority of countries have been unable to contain the virus. This paper contends this is due to a lack of solidarity. In the absence of a vaccine, the majority of countries relied on public health measures which required sacrifices of personal freedom.<sup>109</sup> Unfortunately, this pandemic has *not* united people, but has instead unveiled an absence of social cohesion. Arguably, this has resulted in an inefficiency of these measures. To explore this further, case studies of two countries, UK and Japan, will be examined. The UK will illustrate result of solidarity's absence, whilst Japanese social cohesion will exemplify the benefits of its existence.

#### *The UK and the lack of solidarity*

Arguably, in the UK the same process discussed by Prainsack and Buyx unfolded itself during the pandemic.<sup>110</sup> In fact, at the start of this crisis, news outlets celebrated the solidaristic efforts of citizens—for instances showing students helping the elderly carry shopping.<sup>111</sup> However, the atmosphere rapidly changed and an 'Us-vs-Them' rhetoric strengthened. Since the beginning of the pandemic, 90% of all of COVID-19 related death have been among people aged 65 and over.<sup>112</sup> This meant that younger generations had to accept severe restrictions to their freedoms and make sacrifices out of support for older citizens.<sup>113</sup> However, when mutual support started to weaken, an openly ageist discourse

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<sup>109</sup> Muneera Bano, Didar Zowghi, and Chetan Arora, 'Requirements, Politics, Or Individualism: What Drives the Success Of COVID-19 Contact-Tracing Apps?' (2021) 38 IEEE Software 7.

<sup>110</sup> Prainsack and Buyx, (n 105) 2.

<sup>111</sup> Floris Tomasini, 'Solidarity in The Time Of COVID-19?' (2020) 30 Cambridge Quarterly of Healthcare Ethics.

<sup>112</sup> Gabriella Swerling, 'Ageism' Is to Blame For Britain's High Covid Death Toll, Age UK Boss Suggests' (*The Telegraph*, 2021) <<https://www.telegraph.co.uk/news/2021/01/16/ageism-blame-britains-high-covid-death-toll-age-uk-boss-suggests1/>> accessed 18 March 2021.

<sup>113</sup> Niklas Ellerich-Groppe, Mark Schweda and Larissa Pfaller, '#Stayhomeforgrandma – Towards An Analysis Of Intergenerational Solidarity And Responsibility In The Coronavirus Pandemic' (2020) 2 Social Sciences & Humanities Open 1.

started to emerge.<sup>114</sup> Some people blamed the elderly for these restrictions, even leading the devaluating phrase, #BoomerRemover, to trend on social media.<sup>115</sup> This could explain the progressive decrease in compliance with lockdown regulations.

In the UK, the lockdown was legally enforced and to counter rule breaches, the government implemented high penalties.<sup>116</sup> Yet, this did not deter rulebreakers. In fact, a study by University College London suggests 63-69% of people ‘completely complied’ to the first lockdown regulations.<sup>117</sup> However, in the second lockdown there was a 28% decrease in compliance (46-49%).<sup>118</sup> An overall lower level of compliance was exhibited by young adults (aged 18-29)—especially in the second lockdown.<sup>119</sup> Hence, this resulted in the inefficiency of health measures—by January 2021 UK’s daily case rate averaged at 59,000 and forcing the country into a third lockdown.<sup>120</sup>

It is important to recognize that other factors can also explain the above increase in cases. For instance, the development of a new Sars-CoV2 variants, the increase in localised outbreaks in workplaces, and the influx of students returning to and from university.<sup>121</sup> However, an important factor to examine are the various government failures, as it can be argued that their ineffective and inconsistent public health measures encouraged distrust and thus, stimulated a lack of solidarity.

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<sup>114</sup> Joanne Brooke and Debra Jackson, 'Older People And COVID-19: Isolation, Risk and Ageism' (2020) 29 *Journal of Clinical Nursing* 2044.

<sup>115</sup> Ellerich-Groppe and others (n 113) 1.

<sup>116</sup> Especially during the second lockdown, fines could rage £ 200 to £10,000 for organisers of large gatherings. (see: 'Covid-19: Warning Over Tough Fines As New Lockdown Begins' (*BBC News*, 2021) <<https://www.bbc.co.uk/news/uk-54815307>> accessed 7 May 2021.)

<sup>117</sup> Daisy Fancourt and others, 'Covid-19 Social Study' (University College London 2020) 4-11; The sample of this study was representative and was made of 70,000 respondents.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid: In the second lockdown only 22% of young adults complied to regulations.

<sup>120</sup> 'Covid: England's Third National Lockdown Legally Comes Into Force' (*BBC News*, 2021) <<https://www.bbc.co.uk/news/uk-55554550>> accessed 18 March 2021.

<sup>121</sup> Tony Kirby, 'New Variant Of SARS-Cov-2 In UK Causes Surge Of COVID-19' (2021) 9 *The Lancet Respiratory Medicine*.

West-Oram argues that government officials hold additional vital responsibilities towards their constituents.<sup>122</sup> They should enact legislations which establish institutions or programs that protect and promote public health.<sup>123</sup> These systems are the ones that give the necessary guidance on how and why citizens should exercise solidarity.<sup>124</sup> In fact, governments must make sure these initiatives are: (1) accessible to all members of the community, (2) trustworthy, (3) transparent, and (4) that the importance of the program is extensively understood.<sup>125</sup> Hence, if the government's design of these institutions is ineffectively, solidarity cannot develop between citizens.<sup>126</sup>

In March 2020, the current government downplayed the severity of the pandemic. The Prime Minister, Boris Johnson, even claimed he would *not* refrain from shaking hands with every patient in the COVID-19 wards.<sup>127</sup> West-Oram contends that by belittling the risks of coronavirus, people were uncertain about which guidelines to follow and how to act.<sup>128</sup> Moreover, the government initially endorsed a 'herd immunity' strategy—which advocated for Sars-CoV2 to infect around 60% of the entire population.<sup>129</sup> However, as soon as the NHS was overwhelmed by the increase in COVID-19 cases and deaths, the government backtracked and adopted the WHO's strategies—which they had originally criticised.<sup>130</sup> Prainsack and Buyx argue Tier 1 and 2 solidarity are depended on conditions which

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<sup>122</sup> West-Oram (n 58) 66.

<sup>123</sup> Ibid.

<sup>124</sup> West-Oram (n 58) 67.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> 'I Shook Hands with Everybody,' Says Boris Johnson Weeks Before Coronavirus Diagnosis – Video' (*the Guardian*, 2021) <<https://www.theguardian.com/world/video/2020/mar/27/i-shook-hands-with-everybody-says-boris-johnson-weeks-before-coronavirus-diagnosis-video>> accessed 28 March 2021.

<sup>128</sup> West-Oram (n 58) 67.

<sup>129</sup> Ed Yong, 'The U.K.'S Coronavirus 'Herd Immunity' Debacle' (*The Atlantic*, 2020) <<https://www.theatlantic.com/health/archive/2020/03/coronavirus-pandemic-herd-immunity-uk-boris-johnson/608065/>> accessed 28 March 2021.

<sup>130</sup> Ibrahim and others, 'Britain Drops Its Go-It-Alone Approach to Coronavirus' (*Foreign Policy*, 2021) <<https://foreignpolicy.com/2020/03/17/britain-uk-coronavirus-response-johnson-drops-go-it-alone/>> accessed 28 March 2021.



encourage the ‘economic and mental ability to support others’<sup>131</sup> However, by delivering inconsistent and contradictory policies, the government made citizens feel confused, unsafe and distrustful of public health measures. Thus, citizens focused on preserving their own interests rather than supporting one another, resulting in an absence of solidarity and the continuation of the pandemic.

### *Japan and the Benefit of Social Cohesion*

The Japanese government’s response to COVID-19 was focused on keeping the death toll to a minimum.<sup>132</sup> Japan has a ‘super aging’ society—28% of their population is aged 65 and over.<sup>133</sup> As the elderly are at greater risk of severe illness or death from coronavirus, the government’s strategy hoped to minimize fatalities instead of slowing the virus’s spread.<sup>134</sup> To achieve this, they prioritised the treatment of patients in critical conditions and prevented clusters of transmission.<sup>135</sup> In April 2020, the government declared a ‘formal state of emergency’ in Tokyo and other urban areas.<sup>136</sup> Residents in these areas were required to stay at home as much as possible, however they were not legally obliged to do so.<sup>137</sup> In fact, unlike the rest of the world, this was a ‘requested lockdown’ with no legal enforcement. Thus, the government did not have the power to close local business or sanction people for leaving their homes, as the responsibility to abide was at the discretion of individuals.<sup>138</sup>

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<sup>131</sup> Hendrick Wafenaar and Barbara Prainsack, 'The New Normal: The World After COVID-19' (*Medium*, 2021) <<https://medium.com/@hendrik.wafenaar/the-new-normal-the-world-after-covid-19-201189e22545>> accessed 25 April 2021.

<sup>132</sup> Tomaya Ono and Shigenori Matsui, 'Japan: Keeping the Death Toll to the Minimum', *Covid-19 in Asia: Law and Policy Contexts* (1st edn, Oxford University Press 2021) p147.

<sup>133</sup> 'Japan Population to Shrink By One-Third By 2060' (*BBC News*, 2021) <<https://www.bbc.co.uk/news/world-asia-16787538>> accessed 28 March 2021; N. Muramatsu and H. Akiyama, 'Japan: Super-Aging Society Preparing For The Future' (2011) 51 *The Gerontologist*.

<sup>134</sup> Ono and Matsui (n 132) p147.

<sup>135</sup> *Ibid* p.155; *Id*

<sup>136</sup> *Ibid* p.153.

<sup>137</sup> *Ibid*.

<sup>138</sup> Rupert Wingfield-Hayes, 'Coronavirus: Japan's Mysteriously Low Virus Death Rate' (*BBC News*, 2020) <<https://www.bbc.co.uk/news/world-asia-53188847>> accessed 28 March 2021.

Despite the lack of legal enforcement, it can be argued that Japan's relaxed but consistent measures were successful. According to Professor Shibuya, these mild lockdowns had the same effect of enforced ones, as 'Japanese people complied despite the lack of draconian measures'.<sup>139</sup> In fact, in 2020 Sars-CoV2 accounted for only 0.3% of all Japan's fatalities.<sup>140</sup> Moreover, a study randomly testing 8,000 people in Tokyo, found only 0.1% were positive to COVID-19 antibodies.<sup>141</sup> Although Ono and Matsui claim that prioritising patients in critical condition reduced fatalities by alleviating the strain on the health care system, Shibuya argues that this is not the case.<sup>142</sup> In fact, their argument fails to account for the effective soft-lockdown, which instead suggests a strong sense of community and social cohesion—as Japanese citizens willingly abided to a costly rule for the benefit of others.<sup>143</sup> Thus, the success of these health measures is arguably due to the presence of interpersonal solidarity amongst Japanese citizens.

Unlike the UK government, it is contended that Japan maintained a consistent, transparent, and clear strategy from the beginning of the pandemic. This encouraged mutual support and trust amongst citizens, fostering solidarity and rendering health measures effective—as the existing social cohesion encouraged citizens to abide to the rules. This suggests that solidarity is intrinsic to successfully tackle future pandemic and as such must be nurtured. This paper will progress by examining how solidarity can be developed, arguing in favour of establishing solidaristic institutions within countries around the world.

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<sup>139</sup> Rupert Wingfield-Hayes, 'Coronavirus: Japan's Mysteriously Low Virus Death Rate' (*BBC News*, 2020) <<https://www.bbc.co.uk/news/world-asia-53188847>> accessed 28 March 2021.

<sup>140</sup> Japan Coronavirus: 466,849 Cases and 9,031 Deaths - Worldometer' (*Worldometers.info*, 2021) <<https://www.worldometers.info/coronavirus/country/japan/>> accessed 28 March 2021; The population of Japan is of around 126 million people; this means that less the 0.01% of the population was infected by COVID-19.

<sup>141</sup> Rupert Wingfield-Hayes, 'Coronavirus: Japan's Mysteriously Low Virus Death Rate' (*BBC News*, 2020) <<https://www.bbc.co.uk/news/world-asia-53188847>> accessed 28 March 2021.

<sup>142</sup> Ono and Matsui (n 132) 155; Rupert Wingfield-Hayes, 'Coronavirus: Japan's Mysteriously Low Virus Death Rate' (*BBC News*, 2020) <<https://www.bbc.co.uk/news/world-asia-53188847>> accessed 28 March 2021.

<sup>143</sup> Japan does not embrace liberalism and thus individualism, but instead is focused on shared community values, which facilitate the development of solidarity.

### **3.2 Developing Solidarity: Addressing Individuals' Needs for Social and Economic**

#### **Stability**

Göran Tomson argues that the pandemic has unveiled inequalities in demographics, technology, environment, and other megatrends.<sup>144</sup> Indeed, even countries that exhibited solidarity are now suffering from inequalities. Japan has entered into a technical recession and is facing the greatest economic challenge in decades.<sup>145</sup> Ono and Matsui contend that although the Japanese strategy did achieve their primary goal of keeping the death rate to a minimum, it is unclear whether they will remain successful as the pandemic unfolds.<sup>146</sup> They suggest that Japan should re-evaluate their strategies in favour of a 'holistic and systematic' response through the development of health institutions.<sup>147</sup>

These inequalities hinder people's ability to see commonalities with one another and instead invigorate the existing individualism. Thus, when individual rights and interests are not being met, people will focus on fulfilling their own benefits instead partaking in the collective efforts. Prainsack proposes that building institutions is a necessary condition for a lasting and stable solidarity.<sup>148</sup> Tier 1 and 2 solidarity depend on strong and well-funded public structures that provide people with the 'economic and mental ability to support others', preventing them from 'fending only for themselves'.<sup>149</sup> Thus, by developing institutions,

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<sup>144</sup> Göran Tomson and others, 'Solidarity And Universal Preparedness For Health After Covid-19' (2021) 59 MBJ 1.

<sup>145</sup> Keita Nakamura, 'Japan's Economy At Critical Juncture As Coronavirus Puts Growth And Olympics At Risk' (*The Japan Times*, 2021) <<https://www.japantimes.co.jp/news/2020/03/23/business/economy-business/japan-economy-coronavirus-growth/>> accessed 28 March 2021; The outbreak has caused job losses and has intensified the gap between the rich and the poor (see: 'COVID-19 Cuts Jobs, Boosts Stocks, Widening Economic Gap In Japan' (*Japantoday.com*, 2021) <<https://japantoday.com/category/business/covid-19-cuts-jobs-boosts-stocks-widening-economic-gap-in-japan>> accessed 28 March 2021.).

<sup>146</sup> They also contend that their public health strategies will not contain deadlier diseases in the future. (see: Ono and Matsui (n 132) 160)

<sup>147</sup> Ibid.

<sup>148</sup> Prainsack (n 70) 127.

<sup>149</sup> Hendrick Wafenaar and Barbara Prainsack, 'The New Normal: The World After COVID-19' (Medium, 2021) <<https://medium.com/@hendrik.wagenaar/the-new-normal-the-world-after-covid-19-201189e22545>> accessed 25 April 2021

governments will provide people with economic and social stability, which prevent the development of inequalities and allowing individuals to join in the collective efforts.<sup>150</sup>

### **3.3 Developing a Solidaristic Institution for the APP**

The development of solidaristic institutions should not be limited to health and social welfare, as solidarity impacts all aspect of modern society—including privacy and data law. In fact, this discussion has shown that because the effectiveness of contact-tracing applications is dependent on people's willingness to use them—the greater the social cohesion, the higher the likelihood people will carry out a costly activity for the common good. This means that to encourage individuals to download the application, the APP's current data governance framework must be replaced in favour of a system that nurtures solidarity.

#### *The APP's Informed Consent Framework*

The APP is currently governed by the voluntary, individual consent-based model, as users downloaded it on a voluntary basis and use it at their own discretion. Informed consent requires Healthcare professionals to gain authorisation by their patients before performing any research or treatment.<sup>151</sup> The law on informed consent is concerned with ensuring a sufficient amount of information is disclosed to patients—before they give consent.<sup>152</sup> When patients provide consent their legal rights are waived, and actions that would otherwise be

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<sup>150</sup> Additionally, Prainsack contends that the dominant political discourse emphasises differences between people, precluding them from seeing similarities within each other and thus, failing to foster solidarity. However, this is not going to be explored in this paper (see Hendrik Wafenaar and Barbara Prainsack, 'The New Normal: The World After COVID-19' (Medium, 2021) <<https://medium.com/@hendrik.wagenaar/the-new-normal-the-world-after-covid-19-201189e22545>> accessed 25 April 2021).

<sup>151</sup> Onora O'Neill, 'Public Health Or Clinical Ethics: Thinking Beyond Borders' (2002) 16 *Ethics & International Affairs* 35.

<sup>152</sup> B.G. Main and S. R. L. Adair, 'The Changing Face of Informed Consent' (2015) 219 *British Dental Journal* 35; In fact, in the eventuality of an adverse clinical outcome, a professional's failure to provide adequate information could signify negligence of their duty.

unlawful are permitted. The requirements of informed consent have been incorporated into the data protection framework, to regulate the use of participants data in medical research.<sup>153</sup>

The introduction of informed consent after the Second World War, monumentally changed medical practice, from being largely paternalistic to a system revolving around the decision of patient-participants.<sup>154</sup> An autonomous patient is an independent agent, who has the capacity to make their own decision on whether to accept or refuse the treatment or research.<sup>155</sup> Yet, in recent years the requirement to respect absolute patient autonomy has proven to be problematic.<sup>156</sup>

### *The Problem with Informed Consent*

In medical research, this resulted in the enactment of legislation and regulations with stricter requirements for informed consent.<sup>157</sup> In Biobank research it is hard to achieve fully informed and explicit consent—as often it is impossible to predict all the ways in which the data will be utilized in the future.<sup>158</sup> In fact, these new consent requirements become an obstacle in the collection of important data, as any uncertainty may result in patient's

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<sup>153</sup> Neil C Manson and Onora O'Neill, *Rethinking Informed Consent In Bioethics* (Cambridge Univ Press 2008).

<sup>154</sup> The atrocities undertaken by Nazi Germany in the name of medical research, led to the enactment of the first authoritative codified statement of consent requirements. The Nuremberg Code of 1947 established that the 'voluntary consent of human subject is absolutely essential' for medical research ( see Manson and O'Neill (n 147) p26); Prainsack and Buyx (n 5) p114.

<sup>155</sup> O'Neill (n 151) 36; Daniels N, *Just Health Care* (Cambridge:University Press, 1985) p.5.

<sup>156</sup> In the medical sphere, O'Neill claims that the heavy focus on patient autonomy does not exemplify the reality of public health—where medical interventions are often compulsory. In fact, medical professionals are connected to 'complex institutional networks' and patients' autonomy is hampered by their other responsibility and family involvement. Consequently, it can be contended that informed consent has become a 'quasi-synonym' of autonomy—reducing its importance to a 'stamp of approval' for medical practice. This is because in certain situations patients have no or a reduced capacity for individual autonomy. For example, instances which involve children, the elderly, the comatose, the mentally disturbed and even when someone is simply feeling ill or frail. (see: O'Neill (n 151) 36.)

<sup>157</sup> Prainsack and Buyx (n 5) p114; However, in medical practice informed consent can be argued to have become a risk managing tool for the medical professional. O'Neill argues that patient autonomy is limited to fulfilling the informed consent requirements amounting only to the freedom to refuse treatment. In fact, patients are routinely offered standard treatment leaving them relatively little choice. Thus, informed consent is no longer a 'robust expression of individual autonomy' (see: O'Neill (n 151) 36)

<sup>158</sup> Margit Sutrop, 'Viewpoint: How To Avoid A Dichotomy Between Autonomy And Beneficence: From Liberalism To Communitarianism And Beyond' (2011) 269 *Journal of Internal Medicine* 375.

unwillingness to participate in the study and thus, impede scientific research that aims to advance the common good.<sup>159</sup>

The current informed consent framework's focus on individual rights and interests, advocates liberalism, which is antithetical to solidarity.<sup>160</sup> Thus, when participation in a study requires individuals to endure a cost which does not favour them directly, they may not participate. This limitation has been illustrated by the use of contact-tracing applications during the COVID-19 pandemic. Although consent is important, in this context it has arguably impeded the APP from slowing down the spread of the virus. The reason for this is that the framework's focus on the individual does not create the required social cohesion to encourage users to download and use of the APP. Thus, the low uptake of the APP has shown that informed consent is inappropriate for the regulation of contact-tracing applications.

This discussion has suggested that the low uptake of the APP was a consequence to the lack of solidarity, the system of informed consent needs to be replaced by a framework which develops people's willingness 'to accept costs to help others to whom they feel connected in a relevant way'.<sup>161</sup> Subsequently, three reforms will be proposed: (1) Dynamic Consent, (2) Community Advisory Board, and (3) Solidarity-Based Data Governance. These will be examined in relation to how well they develop transparency, public trust, accountability, and collectivism.

## **IV. REFORMING THE INFORMED CONSENT FRAMEWORK**

### **4.1 Three Promising Reforms**

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<sup>159</sup> Ibid.

<sup>160</sup> Sutrop (n 158) 375.

<sup>161</sup> Prainsack and Buyx (n 5) p.55.

## *Dynamic Consent*

The Dynamic Consent (subsequently ‘DC’) model is a personalised communication interface which directly connects patients with researchers.<sup>162</sup> This ‘dynamic’ interface is tailored to the specific needs of the participant, allowing them to change their consent preferences and monitor their data in real time.<sup>163</sup> This enables individuals to provide different kinds of consent depending on the study, broad consent, or even revoke their consent.<sup>164</sup> Moreover, the DC interface, allows the communication and information settings to suit both the particular research enterprise and the specific research or study population, whilst providing the highest level of privacy safeguards.<sup>165</sup>

According to Kaye, individual autonomy in this system is not static—the participant is constantly involved in the decision making process.<sup>166</sup> This arguably enhances the participants scientific literacy, as the digital interface allows them to choose how much and what kind of additional information they want.<sup>167</sup> This is particularly beneficial, as users would be able to understand not only how the APP uses their data, but also how COVID-19 functions and is transmitted.

Moreover, by permitting participants to monitor the research studies and offering both an ‘audit process and early warning system of potential security breaches’, the interface

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<sup>162</sup> Jane Kaye and others, 'Dynamic Consent: A Patient Interface For Twenty-First Century Research Networks' (2015) 23 *European Journal of Human Genetics* 141.

<sup>163</sup> They can even choose the manner to be contacted and kept informed. This depends on the biobank resources and can range from more traditional paper-based formats, such as letters or newspaper, to modern platforms like social network websites (see: *Ibid*).

<sup>164</sup> Kaye and others (n 156) 143.

<sup>165</sup> *Ibid*; The interface provides a ‘reliable storage and enforcement of consent’. In fact, it uses a ‘Wrapped information’ package, which embraces the uses homomorphic encryption tech, whereby data is processed directly from its encrypted state while maintaining encrypted the results of the data processing. (see: Craig Gentry, 'Fully Homomorphic Encryption Using Ideal Lattices' [2009] *Proceedings of the 41st annual ACM symposium on Symposium on theory of computing - STOC '09* pp169-178.);

<sup>166</sup> Kaye and others (n 164) 143.

<sup>167</sup> *Ibid*144.

provides transparency and accountability.<sup>168</sup> This fosters the participants trust and confidence in the research project, and thus makes the framework superior to the traditional informed consent system. Yet, it is not appropriate for contact-tracing applications as it does not foster social cohesion and may lead to ‘consent fatigue’.<sup>169</sup>

DC requires patients to give consent ‘over and over again’.<sup>170</sup> This is impractical for contact-tracing applications, as the applications already rely on high levels of user involvement. Thus, making them even more involved may decrease the efficiency of the application—as expecting participants to give consent every step of the way could lead to ‘consent fatigue’ and disengage users.<sup>171</sup> Furthermore, DC still applies an individual-centred framework, which arguably does not foster social cohesion. Although this system develops trust, it does this by increasing individuals’ involvement in the decision making process. This only means that once an individual has accepted to participate in the project, they are less likely to drop out. Yet, it does not necessarily encourage new patients to participate. The framework still concentrates on the individual, which means that if joining a study is not beneficial to him/her, they may not participate.<sup>172</sup> Sutrop argues that to encourage participation in epidemiological, observational, or interventional studies, new frameworks must foster collective values and solidarity.<sup>173</sup> Thus, as DC does not develop collective values and it is not the appropriate framework to encourage widespread use of contact-tracing applications.

### *Community Advisory Board*

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<sup>168</sup> Ibid.

<sup>169</sup> Kristin Solum Steinsbekk, Bjørn Kåre Myskja and Berge Solberg, ‘Broad Consent Versus Dynamic Consent In Biobank Research: Is Passive Participation An Ethical Problem?’ (2013) 21 *European Journal of Human Genetics* 897.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> It is appreciated that there are a lot of studies that suggest that people will participate even where there is no direct benefit from them. For an example see: Rhidian Hughes, ‘Why Do People Agree to Participate in Social Research? The Case of Drug Injectors’ (1998) 1 *International Journal of Social Research Methodology*.

<sup>173</sup> Sutrop (n 158) 378.



Mayo Clinic Biobank piloted a system of governance which employed techniques of a deliberative democracy.<sup>174</sup> This theory places citizen's decision-making and majority rule at its core.<sup>175</sup> They assembled a representative group of citizens to become part of a Community Advisory Board (CAB).<sup>176</sup> Alongside the Biobanks' Ethics Research Unit, the CAB was in charge of the informed consent process.<sup>177</sup> They also advised the Biobank on its operation and management—tackling issues from data-sharing to best-practise for engaging with potential participants.<sup>178</sup>

Koenig argues that the frameworks' emphasis on deliberative democracy, renders consent no longer about individual choice, but is instead about giving up control.<sup>179</sup> Indeed, participants are providing 'consent to be governed' as they are accepting 'procedures and practices' devised and implemented by the CAB.<sup>180</sup> This fosters communitarianism, as the common good prevails over the interest and rights of individuals.<sup>181</sup> The CBA achieves this by making decisions that promote shared values and ideals, developing social cohesion amongst the community. Unfortunately, collectively is achieved without abandoning individual sovereignty, as participants voluntarily enter the study.<sup>182</sup> Thus, this system only foster social cohesion after participants join the research program, making it unsuitable for contact-tracing applications—where social cohesion is required to encourage the initial installation.

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<sup>174</sup> Janet E. Olson and others, 'The Mayo Clinic Biobank: A Building Block For Individualized Medicine' (2013) 88 Mayo Clinic Proceedings 952.

<sup>175</sup> 'What Is Deliberative Democracy? — Mosaiclab' (*MosaicLab*, 2021) <<https://www.mosaiclab.com.au/what-is-deliberative-democracy>> accessed 27 April 2021.

<sup>176</sup> Barbara A. Koenig, 'Have We Asked Too Much of Consent?' (2014) 44 Hastings Center Report 33; In the initial stages they also established a Deliberate Community Engagement Group. Here members were in charge of deliberating on the study—including 'trade-offs among competing social goods' (see Olson and others (n 174) 956)

<sup>177</sup> Olson and others (n 174) 956

<sup>178</sup> *Ibid* 954

<sup>179</sup> Koenig (n 176) 34.

<sup>180</sup> *Ibid*.

<sup>181</sup> Sutrop (n 158) 375.

<sup>182</sup> Koenig (n 176) 34.

In Mayo Clinic Biobank's evaluation of the project, they found that the participation rate was of 29%.<sup>183</sup> Arguably, this low participation rate is consequent to the framework's failure to develop sufficient trust in the research scheme to elicit individuals to join the study.<sup>184</sup> In fact, the CAB it does *not* have the authority to hold the Biobank accountable or enforce consequences.<sup>185</sup> This is because they are still subordinate to the Mayo Institutional Review Board and cannot make the final decision.<sup>186</sup> This means that if individuals are harmed as a consequence of data use, they may be reluctant to contact the CAB—as they may not trust their interests will supersede the Biobanks'.

Moreover, if such a system were to be applied on a large scale, the members of the CAB would need to be elected.<sup>187</sup> This raises a range of issues including who would be eligible to vote, and how does the electoral system function. In the eventuality that elected members are not representative of the participants (minorities and sexes must be equally represented) individuals might be distrustful of the CAB. This is because they may feel that their concerns are not being heard. Similarly, if the election system is unfair or discriminatory, it will hinder public trust. As previously discussed, trust gives individuals security, permitting them not to fend for themselves but instead join the collective efforts.<sup>188</sup> Thus, it is argued public trust is a required element for frameworks to achieve solidarity and widespread uptake of the APP.

### *Introducing a Solidarity-Based Data Governance Framework*

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<sup>183</sup> Olson and others (n 174) 956

<sup>184</sup> Ibid.

<sup>185</sup> Koenig (n 176) 34.

<sup>186</sup> Olson and others (n 176) 954.

<sup>187</sup> The CAB is formed by 20 members and co-chaired by a community member (see Ibid 956).

<sup>188</sup> Hendrick Wafenaar and Barbara Prainsack, 'The New Normal: The World After COVID-19' (*Medium*, 2021)

<<https://medium.com/@hendrik.wagenaar/the-new-normal-the-world-after-covid-19-201189e22545>> accessed 25 April 2021.

Prainsack <sup>189</sup> proposes a system of data governance that draws directly upon solidarity. <sup>190</sup> The ‘Solidarity-Based Data Governance Framework’ (Subsequently ‘Framework’), operates on the assumption that individuals who agree to data use for a public benefit are willing to accept the resultant costs. <sup>191</sup> Consequently, these individuals have a collective responsibility to protect others from harm, by guaranteeing adequate safeguards. <sup>192</sup> In fact, unlike informed consent frameworks—which are concerned with ‘preventing and minimising risk’—this Framework shifts the focus to harm mitigation. <sup>193</sup> Individuals are informed of all the risks, but are provided with mitigation strategies for when actual harm occurs. <sup>194</sup> This is achieved through the system’s three pillars: (1) Facilitating ‘desirable data use’, (2) Harm Mitigation, and (3) Taxing Corporate data use that does not meet ‘desirable use’. <sup>195</sup>

The Framework distinguishes between desirable and non-desirable data uses. <sup>196</sup> Data processing is considered desirable if it is used for the public interest—this is determined by counterbalancing the risks with the benefits arising from the processing of data. <sup>197</sup> Only desirable data uses are governed by this framework, and they should be facilitated by removing or easing any existing barrier. <sup>198</sup> However, Prainsack argues it is important to recognise that even data uses which are recognised as desirable can cause harm to a minority

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<sup>189</sup> Although, the idea that solidarity and Harm mitigation is important for data-governance was invented by both Prainsack and Buyx, the 3 pillar model that will be discussed in this chapter was created by Barbara Prainsack alone. This means that although I will draw on literature written by both, I will address the model as being Prainsack’s and not as a system developed by both.

<sup>190</sup> Prainsack (n 6) 91.

<sup>191</sup> *ibid.*

<sup>192</sup> *Ibid* 92.

<sup>193</sup> Barbara Prainsack, and Alena Buyx, ‘a Solidarity-Based Approach to the Governance of Research Biobanks’ (2013) 21 *Medical Law Review* 1.

<sup>194</sup> *Ibid* 12.

<sup>195</sup> Prainsack (n 6) 97.

<sup>196</sup> Data uses that are not classified as desirable but do not pose ‘unacceptable risks’ should still be allowed; however, a adequate mitigation scheme must be in place to compensate the public if the harm eventuates. ( see: prainsack and Buyx (n 187) 100).

<sup>197</sup> Data use in the public interest includes any data use which either benefits many people, future generations or even society as a whole (see Prainsack (n 6) 93).

<sup>198</sup> Prainsack suggests that in acceptable circumstances the regulatory requirements of the data use should be eased or even removed. This is done to facilitate valuable research from occurring, as she argues that ‘overcautious ethics review’ or ‘unduly time-consuming and costly bureaucracies’ have prevented the use of data. She even argues that to further encourage this public funding should be made available for research studies in the public interest. (see: Prainsack (n 8) p 94 ).

of individuals.<sup>199</sup> In fact, the Framework ensures harm mitigation strategies are in practice, by enacting Harm Mitigation Funds (HMFs).<sup>200</sup> HMFs are independent bodies that deal with any kind of action or complaint that the current legal remedies are unable to deal with.<sup>201</sup> Every large and smaller corporation should be associated with an HMF, by either establishing their own fund or affiliating with the HMFs established at national levels. Lastly, Prainsack contends that data should be classed as an asset, and as such taxes should be imposed on data uses that do not serve a public interest.<sup>202</sup> This ensures that corporations pay some return from benefitting from undesirable data use. The revenue collected should be awarded to citizens who undertook the risk of providing data or fund the national HMFs.<sup>203</sup>

Prainsack's Framework has been considered for a multitude of purposes, including Biobank research and personalised medicine.<sup>204</sup> However, it has not yet been considered as a potential regulatory framework for contact-tracing applications. Given that the APP's data processing is in the public interest, the application satisfies the desirability criteria and can utilize this Framework. This paper argues that the Framework's focus on solidarity, makes it a promising alternative to the application's informed consent-based regime. In fact, unlike DC and the CBA, this Framework develops public trust, offers an effective accountability system, and fosters solidarity. Yet, it has a downfall: the harm mitigation and accountability strategies are designed for corporations and not government agencies. Thus, to establish whether it should regulate contact-tracing applications, the benefits and disadvantages associated with Prainsack's Framework must be examined.

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<sup>199</sup> Ibid 95.

<sup>200</sup> Ibid.

<sup>201</sup> They are independent, which means that members must be separate from the data controller and from the organization that reviews the appeals of individuals who have suffered harm from data use (see *ibid*).

<sup>202</sup> Ibid 96.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid 97.

## **4.2 Critiquing Prainsack's 'Solidarity-based Data Governance' Framework**

### *The Benefits of a Grounding in Solidarity: Trust, Accountability and Social Cohesion*

Unlike informed consent which only provides preventative safeguards, the Framework establishes harm mitigation strategies to remedy actual harm when it eventuates.<sup>205</sup> Actual harm signifies something that has already happened, which means it must be examined and judged retrospectively.<sup>206</sup> Emphasising this from the outset ensures the availability of more remedies *after* the harm eventuates—for instance, putting funds aside from the start to compensate the affected individuals.<sup>207</sup> Moreover, the data controller must be completely candid and inform the participant both the risks and corresponding remedy. Hence, the presence and awareness of these remedies from outset, builds participants' trust in the research study and confidence that their grievances will be adequately addressed, which means more individuals will participate.

Currently, proving cause of harm through the available legal remedies can be complicated or even impossible.<sup>208</sup> Although some countries already have independent bodies that can audit data use (for example the ICO in the UK), their powers are limited to policing the way in which data is processed, and not mitigating the harm inflicted on data subjects.<sup>209</sup> However, HMFs would address all kinds of harm, and provide corresponding adequate remedies—ranging from financial support to public acknowledgment of harm.<sup>210</sup> Thus, the existence of HMFs not only makes participants feel secure their grievances will be addressed, but holds the data controllers accountable for their breaches.

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<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid 13.

<sup>208</sup> Prainsack (n 6) 95.

<sup>209</sup> Ibid.

<sup>210</sup> Data subjects can suffer a multitude of different types of harm, which can be of financial, social, or emotional nature. Each type requires to be mitigated in a specific manner. (see: Prainsack (n 6) 95)

Furthermore, the HMFs and the taxation system, ensure data collectors are held accountable for undesirable data uses or actual harm. As HMFs are independent bodies, they are impartial and have the authority to hold data controller accountable and enforce consequences.<sup>211</sup> The system of taxation pre-emptively taxes all undesirable data uses, this financial burden compels enterprises to carefully consider before undertaking undesirable data processing. This arguably develops participants' trust in the system, whilst guaranteeing data controllers are accountable.

According to Lafky and Horan, people's paramount concern is privacy and security of their data.<sup>212</sup> By providing an effective harm mitigation system and holding data collectors accountable, the Framework addresses these concerns. In fact, once participants' know that their grievances will be adequately addressed, they will more likely accept 'costs for the sake of supporting others'.<sup>213</sup> This shifts the focus from individual rights and interest, to participating for the common good, which consequently generates common values and ideas. Thus, when individuals commit to undertaking a cost which benefit a public interest, Prainsack argues that solidarity has occurred.<sup>214</sup> As more people participate in the research, the common values and ideas will eventually become 'normal' and tier 2 solidarity will arise.

Unlike the previously discussed modle, this Frameworks' grounding in solidarity is able to develop the individual's initial commitment to participate in the study. This is essential for the efficiency of contact-tracing applications, as they rely on the individual's willingness to utilize them. Thus, it is argued that APP should be regulated by Prainsack's Framework as it creates the necessary conditions for widespread use.

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<sup>211</sup> Ibid.

<sup>212</sup> Deborah Beranek Lafky and Thomas A. Horan, 'Personal Health Records' (2011) 17 Health Informatics Journal 63.

<sup>213</sup> Prainsack (n 6) 91.

<sup>214</sup> Ibid 92.

### *Applying the Framework to the APP: A Problem with Government Accountability*

The Framework's harm mitigation strategies are designed to address harm in instances where the data controller is a corporation. The data controllers of the APP, DHSC, is a government agency, as Contact-tracing applications are devised by governments as part of their disease containment strategy. This means that government agencies—not corporations—are the data controllers. This is problematic as Prainsack's HMFs and taxation system is only designed to hold corporations accountable, meaning that if participant suffered actual harm as a consequence of government data use, their grievances cannot be addressed under this Framework. Without the HMFs and taxation system, individuals would not trust the Framework, solidarity would not be developed, and individuals would install the APP—which unfortunately would mean that the Framework cannot govern the APP.

To overcome this limitation, this paper propose that Prainsack's Framework could be adopted internationally in a WHO convention on the protection of health data. As part of the convention, countries would be advised to create their own independent HMFs, where users of contact-tracing applications could bring their claims for actual harm. These HMFs would be nationally funded and would remedy any harm caused by their government. Moreover, if countries were to undertake undesirable data use, the convention would impose sanctions—which could vary in degree according to the level of undesirability. This system would function in the same exact manner as the Framework and thus, would foster the required solidarity for widespread uptake of applications.

If such a convention is not possible, the UK could integrate a HMF in the ICO or establish a single national HMF to hold both government agencies and corporations accountable.<sup>215</sup> This new function of the ICO would extend its power beyond policing data use, enabling it to also mitigate the harm inflicted on data subjects and offer the appropriate remedies to the user's grievance. However, these are just consideration, as reforming Prainsack's Framework is beyond the scope of this paper. Nevertheless, this is the first time this Framework has been critically analysed in the context of COVID-19 and contact-tracing applications, as such further research into these reforms should be undertaken. Such an inquiry would be beneficial as adapting this Framework into a system that holds government agencies accountable will arguably make it appropriate for the APP and therefore a valid reform to its current voluntary, individual consent-based model.

Despite this limitation, this paper still maintains Prainsack's Framework is the most appropriate scheme to replace APP's informed consent-based framework. The Framework not only enables the cultivation of public trust through its harm mitigation strategies, but also generates solidarity—a required conditions to encourage individuals to carry costs in support of a common cause. Thus, creating the environment to achieve widespread uptake of the APP.

## **CONCLUSION**

The COVID-19 Pandemic needs to be a wake-up call for governments around the world, a foretaste of the disastrous consequences of an absence of solidarity. To ensure the future effectiveness of public health measures, this paper has recommended the development

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<sup>215</sup> The National HMF would function exactly the same as the ones in Prainsacks system, with the exception that government agencies can also be taxed for undesirable data use and can be held accountable for actual harm.



of solidaristic institutions, which provide people with economic and social stability to allow individuals to join the collective efforts, instead of fending for themselves.

Given the importance of contact-tracing applications as disease containment tool, it is essential for countries to maximise their application's uptake. Unfortunately, the APP's current data governance model is informed consent-based, which is an individual-centred ethical framework and therefore, does not encourage individuals to install the applications for the benefit of the society they live. After a consideration of various alternative reforms, this paper has argued in favour of adopting Prainsack's Solidarity-Based Data Governance Framework. Through various harm mitigation strategies, this Framework offers guarantees users the accountability of data controllers and the availability of remedies to address any of their grievances. This enables the development of trust in the application, which in turn generates solidarity—the condition required to encourage individuals to carry costs in support of a common cause.

As this is the first time Prainsack's Framework has been considered in the context of COVID-19 and contact-tracing applications, there is unfortunately a drawback to this paper's argument: the model was designed to hold accountable corporations and *not* government agencies. Although, this article does provide some suggestion on how HMFs could be adapted to hold government's accountable, these are merely a starting point rather than a clear-cut solution. Nevertheless, a detailed analysis is beyond the scope of this paper, and instead recommend that this area is researched further, as it would help determined whether Prainsack's Framework would practically work in the context of contact-tracing applications.

**Total Word Count:** 8620

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