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EDITORIAL

Once again we have a special issue of the journal. But this time it is on "social law": domestic violence, children and causation of crime (specifically serial killing).

In the first of the five papers the author addresses domestic violence, child contact and a rights-based approach to "welfarism" in the United Kingdom. The focus of the paper is on situations where a perpetrator of domestic violence applies to the court for a contact order after separation or divorce. This is, firstly, because such cases are the most frequently cited among cases of welfare concern and a disproportionate amount of current resources is spent on them. The second reason is the severe adverse consequences on children that may result from the system getting it wrong. After an explication of domestic violence and its effects on children, the paper explores the present legal framework (identified as the welfare principle and human rights conventions) for dealing with applications for child contact. It proposes that a far better and more transparent way to determine contact applications is a rights-based approach, rather than the welfare principle ("welfarism"). The paper argues, *inter alia*, how this approach will be of particular use where the rights and freedoms of a family's members are already out-of-balance, an example of this being family members living with domestic violence.

The second article looks at some problems resulting from children being allowed to appear as witnesses in English criminal proceedings. The author observes that, although in the past decided cases, influential philosophical viewpoints and commentaries by academics did not support the position that, because of their age, very young children be allowed to give evidence, there is today a change of position in that age does no longer bar the giving of evidence in court. So, the old prejudice against children as witnesses is gone. One positive aspect of the present change is that, especially in cases of domestic violence and offences of sexual abuse, children may actually be the only witnesses. After looking at, among other things, methods of interviewing children, the effect of the trial

process on the child as a witness and the need for children in the trial process, the paper makes a brief comparison between English law and Canadian law on the issue of children as witnesses in court. It then concludes that, despite the weaknesses and limitations of the legal procedures regarding child witnesses, the English courts have shown that those old prejudices are no longer supportable. The author finally submits that allowing even young children to appear in criminal proceedings as witnesses is fair.

In the third paper the author focuses on the causation of serial killing and how the English criminal justice system currently responds to it. First, it looks at the "nature debate", the idea that biological factors determine such violent behaviour. Next, it considers the "nurture debate", the environmental influences or factors. The author's opinion is that scientific explanations of violent behaviour are vital to understanding whether or not the criminal justice system ought to introduce a generic defence, which would either mitigate or even excuse serial killers from criminal culpability. The paper also addresses the critique of the English criminal justice system in the form of its lack of stringency when responding to serial murder. So, it discusses the possibility of reinstating the death penalty for such offenders. In addition, it explores the extent to which psychopathic serial killers can be rehabilitated or otherwise dealt with by the mental health system.

The fourth paper takes a look at the response of the criminal law to domestic violence. First, it explains the meaning of domestic violence, noting its legal definition which, necessarily, is wide so as to include the many forms of the phenomenon. It makes it clear that domestic violence is not labelled as a particular offence but that the criminal law responds to it with a variety of offences. Then, after discussing how a prosecution that involves domestic violence is facilitated, the paper focuses on the restraining order, a particularly useful court order aimed at protecting the victim of domestic violence from more harm/harassment by keeping the abuser away from that victim. It also notes the following: (a) that a victim of domestic violence can apply under the Family Law Act 1996 for a non-molestation order, breach of which is a criminal offence punishable by up to five years' imprisonment; (b) that there are domestic violence protection notices and orders that protect a victim

immediately after an attack by forbidding the abuser to contact the victim or return home for up to 28 days; and (c) that there is the use of community resolutions that involve techniques of restorative justice, such as the abuser apologising, or paying compensation to the victim, or repairing any damage caused.

The last paper discusses the legal consequences of intimate-partner abuse (which includes domestic violence) in the home from the viewpoint of the law of tort. It defines, *inter alia*, the meaning of "intimate partner" and discusses today's broad meaning of domestic violence, which term covers not only actual violence or abuse but also controlling behaviour, coercive behaviour and threatening behaviour. In the author's opinion, exposure of an intimate partner to environmental tobacco smoke (second-hand smoke) in the home is a form of abuse in the home. The paper then focuses on how the law of tort deals with actual violence in the home (trespass to the person), threat of violence in the home (harassment) and exposure to environmental tobacco smoke in the home (the relevant torts there being battery, private nuisance and occupiers' liability). Lastly, the paper notes possible defences available to a defendant intimate partner.

Dr Benjamin Andoh
Assistant Editor

Domestic Violence, Child Contact and a Rights-Based Approach to "Welfarism"

Rachel Knight

Introduction

> *"In the UK, we have been wrestling with this problem and solutions to it for a very long time and with very mixed success."*
>
> Mr Justice Coleridge[1]

Within the context of the dynamically changing structure and formation of the British family unit over the past four decades,[2] with "ever-increasing workloads and at a time of unprecedented financial squeeze",[3] family law decision-makers are tasked with the jurisprudential objectives of "strengthening individuals and families and enhancing their functioning".[4]

Of all the disputes that these decision-makers must determine, "those between separated parents over contact with their children are amongst the most difficult and sensitive",[5] and courts are finding it increasingly difficult to resolve the "myriad of diverse and complex cases before them".[6] Despite governmental efforts to promote

[1] Mr Justice Coleridge, "Let's hear it for the child" [2010] (Keynote address to ALC Conference 27th Nov. 2010). See: <http://www.alc.org.uk/news_and_press/news_items/address_by_mr_justice_coleridge_to_alc_conference_2010/> accessed: 18/4/13.
[2] Blain S, "Alternative families and changing perceptions of parenthood" [2011] *Fam Law* 41 289.
[3] Mr Justice Coleridge, "Let's hear it for the child".
[4] Babb B, "An interdisciplinary approach to family law jurisprudence" [1997] *ILJ* 72 3 5.
[5] Per Wall J in *Re O (a child) (Contact: Withdrawal of application)* [2004] 1 FLR 1258 para. 6.
[6] Wilson J, "Assessing Impact" [2011] *FLJ* 12 3.

mediation as an alternative to litigation,[7] the numbers of contact-order applications have risen over the past 15 years,[8] cases are taking longer[9] and both fathers' and women's rights activists have become increasingly vocal in their campaigns against perceived bias and risks within proceedings.[10]

If it were clear that the children's "welfare"[11] was being adequately promoted within courts, then perhaps some comfort might be found in this; but, aside from the fact that children are complaining that they are not being listened to,[12] a growing body of academic commentary is doubtful that the current framework is adequately serving children's best interests[13] and this argument is supported by a range of recent empirical research.[14]

This paper focuses on cases where the applicant is a perpetrator of domestic violence for two reasons. Firstly, this is by far the most frequently cited welfare concern in contact cases[15] and so is responsible for consuming a disproportionate amount of current resources; but, secondly, because the consequences for children where the system gets it wrong can be so severe. Women's Aid have produced a compelling report identifying 29 children within a ten-year period who were killed by their violent fathers during contact sessions;[16] and a recent study commissioned by Rights of Women found women and children were still being put at significant risk of

[7] See, for example: <https://www.gov.uk/government/speeches/family-mediation-council-s-professional-practice-consultants-conference-2013> accessed: 10/4/13.
[8] Lader D, *Non-resident parental contact 2007/8* (Office of National Statistics: Omnibus survey report 2008) 38 p. 16.
[9] Giovannini E, *Outcomes of family justice children's proceedings: a review of the evidence* (Ministry of Justice: research summary June 2011) 6/11.
[10] Both Women's Aid and Fathers for Justice pressure groups have been actively campaigning on the topic of child contact laws.
[11] S1 (1) Children Act 1989 prescribes that the "welfare" of the child must be "paramount" in contact decisions.
[12] O'Quigley A, "Listening to children's views: the findings and recommendations of recent research" (Joseph Rowntree Report: research and innovation 2000).
[13] Examples include: Reece H, "UK women's groups, child contact campaign: so long as it is safe" [2006] *CFLQ* 18 (4); Bailey-Harris R, "Contact: domestic violence" [2012] *Fam Law* 42; and Mills O, "Effects of domestic violence on children" [2008] *Fam Law* 16 5.
[14] Examples include: Coy M *et al*., "Picking up the pieces" (Rights of Women and CWASU research report, Nov. 2012) 91; and Thiara R and Gill A, "Domestic violence, child contact and post-separation violence" (Report of research findings: NSPCC 2012).
[15] Hunt J and Macleod A, "Outcomes to application to court of contact orders after parental separation or divorce" (London MOJ 2008) 31.
[16] Saunders H, "29 homicides: lessons still to be learned on domestic violence and child protection" (Research report: Women's Aid 2004) 8.

harm within child-contact proceedings.[17] It is submitted that we cannot afford to get this wrong – neither for the individual children, nor for the wider society in which they live.

This paper makes no apology for devoting the first part entirely to the understanding of what domestic violence is and what its effects might be for children who have been exposed to it. This is deemed essential to understanding which legal structure might improve outcomes for children.

The second and third parts of this paper explore the current legal framework for determining child-contact applications, namely the "welfare principle" and human rights conventions. Contemporary criticisms of these are considered alongside unexplored legal arguments, with particular reference to domestic violence cases. The fourth, final part outlines and critiques four suggestions for reform advanced by prominent academic commentators.

Finally, the conclusion offers the thesis of this paper, which is that a rights-based approach to contact cases is better equipped than the welfare principle, not only to accord with the UK's human rights obligations, but also to augment the objective of "welfarism"[18] within a more transparent, realistic and individualised model. It is argued that this would be particularly useful where the rights and freedoms of members of a family are already unbalanced, such as of those living with domestic violence.

[17] Coy M *et al.*, "Picking up the pieces" (Rights of Women and CWASU research report, Nov. 2012) 91.

[18] This term was first used by Eekelaar and is explored further below. See: Eekelar J, "Beyond the welfare principle" [2002] *CFLQ* 14 (3).

I. Domestic violence

> *"Without knowledge about the dynamics of domestic violence, the actions of those concerned can be difficult to understand and the behaviour of children can be difficult to understand."*
>
> Marianne Hester[19]

What is domestic violence?

Despite some academic criticism of its implications,[20] this paper uses the term "domestic violence" because it has become the most commonly accepted umbrella heading which, in light of recent amendments,[21] the government now describes as:

> any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members, regardless of gender or sexuality. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial and emotional means.[22]

Psychologists have sought to sub-divide this broad definition into categories, *inter alia* in order to better understand the effects of the abuse on women and children;[23] but critics have voiced concerns about the marginalisation of individual victims' experiences through such categorisation,[24] and within English and Welsh contact-proceedings "types" of violence are rarely referred to. There is also no overarching, legal definition of domestic violence. Instead courts prefer to "consider each case on its own merits".[25] Criticisms that in

[19] Hester M *et al*., *Making an impact: children and domestic violence* (2nd edn, JK Publishing 2007) p. 17, para. 1.
[20] For example, Allen J and Walby S, "Domestic violence, sexual assault and stalking: findings from the British crime survey" (Home Office: Research study March 2004) 276.
[21] The Home Office amended this definition of domestic violence in March 2013 to include 16- and 17-year-olds and include the "coercive control" element.
[22] <https://www.gov.uk/domestic-violence-and-abuse>
[23] See, for example: Steegh N, "Differentiating types of domestic violence: implications for child custody" [2005] *Louisiana Law Rev.* 65 4 1379–1431.
[24] Humphreys C and Joseph S, "Domestic violence and the politics of trauma" [2004] *WSIF* 27 5 6.
[25] Per Dame Butler-Sloss P, in *Re L, V, M, H (children: contact) (domestic violence)* [2000] 4 ALL ER 609.

practice this still involves generalisations about the benefits of conservative ideals of post-separation family roles are explored in more detail below.

Research suggests that domestic violence is "a gender issue" in that it is predominantly perpetrated by men towards women[26] and it is used as an example of the residue of former patriarchal societal structures,[27] although this has been contested by a small number of American studies which have suggested that it is the impact of the violence, rather than the act itself, which is most prominently felt by women.[28] Child-contact case law takes a *prima facie* gender-neutral approach to domestic violence,[29] although this approach is contested by some pressure groups.[30]

What is clear and common to all domestic violence cases is the existence of a marked power imbalance, to the detriment of one party.[31] The degree and nature of the negative impact felt by the vulnerable party is subject to not only the actions of the perpetrator, but the victim's individual circumstances.[32] It should be noted that, in its most extreme form, domestic violence may induce severe psychological syndromes for the victim,[33] or even death.[34] Nevertheless, recent research has highlighted the courts' tendency within child-contact proceedings to marginalise domestic violence.[35]

[26] Gilmore S, "The assumption that contact is beneficial: challenging the secure foundation" [2008] *Fam Law* 1226.
[27] Alonso M, "Rationalising patriarchy: gender and domestic violence" [1996] *GSCP* 2 12.
[28] Russel B, *Perceptions of female offenders* (1st edn, Springer 2013) p. 153.
[29] Per Dame Elizabeth Butler-Sloss, in *Re S (a child)* [2004] EWCA Civ 18 Para 16.
[30] Davis W, "Gender bias, fathers' rights, domestic violence and the Family Court" [2004] *FLJ* 299.
[31] Hester M and Westmarland N, "Tackling domestic violence: effective interventions and approaches" [2005] (Home Office research study 290).
[32] Dobash P and Dobash R, *Women, violence and social change* (1st edn, Routledge 1992).
[33] For example, "battered wife syndrome" or "post traumatic stress disorder". See: Hester M *et al.*, *Making an impact: children and domestic violence* (2nd edn, JKP 2007) p. 84.
[34] For statistics on intimate partner deaths, see: <http://www.womensaid.org.uk/domestic_violence_topic.asp?section=0001000100220036> accessed 14/4/13.
[35] Coy M *et al.*, "Picking up the pieces" (Rights of Women and CWSU: Research report Nov. 2012) 91.

The impact of domestic violence on children

There is no uniform response from children who have lived with domestic violence.[36] Even children from the same family respond differently to their experiences.[37] Every child who comes before the court presents their own set of unique experiences and reactions.[38] However, a broad range of studies into children who have lived within the context of domestic violence have concluded to differing degrees, notable and detrimental impacts upon children of all ages, ranging from bed-wetting to severe developmental delays.[39]

Until the mid-1980s, negative effects on children, caused by domestic violence, were thought to be mild or transient,[40] but such ideas have been superseded by more recent findings, which suggest that different types of exposure will cause long-lasting harm, dependent on a number of factors, including the child's age, race, gender and socio-economic status, but also on the resident parent's ability to recover and provide a more stable future for them.[41]

Child-contact proceedings have been slow to incorporate psychological research findings into judicial decision-making, and the leading authority of *Re L, V, M, H (children) (domestic violence)*[42] marked the beginning of such evidence really impacting upon constructions of children's welfare,[43] after broad acceptance of the findings of a psychological report by Sturge and Glaser,[44] which advocated *inter alia* that the quality of contact offered by the perpetrator ought to be considered.

The importance of maternal stress to the well-being of a child has been explored in a number of studies and has been found to be a

[36] Hester M. *et al*., *Making an impact: children and domestic v*iolence (2nd edn, JKP 2007) p. 63 para. 1.
[37] *Ibid*., para. 3.
[38] Reece H, "UK women's groups, child contact campaign: so long as it is safe" [2006] *CFLQ* 18 (4).
[39] Examples from: Levine M, "Interpersonal violence and its effects on the children: a study of 50 families in general practice" [1975] *MSL* 15; to Ware H, "Husbands' marital violence and the adjustment problems of clinic-referred children" [2000] *BTJ* 38.
[40] Harris-Hendriks J *et al*., *When father kills mother: guiding children through trauma and grief* (1st edn, Routledge 1993).
[41] Hester M and Radford L, *Mothering through domestic violence* (1st edn, JKP 2006).
[42] *Re L, V, M, H, (children) (domestic violence)* [2000] 2 FLR 334.
[43] Burton F, *Family law* (1st edn, Routledge 2012).
[44] Glaser D and Sturge C, "Contact and domestic violence – the experts' court report" (Report for case: *Re L, V, M, H (children) (domestic violence)* [2000] 2 FLR 334).

significant factor in the healthy development of a child. In particular, such stress can compound behavioural problems in children[45] and increase the likelihood of mothers emotionally distancing themselves from their children.[46]

This has proven problematic for the courts, who must consider the welfare of the child as "paramount" and supreme over any adult interests; and, whilst judges have emphasised that parental interests are material "only in so far as they bear on the welfare of the child",[47] there are many examples where the courts have found a mutuality of interests between parent and child.[48] Fathers' campaign groups have complained that mothers' interests are often furthered under the guise of children's and that this provides bias within proceedings.[49]

Domestic violence perpetrators as parents

In spite of potential detrimental impacts, perpetrating domestic violence is not "a bar to child contact",[50] and courts still place enormous weight in proceedings on the benefits of contact, in the absence of a compelling reason not to grant it.[51] Furthermore, the legislature has refused to introduce any presumption against contact for established perpetrators, and, indeed, current proposals are for legislative introduction of a presumption of the benefits of both-parental involvement.[52]

The courts' pro-contact orthodoxy is seldom justified within judgments and instead it is tritely accepted that ordinarily contact is in a child's interests.[53] Its justification, however, can be found in both human rights obligations to preserve rights to contact[54] and a

[45] Wolf D *et al*., "The effects of children's exposure to domestic violence: a meta-analysis and critique" [2003] *CCFPR* 6 (3).
[46] Hester M and Radford L, *Mothering through domestic violence* (1st edn, JKP 2006) p. 81.
[47] Per Bingham MR, *Re O (Contact: imposition of conditions)* [1995] 2 FLR 124 para. 16.
[48] The most frequently used example is: *Payne v Payne* [2001] EWCA Civ 166. This was a relocation case determined on the basis of mutuality of mother's and child's interests.
[49] Davis W, "Gender bias, fathers' rights, domestic violence and the Family Court" [2004] *FLJ* 299.
[50] *Re L, V, M, H, (children) (domestic violence)* [2000] 2 FLR 334.
[51] *Re A (Contact: separate representation)* [2001] 1 FLR 715.
[52] See: clause 11, (1) Children and Families Bill.
[53] Gilmore S, "The assumption that contact is beneficial: challenging the secure foundation" [2008] FLR 1226.
[54] For example, under Article 8, European Convention on Human Rights and Fundamental Freedoms incorporated into domestic law within the Human Rights Act 1998.

wide acceptance of the merits of early "attachment theories"[55] and other research which has highlighted the benefits of the parent–child relationship. Even fathers who have perpetrated domestic violence against their spouses have been found to develop significant attachments with their children,[56] and indeed this may be the strongest attachment they have in cases, for example, where a mother's emotional availability has been limited. Research suggesting that some children identify with their perpetrating parent in an attempt to feel secure[57] or that others feel protective towards the perpetrator, especially where their vulnerability has become apparent to the child,[58] does not appear to have any material influence on child-contact cases.

It should be noted that experts currently regard the perpetration of domestic violence "as a serious failure in parenting".[59] Domestic violence is the most common context for child abuse;[60] and the more severe the domestic violence, the more extreme the abuse of children is in the same context.[61] Furthermore, violence rarely ends when the relationship does,[62] and more-recent research has identified a number of perpetrators using child-contact proceedings to continue the cycle of abuse against their former partner.[63]

[55] See, for example: Bowlby J, *Attachment. Attachment and loss* (1st edn, NYBB 1969).
[56] Ainsworth M, *Attachments and other affectional bonds across the life-cycle* (1st edn, Routledge 1991).
[57] Hester *et al*., *Making an impact: children and domestic violence* (2nd edn, JKP 2007) p. 81 para. 3
[58] *Ibid*., p. 82 para. 1.
[59] Glaser D and Sturge C, "Contact and domestic violence – the experts' court report" (Report for case: Re L, V, M, H (children) (domestic violence) [2000] 2 FLR 334).
[60] Hester *et al*., *Making an impact: children and domestic violence* (2nd edn, JKP 2007) p. 42 para. 6
[61] *Ibid*., p. 43 para. 1.
[62] Bagshaw *et al*., "The effect of family violence on post-separation parenting arrangements" [2011] FML 86.
[63] Hester R and Radford L, *Mothering through domestic violence* (1st edn, JKP 2006) p. 82.

II. The "welfare principle"

> *"When a court determines any question with respect to — (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration."*
>
> S1(1) Children Act 1989

A brief history of the "welfare principle"

The "welfare principle", which governs child-contact proceedings in England and Wales, with its child-centred rhetoric, was not always the approach the courts adopted. Rather, before the 18th century, children were institutionally perceived as instruments for the promotion of interests of others. Family law scholars have referred to this era as "instrumentalism";[64] but what this fails to identify is that children were, in particular, personal *chattels* of their father, who was judged to be biologically responsible for their being, in a patriarchal framework, which preferred that "the law should not, except in very extreme cases, interfere with the discretion of the father ..."[65]

The growing influence of the period of "enlightenment", however, with its intellectual challenges to accepted norms, is credited with developing the series of "poor laws",[66] which provided for the destitute, into those which provided for children. By the late 19th century this included the right to take on the powers and duties of a parent, and within the Matrimonial Causes Act 1857, for the first time, courts could override the rights of fathers over their children. In 1925, the principle of equality of rights between mothers and fathers was enshrined in law,[67] with the welfare of the child paramount, a modified version of which appears above, drawn from the more-recent Children Act.[68]

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[64] See: Eekelar J, "Beyond the welfare principle" [2002] *CFLQ* 14 (3).
[65] *Re Agar-Ellis* (1883) ChD 317 para. 16.
[66] Early welfare-related "poor laws" developed from the 16th century onwards.
[67] Guardianship of Infants Act 1925.
[68] Children Act 1989.

The modern position of "welfarism",[69] where the carers of children are expected to use their position to develop children's interests rather than their own and the notion that the welfare principle is the means to achieve it, has become deeply embedded within English and Welsh law. The wider concept of "welfarism" has found broad-scale jurisprudential acceptance as a means of improving families,[70] but the principle itself has more recently been criticised by a number of leading academics.

Contemporary criticisms of the welfare principle

Despite its necessary "paramountcy"[71] within relevant proceedings, there is no definition of "welfare" in the Children Act. Instead a list of factors[72] which courts must "have regard to"[73] is provided. Since there is no strict precedent system to be applied in child-contact cases, this leaves a great deal of discretion in the hands of individual judges, to determine "intractable cases"[74] according to an arguably rather ill-defined concept. Academic criticism of the principle can broadly be split into two categories.

The first of these categories may be described as the "transparency objection". It has been argued that, within the principle's practical application and the broad judicial discretion, there is a lack of clarity as to what is in fact driving determinations.[75] Pursuing the welfare of the child has become sufficient justification for a decision, without a clear explanation as to why a particular decision is in a child's best interests and, accordingly, it has been suggested that outcomes are driven by "untested judicial determinations about what is good for children".[76] Other transparency objections are that the rhetoric is concealing the fact that it is often adult interests, rather than children's, which dominate judicial considerations.[77]

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[69] Eekelar J, "Beyond the welfare principle" [2002] *CFLQ* 14 (3).
[70] Babb B, "An interdisciplinary approach to family law jurisprudence" [1997] *ILJ* 72 3 5.
[71] The welfare of the child must be the court's "paramount" consideration: S1 (1) Children Act 1989.
[72] S1 (3) Children Act 1989.
[73] S1 (3) Children Act 1989.
[74] Brissenden C, "Changing residence: a judgement of Solomon" [2010] *FLW* 89.
[75] Eekelar J, "Beyond the welfare principle" [2002] *CFLQ* 14 (3).
[76] Scathingly criticised within: Reece H, "Consensus or construct" [1996] *OLJ* 49 (1).
[77] See Fineman M, "Dominant discourse, professional language and change in child custody decision-making" [1988] *Harvard LR* 977.

Family law decision-making necessitates the use of normative rather than objective standards, since, without certain accepted "truths", resolving cases would be quite impracticable.[78] It is, however, the notion that "they tend to reflect conservative ideals and traditional concepts of family roles, relationships and structures"[79] which might prove problematic for children who have lived with domestic violence, where the family's social reality does not easily accord.

Research involving *Foucauldian*[80] discourse analysis has proven a popular means of exposing dominant discourse within contact proceedings and has been largely supportive of "transparency objections" to the welfare principle.

Discourse analysis carried out by Kaganas[81] has, perhaps unsurprisingly, highlighted a dominant "welfare discourse" within proceedings, but more interestingly identified that the means to achieve it is centred on promoting parental contact and co-operative parenting. In light of the aforementioned research, this is clearly not a baseless approach to children's best interests and may be successful in many instances. It may not, however, work for troubled children and families, for example, where "co-operative parenting" or "contact" is simply not a viable option. Non-compliant, resident parents thus start out in the assumed position of "bad parent", with the potential effect within violent families of tipping already unbalanced power dynamics rather too far in the perpetrator's favour.[82]

Other dominant discourses in such analysis centre on gendered assumptions about post-separation family roles[83] and the marginalisation of domestic violence within proceedings, with the effect of putting children at risk.[84] The gender issue is pertinent to domestic-violence families, for whom it is far more likely that the victim will be a woman.

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[78] Garfinkel I, "The use of normative standards in family law decisions" [1990] *FLQ* 24 2.
[79] Kaganas F, "Contact disputes: narrative constructions of 'good parents'" [2004] *FLS* 12 (1) p. 6 para. 1.
[80] With reference to French philosopher Michel Foucault (1926–1984).
[81] Kaganas F, "Contact disputes: narrative constructions of 'good parents'" [2004] *FLS* 12 (1).
[82] Further highlighted in: Coy *et al*., "Picking up the pieces: child contact and domestic violence" (Research report: Rights of Women and CWSU, Nov. 2012) 91.
[83] Shea-Hart A, "Child contact and domestic violence: in whose best interests?" [2010] *AFLJ* 82 (3).
[84] Radford L, "Child contact and domestic violence: dominant discourses" [2002] *HLR* 29.

There is, however, a second objection to the principle, which has found favour with a number of academics. The lack of *prima facie* consideration given to other parties' interests rather than the child's in proceedings has been criticised as not understanding the interdependent nature of rights and responsibilities, as being unfair to adults[85] or as not representing the child's welfare, which necessitates teaching children to defer to others' rights where significant.[86] It has been suggested that: "the paramountcy principle must be abandoned and replaced with a framework which recognizes the child as merely one participant in a process in which the interests of all participants count."[87]

This "rights-based" criticism of the welfare principle has gained support in light of the increasing importance of human rights within English and Welsh law. A number of prominent academics have recently sought to demonstrate that the welfare principle simply does not accord with our obligations under the European Convention on Human Rights, especially since its incorporation into domestic law within the Human Rights Act 1998. This argument is explored further in part III.

[85] Fineman H, "Dominant discourse, professional language and change in child custody decision-making" [1988] *Harvard LR* 977.
[86] Herring J, *Family Law* (4th edn, Longman 2011) p. 434.
[87] Reece H, "Consensus or construct" [1996] *OLJ* 49 (1) p. 24 para. 2.

III. The human rights of mothers, fathers and children

"Resistance to the Human Rights Act is strongly marked within many areas of law, but that resistance is especially and increasingly apparent in the field of family law, particularly in relation to disputes involving children."

S Choudhry and H Fenwick[88]

Article 8, ECHR, victims of domestic violence, and the rise of the "suffragents"[89]

By virtue of s.6, Human Rights Act 1998, it is unlawful for the courts to act in a way which is incompatible with rights guaranteed within the ECHR,[90] and it is well established within the case law of the ECtHR[91] that the right to respect for private and family life enshrined in Article 8 includes the "mutual enjoyment by parent and child of each other's company",[92] and this includes potential relationships between parents and children.[93]

With more women going out to work and the traditional role of the father's responsibilities changing, the past 30 years has seen "a new politics of fatherhood".[94] Whilst many reject suggestions of bias within domestic contact proceedings advanced by increasingly active fathers' rights groups[95] (although cases of mothers refusing contact due to "implacable hostility" are recognised by the courts where there is no established violence),[96] it is suggested that the changing role of fathers may be seen as justification for the changes within expectation of rights, since rights and responsibilities are so closely intertwined. A number of fathers across Europe have used the mechanism of the ECHR to challenge the limited state protection of

[88] Choudhry S and Fenwick H, "Taking the rights of parents and children seriously: confronting the welfare principle under the Human Rights Act" [2005] *OJLS* 25 3 para. 1.
[89] The term used to describe Fathers for Justice member Martin Davis. See: <http://men.typepad.com/f4j/2004/12/martin_matthews.html> accessed 16/4/13.
[90] European Convention on Human Rights and Fundamental Freedoms 1950.
[91] European Court of Human Rights, Strasbourg.
[92] *Johansen v Norway* [1997] EHRR 33 para. 52.
[93] *R (Fawad and Zia Ahmadi v Secretary for State for the Home* Department [2005] EWCA Civ 1721 para. 18.
[94] Collier R, "Fathers 4 Justice, law and the new politics of fatherhood" [2005] *CLFQ* 17 4.
[95] *Ibid*., esp. para. 6.
[96] *Re B (A Minor) (Access)* [1984] FLR 648.

their rights as a father,[97] and accordingly a principled approach is beginning to emerge in the Strasbourg court, which domestic courts have little choice but to acknowledge.[98]

It is clear that the UK is obliged not only to take such measures as to "not hinder the parent–child relationship",[99] but also to take positive measures to promote this aspect of "family life",[100] but it must be noted that Article 8 provides only a qualified right. That is to say, it may be interfered with by the state, *inter alia*, for "the protection of children's interests"[101] or more generally "for the protection of rights or freedoms of others".[102] Therefore the rights of a non-resident parent will be subject to any greater rights deemed to be held by the child or the resident parent and to any other relevant competing interests.[103]

Whilst the right to parent–child contact is rather more developed in the jurisprudence of the Convention, Choudhry[104] has suggested that, in a rights-based approach, this may be balanced with a resident parent's rights under Article 8, and that this is especially relevant within the context of domestic violence.[105] The right to respect for private life enshrined in Article 8 is a wide-ranging right,[106] which includes physical and moral integrity,[107] as well as psychological integrity.[108] The potential for a resident parent and victim of domestic violence to invoke Article 8 rights to protect personal autonomy is yet to be developed in the jurisprudence of Strasbourg, although the very nature of the condition might make victims rather less likely than their perpetrators to instigate the litigation, which might usefully develop such principles.

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[97] For example: *Esholz v Germany* [2000] 2 FLR 486; *McMichael v UK* [1995] 20 EHRR 205; *Hendriks v Netherlands* [1982] EHRR 5 223.
[98] Choudhry S and Herring J, "Domestic violence and the Human Rights Act: a new means of legal intervention?" [2005] *PL* 752.
[99] *Johansen v Norway* [1997] 23 E.H.R.R. 33.
[100] *X and Y v Netherlands* [1986] 8 E.H.R.R. 235.
[101] It is established that "legitimate aim" within Article 8(2) includes preserving rights and interests of children: *R v UK* [1988] 2 FLR 445.
[102] Article 8 (2) European Convention on Human Rights and Fundamental Freedoms.
[103] See, for example: *Yousef v Netherlands* [2003] 1 FLR 210.
[104] Choudhry S, "Contact, domestic violence and the ECHR" [2011] *WJCLS* 12.
[105] *Ibid.*
[106] Herring J, *Family law* (4th edn, Longman 2011) p. 428.
[107] *X and Y v Netherlands* [2005] EHRR 8 235.
[108] *R (Bernard) v Enfield London Borough* Council [2003] EWCA Civ 23.

Article 3 and "absolutely" no inhuman or degrading treatment

Advocates of a rights-based approach to contact decisions[109] have suggested that Article 3 of the Convention may also be invoked in contact proceedings, for example, where a victim of domestic violence is at risk of the more serious "inhuman or degrading treatment".[110] Article 3 is the one provision in the Convention (and Human Rights Act) which is unqualified and cannot be derogated from. If established, any Article 3 rights under the Convention would supersede those under Article 8 and, therefore, the state would be permitted (or required) to interfere with contact applications where a resident parent was at risk of such treatment.

A minimum level of severity is required to constitute "inhuman or degrading treatment"[111] and this will not apply where suffering is considered "trivial".[112] It has, however, been established that actual bodily injury or "intense mental suffering"[113] would suffice as the requisite "ill-treatment",[114] and that treatment which "humiliates or debases an individual and diminishes human dignity, arousing feelings of inferiority capable of breaking an individual's moral or physical resistance",[115] is also sufficiently inhuman or degrading to fall within Article 3. The severity of conditions such as "battered wives syndrome" may well fall within this Article also.

Furthermore, the state is recognised as having a positive obligation to protect private individuals from one another in this context.[116] It is to be hoped that court decisions whereby a victim suffering from such a syndrome is ordered to facilitate contact arrangements, which subject her to such conditions, would not occur, but women's groups have suggested that proceedings are often facilitating the continuation of abuse and that sometimes this is severe.[117]

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[109] See, for example, Choudhury, *op. cit.*

[110] Article 3 European Convention on Human Rights prohibits "torture or inhuman or degrading treatment or punishment".

[111] Article 3 European Convention on Human Rights and Fundamental Freedoms.

[112] *Ireland v UK* [1979] 2 EHRR 25 para. 162.

[113] *Ibid.*

[114] See: *Pretty v UK* [2002] 1 EHRR 129.

[115] *Price v UK* [2002] 34 EHRR 53 paras 24–30.

[116] Choudhry S, "Taking the rights of parents and children seriously: confronting the welfare principle under the Human Rights Act" [2005] *OJLS* 25 3. See also: *A v UK* (1998) 27 EHRR 611; and *E v UK* [2002] 4 EHRR 19.

[117] For example: Coy *et al*., "Picking up the pieces" (Research report: Rights of Women and CWSU Nov. 2012) 91.

Children's rights and paternalism versus autonomy

The broad-scale acceptance of "welfarism" has brought with it increasing calls for children to have rights of their own,[118] and these are now protected by a variety of international instruments, of which the United Nations Convention on the Rights of the Child (CRC)[119] is the most comprehensive and widely ratified.

Although this Convention is not incorporated in our domestic legislation, the UK is answerable to the UN Committee on the Rights of the Child, if its institutional framework does not accord with the CRC. In relation to child-contact disputes, this necessitates that the courts consider the interests of the child as "primary".[120]

Academics have distinguished between the welfare principle, which necessitates the interests of children to be "paramount" and supersede *any* other competing interests, the CRC approach which requires these interests to be "primary", and that of the ECHR, which traditionally has considered children's interests to be considered of "special significance",[121] although the ECtHR is increasingly using the terminology of the CRC when addressing cases concerning children.[122]

Lord Oliver considered differences between the systems in *Re KD (A minor) (Ward: termination of access)*[123] and opined that any apparent conflict was "merely semantic".[124] However, a direct challenge to the UK's "paramountcy principle" in *A and Byrne v UK*[125] found that it was for the national authorities to "strike a fair balance between the relevant and competing interests".[126] In light of the differing starting-points of the two systems, the potentially differing outcomes and the narrower margin of appreciation afforded in such cases, academics have argued that the differing approaches simply do not

[118] See, for example, Freeman M, "Why It Remains Important to Take Children's Rights Seriously" [2007] *International Journal of Children's Rights* 15 1 5–23.
[119] United Nations Convention on the Rights of the Child 1989.
[120] S3(1) United Nations Convention on the Rights of the Child 1989.
[121] *E v UK* [2002] 4 EHRR 19.
[122] Herring J, *Family law* (4th edn, Longman 2011) p. 437 para. 2.
[123] *Re KD (A minor) (Ward: termination of access)* [1988] 1 ALL ER 577.
[124] *Ibid*., para. 16.
[125] *A and Byrne and twenty twenty television v UK* [1998] 25 CD 159.
[126] *Ibid*., para. 60.

accord.[127] However, the increasing integration of CRC principles and terms into ECHR jurisprudence has opened up new potential for children who have lived with domestic violence to invoke rights independently. Children have already found success in their complaints where the state has failed to protect them from "degrading treatment",[128] and the state must afford them "special protection"[129] in the form of deterrence against "serious breaches of personal integrity",[130]such as by not allowing a known abuser close contact with children.[131] Courts must be mindful of their ECHR obligations when granting contact to known violent abusers to prevent violations of Article 3.

Furthermore, it has been established that Article 8 includes the right to "develop individual personality". An individual child wishing to contest contact with an abusive, non-resident parent may bring an action in their own right[132] and argue against the state for a framework which prevents them from doing so or, indeed, where the state has failed to respect their physical, moral or psychological integrity.

A final point to consider is whether it is the parent–child contact itself which is protected within Article 8 or whether it is the right to *choose* whether or not to have this contact that is protected. Pretty[133] was unsuccessful in her argument that the right to die was "not the antithesis of the right to life, but the corollary of it",[134] but this concerned an absolute right. The qualified right to join an association[135] has been interpreted as conferring a corresponding right not to join an association,[136] and Article 9 embraces a freedom from any compulsion to express thoughts.[137] The question of whether a child who does not want to have contact with a previously violent parent ought to have this right protected remains to be

[127] Choudhry S, "Taking the rights of parents and children seriously: confronting the welfare principle under the Human Rights Act" [2005] *OJLS* 25 (3).
[128] For example, *A v UK* [1999] 27 EHRR 611.
[129] *E v UK* [2002] 4 EHRR 19.
[130] *A v UK* [1999] 27 EHRR 611 para. 22.
[131] *E v UK* [2002] 4 EHRR 19.
[132] See, for example: *A v UK* [1997] 27 EHRR 611.
[133] *Pretty v UK* [2002] 35 EHRR 1.
[134] *Ibid*., para. 24.
[135] Article 11 ECHR confers a right to "freedom of assembly and association".
[136] *Young, James and Webster v UK* [1981] 4 EHRR 38.
[137] Clayton R and Tomlinson H, *The law of human rights* (2nd edn, OUP 2009) p. 913 para. 13.

answered. Certainly, it would be difficult to compel absent parents to have contact with children where they did not want to, and therefore it might be argued to be unfair that the child may be compelled by the court to have an equally unwanted contact.

Children are not afforded quite the same rights as their parents under the ECHR and they cannot, for example, invoke the right to vote. They are instead offered a qualified deontological version of rights; but where they are subject to contact proceedings after already being exposed to domestic violence, it is submitted that it is within the dynamic of the "living instrument" of the ECHR, as incorporated by the HRA, that they may find the most hope of a less paternalist approach than the welfare principle, and grasp a little autonomy.

IV. Reforming the current legal system

> *"The reformulation of the welfare principle, would be difficult, but not impossible, and could be attractive."*
>
> John Eekelaar[138]

Bainham's model of primary and secondary interests

A developed model has been advanced by Bainham[139] which proposed an alternative to the welfare principle, where parents' and children's interests would be categorised as either primary or secondary interests.[140] In this event, a child's secondary interests would have to give way to a parent's primary interests and vice versa, but also "collective family interests" would also be taken into account in the balancing exercise carried out by the court.

What this model does allow for is a more transparent consideration of individual needs and it recognises their interdependence with the family unit as a whole. The balancing exercise would also meet the requirements of the rights-based approach advocated in the

[138] Eekelaar J, "Beyond the welfare principle" [2002] *CFLQ* 14 (3) para. 1.
[139] Bainham A, "Changing families and changing concepts: reforming the language of family law" [1998] *CFLQ* 10 (1).
[140] *Ibid.*

jurisprudence of the ECtHR, but there is no specific reference to domestic violence in this model and how the needs of the primary victim and child might be determined, despite it being raised as a welfare issue by approximately 56 per cent of contact disputes.[141] Without guidance as to how these needs might be understood by judges, there remains the same judicial discretion that arguably allows room for, or the marginalisation of, the issues of domestic violence in contact proceedings.

Eekelaar and his least detrimental alternative

A modified suggestion by Eekelaar[142] is that the "least detrimental alternative"[143] ought to be applied. That is to say that: "the best option is to adopt the course of action that avoids inflicting the most damage on the well-being of any interested individual."[144] He suggests that: "if the choice was between a solution that advanced a child's well-being a great deal, but also damaged the interests of a parent a great deal, and a different solution under which the child's well-being was diminished, but damaged the parent to a far lesser degree, one should choose the second option, even though it was not the least detrimental for the child."[145] This test is qualified by the fact that, under this model, no solution may be adopted where the detriments outweigh the benefits to the child.

Again, no reference is made in Eekelaar's model to the most frequently cited welfare concern in proceedings, but under this test, the detriment to a child of no contact with a parent would be weighed against the detriment to the victim of ongoing contact arrangements. Under the current welfare principle, the court might order a victim to face her perpetrator in order to facilitate contact arrangements deemed in the child's best interests. Under Eekelaar's model some consideration would need to be given to the detriment caused to the victim by continually having to face her perpetrator. There does, however, remain a significant degree of judicial discretion within this test to determine what might constitute "detriment". Since much of the contemporary research suggests that

[141] Buchanan *et al*, [2001].
[142] Eekelaar J, "Beyond the welfare principle" [2002] *CFLQ* 14 3.
[143] *Ibid*., para 1.
[144] *Ibid*., para 201.
[145] *Ibid*., paras 243-45.

much of the problem for children who have lived with domestic violence is centred on judicial constructions of welfare, it might be argued that there would be an identical problem when determining "detriment".

Perry's presumption against contact

Perry[146] has argued that there ought to be a legislative presumption against contact with an established perpetrator.[147] This argument is centred on the quality of contact perpetrators are able to offer, highlighting that the risk of harm referred to in the welfare "checklist"[148] is always high: this is shown in the findings that children who live in an atmosphere of domestic violence or witness such violence suffer harm,[149] and the statistical links between child abuse and spousal abuse and the numbers of children abused or even killed after contact has been ordered.

This is a compelling argument for reducing the risks to children posed by contact proceedings. Research into the success of the implementation of such a presumption in New Zealand law has certainly found such a presumption to reduce risk, although not eliminate it.[150] This is, however, a paternal approach which does nothing to recognise children's autonomy in making decisions about whether they feel comfortable and benefitted by contact or not; and also it does little to address concerns about the welfare principle's non-compliance with international human rights obligations.

Herring's relationship-based welfare theory

Finally, Herring[151] has proposed a "relationship-based welfare theory".[152] This argument suggests that society in general is based on mutual co-operation and support, and so children must be

[146] Perry A, "Safety first? Contact and family violence in New Zealand: an evaluation of the presumption against unsupervised contact" [2011] *CFLQ* 18 (1).
[147] *Ibid*., para. 8.
[148] The term "checklist" is not actually used, but a list of factors the courts must have regard to is contained within .s1(3) Children Act 1989.
[149] The definition of "harm" in Children Act 1989 has been amended to include witnessing harm to others.
[150] Perry A, "Safety first? Contact and family violence in New Zealand: an evaluation of the presumption against unsupervised contact" [2011] *CFLQ* 18 (1).
[151] Herring J, *Family law* (4th edn, Longman 2011) p. 424 para. 6.
[152] *Ibid*.

encouraged to adopt a social obligation, and that they are not to expect parents to make excessive sacrifices for their minimal benefits. He argues that "a relationship based on unacceptable demands on a parent is not furthering a child's welfare",[153] and that supporting a child's primary caregiver means supporting the child.

In a sense, Herring is not changing the welfare model itself, but is reinventing current interpretations of what welfare actually means for a child – however, his interpretation of a child's welfare is by no means baseless. One of the aforementioned factors determining children's ability to recover from domestic violence has been found to be the ability of the victim (usually the primary caregiver) to recover.[154] Further research has highlighted that the examples set by a child's family relationships will influence and to some extent determine the child's future relationships,[155] which presumably will have a tremendous impact upon the child's future welfare. Again Herring's theory makes no reference to the human rights objections to the welfare principle, but there would appear to be some merit in his reasoning for families recovering from domestic violence.

Conclusion

It is submitted that it is necessary to create an institutional framework which discourages the degrading and debasing of individuals, and that particular attention must be paid to women and children in light of the patriarchal framework from which contemporary society has evolved. However, the broad definition of domestic violence also poses a number of problems for family law decision-makers.

The umbrella heading of "domestic violence" may include a man who becomes terrifyingly but quite unconsciously violent when he is drunk, or one who sets out to consciously strip his partner of her every autonomy through a series of planned, violent and sexual assaults. Both experiences will have devastating effects on the victims, including any children, but these may be very different, and accordingly the type of protection and the response of family

[153] *Ibid*., p. 425 para. 1.
[154] See part I.
[155] See part I.

decision-makers must be able to take this into account.

The welfare principle has the noble objective of ensuring that the child's welfare is paramount, and, in a society that recognises the need to protect the interests of the vulnerable, this is surely commendable. It does, however, lack the flexibility to manage the complicated competing needs in domestic-violence cases, and it is disappointing that there are currently no government statistics that monitor the outcomes of contact orders.[156]

The time and resource constraints placed upon family courts necessitate a normative approach to judicial determinations of a child's welfare, which tends to single out certain groups for disadvantage.[157] The fact that children have been identified as having been *killed* by the very person with whom the court has deemed contact to be in their best interests really ought to be reason enough to consider that there is a problem worthy of further consideration.

Children do not exist outside their individual context, and their future is dependent not only on their capabilities and physical environment, but also on their relationships and on those to whom they have formed attachments. What is common and unique to domestic-violence families is the extent to which these relationships are broken. They become part of a unit where one or more members of their family have their basic rights and freedoms stripped from them, and this is what shapes their notions of themselves and others around them as they develop.

Human rights obligations upon the family courts are increasingly better understood, and it is clear that an approach to proceedings where the interests of all parties are balanced, affording "special protection" to children, is the preferred approach in Strasbourg. The welfare principle, however, is embedded in English and Welsh law, and the legislature and judiciary will be slow to implement a framework which affords a *prima facie* lower standard of protection to children.

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[156] See, for example: Gilmore S, "The assumption that contact is beneficial: challenging the secure foundation" [2008] *Fam Law* 1226.

[157] Choudhry S, "Taking the rights of parents and children seriously: challenging the welfare principle under the Human Rights Act" [2005] *OJLS* 25 3 para. 2.

However, in light of the above, it is time to consider whether the welfare principle really does mean "welfarism". The alternative of an approach which is able to expressly recognise and balance the unequally distributed rights and freedoms within families living with domestic violence might provide better protection for such children. Furthermore, the transparency of proceedings which would better expose any bias and accord with obligations under the Human Rights Act might better serve all children.

Within a "rights-based" approach to contact decisions, the specific needs of families living with domestic violence would still need to be addressed, and indeed a presumption against contact for perpetrators would probably still comply under Article 8(2); but a mother would be able to argue independently of her child that her needs deserved consideration; so would a non-resident father. Surely, being raised in a family in which the basic human rights of all parties are recognised and balanced, with a special protection given to those who are vulnerable, is in a child's best interests.

This rights-based approach is a more transparent, honest and individualised version of "welfarism", which is better equipped to deal with such disputes and, particularly, with those where domestic violence is an issue. It is time to reconceptualise children's welfare and move towards an approach to child-contact decisions where children are given some autonomy and where they are part of a structure which gives due weight to all parties' interests; this is especially important for those who have come from families characterised by significant power imbalances.

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Is It Fair for Children to Appear as Witnesses in Criminal Proceedings? Should There Be a Minimum Age for Children Appearing in Court?

Nicole Tytler

Introduction

This article addresses some of the issues raised by allowing children to appear as witnesses in criminal proceedings under English law. Across the years, not only judges and academic writers in the legal field, but also philosophers and psychologists, have questioned the competence of children in giving testimony, especially very young children.

Influential philosophical points of view, academic commentaries and judges' dicta will be used to consider the old perception of the ability and competence of children to give evidence; these observations will be compared with recent academic commentaries and judicial decisions where children were allowed to give evidence in court despite their age. Early cases and academic commentaries considered that very young children should not be allowed to give evidence because of their age: it will be seen that this position has now changed and that age is no longer a bar to giving evidence and appearing in court. Statutory provisions will be discussed, and academic and judicial positions will be used to support this point. A reasoned conclusion will summarise the current position of this area of law, and a comparison with the law in Canada will be made for suggestions of possible reforms.

This paper demonstrates the uncertainties and inconsistencies in this area of law, which have resulted in different judicial decisions over

the years. Its key objective is to demonstrate the importance of child witnesses in the judicial system and how children should be allowed to give evidence and appear in court.

Historical background

Historically, witnesses had to take an oath: this was a solemn promise, sworn on the Bible, to tell the truth; a deliberate lie was punishable by both divine and secular sanctions. Therefore it was essential that a person, before taking the oath, understood its nature and consequences.[1] It was generally believed that children lack this understanding because of their age (especially children below the age of seven were considered more vulnerable);[2] therefore, they were more likely to be prevented from giving evidence. This underestimation of children's capacities is reflected in historical texts and legal statements. For instance, Kant suggested that a child must reach the age of ten before "reason appears",[3] and Aristotle claimed that children's "deliberate faculty is immature".[4]

Formerly, the "well recognised and long-standing authority"[5] was by Lord Goddard CJ in *R v Wallwork*[6] where the judge criticised the calling of a five-year-old child who had been sexually abused by her father: the child said nothing in court. Lord Goddard CJ asserted: "The court deprecates the calling of a child of this age as a witness … The jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could."[7] The words "deprecates" and "ridiculous" clearly indicate the court's reluctance to allow young children to appear in court, on the presumption that children could not be regarded as being as reliable as adults. The

[1] I. Dennis, *The Law of Evidence* (4th edn, Sweet and Maxwell, Cornwall 2010) 557; G. Durston, *Evidence Text and Materials* (2nd edn, Oxford University Press, New York 2011) 357; R. Glover, P. Murphy, *Murphy on Evidence* (12th edn, Oxford University Press, New York 2011) 553.
[2] J. McEwan, "Child evidence: more proposals for reform" (1988) *Crim. L.R.* 813, 818; W. Cassel, D. Bjorklund, "Developmental patterns of eyewitness responses to repeated and increasingly suggestive questions" (1995) *Law and Human Behavior*, 19, 507–531; Y. Ben-Porath, G.G.N. Hall, R. Hirschman, J.R. Graham, M. Zaragoza (eds), *Memory and Testimony in the Child Witness* (vol. 1, SAGE Publications, Thousand Oaks 1995) 241.
[3] Kant 250, as cited by B. Franklin, *The New Handbook of Children's Rights: Comparative Policy and Practice* (1st edn, Routledge Chapman & Hall, London 2001) 22.
[4] Aristotle1260, as cited by B. Franklin, *The New Handbook of Children's Rights: Comparative Policy and Practice* (1st edn, Routledge Chapman & Hall, London 2001) 22.
[5] *R v Wright* (1990) 90 Cr. App. R. 91, 94 (Ognall J).
[6] (1958) 42 Cr. App. R. 153.
[7] *Ibid*., 160.

judge's dicta visibly demonstrate how age was an essential factor in determining witnesses' competence at that time. Subsequently, in *R v Wright*, Ognall J reaffirmed the validity of Lord Goddard CJ's proposition.[8] In the latter case, the complainant was six years old when she gave evidence of alleged indecent assault by the appellants.

Even in the 1990s, the unreliability of children's evidence in court was asserted by psychologists who pointed out the danger of trusting what children said. Burtt emphasised that: "children are dangerously vulnerable to coaching and erroneous leading questions."[9] Davies claimed four "problems" of child witnesses: they are inaccurate, liable to fantasy, prone to suggestion, and lie.[10] Furthermore, Heydon, in his legal textbook, focused on the fact that children may invent some situations; he also criticised children's behaviour by pointing out that "sometimes [they] behave in a way evil beyond their years".[11] These statements reveal a strong negative prejudice against child witnesses, which is rejected in this paper.

Only in recent years has there been a change in the general perception of children appearing as witnesses in criminal proceedings.[12] It was recognised that the exclusion of children's evidence caused significant difficulties in the administration of criminal justice. In fact, it happens that children may be the only witnesses, especially in offences of sexual abuse and domestic violence against themselves.[13] Court procedures and legal practices have been improved to facilitate the testimony of a child witness (the following section analyses this point further). Subsequent cases show a more flexible and open approach to this topic, which is reflected also in later judges' decisions and academic commentaries.

[8] (1990) 90 Cr. App. R. 91, 94.
[9] H.E. Burtt, *Applied Psychology* (1st edn, Prentice-Hall Inc, New York 1948).
[10] R.H. Flin, Y. Stevenson, G.M. Davies, "Children's knowledge of court proceedings" (1989) *British Journal of Psychology*, 80, 285–297.
[11] J.D. Heydon, *Evidence: Cases and Materials* (2nd edn, Butterworth & Co Publisher Ltd, Belfast 1984) 84.
[12] *Re Z* [1990] 2 Q.B. 355, 361 (Lord Lane CJ); *R v Barker* [2010] EWCA Crim 4 [36] (Lady Justice Hallett, Mrs Justice Macur); A. Brammer, P. Cooper, "Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems" (2011) *Crim. L.R.* 925; J.R. Spencer, "Child witnesses and cross-examination at trial: must it continue?" (2011) *Arch. Rev*. 7.
[13] J. McEwan, "Child evidence: more proposals for reform" (1988) *Crim. L.R.* 813, 815; J.R. Spencer, "Children's evidence: the Barker case, and the case for Pigot" (2010) *Arch. Rev.* 5, 7; I. Dennis, *The Law of Evidence* (4th edn, Sweet and Maxwell, Cornwall 2010) 557.

Methods of interview for children

The enactment of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 created a sea change in the criminal courts' approach to children, clarifying the competence rules of witnesses in criminal cases.

Before the enactment of the YJCEA 1999, Bridge LJ in *R v Hayes* gave a thoughtful statement concerning the competence of children, showing that he had already moved towards a more open-minded position: "the all-important matter is to see and hear the witnesses, and only one who has seen and heard, particularly child witnesses, can have a basis for a rational conclusion as to whether their evidence is reliable or not."[14]

Sections 23 to 27 of the YJCEA 1999 provide special measures for witnesses when giving evidence – s.23: "Screening witness from accused" (as amended by s.104 of the Coroners and Justice Act (CJA) 2009), s.24: "Evidence by live link" (as amended by s.102 CJA 2009), s.25: "Evidence given in private", s.26: "removal of wigs and gowns", s.27: "Video recorded evidence in chief" (as amended by s.108 CJA 2009), s.29: "Examination of witness through intermediary", and s.30: "Aids to communication". Since 1989 in English courts, children in criminal proceedings have had the possibility of giving evidence by live television link or by means of a videotaped interview.[15] However, these methods were criticised as depriving the accused "of the benefits of seeing and hearing the witnesses give evidence live in court" (analysed in more detail below).[16]

S.53(3) provides how to assess witnesses' competence:
"A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—
(a) understand questions put to him as a witness, and
(b) give answers to them which can be understood."

S.53 YJCEA 1999 applies equally to both adults and children, and it

[14] [1977] 1 W.L.R. 234, 238.
[15] S.32 Criminal Justice Act 1988.
[16] D.J. Birch, D. Tausz, "Evidence: evidence via television link and video recording of interview with child" (2001) *Crim. L.R.* 473, 476.

was enacted in response to modern psychological research, which showed that little children are capable of giving truthful evidence.[17]

In *R v Powell*[18] the evidence in chief of a child under four years, concerning indecent assault, was given by way of video recording (admitted in evidence under s.27(1) of the YJCEA 1999), but on cross-examination it appeared that the child was incompetent as a witness because of a lack of ability to answer questions put to her. Scott Baker J found that s.53(3) of the YJCEA 1999 makes clear that the age of a witness does not determine his/her competence to give evidence.[19] The same point was emphasised by Richards LJ and Forbes J.[20] In the conclusion the judges reiterated that the young age of the child "was not in itself necessarily an insurmountable obstacle for the prosecution".[21] It was held, *inter alia*, that the judge should have reconsidered the question of whether the complainant was a competent witness at the conclusion of the complainant's evidence.[22] Hence, *R v Powell* is an effective example of the objective application of the law under the YJCEA 1999.

S.54 clarifies that the burden of proof in proving the competence of a witness, on the balance of probabilities, is on the party calling the witness.

In *G v DPP* it was held that expert evidence was not appropriate in deciding the question of the competence of a child witness.[23] Now s.54 specifies that expert evidence may be called for this purpose.

R v Brasier,[24] *R v Hayes*[25] and *R v Campbell*[26] raised the issue of child witnesses being sworn. Now s.55 specifies that a witness under 14 years may not be sworn.

In addition, s.16 of the YJCEA 1999 concerns "witnesses eligible for assistance on grounds of age or incapacity": witnesses under 17 are

[17] J.R. Spencer, "Children's evidence: the Barker case, and the case for Pigot" (2010) *Arch. Rev*. 5, 7.
[18] [2006] 1 Cr App R 31.
[19] *Ibid*., [18].
[20] *R v Malicki* [2009] EWCA Crim 365 [12]; *R v MacPherson* [2006] 1 Cr. App. R. 30 [18].
[21] [2006] 1 Cr App R 31 [42].
[22] *R v Powell* [2006] 1 Cr App R 31 [34].
[23] [1998] QB 919, 925 (Phillips LJ).
[24] (1779) 1 Leach 199.
[25] [1977] 1 W.L.R. 234.
[26] (1983) 147 J.P. 392.

eligible under this section (s.98 CJA 2009 has raised the age to 18). S.17 concerns "witnesses eligible for assistance on grounds of fear or distress about testifying", and states, *inter alia*, that the court must take into account the age of the witness.

These points demonstrate that the age of the witness was deliberately included in some provisions, with the aim of placing child witnesses in a fairer position under law than in the past.

The primary purpose of an interview with a child witness is to make a deposition which is rich in information and detail. Hudson, Fivush, Frizon and Tully, in their psychology books, state that younger children have not yet learned the conventional framework for recounting the past, and therefore depend on the adult's questions to guide their recall.[27] Nevertheless, Zaragoza *et al.* emphasise that the types of information that children recall do not change over time, nor does the total amount of information recalled.[28] This is a substantial change from the former belief that children's memories are not reliable.

All these analyses were incorporated in the report "Interviewing Child Witnesses under the Memorandum of Good Practice: A research review".[29] This document outlined core principles to be followed by police officers and social workers when conducting interviews. Now the Memorandum has been replaced by: "Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures"[30] (ABE) because it also incorporates studies on the YJCEA 1999.

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[27] J. Hudson, R. Fivush, *Knowing and Remembering in Young Children* (1st edn, Cambridge University Press, Cambridge 1990) 243; K. Frizon, B. Tully, *Resource Manual of Specialised Investigative Interviewing: Obtaining Testimony from Children and Psychologically Vulnerable Adults Who Are Suspected of Being Perpetrators or Victims of Crime or Abuse* (1st edn, Psychologist at Law Group, London 1996) 232.

[28] M.S. Zaragoza, J.R. Graham, G.C.N. Hall, R. Hirschman, Y.S. Ben-Porath, *Memory and Testimony in the Child Witness* (vol. 1, SAGE Publications, Thousand Oaks 1995) 178.

[29] G.M. Davies, H.L. Westcott, "Interviewing Child Witnesses under the Memorandum of Good Practice: A research review" (Police Research Series, Paper 115, Policing and Reducing Crime Unit 1999, London 1999): <http://lx.iriss.org.uk/sites/default/files/resources/040.%20Research%20Review%20of%20the%20Memorandum%20of%20Good%20Practice.pdf > accessed on 10 January 2013.

[30] Ministry of Justice, "Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures" (March 2011): <http://www.cps.gov.uk/publications/docs/best_evidence_in_criminal_proceedings.pdf> accessed on 10 January 2013.

ABE offers guidance "to assist those responsible for conducting video-recorded interviews with vulnerable, intimidated and significant witnesses, as well as those tasked with preparing and supporting witnesses during the criminal justice process".[31] ABE encompasses child witnesses in the wider categorisation of "intimidated and vulnerable witnesses", who have been recognised also under statute; it contains specific sections also for "disabled children and children with learning difficulties".[32] This section supports the position that there is no presumption against child witnesses appearing in court, even in these situations.

On this analysis, the words of Brammer and Cooper seem correct: "the introduction of special measures has had some success in its objective of facilitating better evidence from vulnerable and intimidated witnesses."[33]

Child witnesses and the effect on the trial

The trial process has a great effect on the child, the accused, and the trial itself. Witnesses, both children and adults, often have a significant fear of giving testimony in the physical presence of the accused; the special measures enacted in the YJCEA 1999 are designed to reduce this possible trauma, as it might affect the integrity of their testimony. Nevertheless, there is a considerable debate about the imbalance between the protection of child witnesses and the rights of the defendants. In 1995 it was stated: "To protect child witnesses as well as innocent defendants, it is essential to determine the ways in which the use of closed-circuit technology affects children and their testimony, as well as the degree to which jurors' duties as fact finders may be inhibited or enhanced by use of closed-circuit testimony."[34]

Attention should be paid to the appellant's submission in *R v Powell* (considered above) as regards the application of s.27(1), where it

[31] *Ibid*.
[32] *Ibid*., Appendix E.
[33] A. Brammer, P. Cooper, "Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems" (2011) *Crim. L.R.* 925, 929.
[34] M.S. Zaragoza, J.R. Graham, G.C.N. Hall, R. Hirschman, Y.S. Ben-Porath, *Memory and Testimony in the Child Witness* (vol. 1, SAGE Publications, Thousand Oaks 1995) 215.

was stated, *inter alia*, that the interview was poorly planned and conducted, and it was undertaken in an environment ill-suited for the purpose.[35] The issue was that the child had not been interviewed promptly and appropriately, and the trial took place nine months after the event.[36]

Spencer, in the 2010 *Archbold Review*, provides an insightful critique of *R v Barker*[37] (this case is analysed in the following paragraph).[38] Spencer argues that a closer inspection of the current system would reveal that the requirement that the child has to be brought to the trial court for a live cross-examination has great disadvantages. The child has to re-live the incident, many months afterwards, in circumstances that are certain to be stressful. More significantly, counsel for the defendant in these circumstances will mostly engage in "communication … likely to be rudimentary and give him little chance to probe the allegation".[39]

Hall points out the implications that special measures do not adequately take into account the child's wishes and the views about their use.[40] Moreover, McEwan, in 1988, argued that usually "defence lawyers have no pre-trial contact with the child and yet by cross-examination must seek to undermine his evidence without alienating the jury".[41] Even though this statement might be correct in some situations, this does not imply that the child is in a better position than the accused.

The above examples demonstrate there are criticisms of special measures.[42] It is questionable whether special measures, in truth, put the accused at a greater disadvantage or fail to address child-witness issues. Legislation and all relevant court procedures are implemented to ensure that there is always a balance between the right of the defendant to have a hearing in accordance with the legislative purpose, the interests of the child witness and the interests of justice.

[35] [2006] 1 Cr App R 31 [24].
[36] *Ibid*., [41].
[37] [2010] EWCA Crim 4.
[38] J.R. Spencer, "Children's evidence: the Barker case, and the case for Pigot" (2010) *Arch. Rev*. 5.
[39] *Ibid*., 7.
[40] M. Hall, "Children giving evidence through special measures in the criminal courts: progress and problems" (2009) 21(1) *Child and Family Law Quarterly* 65.
[41] J. McEwan, "Child evidence: more proposals for reform" (1988) *Crim. L.R*. 813, 814.
[42] *R v Malicki* [2009] EWCA Crim 365 [15]; *R v MacPherson* [2005] EWCA Crim 3605 [25] (Forbes J).

A correct procedure will reduce or prevent the possibility of unfair and unjust outcomes for the accused, without favouring one party or the other.

On the other hand, there are also cases where "the child fails to communicate at all, and when no cross-examination is possible, the prosecution – however well founded – usually has to be abandoned".[43] The occurrence of these circumstances demonstrates how the trial, *per se*, can have a "harmful" impact on a child who is very vulnerable, and this undoubtedly has a bad effect on the trial process also, because it cannot be carried out further without the child's testimony.

The rationale of *R v Smith*, concerning S's conviction of rape and gross indecency with a 12-year-old child, makes clear the judge's task of ordering a procedure which reduces the strain on child witnesses, without prejudicing the defendant's interests. It also highlights that anyone providing comfort and support to a child witness should not talk to the complainant while he/she is giving evidence, because this might prejudice the regularity of the trial.[44]

In former years, the competence of a child was normally determined in the presence of the jury, on the basis that this would also assist jurors when it came to weighing their testimony, if they were permitted to give evidence.[45] Now, under s.54, any proceedings held for the determination of a witness's competence take place in the absence of the jury (if there is one).

This is an important development: it appears to be a more objective assessment, and it ensures that the jury is not influenced in any way by presumptions about the validity of witnesses, especially young witnesses.

In *R (D) v Camberwell Green Youth Court* and *Regina (G) v Camberwell Green Youth Court* (Conjoined Appeals),[46] the issue before the House of Lords was whether the new scheme providing

[43] J.R. Spencer, "Child witnesses and cross-examination at trial: must it continue?" (2011) *Arch. Rev*. 7, 9.
[44] [1994] *Crim. L.R*. 458.
[45] *R v Reynolds* (1950) 34 Cr. APP. R. 60.
[46] [2005] UKHL 4.

for how child witnesses are to give their evidence in criminal cases is compatible with the right of the defendant to a fair trial under Article 6 of the European Convention on Human Rights (ECHR), in particular when that defendant is also a child. Lord Rodger of Earlsferry asserted that "the use of the special measures will maximise the quality of the children's evidence in terms of its completeness, coherence and accuracy";[47] and so Parliament had not enacted provisions incompatible with the ECHR.[48] On this basis the appeals were dismissed. This case is another illustration of how "the modification is simply the use of modern equipment to put the best evidence before the court, while preserving the essential rights of the accused to know and to challenge all the evidence against him".[49] Hence, it is unlikely that a defence will successfully rely on an "imaginary" imbalance between the right of the defendant to have a hearing in accordance with the norm and the interests, not only of the child witness, but also of justice.[50] Doak, in his case comment, states: "this decision is to be welcomed in that it expressly acknowledges the strong public interest in ensuring that vulnerable witnesses are empowered to give the best possible evidence at court."[51]

It should be emphasised that a right to a fair trial applies uniformly and in its entirety to everyone, adults as well as children: "it is essential to consider the individual nature of the child and the case, and to reconcile those factors with the interest of judicial expedience and the other parties' interest of legal protection."[52] In fact, a fair trial can be achieved only if the rights of all the parties are protected.

The paramount importance of a fair criminal trial is also represented by s.78 of the Police and Criminal Evidence Act (PACE) 1984, which provides that the court may exclude evidence which would have an adverse effect on the fairness of the proceedings. S.78 has

[47] *Ibid*.
[48] *Ibid*., 21(Lord Brown of Eaton-under-Heywood).
[49] *Ibid*., 18 (Baroness Hale of Richmond).
[50] *Ibid*., 16 (Baroness Hale of Richmond).
[51] J. Doak, "Child witnesses: do special measures directions prejudice the accused's right to a fair hearing? R v Camberwell Green Youth Court, ex p. D; R v Camberwell Green Youth Court, ex p. G" (2005) *INTLJEVIDENCEPROOF* 291, 294.
[52] Council of Europe, "Hearing of children in criminal procedure according to article 6 of the European Convention on Human Rights" <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper5_en.asp> accessed on 12 April 2013.

been considered in different cases,[53] such as *DPP v M*, where it was stated that it applies not only to child witnesses, but to all witnesses.[54]

In practice, there are different opinions on the effect that a child witness has on the trial. However, it seems that judicial decisions have shown a sensible and practical approach, which seems to result in appropriate outcomes.

Not every child is the same: the new position in *R v Barker*

Bob Franklin, in his book concerning children's rights, focuses on the fact that children are still often regarded as "irrational and incompetent in the public consciousness".[55] The main point in this underestimation, he asserts, is that: "(in) denying children the right to participate and make decisions for themselves, society's motives are allegedly benign, seeking only to protect children from harmful consequences of their own incompetence."[56] Notwithstanding the increase of children being able to testify, this negative idea is still present, and needs to be recognised.

R v Barker,[57] decided only a few years ago, is a significant case in this area of law, because it makes it clear that children, even if very young, have the right to be heard in court. The case concerned Barker, who was convicted of anal rape of a girl who was less than three years old at the time of the offence and was four-and-a-half years old when she gave evidence. Lady Hale and Mrs Justice Macur, who gave the seminal judgment in the Court of Appeal, affirmed Barker's conviction.

Their Ladyships clarified that there are no presumptions or preconceptions when assessing the competence of an individual witness; as they said, "the question is entirely witness or child specific".[58] These dicta are in accordance with Lord Lane CJ's

[53] *R v Barker* [2010] EWCA Crim 4; *G v DPP* [1998] QB 919; *DPP v M* [1998] Q.B. 913.
[54] [1998] Q.B. 913 (Phillips L.J).
[55] B. Franklin, *The New Handbook of Children's Rights: Comparative Policy and Practice* (1st edn, Routledge Chapman & Hall, London 2001) 23.
[56] *Ibid*., 22.
[57] [2010] EWCA Crim 4.
[58] *Ibid*., [38].

judgment in *R v Z*,[59] and they realistically recognise that not every child is the same.

The judges acknowledged that "the chronological age of the child will inevitably help to inform the judicial decision about competency"; however, this is not the crucial element,[60] as it was thought to be in *R v Wallwork*[61] and *R v Wright*.[62]

Their Ladyships stated that, in instances where the child might be lying or mistaken in giving evidence, the solution is to formulate short, simple questions for the witness to answer.[63] This means questions that are developmentally appropriate to the young witness.

The appellant submitted, *inter alia*, that the evidence should have been stopped because of the lapse of time: this point was supported by reference to the earlier decisions in *R v Powell*[64] and *R v Malicki*[65] (above). Nonetheless, in the present case, the judges refused this ground of appeal and emphasised that "in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute."[66]

Their Ladyships were very clear and precise in giving their reasoning throughout the judgment. The judgment highlights the importance of the statutory criteria for assessing witnesses' competences and recognises the realities of children's cognitive abilities.[67]

Spencer, in critically analysing *Barker*, comments: "it is difficult not to feel some sympathy with the defence counsel's argument that the cross-examination did not really produce much meaningful

[59] [1990] 2 Q.B. 355, 360; J. Plotnikoff, R. Woolfson, "Cross-examining children – testing not trickery" (2010) *Arch. Rev*. 7, 8.
[60] [2010] EWCA Crim 4 [39].
[61] (1958) 42 Cr. App. R. 153.
[62] (1990) 90 Cr. App. R. 91.
[63] [2010] EWCA Crim 4 [42].
[64] [2006] 1 Cr App R 31.
[65] [2009] EWCA Crim 365.
[66] *Ibid*., [50].
[67] *Ibid*., [39].

exchange."[68] Similarly, in a previous case comment, Spencer stated that *Barker* "shows that there is still much amiss in the way the criminal justice system deals with little children who have the misfortune to be witnesses".[69] However, as a decision about the competency of child witnesses and the weight to be accorded to their evidence, the decision in *Barker* is surely welcome.[70] Henderson criticises *Barker* by pointing out that the court "hugely underestimates" the complex task of cross-examination. In fact, formulating "short, simple questions", as suggested by the judges, does not in itself resolve the problem of how cross-examination can be "unnecessarily traumatic and a threat to the safety of the evidence".[71]

Even though there are some concerns about the rulings in *R v Barker*, the importance of this case cannot be denied;[72] it provides a more flexible approach upon broader principles.

Need for children in the trial process

Witnesses, especially primary victims, are the main source of evidence in the criminal justice system through which justice can be achieved. In fact, if witnesses withdraw from the criminal justice process, this would result in cases failing to be successfully prosecuted.

Where children are needed to testify in court, they should be admitted without prejudices, examining their competence and their evidence through the formal procedures. In truth, there are children who are not suitable to appear in court because their testimony would not help the process; however, this does not imply that every child is unsuitable. In some circumstances interviewing a child, cross-examining and calling him/her back may be more difficult than interviewing an adult; but this should not be a barrier to allowing

[68] J.R. Spencer, "Child witnesses and cross-examination at trial: must it continue?" (2011) *Arch. Rev.* 7, 9.
[69] J.R. Spencer, "Children's evidence: the Barker case, and the case for Pigot" (2010) *Arch. Rev*. 5.
[70] Ibid., 7.
[71] E. Henderson, "Root or branch? Reforming the cross-examination of children" (2010) *C.L.J*. 460, 462.
[72] A. Brammer, P. Cooper, "Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems" (2011) *Crim. L.R.* 925, 931; A. Roberts, "Evidence: young child alleging sexual abuse – whether competent witness" (2011) *Crim. L.R.* 233, 236.

them to give evidence. In fact, the evidence that emerges in the interview often has significant value.

Jones reports the evidence of a three-year-old child in the late 1990s in the USA.[73] The interviews conducted by the police and by the author, at different times after the occurrence of the event, showed that a child as young as three can provide a convincing account of a traumatic event. The main point that justified the conclusion was that the child could correctly identify her assailant on different occasions; the defendant himself, just before the trial, confessed what happened.[74] This case adds support to the argument that there should not be a minimum age to testify, because even very young children may be adept at recalling events they have witnessed.

Therefore, it is clear that "the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults, some children will provide truthful and accurate testimony, and some will not."[75]

In *R v J*[76] the trial judge admitted hearsay evidence under s.114 of the CJA 2003 (and mentioning s.78 of the PACE 1984), of what a 30-month-old child said to her mother, and convicted the appellant for assault by penetration of a child under the age of 13 and unlawful wounding. The Court of Appeal (CA) upheld the conviction. Hooper LJ, giving the leading judgment in the CA, referred to s.114 as the "safety-valve provision", which was introduced to deal in part with this type of case.[77] Moreover, in addition to the hearsay evidence, "there was very strong circumstantial evidence that the appellant committed this dreadful offence".[78]

S.114 permits courts to admit hearsay evidence where they are satisfied that it is in the interests of justice for it to be admitted: this includes cases where the child is as young as 30 months old.[79] The

[73] D.P.H. Jones, "The evidence of a three-year-old child" (1987) *Crim. L.R.* 677.
[74] *Ibid*., 680.
[75] A. Brammer, P. Cooper, "Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems" (2011) *Crim. L.R.* 925, 931.
[76] [2009] EWCA Crim 1869.
[77] *Ibid.*, [24].
[78] *Ibid.*, [38].
[79] J.R. Spencer, "Child witnesses and cross-examination at trial: must it continue?" (2011) *Arch. Rev*. 7, 8.

illustrations above confirm that the traditional perception of children's value as witnesses is not accepted by the courts anymore. The courts, where appropriate, have been seen to use their discretion in an effective way.

Possible reforms and conclusion

English law has seen an historical development of the laws governing the assessment of children's competency to testify in criminal cases, both under common law and under legislation. It is clear that the initial scepticism of possible fantasy, suggestion or malice on the part of children has not been borne out.

Currently there are more services and support available to child witnesses. Interviewers play a key role, as they are often the first key-contact with a child who later gives evidence: it is important that interviewers have extensive skill in and understanding of how to approach such witnesses, otherwise this may cause the children to provide unreliable accounts.

Bala *et al.* offer a detailed analysis of the Canadian law on child witnesses, also making a comparison with the English law.[80] They state: "Canadian judges are satisfied that the changes to the laws governing the assessment of child witness competency do not interfere with the rights of an accused to a fair trial and facilitate the search for the truth";[81] and this seems to apply equally to English law, as can be seen from the decided cases analysed above.

S.16.1 of the Canada Evidence Act R.S.C. 1985, enacted as S.C. 2005, is similar to the provisions of YJCEA 1999 relating to children. However, under the Canadian Act, there are more provisions aimed specifically at children under the age of 14, whilst under English law these special measures are for everyone who falls within the category of vulnerable or intimidated witnesses.

Bala *et al.* criticise the fact that the present English law fails to require a child to promise to tell the truth, as is required under

[80] N. Bala , K. Lee, R.C.L. Lindsay, V. Talward, "The competency of children to testify: psychological research informing Canadian law reform" (2010) *International Journal of Children's Rights* 18, 53.
[81] *Ibid*., 68.

Canadian law.[82] The authors suggest that the English reforms do not reflect the current psychological research which is very important. They assert that having the child promise to tell the truth increases the likelihood that they will tell the truth.[83] Whilst it is acknowledged that this point might be an improvement in the treatment of child witnesses, it is not clear whether it would make a great difference. Perhaps, significant changes should be made regarding the time between the occurrence of the event and the beginning of trial: this would make it easier for the child to offer a more detailed and meticulous testimony. More detailed guidance on how to approach cross-examination would be useful, as Henderson argued (above). This is an important stage in the trial process, and it is crucial that it be dealt with in the best way. Intermediaries should be used more often, and questions should be phrased in a neutral way. These suggestions are made in light of the increase in the number of child witnesses across England and Wales. Figures obtained by the BBC show that, in England and Wales, 1,116 child witnesses were recorded in 2008/9.[84]

In conclusion, even though there are still weaknesses and limitations on the legal procedures for child witnesses under English law, the courts have demonstrated that the old prejudices which affected some decisions have been swept away. Now the duties of the judges are clear and established by different statutes, which have positively dealt with the issues of child witnesses' varied development.

It is thus submitted that it is fair for even young children to appear as witnesses in criminal proceedings. There is no credible social, psychological or legal reason for there to be a minimum age for child witnesses to appear in court or against using their testimony as a basis for the potential conviction of the accused. The state of the English law may not be perfect, but it is much more likely to produce justice than was the case previously.

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[82] *Ibid*., 74.
[83] *Ibid*., 76.
[84] A. Crawford, "NSPCC urges more support for child court witnesses" (November 2009) <http://news.bbc.co.uk/1/hi/uk/8375293.stm > accessed on 10 April 2013.

LEGAL OPINION

Serial Killers, the Nature–Nurture Debate and the Response of the Criminal Justice System

Katie Haydon

Introduction

Serial killers, the most enthralling criminals to ever exist, have stirred an intense debate amongst social scientists as to their psychological composition. The predominant argument surrounds understanding the catalyst that projects these individuals to heinously slay sometimes dozens of blameless victims. Are they the product of nature or nurture? Which contention reigns supreme? This paper will explore this in great detail.

This paper provides analysis of and insight into the criminological nature versus nurture debate as a means to explain this violent criminal behaviour. Initially it poses the question: "Are serial killers simply born to kill, or are they the product of their upbringing?"

It is presented in six parts, with this introduction as part one. Parts two and three of this paper examine the range of different influences on serial killers and the extent to which these influencing factors impact and heighten the notoriety of serial killers and their vicious

actions. The opening arguments in this paper centre on the nature debate, in other words, the notion that biology determines violent behaviour. This is followed by highlights and assertions from the nurture debate and the degree to which early influences and experiences are the key to learned violent behaviour. More and more evidence is produced by the pundits, including academia, in order to substantiate the biological and environmental influences on such criminals.

The focus of part four is broad, although it can be described in three subsections: firstly, to describe the criminal justice system's current response to serial killing as well as how the system and its response should and could be improved. To do this the paper covers the possibility of the genetic defence and the reinstatement of the death penalty.

As scientific explanations of violent behaviour gain more and more momentum, there are many arguments that such evidence should be used to either mitigate or excuse the crimes committed by serial killers. The idea of adopting science as a defence to the crime of murder is controversial and much discussed. Are genetics justifiable as an excuse for serial murder or would such a defence simply advocate more leniencies in the already seemingly docile English criminal justice system? Additionally, how realistic and effective was the death penalty as a solution to murder? These are all entirely relevant questions to the debate.

Upon a successful plea of diminished responsibility, many serial killers are turned over to the mental health system for "treatment", though the treatment of psychopathy, a condition often exhibited by serial killers, is greatly debated. Over the course of part five, the notion of the "incurable psychopath" will be briefly examined. Is there such a thing as a curable psychopath?

Methodology

The decision to focus on the nature versus nurture debate lies at the heart of the writer's interest in criminology. A great deal has been written already about the different influences that trigger or facilitate human behaviour. The space constraints of this paper have

influenced the choice to focus the debate on what triggers serial murder.

Another constricting factor was the inaccessibility of primary research opportunities. Early on in the research stage, correspondence with a local mental health centre, secure hospital and treatment facility failed to yield any opportunities for research. This prompted the decision to work with secondary research data as the basis for this analysis and review.

Although issues in obtaining primary research data were present, the secondary research data was riveting to look at, especially considering the abundance of journal articles available that were relevant to the paper. The topics covered in this paper are extensively explored by social scientists and legal professionals, which promoted reliability throughout.

The literature provides researchers with many great and significant references that are relevant to the current debate, as well as previous studies conducted over recent decades. It was imperative to carry out a full literature search and review before even attempting to put arguments to paper.

Part 2

> *"Nature is all that a man brings with himself into the world; nurture is every influence without that affects him after his birth"*[1]
>
> Francis Galton

The term "serial killer" undeniably invokes a substantial degree of fear amidst the majority of us, and there is no denying that serial killers draw our attention. Over the years, the western world has become culpable for transforming these monstrous killers into twisted celebrities, due to our increasing inquisitiveness and somewhat morbid fascination with their creation and development. What could have possibly gone so wrong in an individual's life that

[1] Francis Galton, *English Men of Science: Their Nature and Nurture* (Macmillan & Co 1874) 9.

it enticed them to heinously kill dozens of innocent people? Some could justly contest that serial killers have developed into a morbid phenomenon.

Social scientists have analysed the individual incentives of an interminable number of serial killers to seek a greater insight into their psychology. What is the central driving force behind serial murder? It is believed that there are two focal influences on a serial killer's behaviour, which are nature and nurture. The nature versus nurture debate has captivated the world of criminology, in an attempt to justify this criminal behaviour. The dispute was originally coined by the English polymath Francis Galton, who speculated on whether individuals are the product of biological or environmental influences.

Throughout the entirety of the binary parts, an analytical exploration shall be exhumed to quantify whether serial killers are the product of nature or nurture. Which argument prevails?

Are serial killers simply "born to kill"?

The terms "born to kill" and "natural-born killer" are habitually used statements that have continually withstood an abundance of criticism. Could it really be plausible that a new-born baby is destined to be a vicious killer later on in life? The general consensus, quite rightly, is a failure to comprehend such an ideology. Therefore, substantiating that a serial killer was "born to kill" is extremely controversial. There is, however, extensive evidence validating the existence of an individual's predisposition to violence, and as murder is considered the most extreme form of violence, examining its natural provocations throughout this paper seems fitting.

The physical attributes one possesses, such as eye colour, hair colour and height, are all scientifically proven to be the result of genetic inheritance from one's biological mother and father. However, biological justifications for criminal behaviour have also existed since the 19th century. One of the predominant arguments attributed to Charles Goring, a pioneer in criminology, following his study of *The English Convict*,[2] was that certain criminals had a genetic

[2] Charles Buckman Goring, *The English Convict: A Statistical Study* (HM Stationery Office 1913).

inherited inferiority. Goring believed that criminal behaviour could be inherited in the same way as ordinary physical features.[3]

America's most prolific female serial killer Aileen Wuornos' biological father, Leo Dale Pittman, happened to be a psychopathic child molester. Could having a violent father have been to her detriment? Could there have been a biological link? The theories of biological determinism, in the forms of genetic inheritance, biochemical factors and mental illness, will be critically evaluated as to their effects on one's predisposition to violence. Fundamentally, is biology really a serial killer's destiny?

Genetic inheritance

> *"We used to think that our fate was in our stars, but now we know that, in large measure, our fate is in our genes."*[4]
>
> James Watson, co-discoverer of the structure of DNA

A concept that has enthralled social scientists for centuries is the idea of the "criminal gene". Does it really exist? Can criminal traits be passed down from a parent to their offspring? In one of the many longitudinal adoption studies of its type, Hutchings *et al.* (1977)[5] attempted to answer this by observing a group of boys who were adopted into unrelated families in Copenhagen during 1927 and 1941, to examine their criminal careers in adulthood. It was discovered that nearly 50 per cent of the boys with a convict as a biological father became criminals themselves. Yet only a third of the boys without a criminal record had biological criminal fathers. Could this be an indication of genetically inherited criminality?

What about criminal traits of violence and aggression? Can they also be inherited genetically? Tiihonen *et al.* (2014)[6] made a somewhat momentous confirmation with respect to the relationship between genetics and violence whilst genetically analysing 895 Finnish

[3] Stephen Jones, *Criminology* (5th edn, Oxford University Press 2006) 274.
[4] Jon Beckwith, "A Historical View of Social Responsibility in Genetics" (1993) 43 *BioScience* 327.
[5] Barry Hutchings and Sarnoff A. Mednick, "Criminality in Adoptees and their Biological and Adoptive Parents: A Pilot Study" in Sarnoff A. Mednick and Karl O. Christiansen (eds), *Biological Bases of Criminal Behaviour* (Gardner Press 1978).
[6] J. Tiihonen *et al.*, "Genetics Background of Extreme Violent Behaviour" (2014) *Journal of Molecular Psychiatry.*

prisoners. The study validated speculation that there were specific genes associated with violent impulsive behaviour. The genes discovered were a mutation of the Monoamine Oxidase A (MAO-A) gene, often referred to as the "warrior gene" and a variant of Cadherin 13 (CDH13).

The type of crime committed by the test subjects fluctuated from non-violent to severely violent. Tiihonen *et al.*[7] concluded that the delinquents displaying at least one of the two genes in question within their genetic make-up were largely those who had committed violent crimes. Those who display such a genetic make-up are 13 times more likely to have a history of repeated violent behaviour.[8] It was also predicted that approximately five to ten per cent of violent crimes in Finland were associated with the presence of either gene. Accordingly, no substantial signal was observed for either MAO-A or CDH13 among non-violent offenders.[9]

The Monoamine Oxidase A (MAO-A) gene essentially breaks down neurotransmitters in the brain such as serotonin, dopamine and noradrenalin, which are chemicals within the brain that communicate information to the body. Such neurotransmitters are held accountable for regulating sleep, hunger, thirst and the control of emotional and psychological processes. Some individuals display abnormally low levels of activity within their MAO-A gene which ultimately leads to an excess of neurotransmitters. This genetic deficiency is called "Brunner Syndrome".

The association between "Brunner Syndrome" and violent behaviour was initially discovered by Brunner *et al.* (1993),[10] hence the name awarded to it. Brunner *et al.*[11] conducted an observation of 14 male subjects in the same Danish family, which spanned a total of four generations. Each male displayed impulsive aggressive behaviour which manifested in acts of verbal and physical aggression including arson, aggravated assault, sexual assault, attempted rape and

[7] Tiihonen *et al.* (2014) *op. cit.*
[8] Melissa Hogenboom, "Two Genes Linked with Violent Crime" (BBC News 28 October 2014) <http://www.bbc.co.uk/news/science-environment-29760212> accessed 30 December 2014.
[9] Tiihonen *et al.* (2014) *op. cit.*
[10] Han G. Brunner *et al.*, "Abnormal Behaviour Associated with a Point Mutation in the Structural Gene for Monoamine Oxidase A" (1993) 262 *Science* 578.
[11] Brunner *et al.* (1993) *op. cit.*

exhibitionism.[12] Here, it was discovered that the men in this particular family had extremely low levels of MAO-A activity. Surely, 14 men in one singular family displaying the same genetic abnormality is not coincidental? It certainly suggests genetic inheritance. The link between Brunner Syndrome and violent behaviour was also made more recently by Piton *et al.* (2014).[13]

It is understood that CDH13 is involved in the signalling process between cells, yet there is diminutive preceding literature on the link between violence and a variant of Cadherin 13 when equated with the "warrior gene". However, it was previously found to be the most prevalent genetic factor in attention-deficit hyperactivity disorder (ADHD). This suggested to researchers that there was a link between the variant and impulsivity, given the high rate of violent criminals who possess it.

Could these two genes be the cause of serial murder? If so, are serial killers legally and morally culpable for their actions? Could this provide a partial excuse, diminishing one's responsibility from murder to manslaughter?

Biochemical factors

The chemical structure of the human body has also been found to have an effect on impulsively violent behaviour. As previously deliberated, excess levels of neurotransmitters such as serotonin in the brain can greatly increase violent behaviour. Yet low levels of serotonin in the brain – or CFS 5-HIAA, as it is scientifically known – is also associated with increased impulsiveness and impaired control of aggressive behaviours.[14]

Virkkunen *et al.* (1995)[15] suggested that the levels of brain serotonin in violent offenders were significantly lower than in non-violent offenders. This was confirmed through a study conducted by

[12] Brunner *et al.* (1993) *op. cit.*
[13] Amélie Piton *et al.*, "20 Ans Après: A Second Mutation in MAOA Identified by Targeted High-Throughput Sequencing in a Family with Altered Behaviour and Cognition" (2014) 22 *European Journal of Human Genetics* 776.
[14] Matti Virkkunen *et al.*, "Low Brain Serotonin Turnover Rate (low CSF 5-HIAA) and Impulsive Violence" (1995) 20 *Journal of Psychiatry and Neuroscience* 271.
[15] Virkkunen *et al.* (1995) *op. cit.*

Linnoila *et al.* (1993)[16] who observed the chemical make-up of 36 murderers and attempted murderers. It was discovered that they all obtained sufficiently low levels of serotonin. The cause of low levels of brain serotonin is inconclusive, but there is a proposition that serotonin deficiency could well have been the result of damage suffered by an unborn foetus.

Irrefutably there are many similarities among serial killers. Yet, the visibly consistent factor is their gender; they are predominantly men. Of course, suggesting that being born male puts an individual at a greater risk of being a serial killer could be deemed an outrageous statement; however, there is evidence to suggest that high testosterone levels in males can influence violent behaviour. It is believed that high testosterone levels are at least partly responsible for the fact that men commonly appear to be more aggressive than women.[17]

Ehrenkraz *et al.* (1974)[18] explored this by examining the plasma testosterone levels of three groups of male prisoners – chronically aggressive, socially dominant and non-aggressive but assertive. As anticipated, the chronically aggressive prisoners had the highest levels of testosterone, with the non-aggressive prisoners retaining the lowest level. Similar results were achieved by Rada *et al.* (1983)[19] in which it was discovered that violent rapists had extremely high levels of testosterone.

Interestingly, preceding the case of *R v Craddock*,[20] the English criminal law now allows for pre-menstrual tension in women to be used as a defence to murder in certain cases as it is recognised as a chronic disorder by medical professionals. If there really is a correlation between aggressive behaviour and high testosterone levels, could it too be used to defend murder?

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[16] Markku Linnoila *et al.*, "Low Cerebrospinal Fluid 5-Hydroxyindoleacetic Acid Concentration Differentiates Impulsive from Non-Impulsive Violent Behaviour" (1993) 33 *Life Sciences* 2609.
[17] Stephen Jones, *Criminology* (5th edn, Oxford University Press 2006) 283.
[18] Joel Ehrenkranz, Eugene Bliss and Michael Sheard , "Plasma Testosterone: Correlation with Aggressive Behaviour and Social Dominance in Man" (1974) 36 *Psychosomatic Medicine* 469.
[19] Richard Rada *et al.*, "Plasma Androgens in Violent and Non-Violent Sex Offenders" (1983) 11 *Academy of Psychiatry and the Law* 149.
[20] *R v Craddock* [1981] 1 C.L. 49.

Mental illness

Regrettably, mental illness affects a quarter of British adults annually and for some, it does so in an extremely detrimental manner. A large proportion of serial killers were affected by some form of mental illness at the time of their heinous crimes. One may, justly, contest that suffering from a debilitating mental illness does not necessarily result in serial murder, which would be right, as the absolute risk of violence among the mentally ill population is very small, and only a small proportion of the violence in our society can be attributed to persons who are mentally ill.[21] Nonetheless, mental illness has been found to be an indirect contributor to violent behaviour.

The most ubiquitous mental disorder suffered by serial killers appears to be schizophrenia. The cause of schizophrenia is unfounded, yet it is increasingly thought to be a combination of genetic, biochemical and social factors.[22] Schizophrenia is medically demarcated as a brain disorder that affects the way a person perceives the world. Many serial killers suffer from positive schizophrenia, often referred to as paranoid schizophrenia, such as Peter Sutcliffe ("The Yorkshire Ripper") and Herbert Mullins ("The Serial Killing Saviour"). Paranoid schizophrenia causes individuals to hear voices, hallucinate and, more often than not, believe they are being plotted against. Many have argued that sufferers, in seeking to protect themselves from fallacious threats, take extreme measures. Such extremes have resulted in serial murder.

There are several studies which propose that schizophrenia leads to violent behaviour. Wallace *et al.* (1998)[23] studied a sample of Australian convicts who were incarcerated for violent offences, to observe the presence of schizophrenia amongst them, which was found to be high. It was concluded that schizophrenic sufferers were over four times more likely to be convicted of interpersonal violence and ten times more likely to be convicted of homicide than the general population.[24]

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[21] Edward P. Mulvey, "Assessing the Evidence of a Link between Mental Illness and Violence" (1994) 45(7) *Hospital and Community Psychiatry* 663.
[22] Stephen Jones, *Criminology* (5th edn, Oxford University Press 2006) 309.
[23] Cameron Wallace *et al.*, "Serious Criminal Offending and Mental Disorder: Case Linkage Study" (1998) 172 *British Journal of Psychiatry* 477.
[24] Elizabeth Walsh, "Violence and Schizophrenia: Examining the Evidence" (2002) 180 *British Journal of Psychiatry* 490.

Harmoniously, Eronen *et al.* (1998)[25] surveyed 693 prison inmates convicted of homicide in Finland and discovered that schizophrenia was associated with an eight-fold increase in homicide by men and a 6.5-fold increase by women. In conjunction, Brennan *et al.*[26] determined that schizophrenia was the only major mental disorder associated with increased risk of violent crime in both males and females.[27]

The number of female serial killers worldwide is frequently sparse. Nonetheless, the mental disorder Munchausen Syndrome by Proxy (MSBP) is found to be quite common amongst this minute number, having affected Beverley Allit and Genene Jones who were both hailed the "Angels of Death". Munchausen Syndrome by Proxy has been described as a rare form of child abuse[28] whereby a parent or carer of a juvenile exaggerates or causes symptoms of an illness within that child on purpose. The sole purpose is often a bid to be showered with praise and adulation for their heroic effort[29] in dealing with or treating a sick child. Sufferers are often themselves suffering from Munchausen Syndrome, an illness that compels its victims to consistently produce false stories and fabricate evidence, so causing themselves needless medical investigations, operations and treatments.[30]

Beverley Allit, a paediatric nurse at Grantham and Kesteven Hospital, suffered from both disorders. She injected her child victims with high levels of insulin and awaited their cardiac arrest, to gain sorrow and empathy from other hospital workers that she had to witness such horrible events in such close proximity. Munchausen Syndrome by Proxy is a classic example of a mental illness that indirectly leads to serial killing. Beverley Allit, in essence, committed murder simply to gain attention.

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[25] Markku Eronen, Matthias C. Angermeyer and Beate Schulze, "The Psychiatric Epidemiology of Violent Behaviour" (1998) 33 *Social Psychiatry and Psychiatric Epidemiology* 13.
[26] Patricia Brennan, Sarnoff A. Mednick and Sheilagh Hodgins, "Major Mental Disorders and Criminal Violence in a Danish Cohort Study" (2002) 57 *Archives of General Psychiatry* 494.
[27] Walsh (2002) *op. cit*.
[28] "Fabricated or Induced Illness" *NHS Choices*, 6 October 2014 <http://www.nhs.uk/conditions/fabricated-or-induced-illness/Pages/Introduction.aspx> accessed 10 November 2014.
[29] James Alan Fox and Jack Levin, *Extreme Killing: Understanding Serial and Mass Murder* (2nd edn, Sage Publications Inc 2005) 108.
[30] R. Asher, "Munchausen Syndrome" (1951) 257 *The Lancet* 339.

Lastly, it is widely understood that the majority of violently criminal perpetrators, particularly serial killers, exhibit a personality disorder, also referred to as psychopathological abnormalities. There have been many instances over the years where serial killers have been known to display a multitude of personalities.

There is an array of personality disorders that one could potentially suffer from, which are divided into three groups by the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* – clusters A, B and C. The group most commonly associated with violent criminality is Cluster B which includes anti-social, narcissistic, borderline and histrionic personality disorders. Sufferers of Cluster B personality disorders have a tendency to display a lack of empathy towards others, continuous hostility and issues with controlling their impulses.

Dennis Nilsen, Ian Brady, Ted Bundy, Dennis Radar, Arthur Shawcross, Aileen Wuornos, Colin Ireland and Kenneth Bianchi are just a few examples of serial killers who were found to have been suffering from Cluster B personality disorders at the time of their killings. The most prevailing Cluster B personality disorder is the anti-social personality disorder, which is often affiliated with psychopathy, as these sufferers tend to have little empathy and intolerance to frustration, fail to obey authority, feel enamoured by violence, display an unceasing desire for new experiences as well as showing susceptibility to boredom.

So, are serial killers born with a predisposition to extreme violence? Is there some context to the notions of the “natural-born killer” and being “born to kill”? There certainly is an abundance of evidence supporting these assertions, and as science continues to evolve, it is incontestable that this argument will intensify. Fallout from this could mean greater implications for the criminal justice system. One component of the “nature” debate in particular that could have a direct impact is genetic abnormalities. If a serial killer is born with a genetic deficit, then surely their criminal culpability should be diminished?

Part 3

How influential is the environment in serial killing?

The first subsection analysed the association between nature and a predisposition to violent behaviour. In this part, the effects of nurture will be questioned. Just how potent are environmental influences in the formation and development of a serial killer? The chief argument of the nurture "camp" is that certain aspects of human behaviour are acquired through environmental and social factors, as opposed to biological determinism. There is a profusion of evidence which supports the notion that the environment one lives in, principally in childhood and adolescence, could have a detrimental impact on an individual's life. There is a particularly strong association between how one is nurtured and one's susceptibility to violent criminality. Can one's background be that prominent that it projects one to serial killing? Are serial killers the product of nurture? Are they merely made bad?

Childhood and upbringing

Regardless of the nature of their crimes, each serial killer is distinctive from the next. They each have alternative modus operandi, a different sample of victims, and ultimately a dissimilar psychological make-up. Yet, there is one apparent consistency and that is their childhood. It would appear that a particularly small percentage of serial killers endured a seemingly "normal" childhood; Gary Ridgeway ("The Green River Killer") is a classic example of this. He would join his father in driving along the Seattle strip shouting profanities at prostitutes on a regular basis and from a young age; he had a sexual attraction towards his own mother with whom he shared a bed.

Could an individual's childhood be so psychologically damaging that it led them to murder? For Gary Ridgeway, this could be argued to have been the case, as he went on to develop an addiction to prostitutes whom he went on to kill and dump in a river.

Bohman *et al.* (1982)[31] presented a basic illustration of just how compelling an individual's childhood can be on the rates of petty criminal behaviour. A sample of adoptees was selected who were brought up in families where criminal behaviour was accounted for and whose biological relations were not criminal. These particular adoptees were found to be twice as inclined to become criminal as those adoptees with no presence of criminality within either their adoptive or biological families. It is believed that criminality, in all its forms, runs in families and not in the biological sense. Criminality acts almost as a skill, which is passed down from one generation to the other. Farrington (1986)[32] carried out an extensive longitudinal study, called "The Cambridge Study in Delinquent Development",[33] which examined the concept of the criminal family.

The subjects observed were 411 eight- to nine-year-old boys from six state schools in a deprived working class area in south London. When the subjects attained the age of 48, their criminal careers were assessed by looking at either their criminal records or their self-reported offending. It was discovered that the most consistent factor present amongst the subjects with criminal convictions was the attribute of a criminal parent or older sibling prior to the subject attaining the age of ten. Sixty-two per cent of the subjects with a criminal parent or older sibling were themselves a convict. Smith and Stern stated:

> We know that children who grow up in homes characterized by lack of warmth and support, whose parents lack behavioural management skills, and whose lives are characterized by conflict or maltreatment will more likely be delinquent, whereas a supportive family can protect children even in a very hostile and damaging external environment … Parental monitoring or supervision is the aspect of family management that is most consistently related to delinquency.[34]

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[31] Michael Bohman *et al.*, "Predisposition to Petty Criminality in Swedish Adoptees" (1982) 39 *Archives of General Psychiatry* 1248.
[32] David P. Farrington, "Cambridge Study in Delinquent Development (Great Britain), 1961–1981" (1986) ICPSR Data Holdings.
[33] *Ibid*.
[34] Carolyn Smith and Susan Stern, "Delinquency and Antisocial Behaviour: A Review of Family Processes and Intervention Research" (1997) 71 *Social Service Review 382*.

Child abuse certainly appears to be a common divisor amid serial killers. In a contemporary American study of 50 serial killers it was discovered that a total of 68 per cent[35] were themselves a victim of abuse as children, be it psychologically, physically or sexually. This was true for John Wayne Gacy, commonly referred to as "The Killer Clown", who lived in unremitting fear of his violent, erratic, alcoholic father, who regularly lashed out at him physically. Edmund Kemper, aka "The Co-Ed Butcher", was also subject to incessant emotional exploitation by his strict mother. It has been argued that children who experience harsh physical discipline or abuse from parents may develop a working model of relationships as threatening and dangerous, and respond accordingly, using aggression as a social tactic.[36]

In a recent study at University College London (UCL), it was identified that children who endure violence show similar patterns of brain activity to soldiers who have served in combat.[37] The children were each instructed to look at images of adults displaying a range of emotions. When confronted with the image of an adult with an apparent angry face, it was noted that the abused children each responded very distinctly to other children. In essence, children who are abused tune their brains to become "hyper-aware" of impending threats of danger. Consequently, in adulthood these individuals may react in an excessive and perhaps violent manner when they believe, rightly or wrongly, that they are in danger.

Child abuse is not the only factor present within the family home that could be culpable for a child being violent later on in life. Bobby Joe Long, Dorethea Puente and Ed Kemper all came from broken homes – could there be an association? It is suggested that children who are the product of a broken home are at a higher risk of becoming delinquent paralleled to those from "intact" families. This was confirmed by Kolvin *et al.* (1988)[38] who discovered that 53 per

[35] Heather Mitchell and Michael G. Aamodt, "The Incidence of Child Abuse in Serial Killers" (2005) 20 *Journal of Police and Criminal Psychology* 40.
[36] Cynthia Hudley and Andrei Novac, "Environmental Influences, the Developing Brain, and Aggressive Behaviour" (2007) 46 *Theory into Practice* 121.
[37] Mark Henderson, "Abused Children's Brain Similar to Combat Troops, Scans Show" (*The Times* 5 December 2011) <http://www.thetimes.co.uk/tto/health/mental-health/article3248451.ece> accessed 31 January 2015.
[38] Israel Kolvin *et al.*, "Social and Parenting Factors Affecting Criminal-Offence Rates: Findings from the Newcastle Thousand Family Study (1947–1980)" (1988) 152 *British Journal of Psychiatry* 80.

cent of the men studied who were the product of a broken home prior to attaining the age of five, were convicted before the age of 32. This was compared with only 28 per cent of the men who were from a supposed "complete" family.

Head trauma resulting in neurological impairment

Suffering from a traumatic brain injury (TBI), a significant head injury involving loss of consciousness/amnesia with ongoing cognitive or social impairment,[39] is regarded as one of the many catalysts behind violent impulsive behaviour, especially if it occurs during childhood or adolescence. Such behaviour could emulsify into serial murder, which purportedly did for Henry Lee Lucas ("The Confession Killer"), Richard Ramirez ("The Night Stalker"), as well as Bobby Joe Long ("The Classified Ad Rapist"), who reportedly suffered voluminous head injuries as a child, one of which supposedly led to 30 stitches.

Preceding adulthood, an individual's brain is in a time of continued cognitive development[40] and the likely repercussion of a traumatic brain injury will cause an individual to display lower levels of cognitive skills[41] in later life. Cognitive skills essentially control one's thoughts and behaviours, and low levels will reduce an individual's ability to socially interact, and often cause them to encounter difficulties with considering alternative behaviours or controlling impulses, particularly during conflict.[42]

Low impulse control in traumatic head trauma sufferers became apparent when Stoddard and Zimmerman[43] steered an eight-year longitudinal study to examine the differentiation in levels of interpersonal violence of those who claimed to have suffered a previous head trauma, compared with those who had not. It was discovered that participants who had experienced a head injury prior to young adulthood reported more interpersonal violence in

[39] Kenneth Carswell *et al.*, "The Psychosocial Needs of Young Offenders and Adolescents from an Inner City Area" (2004) 27 *Journal of Adolescence* 415.
[40] Sarah A. Stoddard and Marc A. Zimmerman, "Association of Interpersonal Violence with Self-Reported History of Head Injury" (2011) 127 *Paediatrics* 1074.
[41] Michael Sarapata *et al.*, "The Role of Head Injury in Cognitive Functioning, Emotional Adjustment and Criminal Behaviour" (1998) 12 *Brain Injury* 821.
[42] Stoddard and Zimmerman (2011) *op. cit*.
[43] *Ibid.*

adulthood than participants who had never had a head injury.[44] Comparable fallouts transpired from Leon-Carrion and Ramos'[45] study as to the presence of TBI in both violent and non-violent criminals. To which, as hypothesized, those who had committed crimes of a violent nature, including rape and murder, were found to have a far greater percentage of brain injury amongst them than those who committed non-violent crimes such as theft and fraud.

Traumatic brain injury has been found to drastically alter one's personality, more often than not to an extremely detrimental effect. This was originally discovered in the early 19th century when, whilst carrying out his daily routine, an American railroad construction foreman, Phineas Gage, "neuroscience's most famous patient", ended up with an iron rod through his skull, due to a premature explosion. This destroyed the majority of his frontal lobe. What astonished medical professionals, aside from his near impossible survival, was his complete alteration in persona. According to those in acquaintance with Gage, the changes in his personality were extremely profound; a seemingly pleasant and caring man became horrible and callous. Phineas Gage was the first in a long line of non-criminological cases demonstrating extreme personality changes as a result of traumatic brain injury.

Violent media

> *"I knew it was wrong to think about, and certainly, to do it was wrong. I was on the edge, and the last vestiges of restraints were being tested constantly, and assailed through the kind of fantasy life that was being fuelled, largely, by pornography"*[46]
>
> Serial killer Ted Bundy, aka "The Campus Killer"

Technology has been unremittingly advancing throughout the world for decades; as a result pornographic material has become more

[44] Stoddard and Zimmerman (2011) *op. cit*.
[45] José León-Carrión and Francisco Javier Chacartegui Ramos, "Blows to the Head During Development Can Predispose to Violent Criminal Behaviour: Rehabilitation of Consequences of Head Injury Is a Measure of Crime Prevention" (2003) 17 *Brain Injury* 207.
[46] "Serial Killer Ted Bundy Final Interview Only Hours Before Execution Full" (*YouTube* April 9 2015) <https://www.youtube.com/watch?v=vven0SAmzto> accessed 12 April 2015.

readily accessible than ever before. An Internet search for "pornographic sites" remarkably generates a total of 5,180,000 results in 0.17 seconds. What is increasingly disconcerting is the high percentage of pornography reportedly containing explicitly violent material. Regrettably, watching this type of violence is a popular form of entertainment[47] nowadays, particularly for the male population. There is an ongoing dispute as to the degree to which violent media, predominantly in the form of pornography, influences replication in real life. Ted Bundy believed that it could, extensively so.

Bandura *et al.* (1961)[48] conducted an experiment to demonstrate how aggression can be attained through the observation and imitation of the media. Seventy-two children from Stanford University Nursery School were split into three groups and placed in separate test rooms. The children in the first group witnessed an aggressive role model behaving in a physically abusive manner to an inflatable doll for a period of ten minutes. The second group was exposed to a passive role model who played with the other toys in the room ignoring the doll, and the children in the control group sat in an empty room alone.

Each child was then placed in a different room with other toys and subsequently informed that they were not allowed to play with them, in a bid to build their frustration levels. At that point, they were moved into yet another room filled with the same toys in the initial room and observed. As prophesied, the children exposed to the aggressive role model had greater aggressive responses, physically and verbally attacking the "bobo doll", compared to the children in the non-aggressive and control group.

With regard to pornography specifically, it has long been argued that violent pornography generates negative effects on men's attitudes and behaviours towards women.[49] Malamuth and Check (1981)[50]

[47] Richard B. Felson, "Mass Media Effects on Violent Behaviour" (1996) 22 *Annual Review of Sociology* 103.
[48] Albert Bandura, Dorothea Ross and Sheila A. Ross, "Transmission of Aggression through Imitation of Aggressive Role Models" (1961) 63 *Journal of Abnormal and Social Psychology* 575.
[49] William A. Fisher and Guy Grenier, "Violent Pornography, Antiwoman Thoughts, and Antiwoman Acts: In Search of Reliable Effects" (1994) 31 *Journal of Sex Research* 23.
[50] Neil M. Malamuth and James V.P. Check, "The Effects of Mass Media Exposure on Acceptance of Violence against Women: A Field Experiment" (1981) 15 *Journal of Research in Personality* 436.

tested this theory by observing 271 male and female students, splitting them into two groups to address whether or not negative effects do in fact result from exposure to sexually violent films. The first group watched two experimental films that displayed sexual violence against women in a positive light and the second group watched two control films that displayed neither sex nor violence.

Three days after the viewings, each student filled out a "Sex Attitudes Survey" encompassing statements such as "a man is never justified in hitting his wife" and "many women have an unconscious wish to be raped and may then unconsciously set up a situation in which they are likely to be attacked". Students were asked to rank out of seven in terms of how much they agreed. The results showed that the attitudes of the females who watched the experimental films remained unaccepting of such violence, whereas the experiment increased male subjects' acceptance of interpersonal violence against women.[51]

These outcomes were sustained by Donnerstein (1980)[52] who carried out a similar experiment to quantify the level of acceptance of violence against women that men acquire after watching an aggressive-erotic film. Each male subject was angered or treated in a neutral way prior to being split into three separate groups. The first group watched a non-aggressive pornographic film, the second an aggressive pornographic film and the third a neutral film. Subsequently, each subject was given the opportunity to aggress either a male or female victim, both confederates of the experimenter.[53] It was learnt that the subjects exposed to the aggressive pornographic film after being angered by the experimenter and then paired with a female displayed the highest level of aggression.

Was Ted Bundy correct in his statement that, without his pornography infatuation, his life "… would've been a better life"?[54]

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[51] *Ibid*.

[52] Edward Donnerstein, "Aggressive Erotica and Violence Against Women" (1980) 39 *Journal of Personality and Social Psychology* 169.

[53] Daniel Linz, Edward Donnerstein and Steven Penrod, "The Effects of Multiple Exposures to Filmed Violence Against Women" (1984) 34 *Journal of Communication* 130.

[54] "Serial Killer Ted Bundy Final Interview Only Hours Before Execution Full" (*YouTube* April 9 2015) <https://www.youtube.com/watch?v=vven0SAmzto> accessed 12 April 2015.

Substance abuse

The relationship between substance abuse, in the form of alcohol and drugs, and violent behaviour has long been in existence and is a notably common attribute amongst serial killers. Many serial killers, including Ted Bundy and Jeffrey Dahmer ("The Milwaukee Cannibal"), insisted that they were intoxicated with alcohol at the time they committed their horrific murders. According to Murdoch *et al.* (1990)[55] 62 per cent of violent offenders do in fact commit violent acts shortly after the consumption of alcohol, following a review of 26 prisons in 11 different countries. This idea was attested by Wolfgang (1957)[56] in his well-known "Philadelphia study",[57] in which it was discovered that alcohol played a part in nearly two-thirds of the murders that he examined.

Furthermore, Shupe (1954)[58] collected blood and urine samples, over a ten-year period, from a group of subjects over the age of 18 promptly after their consequent arrests having committed a violent crime. It was detected that of the 30 murderers arrested, 67 per cent of them had a distinctly high blood alcohol concentration. Yet how does alcohol contribute to violent behaviour resulting in murder? Many believe, including several serial killers themselves, that it is the reduction in one's inhibitions caused by alcohol that leads to violent crime.

A considerable number of serial killers had drug addictions at the time of committing the murders, including Harold Shipman, aka "Doctor Death", who became accustomed to the substance Pethidine during his time at medical school. Do drugs collaborate with violent crime in the same manner as alcohol? It is strongly alleged that some people do have a tendency to behave violently following the ingestion of certain substances;[59] nonetheless, drugs are dissimilar to alcohol as they all differentiate in their effect.

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[55] Douglas Murdoch, Robert O. Phil and Deborah Ross, "Alcohol and Crimes of Violence: Present Issues" (1990) 25 *Substance Use and Misuse* 1065.
[56] Martin F. Wolfgang, "Victim Precipitated Criminal Homicide" (1957) 48 *Journal of Criminal Law, Criminology, and Police Science* 1.
[57] Wolfgang (1957) *op. cit.*
[58] Lloyd M. Shupe, "Alcohol and Crime: A Study of the Urine Alcohol Concentration Found in 882 Persons Arrested During or Immediately after the Commission of a Felony" (1954) 44 *Journal of Criminal Law, Criminology and Police Science* 661.
[59] S. Jones, *Criminology* (5th edn, Oxford University Press 2006) 295.

Herbert Mullins, aka "The Serial Killing Saviour", had an addiction to LSD and marijuana, stemming from his adolescence, which continued until his arrest for the savage murders of nine people. Accordingly, drugs such as marijuana and LSD are not linked directly to violence; however, LSD is a hallucinogenic drug, and as Mullins was also a paranoid schizophrenic, the drug would have increased his symptoms.

Richard Ramirez, aka "The Night Stalker", had a cocaine addiction since early adolescence. Cocaine can bring about psychiatric symptoms that have been regarded as a contributor to violence. In a study conducted by Manschreck *et al.* (1987),[60] 55 per cent of a sample of patients with cocaine-induced psychiatric symptoms had committed a violent crime whilst under its influence. In addition, 26 per cent of crack-cocaine users admitted to committing an offence, of which 95 per cent were violent, after using cocaine, according to Miller *et al.*[61] Cocaine has also been found to cause a dramatic change in levels of norepinephrine and serotonin in parts of the brain that might provoke aggression, hyperactivity, impaired judgement and paranoia.[62]

Poor nutrition

Prior to the 20th century, there was a strong assumption that poor nutrition was a compelling cause of violent and anti-social behaviour. Implying that an individual is at risk of becoming a serial killer because of their bad diet is a barbaric assertion. In spite of this, there is evidence which suggests that poor nutrition could play a minor part in criminal violence. Gesch *et al.* (2002)[63] observed 230 offenders in prison over an 18-month time frame, and concluded that the convicts who administered a vitamin and mineral supplement had lower instances of anti-social behaviour than those who did not.

[60] Theo C. Manschreck, David Allen and Michael Neville, "Freebase Psychosis: Cases from a Bahamian Epidemic of Cocaine Abuse" (1987) 28 *Comprehensive Psychiatry* 555.
[61] Norman S. Miller, Mark S. Gold and John C. Mahler , "Violent Behaviours Associated with Cocaine Use: Possible Pharmacological Mechanisms" (1991) 26 *Substance Use and Misuse* 1077.
[62] Alexander W. Morton, "Cocaine and Psychiatric Symptoms" (1998) 1(4) *Primary Care Companion to the Journal of Clinical Psychiatry* 109.
[63] Bernard C. Gesch *et al.*, "Influence of Supplementary Vitamins, Minerals and Essential Fatty Acids on the Antisocial Behaviour of Young Adult Prisoners: Randomised, Placebo-Controlled Trial" (2002) 181 *British Journal of Psychiatry* 22.

Moore *et al.* (2009)[64] also ascertained that 69 per cent of the violent offenders studied had allegedly consumed confectionery each and every day during their childhood; this was in comparison with 42 per cent of the non-violent criminals.

Nature or nurture: what prevails?

The nature versus nurture debate has been explored at great length in a bid to underpin the development and creation of serial killers. Yet the subsequent question still remains: are serial killers the product of the environment they live in? Are they simply at the mercy of their genes? Or is it a combination of both?

Determining the psychology of a serial killer through genetic and social factors has always withstood a great deal of scrutiny. Millions upon millions of individuals worldwide have endured or are suffering from genetic and environmental influences such as a traumatic brain injury (TBI), a physically, mentally or sexually abusive childhood, pornography and substance addictions, as well as mental illnesses. Yet only a miniscule proportion of these individuals turn into violent serial killers. How is this possible? What is so different about the lives of serial killers?

> *"Which contributes more to the area of a rectangle, its length or its width?"*[65]

This is the reply attributed to psychologist Donald Hebb when asked whether it was nature or nurture that contributed more to one's personality. Essentially Hebb quantifies that there is yet to – and will in all likelihood never – be a definitive conclusion as to which argument prevails. The debate is extremely profound and somewhat boundless as it exhibits extremely strong arguments on both sides. The nature–nurture debate has actually been declared to be officially redundant by social scientists and scientists.[66]

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[64] Simon C. Moore, Lisa M. Carter and Stephanie H.M. van Goozen, "Confectionery Consumption in Childhood and Adult Violence" (2009) 195 *British Journal of Psychiatry* 366.
[65] Alwyn Scott, *Stairway to the Mind: The Controversial New Science of Consciousness* (Springer-Verlag New York, 1999) 153.
[66] Mairi Levitt, "Perceptions of Nature, Nurture and Behaviour" (2013) 9 *Life Sciences, Society and Policy* 13.

Nonetheless, there does appear to be a slightly stronger prominence given to the role that biological determinism plays in an individual's predisposition to violence. Despite its many objections, there is an extremely strong emphasis on the concepts of "born to kill" and "natural-born killer" as science continues in its advancement. It has been suggested that the attraction of researching the effect of genetics on violent behaviour is the anticipation that scientists are able to present a way of reducing such behaviour once the origin has been scientifically acknowledged. There is, however, a fear that violent individuals would simply embrace a genetic elucidation for their behaviour.

Despite a great deal of evidence that nature is the stronger argument, it has long been accepted by both criminologists and academics that natural and environmental factors interact in great complexity, which ultimately moulds an individual's susceptibility to violence. An interaction of nature and nurture simply provides the most rational explanation for serial murder. Having a genetic abnormality does not necessarily project one to serial murder. So could it be the environment that an individual who is suffering from a genetic abnormality lives in that results in their detriment?

Part 4

In previous parts the natural and social incitements of violent behaviour have been explored and discussed. The focus of these parts has been the intricate psychology of serial killers and now it is time to analyse how the English criminal justice system currently responds to such murderers. This part also addresses two opposing concepts that come to the fore when addressing the punishment of serial killers.

In considering the natural provocations of violent behaviour outside one's control, to what extent could and should the criminal justice system's response be expected to adjust and flex? More specifically, how could the system be modified (if at all) to adjust to advocate more leniency towards these offenders?

It is time to consider to what extent it is justifiable for the judiciary to take natural influences other than mental illness into

contemplation at a serial killer's trial as potential mitigation. This has been much debated and disputed, yet the question remains: "Should genetic explanations of violence be considered as potential mitigation?"

Despite this ongoing debate, the English criminal justice system has already been reprimanded for not being penal enough in its response to serial murder. This argument is amplified principally when compared with the seemingly unforgiving American criminal justice system, which still to this day administers death sentences in some states. Although use of the death penalty is an extremely stringent method of punishing such offenders, should it be reinstated into our apparently compliant criminal justice system?

The criminal justice system's response to serial murder

In England and Wales, like many other common law jurisdictions, the criminal law categorises unlawful killings as either murder or manslaughter. By way of legal definition, attributed to Coke CJ, the offence of murder transpires "when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in *rerum natura* under the King's peace, with malice aforethought, either expressed by the party or implied by law".[67]

Unfortunately the offence of murder withstands extensive criticism. In 2005, the Labour government called for a review of the current law relating to homicide in England and Wales, which was pronounced by the Law Commission to be a rickety structure set upon shaky foundations[68] that is in dire need of reform. The pre-eminent area of concern was that the offence of murder is far too extensive to take accountability for the changing and deepening understandings of the nature and degree of criminal fault.[69] Ultimately, the offence is too wide in that it cannot account for the differences in murder culpability.

[67] Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (first published 1644, Lawbook Exchange 2012) 47.
[68] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com. No. 304, 2006) para. 1.8.
[69] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com. No. 304, 2006) para. 1.32.

For instance, mercy killers – those who have compassionately killed a loved one, customarily in a non-violent manner through the administration of an overdose, to end their suffering from a debilitating and harrowing illness – are categorised by law alongside serial killers. Both individuals are deemed murderers and subject to a sentence of life imprisonment. It is argued by many that this is wholly unjust.

In their report,[70] the Law Commission stated that the current two-tier structure of homicide encompassing only murder and manslaughter is now outdated. It was proposed that a three-tier structure should be introduced to advocate the various degrees of murder culpability often seen throughout the criminal justice system. The crime of murder itself would be divided into two categories (first degree and second degree).

First degree murder would entail an intention to commit murder only, whereas second degree murder would comprise any unlawful killings resulting from an intention to cause serious harm, or a fear of injury where the offender was conscious that his actions involved a substantial risk of death. The third tier would encompass manslaughter, involving unlawful killings brought about by acts of gross negligence, a criminal act intended to cause injury or at least involving a risk of injury.

The Law Commission believed that implementing this structure would make the law on murder clearer and fairer. An individual who only envisioned causing serious harm would be categorised differently by law to those with the sole intention to commit murder. Nonetheless, the proposed homicide structure, although never brought to law, would not have benefited those guilty of mercy killings, which would be deemed first degree murder (intentional unlawful killing).

The Law Commission did, however, propose two concepts that could make a legal distinction between a maliciously intentional murderer, such as a serial killer, and those acting in good faith. Initially it was suggested that a completely separate offence of "mercy killing" should be introduced into criminal legislation, as

[70] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com. No. 304, 2006).

initially proposed by the Criminal Law Revision Committee in 1976.[71] Conversely, a partial defence to murder of "mercy killing" could also be implemented.

Regrettably, it has been argued that in order for legislation to advocate either proposal, a clear and concise legal definition of mercy killing would have to be devised. Thus, neither proposal has been enacted, which is considered to be extremely unfortunate.

Irrespective of this, the differences in murder culpability are addressed to a certain extent during sentencing. Succeeding the abolishment of the death penalty under the Murder (Abolition of Death Penalty) Act 1965, murder carries an obligatory sentence of life imprisonment or the equivalent under the mental health system. Consequently the type of sentence administered to a convicted murderer is not contentious upon a judge's discretion, *per se*. When issuing a life sentence, the court, in accordance with the provisions laid out in s.269 Criminal Justice Act 2003,[72] is, however, obligated to order a minimum term that the offender must serve before being considered for release on licence by the parole board. The minimum term set is contingent upon the seriousness of the offence or offences in question.

There is one exemption to the general rule. If a murderer receives a whole life order, due to the severity and gravity of their offence or offences, they will never be eligible for release. Serial killers almost indisputably obtain a whole life order, as was true for Myra Hindley ("The Moors Murderess"), Dennis Nilsen ("The Kindly Killer") and Harold Shipman ("Doctor Death"). Life ultimately means life for such criminals.

In condemning an individual to prison for the entirety of their lives, the imposition of whole life orders was once regarded by the Grand Chamber of the European Court on Human Rights, in *Vinter and Others v UK*,[73] as a violation of Article 3,[74] which supports the prohibition of inhuman and degrading treatment and torture. This

[71] Criminal Law Revision Committee, *Working Paper on Offences against the Person* (HMSO 1976).
[72] Criminal Justice Act 2003, s.269.
[73] *Vinter v United Kingdom* [2013] ECHR 645.
[74] Human Rights Act 1998 sch. 1 part 1 art. 3.

legal ruling was challenged in *AG Reference (No 69 of 2013)*.[75] The Court of Appeal, led by LCJ Thomas, collaborated that the law in England and Wales provides an offender, subject to a whole life order, with "hope" or "possibility" of release "in exceptional circumstances which render the just punishment originally imposed no longer justifiable".[76]

Despite a lack of clarification as to the type of situation in which this would occur, the appeal was efficacious. Principally, a whole life order is now deemed compatible with Article 3, and should continue to be executed "in those rare and exceptional circumstances",[77] once the case has been referred to the Appeals and Review Unit. This decision has subsequently been upheld in the recent case of *Hutchinson v UK*.[78]

Ultimately, how do serial killers acquire a whole life order? Why is it that not all intentional murderers receive such a perpetual sentence? Cases where the incriminating offence or offences were committed subsequent to 18th December 2003 are now subject to review under schedule 21, Criminal Justice Act 2003,[79] which acts as a "starting point" to the sentencing procedure. There are three starting points for adult offenders – a whole life order, 30 years' imprisonment or 15 years' imprisonment. Once it has been substantiated what sentence best suits, the judge is compelled to deliberate any relevant factors that could potentially aggravate or mitigate the offender.

Schedule 21 s.4(2)[80] states that in a situation where an offender has murdered two or more people,[81] where each murder involved either a substantial degree of premeditation or planning,[82] the abduction of the victim[83] or sexual or sadistic conduct,[84] a whole life order must be rendered the starting point. This subsection applies almost singlehandedly to serial killers. Almost all serial killers, in their

[75] A-G's Reference (No. 69 of 2013); Newell [2014] EWCA Crim 188; [2014] All ER (D) 161 (Feb).
[76] A-G's Reference (No. 69 of 2013); Newell [2014] EWCA Crim 188; [2014] All ER (D) 161 (Feb).
[77] A-G's Reference (No. 69 of 2013); Newell [2014] EWCA Crim 188; [2014] All ER (D) 161 (Feb).
[78] *Hutchinson v United Kingdom* [2015] ECHR 111.
[79] Criminal Justice Act 2003, sch. 21.
[80] Criminal Justice Act 2003, sch. 21 s.4(2).
[81] Criminal Justice Act 2003, sch. 21 s.4(2)(a).
[82] Criminal Justice Act 2003, sch. 21 s.4(2)(a)(i).
[83] Criminal Justice Act 2003, sch. 21 s.4(2)(a)(ii).
[84] Criminal Justice Act 2003, sch. 21 s.4(2)(a)(iii).

administration of multiple murder, entail one, if not all, of these components. Furthermore, it is highly improbable that a judge will curtail the length of a serial killer's sentence in the instance of affordable mitigation.

Mental disorder as a defence

Whilst the exact relationship between mental illness and violent behaviour is inconclusive, there is no denying that a considerable number of serial killers are affected by mental disorders, as deliberated in part two. Thus, upon a successful plea of insanity or diminished responsibility, both concerned with the mental state of the defendant at the time of the committed offence, such offenders are dealt with in a disparate manner and often turned over to the mental health system for treatment. From a humanitarian standpoint, treatment of the mental disorder, as opposed to punishment of the murderer, will serve the interests of society better.

The general defence of insanity, applicable to all offences necessitating proof of *mens rea*, is contained in the M'Naghten Rules. Although not legally binding as a source of law, the M'Naghten Rules have been treated as authoritative since 1843, and are the basis for the defence of insanity today.[85] It is a basic principle under the defence of insanity that every offender is to be deemed sane until the contrary is established whereby, "at the time of the committing of the act the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong".[86]

Upon a judge's acceptance that sufficient evidence exists for the defendant to plead insanity, it falls upon the jury to make the final decision. In being efficacious in pleading the defence of insanity, a "special verdict" of "not guilty by reason of insanity" will be returned by the jury, upon the written or oral evidence of two or more medical practitioners, under s.4(6), Criminal Procedure (Insanity) Act 1984.[87]

[85] Alan Reed and Ben Fitzpatrick, *Criminal Law* (4th edn, Sweet & Maxwell 2009) 186.
[86] M'Naghten's Case (1843) 8 ER 718.
[87] Criminal Procedure (Insanity) Act 1964, s.4(6).

The defence of insanity (insane automatism) has little practical significance for murderers, serial or otherwise, nowadays as it is rarely pleaded, particularly since the implementation of diminished responsibility by the s.2, Homicide Act 1957[88] (as amended by s.52, Coroners and Justice Act 2009).[89] Diminished responsibility, although only attributable for the offence of murder, was introduced to amend the long-standing dissatisfaction with the narrow definition attributed to the defence of insanity.

In essence, *disease of the mind* only refers to cognitive disorders, such as epilepsy (*R v Sullivan*)[90] and arteriosclerosis (*R v Kemp*),[91] which according to Lord Lane CJ in *R v Hennessy*[92] "only affects the proper function of the mind" and not the brain itself.

Whilst the defence serves a purpose, under M'Naghten Rules it must be established that the defendant was suffering from such a "defect of reason" that he was either unable to understand the nature and quality of his actions, or if he did, he must prove that he did not know it was legally wrong, as confirmed in *R v Johnson*.[93] Insanity does not provide a defence if the defendant was merely operating under irresistible impulses[94] resulting from volitional disorders, which was the case in *Kopsch*[95]and *Sodeman v R*.[96] The issue is that the majority of mentally disordered offenders, especially serial killers, have volitional disorders as opposed to cognitive, in that they are conscious that they are being unlawful and have an irresistible impulse to commit murder.

Diminished responsibility is concerned with volitional disorders, and a successful plea in diminished responsibility would reduce one's liability from murder to manslaughter if it can be proved that the individual "was suffering from an abnormality of mental functioning"[97] that "arose from a recognised medical condition"[98]

[88] Homicide Act 1957, s.2.
[89] Coroners and Justice Act 2009, s.52.
[90] [1984] AC 156.
[91] [1957] 1 QB 399.
[92] [1989] 1 WLR 289.
[93] [2007] EWCA Crim 1987.
[94] Alan Reed and Ben Fitzpatrick, *Criminal Law* (4th edn, Sweet & Maxwell 2009) 188.
[95] (1925) 19 LR App R 50.
[96] (1936) 55 CLR 192.
[97] Coroners and Justice Act 2009, s.52(1).

which "substantially impaired"[99] the defendant's ability to either "understand the nature"[100] of his conduct, "form a rational judgement"[101] and "exercise self-control".[102] The abnormality must also provide "an explanation for the defendant's acts and omissions in doing or being a party to the killing".[103] Without the enactment of diminished responsibility, a high percentage of mentally disordered serial killers would be subject to imprisonment, and subsequently deprived of appropriate treatment.

Despite its scarcity, a "special verdict" of "not guilty by reason of insanity" provides the judge with the discretion as to the type of sentence that should be administered; this can vary from an order of complete discharge to sentences of treatment under the mental health system, such as a hospital order with or without restrictions or a supervision order, following the enactment of the Domestic Violence, Crime and Victims Act 2004. A successful plea of diminished responsibility could result in either a hospital order with or without a time limit, a hospital direction, a limitation direction or a guardianship order. It is highly improbable that a serial killer will be subject to anything other than a hospital order without a time limit, under s.41, Mental Health Act 1983, ordinarily referred to as a "restriction order".

A restriction order is only made when the court is contented that it would be paramount to the safety of the general population, upon the evidence of two doctors. Under s.41(2), a restriction order can only be implemented provided that at least one of the two registered medical practitioners, whose evidence is taken into contemplation by the court, also provides oral evidence during the trial. Unlike prison sentences, the purpose of a restriction order is not to reflect the gravity of the offence in their length but to ensure that the patient is not discharged until he is ready.[104] As there is no time limit as to its duration, in all likelihood a serial killer will be detained under a restriction order indefinitely.

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[98] Coroners and Justice Act 2009, s.52(1)(a).
[99] Coroners and Justice Act 2009, s.52(1)(b).
[100] Coroners and Justice Act 2009, s.52(1A)(a).
[101] Coroners and Justice Act 2009, s.52(1A)(b).
[102] Coroners and Justice Act 2009, s.52(1A)(c).
[103] Coroners and Justice Act 2009, s.52(1)(c).
[104] Brenda M. Hoggett, *Mental Health Law* (2nd edn, Sweet & Maxwell 1984) 124.

In the event of a serial killer failing to be successful in his claim for either defence, he will be subject to a whole life order. Assuming it was later to be detected that the individual was suffering from a mental disorder, he would be transferred from prison to a maximum security psychiatric hospital, such as Broadmoor, Ashworth or Rampton, under s.47, Mental Health Act 1983. This was true for Peter Sutcliffe ("The Yorkshire Ripper") and Ian Brady ("The Moors Murderer"). Following a decision of the European Convention on Human Rights in *Aerts v Belgium*,[105] it is deemed a breach of Article 5,[106] advocating the right of liberty and security of person, to keep a prisoner incarcerated when it is of serious urgency that he receives psychiatric care.

Having considered the defences applicable to mentally disordered serial killers, it is now time to consider the possibility of the much disputed "genetic defence".

Should genetic evidence be admissible in court for serial killers?

> *"The concept of free will is an illusion and the fallacy of a basic premise of the judicial system will become more apparent – Choices reflect a summation of their genetic and environmental history."*[107]

Criminal law in England and Wales, like many other common law jurisdictions, is constructed upon the concepts of personal responsibility and free will. Yet developments in behavioural genetics over the past few decades are already challenging the accepted ideas of both legal and moral responsibility in court. There is broad and deep scientific evidence advocating a strong association between one's genetic make-up and one's predisposition to violence and aggression; for instance, the unearthing of the two supposed "violent genes", a mutation of the Monoamine Oxidise A (MAO-A) gene ("Brunner Syndrome") and a variant of the Cadherin 13 (CHD13) gene discussed in part one.

[105] (2000) 29 E.H.R.R.
[106] Human Rights Act 1998, sch. 1 part 1 art. 5.
[107] Anthony R. Cashmore, "The Lucretian Swerve: The Biological Basis of Human Behaviour and the Criminal Justice System" (2010) 107 *Proceedings of the National Academy of Sciences* 4499.

Since the American case of *Mobley v State of Georgia*,[108] attempts to use genetics as a defence to intentional murder has grown incessantly worldwide. The defence team of Stephen Mobley, convicted of murdering a fast food store worker, requested that he be tested for Brunner Syndrome as an explanation for his conduct. Despite their best efforts, the court failed to find such evidence adequate as mitigation and he was subsequently executed in 2005.

The prospect of a "genetic defence" is extremely controversial, yet it is believed that, as the scientific evidence surrounding behavioural genetics continues to evolve at its current pace and thus gain further credibility, it is conceivable that one day it may be introduced as a defence to serial murder. Should such "violent genes" exist, it is argued by some that it should be at least taken into contemplation by a judge and jury. Would it be justifiable to hold a serial killer solely responsible if their actions had a significant genetic basis? Or would this mitigation provide such offenders with another excuse to commit murder that could be violated?

It may be conceivable that "violent genes" exist; nonetheless the medicalisation of criminal behaviour is heavily criticised by legal professionals, who advocate the notion that, no matter the intensity of one's predisposition to violence caused by a genetic deficit, free will is ever present; although one cannot be held culpable for one's biological determinism, yet can for one's weakness of will. Why should serial murderers be exempted from criminal liability for their inability to control themselves? Predisposed to violence or not, an individual is able to understand the concepts of right and wrong.

Genetic aberrations may not wholly supress one's free will, but there is ample evidence to suggest that genetic abnormalities do in fact curtail the degree of free will available to the individual at any given time. Ultimately, the spectrum of choice[109] available to the individual is condensed.

Envisage two situations where one's spectrum of choice is lacking. Firstly, an individual who is compelled to commit murder under

[108] 426 S.E.2d 150.
[109] Sana Halwani and Daniel B. Krupp, "The Genetic Defence: The Impact of Genetics on the Concept of Criminal Responsibility" (2004) 12 *Health Law Journal* 35.

duress, to avoid being killed. This person has limited choices available to him as a result of an *external* factor, which is an accepted defence to murder. The second individual, suffering from a genetic abnormality, kills his victim, as he lacks the capacity to resist his violent urge. His spectrum of choice is also constrained. Yet this particular *internal* factor is not categorised by the law. The question is, should it be?

Although the suggestion that a "genetic defence" should be introduced as mitigation for serial murder seems a little far-fetched, it is indisputable that suffering from a genetic deficiency strongly challenges the presumption that the defendant in question is a mentally sound individual. Taking a biological approach concerning criminal responsibility simply demonstrates the innate abnormality of the criminal accused and therefore always acts to exculpate or mitigate.[110]

This is problematic as mitigation normally occurs in one or two ways: during the trial or sentencing procedure. This would undoubtedly spark outrage at the prospect of a serial killer potentially receiving a condensed sentence, worse still, being found innocent as a result of being efficacious in the "genetic defence". Surely those with a strong predisposition to violence have a greater chance of recidivism? The idea that a "genetic defence" would mitigate or even potentially excuse a convicted serial killer from liability is completely incongruous.

Despite this it cannot be disregarded that in possessing a "violent gene" an individual is rendered "abnormal". In light of this, many have suggested that if the defence were to come into force, then it should not be considered objectively but subjectively under the defence of diminished responsibility.

Reinstatement of the death penalty for serial killers: good or bad idea?

The suggestion that evidence of behavioural genetics could one day be admissible in court for violent criminals such as serial killers is intensely criticised. It has been incessantly argued that our criminal

[110] *Ibid*.

justice system is lenient enough in its response to serial murder, without the added accumulation of scientific evidence being used to diminish such offenders from criminal culpability. Those opposing the "genetic defence" have also called for a more punitive sentence for serial killers, in demanding the reinstatement of capital punishment. Lord Denning (an avid supporter of the death penalty) once said:

> Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformative or preventative and nothing else … The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not.[111]

The death penalty was initially suspended in England and Wales under the Murder (Abolition of Death Penalty) Act 1965 for an experimental period of five years. Prior to the termination of this period, the Home Secretary James Callaghan proposed in 1969 that the Act be made permanent, and thus the death penalty was formally obliterated from legislation. Yet public demand for its restoration was reignited just four weeks after the passing of the Act, following the arrests of the infamous "Moors Murderers" Ian Brady and Myra Hindley, meaning that the pair escaped death and received sentences of life imprisonment. It led to uproar.

To this day, the debate lingers. Would it be justifiable for the criminal justice system to sentence serial killers to death? Why should a system eradicated 50 years ago be reintroduced? Does our great nation want to be categorised amid autocratic states such as Syria and Iran which also impose the death penalty?

[111] Diane P. Robertson, *Tears from Heaven; Voices from Hell: The Pros and Cons of the Death Penalty as Seen Through the Eyes of the Victims of Violent Crime and Death Row Inmates Throughout America* (Writers Club Press 2002) 45.

Although the debate remains, support for the death penalty to be reinstated appears to have fallen in recent years, conferring to the annual results of the *NatCen British Social Attitudes Report*,[112] dropping from 75 per cent in 1983 to below 48 per cent in 2014. Many contest that capital punishment is a barbaric and hypocritical act, essentially permitting the slaughtering of civilians through a judicial framework in an attempt to articulate that murder is wrong. It is strongly believed that as a nation we must steer away from the biblical concept of "an eye for an eye" in this progressive 21st century. Our criminal justice system does not administer punishments for other serious crimes involving an equivalent punishment to the crime committed, for example, a rape for a rape; it is simply an outrageous concept, therefore: why, for murder, should we employ such a practice?

Capital punishment is heavily regarded as a morally repugnant action, which is in direct conflict with one's right to life advocated by the European Convention on Human Rights (ECHR) that as a country we so greatly embrace. Promoting democracy is a primacy. Those in opposition essentially believe that all human life is valuable, even the life of a sadistic serial killer, and consequently no-one should be deprived of this right. Reinstating the death penalty would result in the issue of euthanasia being brought back into question. How is a system of justice to be maintained by not allowing those who wish to die the right to do so, yet permit individuals to die against their will?

There is a strong argument that the death penalty acts as a deterrent, discouraging individuals from committing murder. The threat of execution is, however, unlikely to deter those acting under the influence of alcohol or drugs and those suffering from a mental illness. Whether the death penalty is a deterrent is uncertain.

Possibly the most rational and collective argument opposing capital punishment is the prospect of executing the innocent, which transpired in the case of Mahmood Hussein Mattan who was wrongfully convicted for the murder of Lily Volpert. There is

[112] British Social Attitudes, "Support for the Death Penalty Falls Below 50% for First Time" (Press Release) <http://www.bsa.natcen.ac.uk/media-centre/latest-press-releases/bsa-32-support-for-death-penalty.aspx> accessed 12 February 2015.

absolutely no remedying such a debauched miscarriage of justice. Nonetheless, the introduction of DNA profiling, founded by Alec Jeffreys in the late 1980s, essentially makes it indisputable that the correct perpetrator has been convicted. As a result the likelihood of putting an innocent individual to death is almost impossible.

Capital punishment for intentional murderers is habitually justified by campaigners, such as Restore Justice, as it permanently removes the individual from society, completely eradicating the possibility that they would ever re-offend. Incapacitation is one of the key principles of utilitarianism.

Those in opposition would challenge this, disputing that the imposition of a whole life order achieves the same goal; yet it is no way of guaranteeing that the prisoner will not kill again. It is conceivable that the murder of a guard or other prisoner may transpire, or a member of the public, should the prisoner escape. For instance, Thomas Edward Silverstein, a convicted American murderer, killed a prison guard after being let out of his cell. Even though this is remarkably rare, keeping an intentional killer alive still poses a substantial risk to those around him nevertheless.

The financial cost of imposing whole life orders is an auxiliary issue that must not be overlooked. According to a report published by the Ministry of Justice in 2014, the average annual cost of imprisonment in England and Wales in 2013–14 was £33,785[113] alone; in the event a serial killer is a prisoner for 40 years, this would cost the taxpayer a little under £1.5 million. Many oppositionists, such as Amnesty International, in seeking to obliterate the death penalty altogether, claim that it is capital punishment that is more costly. Yet many statistics are a representation of the cost of capital punishment in America, as many states allow for endless appeals, contributing to the cost. Indeed, the mother of Isabella Clennell, a victim of serial killer Steve Wright, aka "The Suffolk Strangler", stated:

[113] Ministry of Justice, "Costs per Place and Costs per Prison – National Offender Management Service Annual Report and Accounts 2013–2014 Management Information Addendum" (*Information Release* 28 October 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367551/cost-per-place-and-prisoner-2013-14-summary.pdf> accessed 7 April 2015.

> I wish we still had the death penalty, as this is what he truly deserves. He murdered five girls but at the same time has ruined a lot more lives. It is hard to explain the grief, sorrow, hurt and anger my family and I have suffered.[114]

In spite of all this, it is most important to recall the victims slain by violent killers and the subsequent anguish suffered by their loved ones. Many families have called for a reinstatement of the death penalty. They believe that it is the only way in which justice can be served and that it will in some way provide them with closure; of course, this is unproved.

Should serial murderers be punished by the severest of all punishments? Irrefutably a reinstatement of the death penalty in England and Wales would be extremely contentious, as arguments for and against it tend to be distorted by one's own deeply engrained principles and beliefs. Would reinstating the death penalty be for the greater good?

In this part, three autonomous concepts have been considered in relation to the punishment of serial murder and how the criminal justice system currently responds, in addition to two potential reforms. It appears to the writer that the most pressing issue for criminal justice is that of the genetic defence. It is indisputable that as scientific evidence surrounding behavioural genetics develops, support for the "genetic defence" as mitigation for serial murder will only gain momentum, despite the controversy.

This is problematic given the current state of the law relating to murder in England and Wales. Such a defence could see the defendant's whole life order reduced, which would spark outrage. Suppose the worst types of intentional murderers, namely serial killers, were subject to the death penalty. Would the "genetic defence" be more accepted if it only mitigated a serial killer's sentence from death to a whole life order?

[114] "Families Call for Death Penalty" (BBC Suffolk, 21 February 2008) <http://news.bbc.co.uk/1/hi/england/suffolk/7257402.stm> accessed 2 April 2015.

Part 5

"I guess I may be a creature, a psychopath"[115]

Serial killer Dennis Nilsen, aka "The Kindly Killer"

The often cited connection between mental disorders and serial killers has already been looked at briefly in part one. How the criminal justice system deals with such mentally disordered offenders has also been touched upon in part three. Many serial killers are turned over to the mental health system as a result of the psychopathic tendencies that they exhibit. Yet an international debate exists regarding the feasibility and extent to which those deemed "psychopathic" can be successfully treated. To conclude this paper, the issues surrounding the treatability of psychopathy will be discussed concisely.

The term "psychopath" is often used in fictional depictions and by the press in reference to heinous criminals like the serial killer. However, it could be argued that psychopathy is also used as an "umbrella term" for individuals that we do not like, fail to understand or construe as pure evil. But what actually constitutes a "psychopath"?

Attributing to *Hare's Psychopathy Checklist*,[116] the most distinguishable aspects of psychopathy are a high susceptibility to violently impulsive behaviour, alongside a complete disregard for authority, a lack of remorse, deceitfulness and a callous disregard for others. It could be said that these are the emblematic personality traits exhibited by the majority of serial killers. Despite this, the definition of psychopathy is not clear.

Psychopathy appears almost interchangeably alongside the diagnostic construct of anti-social personality disorder (ASPD), which is defined by the DSM (*Diagnostic and Statistical Manual of Diseases*) as well as the ICD (*International Classification of*

[115] Nick Davies, "From the Archive, 26 October 1983: Dennis Nilsen: 'I Have No Tears for These Victims'" (*The Guardian* 26 October 2011) <http://www.theguardian.com/theguardian/2011/oct/26/ukcrime-london> accessed 1 April 2015.
[116] Robert D. Hare *et al.*, "The Revised Psychopathy Checklist: Reliability and Factor Structure" (1990) 2 *Psychological Assessment* 338.

Diseases). Unlike anti-social personality disorder, psychopathy is not medically defined, which has always created confusion amongst clinicians and psychologists.

Incurable psychopath: fact or fallacy?

Recent changes to mental health law in England and Wales by the Mental Health Act 2007 concerning the treatability of mental disordered patients under section 3[117] could be said to demonstrate the issues faced by clinicians in treating psychopathy. The Act replaced the "treatability test", which established that treatment of patients could only be authorised in the event it was "likely to alleviate or prevent a deterioration"[118] of the patient's condition, with the "appropriate treatment test". This states that treatment can be administered provided that "appropriate medical treatment is available".[119] Governmental concern drove this change. Unease mounted as to the possibility that psychopathic offenders, namely murderers, would be released back into society, as psychopathy has long been a disorder deemed untreatable. Although exactly what are the issues that clinicians are principally faced with in attempting to cure psychopathy?

A review of the literature on psychopathy demonstrates little in the way of research into its treatability, especially in comparison to the number of descriptive, structural and etiological studies on psychopathy[120] as a disorder in both adults and children. Although it is clear that strong opinions do exist as to the potential outcomes that treatment *could* have on psychopathy. For instance, one of the first pieces written on the topic, by Suedfeld and Landon (1978),[121] concluded:

> Review of the literature suggests that a chapter on effective treatment should be the shortest in any book concerned with psychopathy. In fact, it has been suggested that one

[117] Mental Health Act 1983, s.3.
[118] Mental Health Act 1983, s.3(2)(b).
[119] Mental Health Act 2007, s.4(2)(d).
[120] Randall T. Salekin, Courtney Worley and Ross D. Grimes, "Treatment of Psychopathy: A Review and Brief Introduction to the Mental Model Approach for Psychopathy" (2010) 28 *Behavioural Sciences and the Law* 235.
[121] Peter Suedfeld and Bruce P. Landon, "Approaches to Treatment" in Robert D. Hare and Daisy Schalling (eds), *Psychopathic Behaviour: Approaches to Research* (John Wiley 1978).

> sentence would suffice: No demonstrably effective treatment has been found.[122]

Although the Mental Health Act 1983 provides only little in the way of guidance as to the treatment of patients as a whole ("nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care"),[123] there are many treatment models available to psychopathic patients, ranging from pharmacological treatments through to extremities such as electroconvulsive therapy and psychosurgery.

An increasingly widespread treatment method used by clinicians is cognitive behavioural therapy (CBT); this type of therapy regards the vast majority of clinical disorders simply as disorders of thought, and appears to be the most successful in treating psychopathy. This type of therapy works on the principle that our behavioural traits are to a large extent controlled by the way we think and, therefore, it should be possible to change maladaptive behaviour by changing the maladaptive thinking behind it.[124] CBT essentially questions the patient's illogical thoughts and thus suggests additional cognitions to substitute them.

Psychosurgery, the most dramatic form of treatment for psychopathy, is extremely controversial for palpable reasons. It is carried out by separating certain parts of the brain from the patient's prefrontal lobe. Due to its sheer extremity, such a treatment is only used in the event that other methods have "failed". Of the few studies carried out deliberating the success rates of curing psychopathy, they all appear to be methodically flawed as they did not include the use of control groups, nor did they allow for necessary follow-ups.

Despite this, it is strongly believed that, rather than being the fault of inadequate treatment models, it is the facets attributed to the condition itself that cause difficulty and are responsible for its "untreatable" nature. Ultimately, psychopathic traits are potentially

[122] *Ibid.*
[123] Mental Health Act 2007, s.7(1).
[124] Jessica H. Lee, "The Treatment of Psychopathic and Antisocial Personality Disorders: A Review" [1999] Clinical Decision Making Support Unit, Broadmoor Hospital, Berkshire.

problematic in treatment settings.[125] There is a collective concern amongst clinicians as to the level of dangerous and unruly behaviour exhibited by psychopathic patients.[126] Often when such violence does transpire, the focus of the patient's hostility is aimed at hospital staff, according to Faulk (1994).[127] This perceived risk often encroaches upon the clinical management of the disorder, primarily as patient confidentiality is often breached in an attempt to protect medical staff, who are fearful of being left alone with such a patient. Brett (1992)[128] happened to also make such an observation during his time at Broadmoor Hospital.

Another core characteristic displayed by psychopathic patients is their incessant compulsion for deceit. Deception makes it exceedingly problematic for clinicians to treat psychopathy, as they are unable to either maintain or create an open and credulous rapport with a patient who continues to lie about the severity of their condition as well as their therapeutic progress. In addition to this, psychopaths tend to exhibit exceptionally poor motivation for change.

The untreatable nature of psychopathy essentially means that such patients have no real place in hospitals and it is believed that as a result psychopaths have acquired somewhat of a pejorative connotation[129] within the mental health system over the years and are disliked by clinicians. This greatly impacts on the success rates of treating psychopathy.

The suggestion that psychopaths are incurable, initiated by Cleckley (1941),[130] is not found to be supported by sound scientific evidence as the research material into this area of mental health appears to be methodologically and sufficiently flawed. Essentially, more appears to have been transcribed about the topic than has truly been

[125] Randall T. Salekin, Courtney Worley and Ross D. Grimes, "Treatment of Psychopathy: A Review and Brief Introduction to the Mental Model Approach for Psychopathy" (2010) 28 *Behavioural Sciences and the Law* 235.
[126] Jessica H. Lee, "The Treatment of Psychopathic and Antisocial Personality Disorders: A Review" (1999) Clinical Decision Making Support Unit, Broadmoor Hospital, Berkshire.
[127] Malcolm Faulk, *Basic Forensic Psychiatry* (2nd edn, Blackwell Scientific Publications 1994).
[128] Tim R. Brett, "The Woodstock Approach: One Ward in Broadmoor Hospital for the Treatment of Personality Disorder" (1992) *Criminal Behaviour and Mental Health* 2.
[129] Jessica H. Lee, "The Treatment of Psychopathic and Antisocial Personality Disorders: A Review" (1999) Clinical Decision Making Support Unit, Broadmoor Hospital, Berkshire.
[130] Hervey M. Cleckley, *The Mask of Sanity* (The C.V. Mosby Company, St Louis, 1941).

researched. Although there has been little in the way of successful treatment of psychopathy, there is nothing to say that it is an impossible task. It appears that more should be achieved to understand the nature and aetiology of the disorder, in order to generate higher success rates of curing psychopathy.

Part 6

Conclusions and recommendations

This paper has analysed the psychology of serial killers and the response of the criminal justice system in England and Wales to such murderers.

An extensive literature review was completed to exhume the key themes of relevance to this study. The literature review created a platform for the binary parts, namely the debate around the natural incitements of violence in the second part, and environmental influences in the third. The focus of these parts has been the immense psychology of serial killers and their subsequent behaviour. Arguments have been explored and assertions have been made in order to quantify whether serial killers are most influenced by nature (at birth) or nurture (environment and circumstances). In seeking to understand which argument prevails, the intricacies and nuances of violent behaviour have been explored at great length.

Having reviewed the existing literature, evaluated the significant arguments and considered the debates, it would appear that neither nature nor nurture rules victorious. The debate is even regarded by social scientists as redundant. It is proclaimed that in some instances it is almost impossible to disentangle both concepts, yet in some cases either nature or nurture is in the ascendancy. In spite of these conclusions, the facts remain: the more that is understood regarding the psychological make-up of serial killers, the greater the chance of the best possible responses.

Having set the scene, it was time for critical arguments to unfold. Just how effective is the criminal justice system at responding to the common law offence of murder? How realistic is the punishment of

serial killers? What reforms, if any, are necessary? From the outset it was understood and asserted that the current structure of homicide in England and Wales is outdated. It is no longer sufficient to cite only murder and manslaughter, given the many differences in murder culpability that have come to the fore in recent years.

This is debated at great length. The severity and gravity of a convicted murderer's offence or offences are only distinguished through the administration of sentencing; other than that, all convicted murderers are categorised together. The Law Commission's proposed three-tier homicide structure, alongside the implementation of a defence or separate offence to mercy killing, appears to eradicate the issues relating to the law of murder in England and Wales, though how long must we wait for such changes to be made?

With scientific evidence surrounding behavioural genetics ever expanding, the prerequisite to implement a "genetic defence" has been brought to the fore by many as a way of mitigating serial killers from criminal culpability. The argument of predominance is that genetic deficits render an individual abnormal. Many remain unconvinced by the concept as to the true purpose which it would serve. The idea that a serial killer could receive a reduced sentence as a result of their genetics is simply implausible. It is concluded that, without drastic overhaul of the criminal justice system's response to murder as a whole in England and Wales, the admission of scientific evidence as mitigation is impossible; likewise, the reintroduction of the death penalty.

It would appear that neither reform would be accepted without the other. The best option for devising a "genetic defence" would be to use it as mitigation in sentencing, from a sentence of death to a whole life order. What remains, however, is the need for those impacted by the hideous actions of serial killers to be convinced that justice has prevailed.

To round off this paper, the arguments put forward in part five focus on the concept of the "incurable psychopath" and the links with serial killing. The arguments around whether or not there is a cure for psychopathy are touched upon to gain a further insight into how

psychopathic serial killers are dealt with. The unclear definition of "psychopathy" appears to be a profound issue in treating the disorder and it appears that more needs to be researched regarding the concept. The issues in this paper relating to the curability of psychopathy are condensed profoundly; the topic appears to be an essay in itself.

In concluding this paper, the potential for further research associated with this enthralling topical debate has also been considered. Perhaps given future opportunities to revisit the thesis, it would be good to review emerging and related research from the mental health system in extensive detail, rather than simply focusing on the criminal justice system and its response to serial murder.

Additionally, it would be useful to compare and contrast the responses of the criminal justice and mental health systems of other geographies.

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LEGAL OPINION

Domestic Violence: The Criminal Law Response

Simon Parsons

Introduction

Domestic violence is serious violence and should be severely dealt with by the criminal law. There is no offence of domestic violence as such; instead the criminal law responds to it with a number of different offences which will be considered in this article, as will the issue of how a prosecution for domestic violence is facilitated. The orders available to deal with domestic violence will also be examined. There is a legal definition of domestic violence contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) as follows:

> "[D]omestic violence" means any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.[1]

This definition to a large extent mirrors the non-legal definition of domestic violence that was used by the government until 31st March 2013[2] when the non-legal definition was changed so that "domestic violence and abuse" is now defined as follows:

[1] Schedule 1, Part 1, paragraph 12(9). "Associated individuals" are those as defined in section 62 of the Family Law Act 1996 and does not just include partners but can include relatives such as a parent or a child.

[2] "Any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality."

> Any incident or pattern of incidents of controlling,[3] coercive or threatening[4] behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, the following types of abuse: psychological, physical, sexual, financial and emotional.[5]

This new definition, which is not a legal definition, includes so called "honour"-based violence, female genital mutilation and forced marriage, and is clear that victims are not confined to one gender or ethnic group.[6] This new definition provides welcome clarity and reflects the fact that young people are just as likely to suffer domestic abuse as any other age group. The definition in LASPO will need to be changed to reflect this clarity.

The criminal law's response to domestic violence

The new definition of domestic violence has to be wide because domestic violence takes many forms, and to deal with it the criminal law has a variety of offences that can be prosecuted. The law is complex but to aid prosecutors, the Crown Prosecution Service (CPS) has produced an *aide-memoire* which is available on the CPS website.[7]

In addition, there are now two specific offences of stalking which have been added to the Protection from Harassment Act 1997 (PHA) by the Protection of Freedoms Act 2012.[8] The first is the basic offence of "stalking"[9] and the second an aggravated offence of "stalking involving fear of violence or serious alarm or distress".[10]

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[3] Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape, and regulating their everyday behaviour.

[4] Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish or frighten their victim.

[5] <http://www.homeoffice.gov.uk/crime/violence-against-women-girls/domestic-violence/> accessed 27th March 2013.

[6] *Ibid*.

[7] <http://www.cps.gov.uk/legal/d_to_g/domestic_violence_aide-memoire/index.html> accessed 27th March 2013.

[8] Section 111.

[9] PHA section 2A.

[10] PHA section 4A.

The former offence could be used in response to excessive personal contact, whilst the latter could be a response to menacing telephone calls, text messages or letters.

The substantive law is complex but it has to be so because of the large number of behaviours which can count as domestic violence. It is not feasible to define a domestic violence offence, or even offences, which cover all of this conduct. Perhaps what is more important is how a prosecution involving domestic violence is facilitated and what orders are available after a conviction or indeed an acquittal.

How is a prosecution involving domestic violence facilitated?

Given the large number of offences that can be used to prosecute domestic violence, there needs to be specialisation to facilitate the effective prosecution of these offences. This has been achieved in a number of ways. First, there is the use of independent domestic violence advisers (IDVAs) whose role is, *inter alia*, to help victims in respect of the prosecution of domestic violence.[11] Second, there is the Code of Practice for Victims of Crime. The code means that all victims must be told when a suspect has been arrested and why an offender received a particular sentence as a matter of course. A victim's rights include the right to information about the crime within specified time scales, including the right to be notified of any arrest and court cases. There is also the right to an enhanced service in the cases of vulnerable or intimidated victims which applies to victims of domestic violence. Third, every CPS area, including CPS Direct, has a co-ordinator responsible for domestic violence, and Crown Prosecutors are given training in respect of domestic violence. This has increased the conviction rate for criminal offences relating to domestic violence. Fourth, there has been the roll-out of specialist domestic violence courts (SDVCs). SDVCs identify domestic violence-related cases and carry out a fast-track process that deals solely with criminal offences relating to domestic violence. This has encouraged a multi-agency approach to domestic violence within the criminal justice process.[12] These specialised

[11] IDVAs can represent the victim at a multi-agency risk assessment conference (MARACs).

[12] The specialist domestic violence court (SDVC) programme has been running since 2005 and there are now 127 courts across England and Wales. Local criminal justice boards (LCJBs) will have responsibility for the governance and performance management aspects of SDVCs from 1st April 2010.

courts have increased the conviction rate of domestic violence offences. In 2007–08 the CPS prosecuted 75,000 cases involving domestic violence against women and girls. By 2011–12 that number was 91,000. Over the same period the number of convictions rose from 52,000 to almost 67,000.[13] Fifth, there are special measures for victims and witnesses. These are a series of provisions that help vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence. Special measures apply to prosecution and defence witnesses, but not to the defendant. Victims of domestic violence, who are very likely to be vulnerable and intimidated as witnesses, can make use of these special measures.[14] These measures may be the difference between a domestic violence prosecution succeeding or failing because without the victim's evidence the CPS is frequently unwilling to proceed with a prosecution.

The restraining order

There is an order which is particularly useful in relation to domestic violence and that is the restraining order. A restraining order is a court order intended to protect victims of domestic violence from further harm or harassment by keeping the abuser away from the victim. This may involve keeping the abuser away from the scene of the violence, which may include the victim's home or place of work. It is a civil order and it does not give the abuser a criminal record. Previously a restraining order could only be imposed upon a defendant following their conviction of the basic or aggravated forms of harassment under the PHA.[15] However, section 12 of the Domestic Violence, Crime and Victims Act 2004 amended the PHA to allow for a restraining order to be made either when a defendant is convicted of *any* offence[16] or, more controversially, when a defendant is acquitted of *any* offence[17] if the court considers the order is necessary to protect a person from harassment by the

[13] <http://www.cps.gov.uk/news/articles/prosecuting_violence_against_women_and_girls_improving_culture_confidence_and_convictions/> accessed 31st March 2013.
[14] Sections 23–30 Youth Justice and Criminal Evidence Act 1999.
[15] Section 2 (basic) and section 4 (aggravated).
[16] PHA section 5.
[17] PHA section 5A.

defendant.[18] The court will have regard to the evidence it heard during the criminal trial when determining whether a restraining order is required. However, further evidence may be required, especially where the defendant has been acquitted and the civil standard of proof is applied.[19] Breach of a restraining order is a criminal offence for which the punishment is a maximum of five years' imprisonment on indictment. There is a defence of reasonable excuse.[20]

Conclusion

The response of the law to domestic violence is complex, for not only is there the criminal law response outlined above, but there is also the civil law response. Under the Family Law Act 1996 a person who has been subject to domestic violence can apply for a non-molestation order from a civil court in which the civil standard of proof applies.[21] Breach of a non-molestation order is a criminal offence for which the punishment is a maximum of five years' imprisonment on indictment.[22] Non-molestation orders are resonant of restraining orders in that both can be made where the court is satisfied, to the civil standard of proof, that either the victim or another person requires protection from the abuser. The PHA also has a civil side, as in a civil action for the statutory tort of harassment; there can be an award of damages together with a civil injunction, the violation of which is a criminal offence also carrying a maximum of five years' imprisonment on indictment.[23]

The law needs to be simplified but its complexity grows. For example, domestic violence protection notices and orders (DVPOs) are available in West Mercia, Wiltshire and Greater Manchester police areas. DVPOs give victims – who might otherwise have had

[18] Harassment is defined in section 7(2) PHA as causing a person alarm or distress. A person who is in "fear of violence" will be alarmed and distressed, thus making the use of the term "fear of violence" in section 5 redundant.
[19] Whilst a court can make a restraining order of its own volition, prosecutors also have an obligation to remind sentencing courts of the option of making a restraining order, including when the defendant has been acquitted. The procedural rules for making applications are set out in Part 50 of the Criminal Procedure Rules. These apply in both the magistrates' court and the Crown Court.
[20] Section 5 and section 5A PHA. The criminal standard of proof is applied when there is a prosecution for the alleged breach of a civil order.
[21] Section 42.
[22] Section 42A.
[23] Section 3 PHA.

to flee their home – time to get the support they need. Before these orders, there was a gap in protection, because the police could not charge the abuse for lack of evidence (and therefore the abuser could not be remanded in custody, although he could be subject to bail conditions), and because the process of granting an injunction took time. DVPOs close that gap. They give police and magistrates the power to protect a victim immediately after an attack, by stopping the abuser from contacting the victim or returning home for up to 28 days. These orders are to be welcomed and they should be rolled out throughout England and Wales, but they do add to the complexity of the law.

There is also the use of community resolutions to deal with incidents of domestic violence. Community resolutions involve restorative justice techniques, such as the offender apologising to the victim, paying compensation or repairing any damage caused. Unlike a caution, a community resolution does lead to a criminal record. These resolutions were used in 2,488 domestic violence cases in 2012. Three conditions have to be satisfied for restorative justice to be an option: low-level harm, the offender accepting their guilt and the victim giving consent. In respect of domestic violence, doubts may arise as to whether the victim genuinely consents and there is evidence that community resolutions are being used in cases of domestic violence involving serious violence. This development is a cause for concern because it is bad for victims of domestic violence and therefore bad for justice. It should be noted that the increase in community resolutions has occurred since the coalition government started cutting police budgets.[24]

The state's response to domestic violence could be simplified. That simplification could be achieved by giving the jurisdiction for dealing with domestic violence solely to the criminal justice process. There is evidence that this is already happening *de facto* as the number of applications for non-molestation orders is reducing as many victims of domestic violence turn first to the criminal justice process.[25] The reason for this switch is that the criminal justice process has specialised in response to domestic violence, in

[24] <http://www.bbc.co.uk/news/uk-22346971> accessed 30th April 2013.

[25] M. Burton, "Civil Law Remedies for Domestic Violence: Why Are Applications for Non-Molestation Orders Declining?" (2009) *Journal of Social Welfare and Family Law* 109.

particular with the introduction of SDVCs. This specialisation is lacking in the civil courts. There is also the difficulty in obtaining civil legal aid through the domestic violence gateway.[26] In addition, there is a case for rationalising the number of different orders and resolutions currently available to deal with domestic violence so that victims have a better understanding of the legal process and thus know where to go and what to apply for.

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[26] The Civil Legal Aid (Procedure) Regulations 2012, regulation 33. See W. Hewstone, "The Impact of LASPO" (Spring 2013) *Hampshire Legal, Journal of the Hampshire Law Society* 24–25.

LEGAL OPINION

Legal Aspects of Intimate-Partner Abuse in the Home: The Position in Tort

Dr Benjamin Andoh

Introduction

This paper examines the legal aspects of intimate-partner abuse in the home (which may take the form of domestic violence) from the position of the law of tort. Although the literature shows a lot of studies done on domestic violence,[1] those studies have largely looked at the criminal law and criminological aspects of the topic. This article aims to contribute to the literature by filling *via* considering the topic from the viewpoint of tort. In order to do so, both primary and secondary sources (statutes, secondary legislation, decided cases, official and other written sources) were perused. In addition, interviews were conducted with the police and women's refuge workers in London and Hampshire. However, owing to constraints of time and resources, the paper's consideration of intimate-partner conflict was limited to only one facet of it –

[1] See, for example, G. Feder, C. Griffiths and H. MacMillan, "Zero Tolerance for Domestic Violence" (2005) *Lancet* 365(9454), 120; I.H. Frieze, *Hurting the One You Love: Violence in Relationships* (Belmont, Wadsworth Learning 2005); S. Walby and J. Allen, "Domestic Violence, Sexual Assault and Stalking" Findings from the British Crime Survey, HORS 276 (Home Office, London 2004); S.B. Plichta, "Intimate Partner Violence and Physical Health Consequences: Policy and Practice Implications" (2004) *Journal of Interpersonal Violence* 19(11) 1296–1323; J. Raphael, "Rethinking Criminal Justice Responses to Intimate Partner Violence" (2004) *Violence Against Women* 10(11) 1354–66; S. Sarantakos, "Deconstructing Self-Defense in Wife to Husband Violence" (2004) *Journal of Men's Studies* 12(3) 277–96; and S.J. Woods, "Intimate Partner Violence and Post-Traumatic Stress Disorder Symptoms in Women: What We Know and Need to Know" (2005) *Journal of Interpersonal Violence* 20(4) 394–402.

domestic abuse or violence, which, as will be shown, has now been so widely defined that it may be said to include exposure to passive smoke in the home, and so on. Constraints of time and resources also necessitated limiting the study to intimate partners. Our focus was, therefore, not on other persons affected by, or involved in, abuse in the home. This paper looks at the following: the key terminology, actual violence in the home, private nuisance, occupiers' liability and then some problems facing an intimate partner who, in reliance on these causes of action, wishes to sue the other partner.

I. Key terminology

The key terms explained here are "intimate partner", "abuse in the home" and "passive smoke".

In this paper, the meaning of "intimate partner" includes spouses, partners registered under the Civil Partnership Act and partners not so registered, as well as mere cohabitees (that is, men and women living together as husbands and wives but who are not married).[2]

"Abuse in the home" includes "domestic violence". Therefore, intimate partner abuse in the home is basically domestic violence against intimate partners. Today, domestic violence has a broad meaning (unlike its narrow interpretation as "physical violence" in the mid-1970s). In *Yemshaw v Hounslow LBC* [2011] UKSC 3 (SC), the Supreme Court (*per* Lady Hale) defined it in the same way as the Home Office did in 2011:

> Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members regardless of gender or sexuality.[3]

[2] Because they are not actually married in accordance with the law, it is inappropriate to describe persons in this last category as "common-law spouses", which term suggests they are spouses under the common law (in contrast with the statutory law), which they are not. So, the term "common-law spouses" is not alright in legal parlance. It should be noted here that the law allows, but does not approve of, mere cohabitation (where the parties are not married or registered under the Civil Partnership Act); for example, the Fatal Accidents Act 1976, s.3(4), states, *inter alia*, that cohabitees do not have an enforceable right to be maintained.

[3] Home Office – UK Border Agency, *Guidance – Victims of Domestic Violence (version 5.0)*, valid from 26th July 2012, p. 5.

It is noteworthy that this definition is broad enough to cover not only spouses (married persons) and registered partners but also unregistered partners, irrespective of their gender or sex – they all fall within the scope of "intimate partners or family members". The definition also covers children and other persons ("family members").

Section 12(9) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 makes the definition even broader in the following way:

> "domestic violence" means any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.

This definition is certainly wide enough to encompass not only spousal abuse (in other words, wife/husband-battering) but also partner abuse (because of the phrase "individuals who are associated with each other"). Thus, so long as the parties are "associated with each other", the incident can occur in the home or elsewhere.

There are some limitations of this definition, however. One is that it implies, but does not expressly mention, "any series of incidents". Although sometimes only one incident may constitute domestic violence, there may also be situations where a single act would not be enough; for example, one restraint of a person's liberty/freedom to go and visit a friend or friends, or refusal to give a spouse money to enable her to do a particular thing of her choice. Rather, a series of, or separate incidents of, such behaviour or "control" can amount to domestic abuse or "violence". A further limitation is that it again implies, but does not expressly mention, persons aged 16 and 17 in the definition, although those persons are today increasingly also likely to be victims of domestic abuse. (In fact, according to the British Crime Survey 2009/10, in the 16–19 age group, 12.7 per cent of women and 6.2 per cent of men suffer partner abuse, in comparison with 7 per cent of women and 5 per cent of men in older age groups. Thus, the group that is most likely to suffer abuse is the 16–19 age group.)

A new definition of domestic violence and abuse (a cross-government definition) has, therefore, been proposed as follows:

> Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality.[4]

This can include psychological abuse (a form of which is harassment, that is, alarming or causing distress to the victim), physical abuse, sexual abuse, financial abuse and emotional abuse, as well as other types of abuse. "Controlling behaviour" is defined as covering acts aimed at making a person subordinate and/or dependent by (a) cutting them off from any sources of support, (b) taking advantage of the victim's resources and capabilities for personal gain, (c) denying them what they need to become independent, to resist and to escape, and (d) policing their daily behaviour. On the other hand, "coercive behaviour" is defined as "an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim". Thus, unlike controlling behaviour, coercive behaviour requires actual coercion or pressure.[5]

The third key term, "passive smoking", may be defined as the involuntary inhalation of another person's tobacco smoke. Therefore, exposing someone to "passive smoke" is causing that person to inhale your unwanted tobacco smoke. A non-smoker may inhale three types of smoke: first, there is smoke inhaled and exhaled by the smoker ("mainstream smoke"), secondly, there is smoke which burning tobacco directly emits ("sidestream smoke") and, thirdly, a mixture of both mainstream smoke and sidestream smoke in the atmosphere ("environmental tobacco smoke" (ETS) or "second-hand smoke").[6] Passive smoking is used in this paper to refer to involuntary exposure to environmental smoke (ETS) or second-hand smoke.

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[4] See Home Office Press Release, Monday 5/11/12.

[5] The Home Office Press Release went on to acknowledge that this is not a legal definition, and to include in the definition "so-called 'honour' based violence, female genital mutilation (FGM) and forced marriage".

[6] See Environmental Protection Agency, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, 3-1 (1992); see also J.C. Byrd, R.S. Shapiro and D.L. Schiedermayer, "Passive Smoking: A Review of Medical and Legal Issues" (1989) *Am. J. Public Health* 199 79:209–13.

Exposure to ETS is considered a form of abuse because passive smoke is injurious to a person's health – it is actually a serious health hazard, as various studies have shown.[7]

Intimate partner abuse and tort law

Technically, intimate partner abuse in the form of actual violence, harassment or exposure to passive smoke is actionable in tort. Where there is actual violence, the cause of action could be trespass to the person (battery, assault or false imprisonment); where there is threat of violence, the relevant torts may be assault and harassment; but where there is exposure of one's spouse to passive smoke, there may be battery as well as other torts like nuisance and breach of duty under the Occupiers' Liability Act 1957.

1. Actual violence

(A) Trespass to the person

There are three types of trespass to the person (battery, assault and false imprisonment) to which an intimate spouse may be subjected. Battery is the direct and intentional application of force to the person of another without lawful justification; therefore, the least touching of

[7] For example, firstly, a report on passive smoking released in 1986 by the Surgeon-General of the United States ("USA") concluded, *inter alia*, that environmental tobacco smoke causes lung cancer and several other respiratory problems in non-smokers (United States Department of Health and Human Services, *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General*, US Department of Health and Human Services, Public Health Service, Center for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health, Rockville, MD, 1986, Publication No. DHHS(CDC)87-8398). Secondly, according to the US Environmental Protection Agency, after its full review of the evidence establishing the dangers of environmental tobacco smoke, involuntary smoking leads to the deaths by lung cancer of 3,000 non-smokers in America annually; environmental tobacco smoke is a human carcinogen, to which no level of exposure is safe; "human carcinogen" is a substance which causes cancer or for which a cause–effect relationship has been established in humans (United States Environmental Agency Report, 1992; see also D. Hoffmann and I. Hoffmann, "The Changing Cigarette 1950–1995" (1997) *Journal of Toxicology and Environmental Health* 50 307–364). Thirdly, studies have provided evidence to support the connection between environmental smoke and heart disease (S.A. Glantz and W.W. Parmley, "Passive Smoking and Heart Disease: Mechanisms and Risk" (1995) 273 *JAMA* 1047). Fourthly, benzo[a]pyrene, a component in cigarette smoke, damages a gene that suppresses tumours (M.F. Denissenko, A. Pao, M. Tang and G.P. Pfeifer, "Preferential Formation of Benzo[a]pyrene Adducts at Lung Cancer Mutational Hotspots in P53" (1996) *Science*, 18th October, pp. 317, 430). Other studies have shown passive smoking to have increased risk of stroke in non-smokers by up to 82 per cent (men having a higher risk than women) (*The Times*, 17th August 1999 – New Zealand study by R. Bonita *et al.*, "Passive Smoking As Well As Active Smoking Increases the Risk of Acute Stroke" (1999) *Tobacco Control* 8 156–160).

another person or an unwanted kiss constitutes battery.[8] This is quite straightforward in the case of actual violence, such as one spouse hitting the other, whether frequently or not. All that the victim has to show is the assailant's intention to touch them directly (*Collins v Wilcock*), although the requirement of directness is not insurmountable (*Scott v Shepherd*)[9] and without any lawful justification; that touching must also be voluntary (*Wilson v Pringle*).[10]

Assault, unlike battery, arises where one person (for example, an intimate partner) acts in such a way that the other partner fears immediate battery will be inflicted on them. Fear of the infliction of immediate battery is crucial here. Therefore, where, for example, one intimate partner, while in the upstairs part of the house, issues a verbal threat of violence to the other partner, who is downstairs at the time, there may be abuse alright but not assault, because infliction of immediate battery will be absent (*Thomas v National Union of Mineworkers*).[11]

Secondly, although it is not clear whether words on their own can constitute an assault,[12] there may still be the possibility of assault where those words are preceded by some violent behaviour on the part of the assailant.

False imprisonment, the third type of trespass to the person, is basically the restraint of a person's liberty or freedom of movement in an area delimited by, or under the control of, the defendant without lawful justification. The restraint, however, must be total (*Bird v Jones*).[13] In addition, for there to be false imprisonment, any condition/s imposed by the defendant must be unreasonable.[14] An example of this is where, for no legally justifiable reason or without

[8] *Collins v Wilcock* [1984] 3 All ER 374. Where there is intention on the defendant's part, the cause of action should be trespass to the person (specifically, here, battery) and, where there is no intention, negligence should be the cause of action; see *Letang v Cooper* [1965] 1 QB 232, 240 (*per* Lord Denning MR); see also *Stubbings v Webb*, where the House of Lords did not allow the plaintiff to treat an intentional personal injury (trespass to the person) as negligence in order to gain an advantage as regards the limitation of actions. For a lucid account of the historical controversy about whether there could be liability for trespass without negligence, see, for example, M. Jones, *Textbook on Torts* (7th edn, Blackstone 2000), pp. 462–3.

[9] (1773) 2 W Bl. 892.

[10] [1986] 2 All ER 440.

[11] [1085] 2 All ER 1.

[12] See *Mead's and Belt's Case* (1823) 1 Lewin 184.

[13] (1845) 7 QB.

[14] *Ibid*.

any reasonable condition imposed, one intimate partner does not allow the other to leave the house to go and visit friends or family members.

The defences to trespass to the person, so far as intimate partner abuse in the home is concerned, include self-defence,[15] consent,[16] section 3(1) of the Criminal Law Act 1967, and so on.[17] However, today, as held by the Court of Appeal in *Pritchard v Co-operative Group*,[18] contributory negligence is not a defence to the intentional tort of trespass to the person. In addition, in the case of spouses, there may be a problem with suing for trespass to the person or other tort.

(B) The tort of harassment

There is also the tort of harassment, created by the Protection from Harassment Act 1997. Section 7 of that Act defines "harassment" as alarming or causing distress to another. According to section 3 of the Act, civil proceedings may be commenced by the victim of the harassment and damages may be awarded for, *inter alia*, any anxiety and financial loss caused by the harassment.

2. Exposure to passive smoke in the home

(A) Trespass to the person

Exposure to passive smoke in the home may also be trespass to the person (specifically battery). This is because, if spitting on a person is battery,[19] then it is arguable that making someone smoke passively (that is, an intimate partner's smoking in the home which causes the other partner to inhale the unwanted, exhaled smoke) should also be battery.[20] Consequently, all that a claimant must show on a balance of probabilities is that the defendant, without lawful justification, blew

[15] *Cross v Kirby* (2000) CA, unreported.
[16] *Condon v Basi* [1985] 1 WLR 866.
[17] It is interesting to note that, although definitely not in this jurisdiction, in some foreign jurisdictions men have the right to use reasonable force and even unreasonable force to chastise their female intimate partner.
[18] [2011] EWCA Civ. 329; [2012] QB 320.
[19] *R v Cotesworth* (1704) 6 Mod. Rep. 174, where the defendant spat on a medical doctor; see also *R v Smith* (1866) 176 ER 910.
[20] See P. McCartney, "Not Smoking Can Damage Your Health" (1988) 138 *NLJ* 425–6. Also, in the USA, a Georgia Court of Appeals has held that an employee who alleged battery by a co-worker's smoking of a pipe near her workstation could sue for battery (*Richardson v Hennly*, 434 S.E. 2d 772 (1993)).

his unwanted smoke on him or caused that smoke to touch him (the claimant).

It is submitted that the victim is unlikely to succeed in an action based on assault simply because the test of immediacy of the battery feared will not be satisfied.[21] Moreover, the incidence of assault here may be said to be minute as such assault can arise only where, because passive smoke is harmful to health, when an intimate partner is about to light a cigarette in the home, the other partner, if present, fears infliction of immediate battery on them.

But then, as trespass requires actual physical contact, is there such contact in the case of exposure to passive smoke? It is thought that this requirement would not be very difficult to satisfy because the vaporous and particulate matter found in ETS could be a sufficient basis for establishing the necessary contact. For example, in an American case, *Davis v Georgia Pacific Corp.*,[22] it was held that deposits of airborne particulates on another person's land constituted trespass, although the particulates were too small to be seen. So, we can say that the physical contact occurs when the passive smoke (environmental tobacco smoke or ETS) enters the nostrils of the non-smoking partner. Actual harm or damage does not have to be shown because trespass is actionable *per se*.

(B) Private nuisance

The second possibility is private nuisance as it is an act that interferes with a person's enjoyment of his/her land. However, the victim, to be able to sue, must have an interest in the land/house in question.[23] For private nuisance to be made out, the act complained of must actually interfere unreasonably with the victim's enjoyment of their land or interest therein. Clear examples are where intimate partner abuse takes the form of actual violence, or a state of affairs like continuous or continual threats of violence/deprivation of

[21] *Thomas v NUM* [1985] 2 All ER 1. Arguably, if a smoker exhales tobacco smoke, the non-smoker does not immediately inhale that exhaled smoke unless the smoker exhales directly into the face of the non-smoker. The success of such an action, if it does happen, would open the floodgates of litigation (every time a person smokes a cigarette in a smoking or no-smoking area, he can, in theory, be sued for assault by the non-smokers present in that area). So the courts are not likely to allow that to happen.

[22] 455 P.2d 481, 483 (1968). This case is, however, only of persuasive authority here.

[23] *Hunter v Canary Wharf* [1997] 2 All ER 426, which overruled *Khorasandijan v Bush* [1993] 3 WLR 476 on this point and upheld the decision in *Malone v Laskey* [1907] 2 KB 141.

certain things (privileges, and so on), thereby causing the victim personal discomfort. Where the abuse is by way of exposure of an intimate spouse to passive smoke, the personal discomfort to the victim is the "intangible or amenity damage".[24]

One question that needs to be answered here is whether smoking at home is reasonable use of land, like eating or drinking at home. It may be said that, whereas eating and drinking at home, at worst, directly harms only the actor (eater/drinker), smoking at home so as to expose the smoker's intimate partner to ETS directly affects the health of both the active smoker and the passive smoker. Therefore, that is what makes it an unreasonable use of land. Relevant factors any court might well consider when deciding on this issue would include both frequency and duration.[25]

But, the problem is whether one spouse with an interest in land – the matrimonial home – can sue the other spouse (also with an interest in the same land) for private nuisance because the latter smokes in that matrimonial home. Unfortunately, the authors have not come across a decided case on this issue. For this reason, not to mention the preservation of family harmony/tranquillity, this option is not recommended.

A further problem is that, as private nuisance can only occur while the person/victim is in the home, is there a guarantee that the victim spouse will not be, or has not been, exposed to passive smoke while outside the home, for example, while on their way to work or at work?

The alternative cause of action, where the victim has no interest in land, is breach of duty under the Occupiers' Liability Act 1957.

(C) Occupiers' liability

The last possibility is breach of duty under the Occupiers' Liability Act 1957. Like negligence, this may be argued where one intimate partner exposes the other to passive smoke in the home. Another example is where one spouse continually abuses the other (via actual

[24] Jones, *op. cit.*, p. 307.
[25] See, for example, *Miller v Jackson* [1977] QB 966.

violence) in the home – the argument of the victim here will be that continual subjection to violence makes the premises unsafe for them for the purpose/s for which they were invited or allowed to be there.

As regards exposure to passive smoke in the home, as already stated, an intimate partner who has no interest in the land, such as a spouse's legal right of occupation of the matrimonial home, cannot sue in nuisance.[26] But he/she can still sue under the Occupiers' Liability Act 1957; such a partner can argue that he/she is living in the home as a "visitor": he/she has both permission or invitation (impliedly and/or expressly) given by the other partner (the occupier, that is, the person with sufficient degree of control over the premises)[27] to live there.[28] They can argue breach of the occupier's duty under the Occupiers' Liability Act 1957 because the continual presence of harmful ETS (passive smoke) in the home is what makes the home/house unsafe or dangerous.

But is a home which is periodically or continually filled with tobacco smoke (or "unclean air") "unsafe" or "dangerous" premises? If it is considered so because ETS contains carcinogenic and asthma-promoting substances, and so on, then the victim can claim that the smoking partner has breached the common duty of care, that is, the duty to take such care as is reasonable in all the circumstances to ensure that the non-smoking partner is reasonably safe in the home for the purpose of living there (s.2(1) and (2), Occupiers' Liability Act 1957).[29]

One problem that is likely to arise here (namely, what if the victim is not confined to the house?) has already been answered. The answer is that it is the continual presence of harmful ETS in the house that matters.

[26] *Hunter v Canary Wharf*.
[27] *Wheat v Lacon* [1966] AC 552.
[28] No matter how unacceptable or outrageous the term "visitor" may seem in this context, the legal position is still that the child is usually in the home lawfully (not as a trespasser). The spouse living in the matrimonial home can also argue the same. So can the elderly relative.
[29] Note, however, the possible defence of consent of the claiming spouse and the problem of the slippery slope argument.

Possible defences to nuisance, occupiers' liability to visitors and negligence

Possible defences here (unlike those to trespass to the person, where contributory negligence is no longer applicable as a result of *Pritchard v Co-op Group*)[30] are: (a) consent of the claimant partner or victim – if, in the case of exposure to passive smoke, one partner consents to the other's smoking in the home; and (b) contributory negligence on the part of the victim (if consent is also present).

These may seem fanciful defences, but they may well arise under the right circumstances. That apart, there are again the problems posed by inter-spousal immunity and section 1(2) of the Law Reform (Husband and Wife) Act 1962.

Some common problems facing a claimant: there are two common problems in the way of an intimate partner who wishes to sue the other partner.

First, an action by an intimate partner against the other is likely to violate the concept of inter-spousal immunity, where the parties are married. This is because inter-spousal immunity is thought to preserve domestic tranquillity or harmony. If so, then there is a strong public policy ground for the courts to reject such a suit in the case of spouses.

Secondly, the Law Reform (Husband and Wife) Act 1962, s.1(2) allows the court, *inter alia*, to stay the action if its continuation would result in no substantial benefit to either party.[31]

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[30] [2011] EWCA Civ. 329; [2012] QB 320.

[31] The actual provisions of s.1(1) and (2) of the Act explain this point with precision. They are set as follows:

1.— Actions in tort between husband and wife.

(1) Subject to the provisions of this section, each of the parties to a marriage shall have the like right of action in tort against the other as if they were not married.

(2) Where an action in tort is brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may stay the action if it appears—

(a) that no substantial benefit would accrue to either party from the continuation of the proceedings; or

(b) that the question or questions in issue could more conveniently be disposed of on an application made under section seventeen of the Married Women's Property Act 1882 (determination of questions between husband and wife as to the title to or possession of property); and without prejudice to paragraph (b) of this subsection the court may, in such an action, either exercise any power which could be exercised on an application under the said section seventeen, or give such directions as it thinks fit for the disposal under that section of any question arising in the proceedings.

Conclusion

As the foregoing shows, the term “intimate partner” embraces both spouses and non-spouses in the same home, while “abuse in the home” includes domestic violence, which has a very broad meaning, going beyond mere physical violence. Presently, it means “any incident or threatening behavior, violence or abuse”. So, in tort, where the abuse takes the form of actual violence, the partner, who is the victim, may sue the other partner for trespass to the person (assault, battery and/or false imprisonment). But where there is exposure to passive smoke in the home, the possible causes of action are battery, nuisance and/or an action under the Occupiers’ Liability Act 1957.

As already noted, some defences, such as self-defence, consent, and so on, may be available to the defendant (the partner who is sued). But again as already pointed out, where the claimant and the defendant happen to be spouses, the claimant may be faced with two difficulties in the form of the concept of inter-spousal immunity and s.1(2) of the Law Reform (Husband and Wife) Act 1962, which may affect/weaken the chances of the action succeeding.

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