



# PENN UNDERGRADUATE LAW JOURNAL

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Volume 3  
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Fall 2015





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A student-run research publication at the University of Pennsylvania, the Penn Undergraduate Law Journal seeks to foster scholarly discourse on topical and historical issues pertaining to law or the legal system. In this spirit, the Journal's principal objective is to publish exceptional undergraduate works, drawn from an array of disciplinary perspectives, that evaluate and elucidate the intricacies, vagaries, and nuances of law as they relate to domestic and international affairs, business, academia, and society. PULJ aims to sustain and enrich a vibrant discussion about law at the undergraduate level because it recognizes that the student writers of today will be the leaders, lawyers, and scholars of tomorrow.

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Sex | Gender | Race



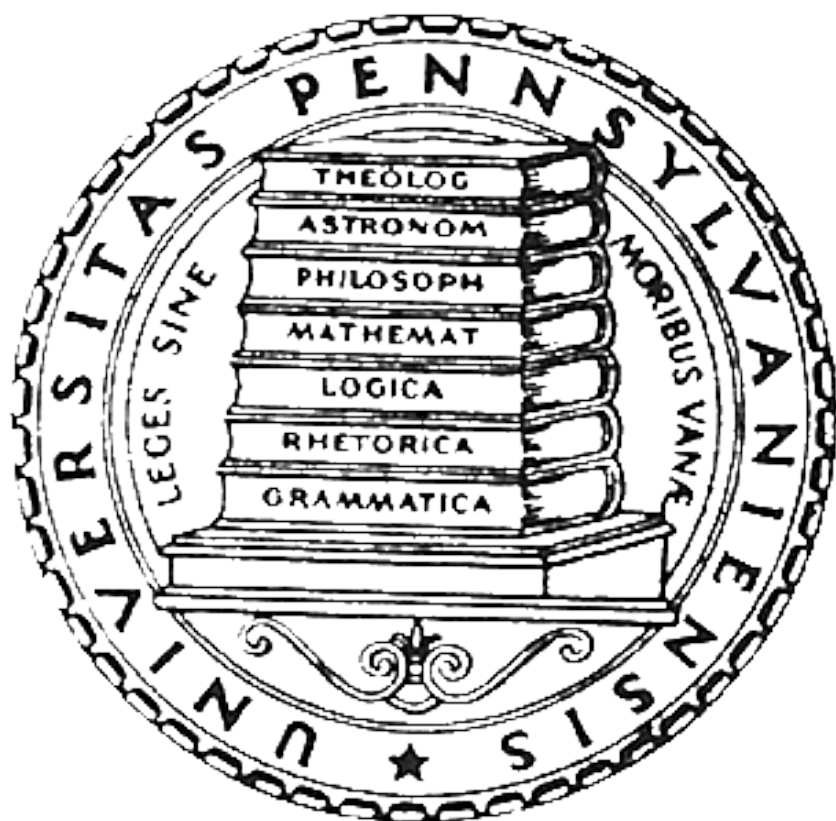
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## *Letter from the Editor*

Dear Reader,

It is with immense satisfaction that I present to you the fifth issue of the Penn Undergraduate Law Journal. In the following pages you will find an intellectually stimulating discourse that combines both abstract concepts, such as moral culpability in the field of biomedical ethics, and current issues, such as the need to reform the immigration process in the United States. These articles reflect the Journal's longstanding dedication to wide-ranging legal discourse, and certainly add value to PULJ's ever expanding oeuvre of interdisciplinary legal analyses.

Our first article, written by Laura Fitzgibbon of Durham University, delves deeply into the case of *CP (A Child) v First Tier Tribunal (Criminal Injuries Compensation)*, in which a child applied for compensation under the United Kingdom's Criminal Injuries Compensation Scheme for harm caused by the mother through her alcohol consumption during pregnancy. The author argues that the court was right in not granting the child compensation, for such a decision would have undoubtedly set a precedent in the criminal law for punishing mothers who consume alcohol during pregnancy, many of whom do so due to substance abuse problems, thereby unfairly criminalizing substance addiction for pregnant mothers.

In our second article, author Michael Goldstein of Southern New Hampshire University examines the Cuban Adjustment Act (CAA), a law passed during the Cold War, which streamlines the asylum process for Cuban Refugees fleeing the Castro Regime. The author argues that the CAA has become an outdated policy, one no longer benefits political refugees, but unfairly prefers Cuban immigrants to non-Cubans looking for economic opportunity in the US. The author goes on to say that, given that there is no longer a rational basis preference of Cubans refugees under the CAA, the law now contravenes the principle of Equal Protection outlined in the Fifth Amendment.

In our final article, Cat McMullen, also of Durham University, demonstrates that physician-assisted suicide is compatible with both Kantian and Utilitarian ethical frameworks. The author points to contradictions in the current legal framework surrounding physician-assisted suicide, in particular the doctrine of double effect, which permits a doctor to legally administer a lethal dosage of a pain-relieving drug if the primary aim is to relieve pain rather than to end the patient's life. The author then takes a practical approach, arguing for the passing of Lord Falconer's Assisted

Dying Bill, which would legalize physician-assisted suicide in the United Kingdom.

Despite the ostensibly disparate natures of the articles, there is common thread of suggested policy reforms that runs through this edition of the Journal and binds each of the pieces together. This includes Lord Falconer's Bill; an actual original amendment to the CAA; and an in-depth discussion of developments in Space Law that appears in our foreword, authored by Professor of Space Policy and International Affairs at the George Washington University, and University of Pennsylvania Alum, Henry Hertzfeld. Professor Hertzfeld's contribution is part of the Journal's ongoing collaboration with the Philomathean Society of the University of Pennsylvania to promote knowledge and ideas about space this year, particularly in the form of public policy. This is the first time the Penn Undergraduate Law Journal has take part in such a collaboration, which encapsulates the exciting ways in which the organization continues to grow.

Finally, I'd like to thank our Faculty Advisory Board, as well as our institutional and corporate sponsors who have made this publication possible. Particularly, I want to thank Dr. Rogers Smith and the Penn Program on Democracy, Citizenship, and Constitutionalism, who contributed support at a key time for the Journal this past year, ensuring the Journal's continued operations. Thank you to our editors who sacrifice their time and patience to make this publication possible and to our business, blog, layout, and communications teams who each add their unique value to our organization.

Sincerely,

A handwritten signature in black ink, appearing to read "Davis Samuel Cooper Berlind". The signature is fluid and cursive, with a large initial "D" and "S" and a long, sweeping underline.

Davis Samuel Cooper Berlind  
*Editor-in-Chief*

## FOREWORD

### DEVELOPING ISSUES IN THE LAW OF OUTER SPACE

Professor Henry R. Hertzfeld<sup>†</sup>

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#### I. INTRODUCTION

Space law is a relatively new field of law, but it is grounded in several well-developed legal areas and draws from many other legal precedents. Since space has a global presence and has always been of interest to all peoples and cultures, space law has as its foundation basic principles of international law. These are coupled with laws dealing with transportation (aviation and maritime), government development of new high technology capabilities (nuclear, security), exploration of unoccupied areas (Antarctica), and more recent commercial transactions.

Outer space is a location for doing things on Earth. And these now familiar applications of space-based capabilities – such as telecommunications, remote sensing, and navigation – are quite different from doing things in outer space itself, such as exploring distant planets, conducting research and development, building structures, and using resources found in space.

Historically, space activities were reserved primarily for government missions. Even when private companies owned space assets such as telecommunication satellites, these were either international governmental consortia or heavily regulated sectors. The international legal foundation centered on a set of United Nations negotiated treaties that were drafted and came into force in the 1960s and 1970s. As described in more detail below, they mainly reflected the concerns of governments and the political reality of two important elements: a) the Cold War and b) the fact that only the two superpowers of the time, the United States and the Soviet Union, had the technological capability to access space.

These conditions were rather stable during the first 25 years of the Space Age, with a few nations, such as France and China, developing new launch vehicles to access space and new capabilities like the U.S. Space Shuttle, which was able to transport people and larger payloads into space and be reused multiple times. But the basic premise that space is a high-risk, large up-front investment remained a uniform barrier to less capable nations and to private investment. As with all high technologies, space capabilities have matured and become available worldwide. They are still risky ventures with large start-up costs, and they only offer investors an opportunity, not a guarantee, of financially profitable re-

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<sup>†</sup>Professor Hertzfeld is a Research Professor of Space Policy and International Affairs and Adjunct Professor of Law at The George Washington University.

turns. However, there has been a very well-documented trend of private sector interest, investment, and even success in various aspects of space activities that started around 1980, began to develop aggressively during the late 1990s, and continues to grow today. Most of the private activity has been terrestrially oriented and is focused on selling space-related products to business, consumers, and governments.

A new expansion of technologies capable of operating in outer space and providing services such as refueling and repairing satellites in orbit, providing research platforms for industrial R&D, and even recovering resources from the Moon and asteroids for re-use in space or on Earth is in the planning and development stage today.

These technologies are common to both government interests and private interests. Very few private sector entities will engage in space without some direct government partnership, either cooperatively, financially, or through regulatory or other incentives. Even those private entities that may engage in space activities directed only toward individual consumers will be required to obtain permission from their respective governments to do so, since – by treaty rules and for very practical reasons – government oversight of safety and security will necessitate a space regulatory regime.

Space technology and technological capabilities have changed. The foundations of space law have not. The critical questions facing space law today are focused on how to adopt new situations to a set of laws developed by and for different purposes. The politics of today's world are also different and will make any negotiations for new fundamental treaties dealing with space issues unlikely to be successful in a time frame to accommodate the types of changes described above.

This paper will explore the most critical issues facing space law today and describe some of the proposed approaches to adapting existing precedents and law to the unique environment of space activities.

## II. THE FRAMEWORK OF SPACE LAW: INTERNATIONAL AND NATIONAL LAWS APPLYING TO SPACE AFFAIRS

After the U.S.S.R. launched the first orbiting spacecraft, Sputnik, in October of 1957, the need to formalize an international legal regime for space was apparent. Under the auspices of the United Nations in 1959, 18 nations formed the Committee on Peaceful Uses of Outer Space (COPUOS), beginning the process of negotiations that led to a set of space treaties. These treaties were designed to encourage States to use space only for peaceful purposes and to engage in cooperative efforts to explore and use outer space for the benefit of all mankind. The essence of space law began with the U.N General Assembly Resolution 1721 in

December 1961<sup>1</sup> and was followed by the 1963 Resolution, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.<sup>2</sup>

The first U.N. treaty on outer space, the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, was adopted in December 1966 and entered into force on 10 October 1967; it has been the underlying basis of international space law since then. Four additional treaties dealing specifically with outer space, all drafted and ratified in the relatively short period between 1967 and 1979, expand on the basic principles and topics of the 1967 Outer Space Treaty.<sup>3</sup> With the exception of the last treaty, the Moon Agreement, all have been ratified by most, if not all, major space-faring nations.

In addition, there have been a number of “soft law” U.N. space agreements in the form of General Assembly Resolutions on various space activities, including direct television broadcasting, remote sensing, the use of nuclear power sources in space, and a re-emphasis on the use of space to address the needs of developing countries.<sup>4</sup> Most recently, COPUOS has issued guidelines on the mitigation of debris removal and guidelines on a Safety Framework for Nuclear Power Source Applications in Outer Space.<sup>5</sup> Other examples of soft law in space affairs are pro-

1 *Resolution 1721 (XVI), International Co-operation in the Peaceful Uses of Outer Space*, UN General Assembly, 1085th mtg (Dec 20, 1961), A/RES/1721(XVI) A and B.

2 *Resolution 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, UN General Assembly, 1280th mtg (Dec 13, 1963), A/RES/18/1962.

3 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 18 UST 2410, 610 UNTS 205 (1967) (Outer Space Treaty, or “OST”); *The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, 19 UST 7570, 672 UNTS 119 (1968) (“ARRA”); *The Convention on International Liability for Damage Caused by Space Objects*, 24 UST 2389, 961 UNTS 187 (1972) [Liability Convention, or “L.C.”]; *The Convention on the Registration of Objects Launched into Outer Space*, 28 UST 695, 1023 UNTS 15 (1975) [Registration Convention, or “R.C.”]; *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 1363 UNTS 3 (1979) (Moon Agreement, or “M.A.”).

4 *Resolution 1962 (XVIII)*, UN General Assembly (Dec 13, 1963) (cited in note 2); *Resolution 37/92, Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*, UN General Assembly, 100th mtg (Dec 10, 1982), A/RES/37/92; *Resolution 41/65, Principles Relating to Remote Sensing of the Earth from Outer Space*, UN General Assembly, 95th mtg (Dec 3, 1986), A/RES/41/65; *Resolution 47/68, Principles Relevant to the Use of Nuclear Power Sources in Outer Space*, UN General Assembly, 85th mtg (Dec 14, 1992), A/RES/47/68; *Resolution 51/122, Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries*, UN General Assembly, 83rd mtg (Dec 13, 1996), A/RES/51/122; *Resolution 62/101, Recommendations on Enhancing the Practice of States and International Intergovernmental Organizations in Registering Space Objects*, UN General Assembly, 75th mtg (Dec 17, 2007), A/RES/62/101.

5 The reference version of the IADC (Inter-Agency Space Debris Coordination Committee) space



posals like the Code of Conduct for Outer Space, drafted by the European Union in 2008, which has been discussed and modified many times since but has not reached an international consensus.<sup>6</sup>

These treaties and agreements are drafted in accordance with international law and should not be viewed in isolation of other public international law documents, such as the Charter of the United Nations.<sup>7</sup>

The space treaties are not self-enforcing; nations must pass legislation to carry out the provisions of the treaties. The United States Constitution, for example, regards treaty agreements as the “law of the land.”<sup>8</sup> Consequently, in U.S. legislation dealing with space activities, the phrase “subject to U.S. international commitments” is routinely included to acknowledge the treaty provisions.

However, nations sometimes interpret the meaning of some of the treaty language differently in their national laws and regulations. For example, in article VII of the OST, nations are internationally liable for their space activities. To carry out this provision, there are a number of different types of indemnification regimes that have developed among the States. Thus, States have acknowledged their treaty requirement of being liable for any damage to another State, but at the same time, they have different mechanisms for carrying out that provision. There are, of course, other examples where States vary even more in their interpretations, and these continue to be open issues to be discussed and negotiated as future problems may develop in space affairs.<sup>9</sup>

The Outer Space Treaty contains a number of important basic principles for space activities. They include:

- The *exploration and use of outer space* is for peaceful purposes and for the benefit of all countries,
- International cooperation in space exploration is encouraged,
- All nations have the freedom to access, explore, and use space without discrimination,
- No State can appropriate space or declare sovereignty over celestial bodies,
- No weapons of mass destruction are to be used in space,
- States are internationally responsible and liable for their activities in space and for the activities of their non-governmental entities.

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debris mitigation guidelines is contained in the annex to UN document A/AC.105/C.1/L.260.

6 European Union, DRAFT Code of Conduct for Outer Space Activities (version from March 31, 2014), online at [http://eeas.europa.eu/non-proliferation-and-disarmament/outer-space-activities/index\\_en.htm](http://eeas.europa.eu/non-proliferation-and-disarmament/outer-space-activities/index_en.htm).

7 UN Charter, 1 UNTS XVI. Article III of the OST specifically ties the OST to the provisions of the UN Charter.

8 US Const Art VI, ¶ II (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...”).

9 Examples of this will be discussed in more detail later in the paper, particularly the issues of private sector exploitation of space resources.

First, it is important to note that the OST is a treaty that focuses on the exploration and use of outer space. It is a treaty dealing with human activities in outer space, not with space itself.

Second, it is important to note that a number of terms used in that treaty are not defined in the document. There is no legal definition of a celestial body, and there is no elaboration on exactly what the word “use” means – is it limited to governmental use, or can it include exploitation of areas or resources in space? There is not even a definition of peaceful purposes in the treaty. Further, the phrase “internationally responsible” is unique to this treaty in international law. The definition of what constitutes international liability is also missing from the OST (but it is clarified somewhat in the Liability Convention), and there is no elaboration of what constitutes an object launched into space (again, this is defined in the Liability and Registration Conventions, but in a very imprecise way).

To complicate issues even more, the treaties are translated into six languages (English, French, Spanish, Russian, Chinese, and Arabic) and each version is considered to be an official one. Not every word has identical counterparts in the various languages, giving latitude in interpretation and implementation of the respective provisions of the treaty.

### III. MAJOR LEGAL CONCERNS OF GOVERNMENT SPACE PROGRAMS

The beginning of today’s space endeavors was the establishment of government programs during the 1950s, which sought to develop the ability to reach outer space by advancing missile and rocket technologies for three major purposes: 1) national security, 2) scientific research, and 3) the demonstration of technological prowess. The two superpowers of that era, the United States and the Soviet Union, were the only nations with both the commitment and the underlying technological capability and infrastructure to successfully initiate these programs. Early satellite programs reflected two clear goals: to monitor each other’s national activities through imagery and other instrumentation from outer space, and to develop and contribute to scientific inquiries on the nature of outer space, the means of using space technologies, and for contributions to international scientific knowledge. Sputnik was a Soviet instrument designed for civil government purposes as one of their contributions to the International Geophysical Year (IGY) in 1958, a multinational civil government effort to share information about the Earth (of course, the launch vehicle was a redesigned military missile, as were all launch vehicles of that era).

The huge monetary investments made by both nations during the 1960s space race to put a human being on the Moon reflected the political and economic potential of advancing cutting-edge technological capabilities for both civilian and military purposes. Each nation also courted international prestige by demonstrating space capabilities that no other nation was then capable of performing. Of

course, the United States' Apollo Program overshadowed the Soviet Union's space accomplishments through the successful landing of humans on the Moon in July 1969, but both nations developed the ability to routinely access and use space.

As a result, the legal focus on space exploration reflected several political realities. Among these are:

- Public safety and liability – determining that launching into space, as well as operating satellites in orbit, is a potentially very hazardous activity and assuring all nations that if something put into space or was intended to be put into space from a launch caused damage to another nation, then the innocent victim would receive compensation.
- Colonization – the fear that nations would claim space or planets for their own use and that this would be a new source of international conflict.
- The necessity of prohibiting nuclear devices from being detonated in space due to the threat of a very large amount of damage to anyone's ability to use outer space.
- Avoiding the possibility that space would be a platform for military operations against other nations.

These, and other government concerns, were quite apparent in the negotiated principles found in the treaties and discussed above. Today, they remain important issues for shaping government space policies and programs. Since all space-faring nations are States Party to the OST, these initial principles that were of particular concern to the United States and the Soviet Union in the 1950s and 1960s have been preserved on an international scale and are applicable to all space activities.

However, the treaties only provide for diplomatic negotiations for the enforcement of these principles. Only the Liability Convention has provisions for a more formal adjudication of claims, but this option has never been used by any nation.

#### IV. EXISTING PRIVATE SECTOR SPACE-BASED APPLICATIONS

By approximately 1980, space technology had begun to mature, and many technological capabilities could be developed for both government customers and civilian users. Most notably were telecommunications services and remote sensing (taking pictures of the Earth from space). Other nations were able to initiate their own space programs, as well. Access to space was no longer limited to two nations, and the uses of space were widening to many different types of customers.

Within the following two decades, because of both a combination of government policy (particularly in the United States) and the spread of technological capabilities, private sector interests were attracting investment, and government agencies were also promoting space uses to the public. The largest revenue generating space service by the late 1990s was (and still is) direct television broadcasting.

Telecommunications services are also an important segment of the space market, offering both fixed and mobile products. In the United States, telecommunications satellites were always manufactured and operated by the private sector but were under heavy government regulations. As with other space-based technologies, it wasn't until the late 1980s that truly private operations began to compete with international intergovernmental organizations such as Intelsat. The opportunities and services developed fast, and by 2000, the telecommunications sector had changed from mainly government dominated to privately run (but still under significant regulatory oversight as with all space activities). Even Intelsat was privatized and is now a large multinational company.

Also heavily regulated and government dominated in all nations is the launch vehicle industry. However, in the 1980s, the United States began to incentivize its private contractors to develop commercial launch vehicles. This trend has continued, and launch vehicle manufacturing and launch operations are now contracted services for government and private satellite customers. In the United States and most other countries, the government(s) are still the primary customers of these companies, but commercial launches now account for approximately 25% of all launches worldwide.

In terms of revenues generated, the next largest space-related business after direct TV broadcast satellites is the use of position, timing, and navigation (PNT) signals that include, among other instruments, a signal that is available and free to use by anyone in the world. Although the U.S. GPS satellite system is a military system and is not privately financed or managed, many valuable and profitable terrestrial applications using this signal (sometimes in combination with similar signals from non-U.S. PNT satellites) have generated a private sector service industry with annual worldwide revenues measured in the billions of dollars.

The third major private activity in space are earth observation satellites that take imagery of the Earth's surface. What began as a government system, with the first United States satellite for civilian purposes launched in 1972 (ERTS-1, later re-named Landsat 1), has now expanded into a system of highly sophisticated imaging satellites, many owned and operated by not only U.S. private firms, but also by non-U.S. governments and companies. The imagery products and services generate relatively modest commercial sales but show a trend towards increased market penetration.<sup>10</sup>

All of the above examples are space applications oriented toward terrestrial activities and customers. The importance of outer space to these activities is primarily that space is an advantageous location from which to receive signals from ground stations on earth and then re-direct and redistribute those signals and

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10 Because of the dual-use nature of this (and most other) space capabilities and services, sales to governments, as well as government funding of remote sensing satellites, represent a major part of the sales and profitability for the business aspects of these companies.

rebroadcast them from space easily and cheaply to customers almost anywhere on earth. Very little reprocessing or “manufacturing” actually takes place in space, except for the maneuvers that keep the satellites in their correct locations.<sup>11</sup>

## V. NEW DEVELOPMENTS: THE RISE OF PRIVATE SECTOR INITIATIVES IN SPACE

It is apparent that today the space sector is on the cusp of successfully developing a number of enabling technologies that will make it possible to routinely do many things in outer space that have been previously impossible. A number of these capabilities will be performed not by government agencies, but by private companies working independently of governments, as well as in close partnerships with some governments where joint R&D and operations enable both to benefit.

Some of those activities in orbit that are being developed and tested are:

- Refueling and servicing of existing satellites,
- Deorbiting satellites and removing human-created space debris,
- Protecting the Earth from an asteroid’s direct impact by repositioning the asteroid away from a trajectory headed for Earth,
- Developing the framework for future in-situ use of resources found on celestial bodies including the Moon and asteroids,
- Developing the ability to bring back to earth valuable resources obtained from celestial bodies,
- Building space power satellites capable of providing energy to space assets, as well as possibly beaming energy to earth,
- Deploying swarms of very small satellites in low earth orbit that will interact and provide remote sensing images, new telecommunications services, and universal broadband connectivity.

Not all of these capabilities will be immediately available, nor will many of them provide profitable opportunities for private investment and risk-taking in the very near future. But companies are being formed and serious investment funds are being made available that support these activities. Over time, at least some of these space-based in-orbit activities will be successful on both a technological and an economic basis.

## VI. THE CHANGING PATTERN OF IMPORTANT LEGAL ISSUES: CONCERNS OF THE PRIVATE SECTOR IN SPACE ACTIVITIES

The central question of the future developments in space law is likely to focus on how governments will adopt and regulate these new types of private

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<sup>11</sup> The minor exception to this are the cameras on the earth observation satellites that do generate imagery in space and then send that digital imagery to ground stations.

sector activities in outer space. Because the treaty regime puts the onus on governmental supervision of national activities in space, and it specifically includes the activities of non-governmental entities, governments have an obligation to be involved in ensuring that the companies operate in a responsible and safe manner in space.<sup>12</sup> Furthermore, if an accident occurs in space and a company is found to be at fault, ultimately the government of at least one of the launching states of the space asset that was responsible for the incident can be held liable for damages.<sup>13</sup>

At the present time, most nations do not exert much regulatory authority over activities that are occurring on-orbit. Most of the national legislation that regulates space is concerned with launching activities, which historically have seen relatively high failure rates coupled with the immediate threat of damage to property or loss of lives terrestrially. Thus, nations transfer some of their financial exposure by requiring private launch operators to purchase insurance. Because there is a possibility of catastrophic damage from space launches, nations also often specifically agree to indemnify third party victims if the losses exceed the insurance coverage.

On-orbit regulations that now exist focus mainly on approvals for the use of spectrum for communications to avoid interference, and they also focus on allocating positions in the relatively crowded region of the geosynchronous orbit. Nations are beginning to develop better means of determining what is actually in orbit in order to inform users of possible collisions in space and avoid future accidents. It is only in recent years that nations have begun to require companies to implement designs to minimize future debris creation in the space environment. Other formal on-orbit regulations include extending the launch period to make sure the satellite gets to its proper orbit and, if the vehicle is scheduled to return to Earth, the government has oversight in the preparations for that return.

Beyond that, nations may examine a payload to be launched to ensure that it is safe and will not endanger either the launch itself or its operations in space. But actual requirements for safety, insurance, and other operations of on-orbit activities have not been implemented, mainly because these activities up to now have either not been accomplished or have only been performed by government agencies themselves.<sup>14</sup>

Besides complying with government regulations, the private sector typically is oriented toward making a profit on their investment.<sup>15</sup> These firms are quite

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12 OST, Art VI (cited in note 3).

13 Liability Convention, Art III (cited in note 3).

14 The United States Government has issued many detailed manuals governing the safety and responsibility of its own operations in space, both by NASA and by the Department of Defense. Because the Government self-insures, it assumes all of the risks that may be involved, including those associated with carrying out the provisions of its treaty obligations.

15 Many new space entrepreneurs today are very wealthy people putting a significant amount of their personal wealth into developing space capabilities. Some profess to be interested in exploration and

aware of the government's treaty obligations, but these obligations may be viewed differently. For instance, governments are very concerned about liability, but as is the case with the U.S. Government, they self-insure their space activities. Companies are concerned with liability as well, but with a difference – they purchase insurance to cover the potential liabilities, and then the cost of the insurance can be factored into the price to the customer.

The following table summarizes some of these differences that can translate into major contracting and legal issues:

Government	Private Sector
Mission success	Operational system
Longer-time frame; limited by annual budgets	Short term focus: profit/cash flow Exception: private entrepreneur funding
Public welfare	Maximize profit
National security	Sustainable operations
Cost effectiveness	Least cost, maximum efficiency
Next engineering/science program	Next consumer/client product
Budget priorities	Private financing/ROI
Authorization/appropriations	Cash flow
Separate R&D, construction, operations budgets	Plan for life cycle funding
Treaties, law, regulations for the public good	Regulatory hurdles, compliance, taxes/user fees

Factors such as the high financial and regulatory barriers to entry into the business; the relationship between safety, cost, price; and maintaining a high degree of reliability and quality are reflected in the future legal issues. Typically, governments are extremely safety-conscious in space missions, particularly if human beings are in space. Companies are also deeply concerned about passenger safety, but they often do not have the same budgets that governments have to ensure the same degree of safety. This can translate into an issue that possibly increases pri-

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in long-term benefits, such as developing settlements on distant planets or performing space activities less expensively than the government can, and that may be quite true. However, these people are also not quite that altruistic. They did not acquire their fortunes by being poor businessmen. They do see profits in the future, even if that future may be longer than a shareholder business firm can reasonably invest in. They also see applications of their new technologies that may have shorter term terrestrial economic potential. It can be argued that economic motivations are just as strong for these entrepreneurs as they are for public companies.

vate sector risks.<sup>16</sup>

Companies eventually will need to get financing from private sources. Investment companies and investors are very conservative and, unlike governments that invest for the public good and for longer-term benefits, private investors have to justify a rate of return to the investment in shorter time frames that equals or exceeds alternative uses of those investment funds.<sup>17</sup>

Space project investments are difficult to explain and to justify under these conditions; therefore, companies seek ways of reducing risks. Governments often can help in some respects through R&D investments, guaranteed purchases of goods and services, cooperative projects, and through regulatory assurances.

The details may vary, but the bottom line is that companies clearly recognize the importance of working with governments on many outer space projects. They also recognize that a regulatory regime will be in place to carry out government commitments from treaty and other international agreements, as well as to ensure domestic safety rules and regulations.

Governments that want to encourage private sector initiatives often develop financial and contracting incentives. Companies also expect and require that a national regulatory framework is predictable, stable, and as transparent as possible.

## VII. PROPERTY RIGHTS IN SPACE

A much debated and controversial issue focuses on the rights of both governments and private entities to use and exploit resources found in space. Analyzing this issues illustrates the tensions between the treaty language itself, the interpretation by a national government of its treaty obligations and the reality of providing incentives for the emerging commercial development of space

Historically, the removal of resources from space has been limited to the United States' and the Soviet Union's returning of samples from the Moon during the 1960s and 1970s, and to a small sample of asteroid materials that the Japanese Hyabusa Mission accomplished in 2010. In each case these were government missions and the returned samples were used primarily for scientific purposes. Each government considered the samples their own property and the samples were not marketed commercially, except for a public auction of some samples that Russia

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16 Of course, even the best efforts of governments don't guarantee safety. Outer space is a risky and difficult environment. And companies correctly argue that they'll be essentially out of business if there is a serious accident that causes loss of life to a paying customer. They also argue that there very well may be methods of achieving the level of safety that large budgets can purchase with newer or different (and less expensive) technologies. To date, there have been no commercial human space flights, so there are no data available to prove either side of these arguments.

17 In economics, this is called the opportunity cost of money.



permitted.<sup>18</sup>

The United States Government prohibits the sale of any Moon rocks collected by the U.S. Government and legally enforces this with criminal penalties. Clearly the ownership of those space materials rests with the government(s), and there have been no international challenges to the rights of governments to both return resources from space and to legally protect them.

A detailed discussion of all of the legal implications of property rights in space is beyond the scope of this brief article.<sup>19</sup> Suffice it to say that property rights do exist in outer space. Anything that is launched from Earth to outer space is owned by the launching state, and that state is internationally responsible and liable for those space objects.<sup>20</sup> This includes all instruments and equipment left on the Moon by various exploratory missions (but it does not imply that the territory underlying the equipment is also owned). By internationally negotiated agreements through the International Telecommunications Union (a U.N. organization), locations in the geosynchronous orbits are assigned to different satellites, and a zone around those satellites is also protected to ensure safety and to minimize spectrum interference. On the International Space Station (ISS), each partner nation owns and controls its own modules and can apply its own laws, including intellectual property law, to activities performed on those modules.<sup>21</sup>

However, all of the above property rights are limited by international agreements and supervised by the various nations' laws and regulations.

The current legal issue is whether private entities can remove valuable resources from celestial bodies and then be assured that they can have the right to use, sell, transfer, or lease those resources.

The Outer Space Treaty, most international lawyers would argue, does not directly permit such activities by private entities or governments. But, at the same time, the wording in the treaty also does not specifically preclude the ownership of resources. Specifically, Article II of the OST states:

“Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”<sup>22</sup>

This provision is oriented towards any celestial body itself and prohibits

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18 Moskowitz, Claire, *Largest Moon Rock Ever Auctioned Could Fetch \$380,000* (Space.com, Sept 18, 2012), online at <http://www.space.com/17650-moon-rock-lunar-meteorite-auction.html>.

19 For a more detailed account, see Henry Hertzfeld, and Frans von der Dunk, *Bringing Space Law into the Commercial World: Property Rights without Sovereignty*, 6 Chi J of Intl L 81 (2005).

20 OST, Art VI and VII (cited in note 3).

21 Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States Of America Concerning Cooperation on the Civil International Space Station, US Department of State (1998), online at <http://www.state.gov/documents/organization/107683.pdf>.

22 OST, Art II (cited in note 3).

a nation (or by extension through Article VI, a non-governmental entity) from declaring sovereignty and appropriating a celestial body such as a planet or asteroid. The question concerning resources relates to the phrase “*use or occupation*” of that celestial body. Since the OST itself is for the “*exploration and use*” of outer space, there is a contradiction and vagueness about what use really means. This is compounded if one refers to the Moon Agreement where the term, exploitation, is added and where Article XI specifically discusses the possibility of future commercial space applications, but does call for an international framework for such activities.<sup>23</sup>

Given the ambiguities in the language of the treaties, and the fact that in order for any nation (or company) to use outer space, some type of physical activity involving the removal of resources from a celestial body will be necessary. It will then logically be within the realm of national law to develop an interpretation of the treaty language and develop a legal and regulatory regime for using resources found in outer space and on celestial bodies. It will also be imperative that nations, in developing these regimes, abide by the principles of the treaties including: accepting responsibility and liability for their actions in space, avoiding or minimizing the contamination of outer space and intentional harmful interference to other nations and their space activities, allowing for the freedom of access of others, and using space resources for peaceful purposes.

An effort in that direction has been initiated by the United States. Following a long-standing policy,<sup>24</sup> the U.S. Congress passed U.S. Commercial Space

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23 Even though the Moon Agreement has not been ratified by the major space-faring nations, sections of it can still be viewed as a window into the thinking and intent of the drafters of the earlier treaties. And even within the Moon Agreement, there are contradictions, since Article VI deals with resources on the surface and subsurface of the Moon but then refers specifically to removal or use for scientific purposes. In other words, there are no crystal clear resolutions of the question at hand in the treaties.

24 Letter from Secretary of State Vance to Senator Church, Chairman of Senate Foreign Relations Committee (Nov 28, 1979), reprinted in *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, Senate Committee on Commerce, Science and Transportation (Aug 1980) at 313 (stating that the Moon Treaty provides no moratorium on exploitation of space resources, that Art II of the Outer Space Treaty’s ban on appropriation only applies to resources in place, and that the Outer Space Treaty and Moon Agreement would allow for ownership of extracted space resources); See also *Testimony of State Dept. Legal Advisor Owen in Hearings Before the Subcommittee on Science, Technology and Space of the Senate Committee on Commerce, Science, and Transportation on Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 96th Cong, 2d sess 2–19 (1980) (both oral and written testimony) (“American companies will have a continuing legal right to exploit the Moon’s resources....”; “...once [resources] have been extracted from the Moon, ownership can be asserted at that point...”; “exploitation [can] go forward and that one can own what one can remove from the surface or subsurface of a celestial body...the negotiating history [of the Moon Agreement] makes it very clear that that was contemplated by the parties.”; “The United States took the position from the outset that such exploitation should be permitted, that such ownership after extraction should be permitted. And that...is an authoritative interpretation ...”; “... we have insisted that even after such a regime is established [an international one under the Moon Treaty], the right of unilateral exploitation will continue to be available to those States which choose

Launch Competitiveness Act (H.R. 2262), and it was signed into law by the President on November 23, 2015. Title IV of that Act specifically grants property rights for obtained abiotic resources from celestial bodies to companies operating under the jurisdiction of the United States. The Act also specifically emphasizes that this is not a declaration of U.S. sovereignty over any celestial body.

Although these provisions of the Act dealing with property rights are controversial, it is interesting to note that not only have companies in the United States supported the Bill, but a recent statement of the International Institute of Space Law has acknowledged that the treaties are not clear on the resource issue and that actions of the U.S. Congress are a “possible interpretation” of the treaty language by a State Party to the Outer Space Treaty.<sup>25</sup>

It should be emphasized that this new U.S. legislation is a broad statement that assures industry that the U.S. Government is committed to supporting private sector development in space. However, the many details of how this new law will be implemented through the licensing and regulatory regime for space that exist in the United States are not specified. Moreover, since actual resource mining and use in space is still many years in the future and the technologies are still under development, it is proper that the details be left to the appropriate time and the appropriate regulatory body to consider when a company or companies have demonstrated specific plans for this type of commercial activity.

Further, there will be different interpretations of the validity of this new law, particularly from other nations. The discussion and possible legal challenges on an international level will be intellectual, political, and emotional. The result is impossible to predict, but it is likely that either the principle of resource property rights will be upheld or that efforts will be made to draft a new treaty with less ambiguous terminology than now exists in the current space treaties.

## VII. MAJOR SPACE LEGAL ISSUES YET TO BE ADDRESSED

The most important international legal issues that will need clarification and better definition as commercial interests expand in space are:

- Distinguishing sovereignty from ownership, property rights, and liability,
- Defining and identifying a nation’s responsibility under Article VI of the OST when assets in space are sold, transferred, or otherwise disturbed by the nation that is not the launching state nor state of registry,
- Similarly, linking the registration of a space asset to actual jurisdiction and control of the appropriate state, not just the jurisdiction and control of the first launching state and/or the state of registry,

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not to participate in such a regime”).

<sup>25</sup> International Institute of Space Law, *Position Paper on Space Resource Mining*, adopted by consensus by the Board of Directors on Dec 20, 2015.

- Identifying and defining the difference between a launch from earth and a launch from a space-based asset,
- Clearly defining a new liability regime for in-space incidents that doesn't contradict or violate any provisions of the Liability Convention,
- Providing for an international binding and enforceable system of dispute resolution for space incidents.

Essentially, the above issues revolve around three principles: (1) *state responsibility* being attached to the most logical state(s) associated with a space asset, (2) the avoidance of one state performing an action that results in *harmful interference* with the assets of another state while in outer space, and (3) *resolving any disputes* in outer space peacefully, effectively, and in a fair and impartial manner.

Today, none of these legal principles are well-defined. So far, the world has been lucky, and there have been no in-space incidents that have occurred that have (1) not been resolved by diplomatic negotiations, and (2) have created enough economic damage in space to warrant a test in a court of law.

The space community should not wait for the inevitable test case. If we do, any hasty solution will be too little, too late. And it would likely be a patchwork of ineffective compromises, or oriented toward one particular situation to ensure that that particular type of incident won't occur again. Governments may be able to settle disputes involving government assets, but when the mix includes valuable commercial assets, the need for a more formal set of definitions and rules will be necessary.

The above issues are now being discussed in academic and government venues. In the more immediate future, establishing a legal and regulatory system that meets the needs of the changing structure of public/private space activities is crucial to all space-faring nations. Developing a balanced approach that addresses the existing treaty obligations with the economic and political realities of today's world that will both incentivize private investment in space, as well as ensure the sustainability of future uses of space, will be a difficult but necessary international challenge.

<b>ARTICLE</b>
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## **BLURRING THE LEGAL DIVIDE BETWEEN FOETUS AND BABY**

Laura Fitzgibbon<sup>†</sup>

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### INTRODUCTION

*CP (A Child) v First Tier Tribunal (Criminal Injuries Compensation) (British Pregnancy Advisory Service/Birthrights and another intervening)*<sup>1</sup> concerns an application for compensation under the Criminal Injuries Compensation Scheme (the CICS) for harm caused by a mother to her born child, CP, through excessive alcohol consumption during pregnancy.<sup>2</sup> CP was born with severe Foetal Alcohol Spectrum Disorder (FASD), a result of prenatal alcohol exposure with a wide variety of manifestations that range in severity.<sup>3</sup> The ‘highly variable and heterogeneous’ intellectual deficits associated with FASD<sup>4</sup> can also be accompanied by distinctive facial deformities and a multitude of physical, emotional, cognitive and behavioural problems.<sup>5</sup> This dissertation will analyse the complex and contentious moral and legal issues surrounding this case, and it will argue that the Court of Appeal’s decision in *CP v CICA*<sup>6</sup> is desirable. A background of CICS and *CP v CICA* will follow, after which the structure of the dissertation will be summarized.

#### *The Criminal Injuries Compensation Scheme*

The Criminal Injuries Compensation Authority administers the CICS. The scheme<sup>7</sup> is made by the Secretary of State pursuant to the Criminal Injuries Com-

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1 EWCA Civ 1554 (2014), 2 WLR 463 (2015).

2 Id.

3 Aniruddho Chokoroborty-Hoque, Bonnie Alberry, and Shiva M. Singh, *Exploring the Complexity of Intellectual Ability in Fetal Alcohol Spectrum Disorders*, 2 *Frontiers in Pediatrics* (2014).

4 Id.

5 British Medical Association Board of Science, *Fetal Alcohol Spectrum Disorders: A Guide for Healthcare Professionals* 1 (June 2007).

6 *CP v Criminal Injuries Compensation Authority (Intervention on behalf of the British Pregnancy advisory service and Birthrights)*, C3/2014/0775 (CA 2014), online at <http://www.birthrights.org.uk/wordpress/wp-content/uploads/2014/11/BPAS-Birthrights-CP-v-CICA-Intervention.pdf>.

7 Ministry of Justice, *The Criminal Injuries Compensation Scheme 2012* (The Stationary Office 2012).

pensation Act 1995,<sup>8</sup> and it enables a person to claim compensation for an ‘injury which is directly attributable to their being a direct victim of a crime of violence.’<sup>9</sup> However, a conviction is not necessary for an application to be made under the scheme.<sup>10</sup> As clarified by *Regina (Jones) v First-tier Tribunal (Social Entitlement Chamber)*,<sup>11</sup> if there is an appeal of a decision, the courts must inquire whether a crime has been committed and, if so, whether that crime was a crime of violence (both must be met for an appeal).<sup>12</sup>

The current (2012) version of the CICS contains an exclusion clause which states that a crime of violence does not include a crime that ‘was sustained in utero as a result of harmful substances willingly ingested by the mother during pregnancy, with intent to cause, or being reckless as to, injury to the foetus.’<sup>13</sup> Therefore, no award of compensation could be made to someone with FASD under this scheme.<sup>14</sup> However, there is no such exclusion clause in the 2008 CICS, the version of the scheme under which the application in *CP v CICA* was filed. As such, there was a push for applications concerning FASD before the introduction of the 2012 CICS exclusion clause.<sup>15</sup> Consequently, eighty cases with similar facts were filed under the 2008 CICS and were affected by *CP v CICA*.<sup>16</sup>

### *CP v CICA*

The alleged crime that founded the application for compensation in *CP v CICA* was section 23 of the Offences Against the Person Act 1861 (s 23 OAPA).<sup>17</sup> Liability under s 23 OAPA is established if a person ‘unlawfully and maliciously’ administers ‘any poison or other destructive or noxious thing’ so as to endanger life or to inflict grievous bodily harm (GBH) on ‘any other person.’<sup>18</sup> It was argued that s 23 OAPA was committed by the mother through her actions of drinking excessive quantities of alcohol in pregnancy, causing GBH to CP in the form of very severe Foetal Alcohol Spectrum Disorder (FASD).

The application for compensation on behalf of CP was rejected by CICA

8 Criminal Injuries Compensation Act 1995, ch 53 (1995).

9 *The Criminal Injuries Compensation Scheme 2012* at ¶ 4.

10 *Id* at ¶ 9.

11 UKSC 19 (2013), 2 AC 48 (2013).

12 *Id* at 16.

13 *The Criminal Injuries Compensation Scheme 2012* at Annex B, clause 1(e) (cited in note 7).

14 HC Deb, vol 586, col 40WH (Oct 14, 2014).

15 Neil Sugarman, *The Criminal Injuries Compensation Scheme Update - foetal alcohol syndrome, neglect, time limits and important changes* (Adoption Today, June 2012), online at <http://www.bubblewrappedchildren.co.uk/fasd.html>.

16 *CP v CICA*, C3/2014/0775 at ¶ 3.

17 *Offences Against the Person Act*, 24 & 25 Vict ch 100 (1861).

18 *Id* at § 23.

on the basis that she was not the victim of a crime of violence,<sup>19</sup> but the First Tier Tribunal disagreed and allowed the claim for compensation: it found that CP had sustained an injury that was directly attributable to a crime of violence, namely s 23 OAPA.<sup>20</sup> However, this was overturned on appeal to the Upper Tribunal in late 2013.<sup>21</sup> The Court of Appeal then heard the appeal by the local authority on behalf of CP on November 5th, 2014. The primary issue for the appeal was whether a foetus could be ‘any other person’ for the purposes of s 23 OAPA, given that CP was a foetus at the time of the administration of the ‘noxious substance.’<sup>22</sup> The result of the case was not wholly predictable; as chapter two will assess, there were compelling legal arguments both for and against the success of the appeal. Furthermore, the potential implications of the decision were subject to substantial debate and media coverage at the time the case was heard. While the case was civil, the Court of Appeal nevertheless offered an interpretation of the criminal law; hence, if the appeal had been allowed, it may have had significant implications for the interpretation and application of the criminal law, serving as a dangerous precedent for prosecutions to be brought under the same or similar circumstances. However, the appeal was dismissed, and the indirect precedent has arguably been avoided, as CP was unable to claim compensation under the CICS.

### *Method*

The first chapter will analyse the rationale pertaining to criminal maternal liability for harm to a mother’s born child through her actions in pregnancy. It will be argued that a mother owes a moral duty to a child that will be born alive, but that this duty should not be enforced through the criminal law. Both justifications for and against criminalisation of this behaviour will be analysed and tested. Some of the issues examined will include: difficulties with identifying a standard of care; considerations of the impact that criminalisation may have on the autonomy of pregnant women; and the practical implications of such criminalisation. Given the conclusion that criminalisation is not desirable, arguments for practical government action pertaining to FASD and substance dependency will be offered.

The second chapter will argue that the reasoning in *CP v CICA* led to a satisfactory outcome. First, in light of the civil nature of the case, the contention that the application for compensation should succeed will be analysed. While it will be argued that it is a morally compelling argument, it will be concluded that it is fundamentally undermined by the potential for the decision to negatively influence criminal law. The legal reasoning in the case will therefore be dissected and

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19 *CP v CICA*, C3/2014/0775 at ¶ 4.

20 *Id* at ¶ 5.

21 *CICA v First-tier Tribunal and CP (CIC)*, UKUT 0638 at 6 (AAC 2013).

22 *CP v CICA*, C3/2014/0775 at ¶ 15.

analysed with reference to case law, statutes and academic discourse. Particular attention will be paid to the argument that the reasoning behind *Attorney-General's Reference (No. 3 of 1994)*,<sup>23</sup> in which an application of the born alive rule held a father liable for constructive manslaughter of his child through his infliction of GBH on the pregnant mother, could be applied to maternal liability under s 23 OAPA. A conclusion will then be drawn about the applicability of criminal law to maternal harm to the child born alive after *CP v CICA*. It will be concluded that it is fortunately not likely.

## CHAPTER ONE: CRIMINAL MATERNAL LIABILITY FOR HARM TO THE CHILD BORN ALIVE

This chapter will examine the justifications of criminal maternal liability for harm to the child born alive through alcohol consumption in pregnancy. It will be argued that criminalisation of alcohol consumption during pregnancy is not desirable for a multitude of reasons, which will set the foundation for the second chapter's argument that the dismissal *CP v CICA* was desirable.

Firstly, it will be argued that a mother owes a moral duty to the foetus she carries that will be born alive. Despite this, however, this chapter will argue that there are strong reasons not to recognise that duty in the form of criminal liability. The justifications underpinning criminalisation of maternal harm to the child born alive through alcohol consumption in pregnancy will be examined, as will specific issues relating to criminalisation of this harm. These issues will include: the point at which that criminalization would occur; causation of harm to the child born alive; the autonomy of pregnant women; and issues of discrimination. The practical implications of criminalisation will also be analysed, resulting in overwhelmingly problematic outcomes. Due to these problematic theoretical flaws and negative practical implications, it will be argued that criminalisation is not an appropriate solution for preventing harm to the child born alive through maternal consumption of alcohol in pregnancy. Instead, provision of care, treatment and education are preferable actions to take.

### I. MORAL RESPONSIBILITY

The moral responsibility of a mother to her child that she carries is a contentious matter. This dissertation will argue that, if a mother has decided to carry her foetus to term, and so intends it to be born alive, then she owes a moral responsibility to the child that will be born alive. However, it will be argued that while this moral duty does exist, it should not be transposed into a legal one insofar as criminalisation of maternal alcohol consumption in pregnancy.

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23 AC 245 (HL 1998).



Heather Draper argues for moral responsibility of a mother to a foetus that will be born alive by comparing the moral duties owed: between strangers; by parents to their children already born; and by a mother to the child that is yet to be, but will be, born.<sup>24</sup> She uses the example of someone in need of a bone marrow transplant, with only one other person representing a known match. Regarding the moral duty owed between strangers, she argues that a determination of moral duty depends on where one sets the minimum level of decency.<sup>25</sup> In contrast, she argues that a parent has a moral obligation to their own born children in this situation, because being a parent involves an ‘obligation to make sacrifices for one’s children that one would not be obliged to make for strangers.’<sup>26</sup> This also applies to a woman once she has decided to continue with a pregnancy, not only when the child is born. As Margaret Brazier argues, it would be difficult to say that a woman who has opted to bring a person into the world has no responsibility for its welfare, particularly because the pregnant woman poses, normally, the most direct threat to the welfare of the future child, given its ‘absolute [dependency]’ on her.<sup>27</sup> Moreover, it can be argued that a pregnant woman, due to this physical dependency, has a stronger moral obligation than parents of a born child, because this dependency brings a heightened moral duty to avoid harming the foetus.<sup>28</sup>

It is possible for parents’ moral obligation to fall unequally on either parent in a specific situation.<sup>29</sup> For example, if a born child needed a bone marrow transplant and only one parent is a match, then the moral obligation to donate bone marrow would fall unequally on the matching parent.<sup>30</sup> Therefore, as Draper posits, there is no issue of discrimination on the basis of pregnancy in relation to this moral obligation, so long as there would be the same obligation on a man in a parallel situation, which there arguably would be.<sup>31</sup>

The strength of the argument for moral responsibility of a mother to her born child is highlighted through a further comparison of parental duties. If a set of parents, a pregnant woman and her partner, smoke cigarettes and thus both cause harm to the child born alive, then it would be illogical to say that only one partner has a moral duty not to harm the unborn child.<sup>32</sup> Therefore, it is difficult to deny the existence of a moral duty on the pregnant woman to her child born alive. However, this chapter will argue that regardless of the strength of the moral duty of the

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24 Heather Draper, *Women, forced caesareans and antenatal responsibilities*, 22 *Journal of Medical Ethics* 327, 330 (1996).

25 *Id.*

26 *Id.*

27 Margaret Brazier, *Liberty, Responsibility, Maternity*, 52 *Current Legal Problems* 359, 367 (1999).

28 *Id.*

29 Draper, 22 *Journal of Medical Ethics* at 330 (cited in note 24).

30 *Id.*

31 *Id.*

32 Brazier, 52 *Current Legal Problems* at 367 (cited in note 27).

mother to her child born alive, it is crucial that this moral duty is not translated into a legal duty, specifically in regards to criminalisation of maternal consumption of alcohol during pregnancy.

This dissertation will now analyse some of the theories that would underpin a policy of criminalisation of maternal harm to the child born alive through alcohol consumption during pregnancy. Specific issues that would arise if the consumption of alcohol during pregnancy was criminalised will be discussed, leading to the conclusion that such a policy is deeply undesirable.

## II. THEORY UNDERPINNING CRIMINALISATION

It could be argued that a theory of deterrence underpins criminalisation of maternal harm to the child born alive, insofar as a woman would not choose to conduct harmful activity during pregnancy if she knew that she may be held criminally accountable.<sup>33</sup> However, while this justification may be valid for some crimes, it is flawed in relation to maternal harm to the child born alive, primarily because it does not fit the context. As Iris Young argues in the context of drug dependency, which can be applied to alcohol dependency, there is little element of choice in which deterrence can operate, because few people use substances with the aim of becoming dependent on them.<sup>34</sup>

The strongest contention is that the motivation for criminalising this harm is predominantly retributive: women have done a moral wrong that is deserving of punishment.<sup>35</sup> In *CP v CICA*, in the context of FASD and s 23 OAPA, the moral wrong is that the mother drank excessive amounts of alcohol during pregnancy, knowing that it might harm the child once it was born alive. However, this justification is flawed because, in most situations, the mother in question will be alcohol-dependent, and so, in essence, substance dependency is criminalised, which is arguably a medical condition.<sup>36</sup> Furthermore, this focus on maternal responsibility represents, as argued by many commentators, the wrong focus. For example, Toscano argues that this focus on maternal harm detracts from other causal factors for ill health of born children, e.g., paternal influences and environmental factors.<sup>37</sup> Patricia Boling posits that the focus on blame and responsibility of women is misguided. She argues that a better focus is one on public accountability for providing

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33 Iris Young, *Punishment, Treatment, Empowerment: three approaches to policy for pregnant addicts*, in Patricia Boling, ed, *Expecting Trouble: Surrogacy, Fetal Abuse and New Reproductive Technologies* at 113 (Westview 1995).

34 *Id.*

35 Vicki Toscano, *Misguided Retribution: Criminalization of Pregnant Women Who Take Drugs*, 14 *Social & Legal Studies* 359, 371 (2005).

36 Emma Pickworth, *Substance Abuse in Pregnancy and the Child Born Alive Rule*, 27 *Anglo-Am L Rev* 1, 472, 491 (1998).

37 Toscano, 14 *Social & Legal Studies* at 377–80 (cited in note 35).

support and education for these women, so that steps are taken to reduce the incidence of this type of harm.<sup>38</sup> This dissertation will argue that the most effective way of managing this issue is not criminalisation, but care, treatment, and education of the people concerned.

In light of these underlying motivations, specific issues regarding criminalisation of maternal harm to the child born alive will now be analysed, with a focus on criminalisation of harm resulting from maternal alcohol consumption during pregnancy. It will be argued that a policy of criminalisation does not appreciate the context of the harm, and as such, would be discriminatory, have dangerous implications for the autonomy of pregnant women, and is not the best method of managing the problem.

### III. AUTONOMY

Firstly, note that there is already a significant restriction on a pregnant woman's autonomy in favour of the foetus: a woman cannot, except in rare circumstances, have an abortion after 24 weeks' gestation.<sup>39</sup> However, for the purposes of this dissertation, it is submitted that regulation of abortion and the issue of criminalisation of maternal harm to the child born alive must be considered separately. As Kenneth Norrie argues, the legal regulation of abortion recognizes the born alive child's inability to act on harm received in utero,<sup>40</sup> and therefore any considerations regarding the autonomy of the pregnant woman come after. Meredith Blake also concurs that the decision to continue with the pregnancy is a significant distinguishing factor: there is a positive duty of assistance on the mother when she assumes responsibility for the foetus' welfare by deciding to carry the foetus to term.<sup>41</sup> This is morally justifiable, since a moral duty towards the child born alive materialises only when the mother has decided to carry it to term: the moral duty is towards a foetus that 'will become a child capable of suffering.'<sup>42</sup> Therefore, it is also possible to view regulation of maternal actions that will harm a child born alive as subsequent to the regulation of termination of pregnancy.

A competent pregnant woman has an unfettered right to her bodily autonomy, insofar as she can refuse consent to medical treatment that may benefit her

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38 Patricia Boling, *Mandating Treatment for Pregnant Substance Abusers Is the Wrong Focus for Public Discussion*, 15 *Politics and the Life Sciences* 51, 52 (1996).

39 Abortion Act 1967 at §1 (1967).

40 Kenneth Norrie, *Protecting the Unborn Child from its Drug or Alcohol Abusing Mother* in Michael Freeman and Andrew Lewis, eds, Volume 3 *Law and Medicine: Current Legal Issues* at 223 (Oxford 2000).

41 Meredith Blake, *Policing Pregnancy: Rights and Wrongs* in Michael Freeman and Andrew Lewis, eds, Volume 3 *Law and Medicine: Current Legal Issues* at 283 (Oxford 2000).

42 Margaret Brazier, *Parental Responsibilities, foetal welfare and children's health*, in Caroline Bridge, ed, *Family law towards the Millennium: Essays for PM Bromley* 270 (Butterworths 1997).

unborn child: the law ‘fiercely protects’ the autonomy of the pregnant woman on the basis that the interests of the foetus cannot override the ‘fundamental human right to make choices for oneself.’<sup>43</sup> The leading cases on this issue are *Re MB (An Adult: Medical Treatment)*<sup>44</sup> and *St George’s Healthcare NHS Trust v S*.<sup>45</sup> In *Re MB*, the Court of Appeal confirmed that the interests of the foetus have no bearing on the decision of whether a caesarean section should be carried out on a pregnant mother: a competent woman may refuse medical intervention ‘for religious reasons, other reasons, for rational or irrational reasons or for no reason at all... even though the consequence may be the death or serious handicap of the child she bears, or her own death.’<sup>46</sup> This was reiterated in *St George’s Healthcare NHS Trust*: while it is true that ‘pregnancy increases the personal responsibilities of a woman, it does not diminish her entitlement to decide whether or not to undergo medical treatment.’<sup>47</sup>

However, in light of the moral duty that a mother owes to the child born alive, some argue that it is acceptable to curb the autonomy of pregnant women who intend to carry the pregnancy to term, though in lesser ways than a forced caesarean section, so as to restrict her from causing preventable harm to the child she carries. It can be argued that there is a ‘positive duty of assistance upon the woman towards the foetus, based upon her assumption of responsibility for its safety.’<sup>48</sup> Therefore, one could argue that in the context of preventable harms, requiring a comparatively minor invasion on the mother’s autonomy when compared to the harm that may result from her actions, to let a woman’s autonomy trump the interests of the child born alive in every instance represents ‘pathological selfishness.’<sup>49</sup>

This leads to an argument, particularly in the context of preventable harms, for a balance between a pregnant woman’s autonomy and the interests of the foetus that will be born alive. Blake suggests that this balance could be similar to the balance of rights under the Human Rights Act 1998;<sup>50</sup> it would allow the examination of wider interests and avoid ‘an autonomic victory for autonomy.’<sup>51</sup> While morally compelling, it disregards the common law stance of upholding the autonomy of women over any interests of their foetus. Furthermore, while the law does impose restrictions on peoples’ actions based on an assumption of responsibility, this does

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43 *CP v CICA*, C3/2014/0775 at ¶ 25.

44 *Re MB (An Adult: Medical Treatment)*, 2 FCR 541 (CA 1997).

45 *St George’s Healthcare NHS Trust v S*, 40 BMLR 160 (CA 1998).

46 *Re MB*, 2 FCR 541 at 553.

47 *St George’s Healthcare NHS Trust*, 40 BMLR at 180.

48 Blake, *Policing Pregnancy: Rights and Wrongs* at 286 (cited in note 41).

49 See Kathy Gyngell, *No woman’s body is an island. Every woman is a piece of the next generation* (The Conservative Woman, Nov 12, 2014), online at <http://conservativewoman.co.uk/kathy-gyngell-womans-body-island-every-woman-piece-next-generation/>.

50 Human Rights Act 1998, ch 42 (1998).

51 Blake, *Policing Pregnancy: Rights and Wrongs* at 300 (cited in note 41).

not usually involve a restriction on their bodily autonomy.<sup>52</sup>

This dissertation will now argue that the autonomy of the pregnant woman must be upheld entirely. Criminalisation for harm caused by alcohol consumption during pregnancy would represent a problematic incursion of the autonomy of the pregnant women in two main ways. Firstly, the restriction on activity during pregnancy that criminalisation would necessitate is problematic in its discriminatory nature and potentially dangerously unrestricted. Secondly, the argument concerning coercion of pregnant women into medical interventions is against the clear stance of common law. This argument also considers discrimination.

### A. Restriction on Activity

There is already some limit to the autonomy of pregnant women, as they cannot do activities in pregnancy that are already illegal.<sup>53</sup> However, if a limit on maternal activity in pregnancy goes further than that which is already illegal, then those limits would arguably be breaching a woman's autonomy<sup>54</sup> in a way that discriminates on gender grounds: it would be criminalising the activity due only to pregnancy.<sup>55</sup> Discrimination on the basis of pregnancy is also evident if a comparison with a non-pregnant person is utilised. For example, if parents of born children are not compelled by law to stop smoking because of a moral duty they owe their children to prevent secondhand smoking, then a pregnant woman should not be compelled by law to stop smoking either.<sup>56</sup>

Moreover, criminalisation of alcohol consumption in pregnancy could represent a 'slippery slope' to criminalisation of consumption of other substances, leading to further restrictions on autonomy in pregnancy. For example, it would be a short step to extend criminalisation to other legal harms that are known to cause damage to the foetus,<sup>57</sup> such as smoking tobacco.<sup>58</sup> Additionally, the potential might exist for criminalisation to be extended to other controls on the lives of women, such as for certain sports that could be dangerous to the health of the foetus.<sup>59</sup> The following argument might also arise: why not permit liability for maternal harm to the child born alive only through use of substances that are already illegal?<sup>60</sup> However, there are still multiple reasons that discourage this, especially

52 Id at 291.

53 Emma Cave, *The Mother of All Crimes* 36 (Ashgate 2004).

54 Id at 37.

55 Pickworth, 27 *Anglo-Am L Rev* at 483 (cited in note 36).

56 Draper, 22 *Journal of Medical Ethics* at 331 (cited in note 24).

57 W Hofhuis, JC de Jongste, PJFM Merkus, *Adverse health effects of prenatal and postnatal tobacco smoke exposure on children*, 88 *Archives of Disease in Childhood* 1086 (2003).

58 Allison Leonard, *Fetal Personhood, Legal Substance Abuse, and maternal Prosecution: Child Protection or "Gestational Gestapo"?*, 32 *New Eng L Rev* 615, 628 (1997–98).

59 *Kelly v Kelly*, SLT 896, 901. (Court of Session 1997).

60 Brazier, *Parental responsibilities* at 289 (cited in note 42).

the argument that it is discriminatory: it would imply an extra crime on the basis of pregnancy.<sup>61</sup> The realities of such an approach are illustrated in a recent controversy in Tennessee. Despite the fact that use of methamphetamine is not illegal, a pregnant woman was given an enhanced sentence for manufacture and use of methamphetamine because she was pregnant.<sup>62</sup> Furthermore, as will be explored later in this chapter, the arguments concerning the practicalities of criminalising consumption of harmful substances in pregnancy deters against it, even in the case of illegal substance use.

### B. *An Obligation to Submit to Medical Procedures*

If concerns regarding restrictions on pregnant women are not strong enough, then another argument drives home the harsh and immediate potential implications of criminalising both legal and illegal substance misuse in pregnancy. If maternal liability for harm or death to the child born alive was recognised as a criminal offence, then it becomes nigh on impossible to argue that the law should not intervene to prevent a crime, which would steer dangerously close to the risk of court-ordered caesarean sections, or other forced medical intervention for substance-dependent women.<sup>63</sup> The realities of this can again be demonstrated with reference to practice in America. Women are frequently convicted of offences for the death or harm of their foetuses, often related to substance dependency, under generally worded statutes, as, for example, for murder or child abuse.<sup>64</sup> The consequences of these offences regularly include incarcerations, forced caesareans and coerced abortion.<sup>65</sup>

## IV. STANDARD OF CARE AND CAUSATION

Criminalising consumption of alcohol during pregnancy would require that the point at which consumption would become criminal be set. This is not straightforward because the point at which harm is caused is not easily identifiable. There is a distinct lack of knowledge regarding the effects of low or moderate levels of alcohol consumption during pregnancy, the varying effects of alcohol consumption at different stages of pregnancy,<sup>66</sup> and whether low levels of alcohol

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61 Pickworth, 27 *Anglo-Am L Rev* at 483 (cited in note 36).

62 Lynn Paltrow, *Letter from National Advocates for Pregnant Women to Attorney General of the United States* (National Advocates for Pregnant Women, Oct 7, 2014).

63 Brazier, *Parental responsibilities* at 290 (cited in note 42).

64 Lynn Paltrow and Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 13 *J of Health Politics, Policy, and Law* 1, 299, 323 (2013).

65 *Id* at 309.

66 BMA Board of Science at 6 (cited in note 5).

consumption are harmful to the developing foetus at all.<sup>67</sup>

Furthermore, since causation would have to be proved beyond reasonable doubt,<sup>68</sup> causation of harm may be difficult to prove, as different factors causing harm to the developing foetus may be hard to disentangle.<sup>69</sup> For example, the activities of the child's father, such as smoking tobacco, can affect the sperm and negatively impact the health of the child born alive.<sup>70</sup> Furthermore, everyday exposure to chemicals can have adverse effects on a foetus.<sup>71</sup>

In light of these issues, one can argue that criminalising 'excessive' alcohol consumption, specifically when the woman is aware her actions may harm her child born alive, would avoid the issues of uncertainty surrounding causation, and identify a fair standard. At this point, causation would be easier to establish,<sup>72</sup> and identifying intention would likely avoid any problems; for example, in *CP v CICA*, it was decided that CP's mother had mens rea for s 23 on the basis that she was aware of the harm that excessive alcohol consumption during pregnancy would cause the born child.<sup>73</sup> However, this stance also has significant flaws. Firstly, what is 'excessive' may differ from one pregnant woman to the next, just as what is 'reasonable' would: there is no one standard that could be set for all women.<sup>74</sup> For example, a cocaine addict could cause more harm to her child through withdrawal, than through a slow reduction in consumption,<sup>75</sup> but it could be considered 'excessive' for a woman who is not substance dependent to use cocaine at all during her acknowledged pregnancy. Given that many women who use harmful substances while pregnant do so because of substance dependency, this argument is particularly strong; substance dependency is arguably a medical condition, and thus should

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67 Jane Henderson, Ulrik Kesmodel and Ron Gray, *Systematic review of the fetal effects of prenatal binge-drinking*, 61 *Journal of Epidemiology and Community Health* 1069 (2007); see also Yvonne Kelly, et al, *Light drinking in pregnancy, a risk for behavioural problems and cognitive deficits at 3 years of age?* 38 *Intl J of Epidemiology* 129 (2009).

68 Elizabeth Prochaska, *Taking responsibility for fetal alcohol syndrome: Criminal Injuries Compensation Authority case* (Birthrights, Feb 5, 2013) online at <http://www.birthrights.org.uk/2014/02/taking-responsibility-for-fetal-alcohol-syndrome-criminal-injuries-compensation-authority-case/>.

69 Pickworth, 27 *Anglo-Am L Rev* at 486 (cited in note 36).

70 Cynthia R. Daniels, *Between Fathers and Fetuses: The Social Construction of Male Reproduction and the Politics of Fetal Harm* 22 *Signs*, *Journal of Women in Culture and Society* 579, 594 (1997).

71 Royal College of Obstetricians and Gynaecologists, *Chemical Exposures During Pregnancy: Dealing with Potential, but Unproven, Risks to Child Health* (RCOG Scientific Impact Paper No 37, May 2013), online at <https://www.rcog.org.uk/globalassets/documents/guidelines/5.6.13chemical exposures.pdf>.

72 Brazier, 52 *Current Legal Problems* at 383 (cited in 27).

73 *CP v CICA*, C3/2014/0775 at ¶ 52.

74 Brazier, 52 *Current Legal Problems* at 379 (cited in note 27).

75 *Id.*

not be criminalised.<sup>76</sup> Further, the arguments discussed above pertaining to the autonomy of both the pregnant women in question and other pregnant woman still hold considerable weight, even for egregious harm. Moreover, strong practical considerations must be weighed, as this dissertation will now do.

## V. PRACTICAL CONSIDERATIONS

The practical implications of criminalisation of maternal harm to the child born alive are, it is submitted, particularly poignant arguments. Some have already been considered in the context of invasions of the autonomy of women (e.g., criminalisation could give rise to situations in which women are coerced into medical interventions). However, there are further considerations regarding the reduction of harm to both women and children affected by maternal harm to the child through alcohol consumption in pregnancy. It will be concluded that criminalisation is certainly not the most effective response to this harm, and that public education, as well as support and treatment of those impacted, would be more effective.

While it could be argued that criminalisation would deter women from consumption of substances in pregnancy, and so reduce the harm caused to the child, this argument is flawed, predominantly because most harm will stem from cases involving addiction. The stronger argument is that criminalisation of the consumption of alcohol, or any other substance, during pregnancy would frighten substance-dependent pregnant women away from seeking help from the health profession and social services. This is because these women may worry that admitting substance addiction or consumption of such substances during pregnancy would result in criminal liability.<sup>77</sup>

Furthermore, factors considered by the government in the process leading to the Congenital Disabilities (Civil Liability) Act 1976<sup>78</sup> in relation to civil maternal liability for harm to a child born alive, are relevant to criminal maternal liability.<sup>79</sup> Liability would be likely to exacerbate the already difficult relationship between mother and disabled child.<sup>80</sup> Furthermore, it was felt that liability would be invoked mainly in situations of matrimonial disputes to use as a weapon against the mother,<sup>81</sup> which would harm the child more through damage to the family unit.<sup>82</sup> These factors would be aggravated in a criminal context, especially for substance addiction, because of factors like difficulty finding employment, and

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76 Pickworth, 27 *Anglo-Am L Rev* at 491 (cited in note 36).

77 Martha Field, *Controlling the Woman to Protect the Foetus*, 17 *Law, Medicine and Health Care* 114, 125 (1989); Young, *Punishment, Treatment, Empowerment* at 112 (cited in note 33).

78 Congenital Disabilities (Civil Liability) Act 1976, ch 28 (CDA 1976).

79 *Id.*

80 Law Commission, *Report on Injuries to Unborn Children*, Law Com No 60 ¶ 55.1 (1974).

81 *Id.*

82 Brazier, *Parental Responsibilities* at 267 (cited in note 42).



the stigma associated with heavy drinking during pregnancy.<sup>83</sup> Moreover, in many circumstances of substance dependency, civil law may intervene to protect the best interests of the child, which may result in the child being removed. This may be retribution enough, especially because a mother is also likely to punish herself for harm she believes she inflicted on her child.<sup>84</sup>

Hence, the practical implications and theoretical flaws of criminalisation of maternal harm to the child born alive, through alcohol consumption during pregnancy, are overwhelmingly problematic. A more effective response to the issue is to provide care and support to the women affected, including providing access to prenatal care and substance addiction treatment programmes,<sup>85</sup> as many commentators, including Boling and Wendy Chavkin, agree.

There are some additional points to be made regarding FASD. Firstly, care and support for affected children are imperative.<sup>86</sup> In the UK, a lack of knowledge of FASD in the health profession – including in terms of diagnosis – limits the access to specialist services that children with FASD need, and there is a ‘post-code lottery of diagnosis.’<sup>87</sup> Given the severe lack of knowledge and data on the prevalence, incidence and symptoms of FASD, further data and information are vital,<sup>88</sup> as they would enable more effective diagnoses of FASD and help families access the help and support they need. The service models to diagnose and support FASD individuals also need improvement, as there is a distinct lack of specialist clinics in the UK.<sup>89</sup> Secondly, the public must be clearly advised that the safest way to avoid FASD completely, is to avoid alcohol consumption during pregnancy.<sup>90</sup> However, the public should not be patronised. Transparent information should be provided, particularly to pregnant women: if scientific knowledge is uncertain, then this uncertainty should be conveyed.<sup>91</sup> It must be clear that low to moderate amounts of alcohol consumed in pregnancy could, but not necessarily will, harm the developing foetus, and that the only way to guarantee that a baby will not suffer from FASD is to avoid consuming any alcohol during pregnancy. Currently, the government tends to portray guidance on the uncertain issue of alcohol consump-

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83 BMA Board of Science at 6 (cited in note 5).

84 Brazier, 52 *Current Legal Problems* at 384 (cited in note 27).

85 Boling, 15 *Politics and the Life Sciences* 52 (cited in note 38); Wendy Chavkin, *Mandatory Treatment for Pregnant Substance Abusers: Irrelevant and Dangerous*, 15 *Politics and the Life Sciences* 53, 53.

86 BMA Board of Science at 1 (cited in note 5).

87 Raja Mukherjee, *FASD in the UK, how far have services come and where do we still have to get to?*, 12 *Fetal Alcohol Forum* 2, 24 (2014), online at [http://www.nofas-uk.org/PDF/FAF%20Dec14%20\(FINAL2\).pdf](http://www.nofas-uk.org/PDF/FAF%20Dec14%20(FINAL2).pdf).

88 BMA Board of Science at 7 (cited in note 5).

89 Mukherjee, 12 *Fetal Alcohol Forum* at 24 (cited in note 87).

90 BMA Board of Science at 12 (cited in note 5).

91 Colin Gavaghan, *You Can't Handle the Truth: Medical Paternalism and Prenatal Alcohol Use*, 35 *J of Medical Ethics* 300, 303 (2009).

tion during pregnancy as inviolable rules, thus presenting uncertain information as and certain and associating risk of harm with guaranteed danger.<sup>92</sup> In addition to paying ‘scant respect’ to a pregnant woman’s autonomy,<sup>93</sup> this perpetuates the stigma associated with drinking alcohol during pregnancy.<sup>94</sup> The social stigma may lead women to shun medical help for her dependency; hence, if this stigma were reduced, more women may seek the help they need.<sup>95</sup>

## VI. CHAPTER CONCLUSION

This chapter has analysed the justifications for and against criminalisation of maternal harm to the child born alive through alcohol consumption in pregnancy. It has been argued that a mother owes a moral duty to avoid causing harm through her actions during pregnancy to her child born alive. However, issues of autonomy, discrimination and an ambiguous point of criminalisation, along with the practical implications surrounding the health and well-being of the people involved, weigh heavily against the legal recognition of said moral duty. A more appropriate and effective response is public education, and support for affected women and children.

The next chapter will use this stance as the basis for which to analyse *CP v CICA*. The arguments for compensation on the basis of civil law will be analysed. However, it will be argued that the decision would have indirectly affected criminal law; hence, the decision against theoretical liability under s 23 OAPA in relation to maternal harm to the child born alive through alcohol consumption in pregnancy was a desirable decision.

### CHAPTER TWO: DID THE COURT OF APPEAL IN *CP v CICA* COME TO A DESIRABLE DECISION?

As previously stated, *CP v CICA* is a civil law case, so the decision does not set a direct precedent for criminal law. Therefore, the compelling arguments for the success of the appeal, on the basis of the justifications for compensation, will first be analysed. However, it will be concluded that compensation in this context is not desirable. Moreover, it will be posited that arguments for compensation are fundamentally undermined by the fact that an application of s 23 OAPA to the consumption of alcohol by a pregnant woman by the Court of Appeal, even in a civil case, would undeniably set a precedent for prosecutions to be brought under

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92 Pam Lowe and Ellie Lee, *Advocating alcohol abstinence to pregnant women: Some observations about British policy*, 12 *Health, Risk & Society* 1, 307 (2010).

93 Gavaghan, 35 *J of Medical Ethics* at 301 (cited in note 91).

94 Lowe and Lee, 12 *Health, Risk & Society* at 309–10 (cited in note 92).

95 Emma Cave, *Drink and Drugs in Pregnancy: Can the Law Present Avoidable Harm to the Future Child?*, 8 *Medical L Intl* 165, 179 (2007).

criminal law, which would be deeply detrimental. In light of this, the interpretation of the criminal law by the Court of Appeal will be analysed. The central legal issue on appeal was, as stated previously, whether ‘any other person’ for the purposes of s 23 OAPA could include the foetus, given that CP was a foetus at the time that she was harmed by her mother’s alcohol consumption. Key issues of the arguments surrounding the case will be analysed, including the legal status of the foetus and the potential applicability of the reasoning in the *A-G’s Reference* to s 23 OAPA. This dissertation will then consider the effect that *CP v CICA* has had on the law as it relates to criminal maternal liability for harm to the child born alive, which had the potential to be extreme. In conclusion, it will be argued that the effect that *CP v CICA* has had on both the criminal law and on compensation for FASD is desirable.

### I. CONFINE CP V CICA TO THE CONTEXT OF THE CICS: ARGUMENTS FOR THE AWARD OF COMPENSATION

The primary reason to apply for compensation and pursue the appeals in *CP v CICA* was to claim compensation on behalf of a child who has FASD because her mother consumed excessive alcohol during pregnancy, knowing that it could harm her infant. Eighty similar applications awaited the outcome of the case.<sup>96</sup> Morally compelling arguments can be made in favour of the appeal in this context, which this dissertation will now analyse. However, as each is addressed, the flaws in the arguments will be highlighted, and it will be concluded that the arguments for compensation under the scheme are fundamentally flawed.

In civil law, children can act on harm inflicted upon them while in utero under the Congenital Disabilities (Civil Liability) Act 1976. The act provides, under s 1(2)(a) and (b), that civil liability to the child born disabled, where it would not otherwise be disabled, can be established where a person is answerable to an occurrence that ‘affected either parent of the child in his or her ability to have a normal, healthy child’ or ‘affected the mother during her pregnancy, or affected her or the child in the course of its birth.’<sup>97</sup> However, there is an express exclusion clause within s 1(1) of the act that states that no maternal liability can arise on the basis of the act.<sup>98</sup> This is qualified by s 2 of the act, which permits maternal liability in the limited circumstance of her negligent actions while driving a motor vehicle if she knows, or ought reasonably to know, that she is pregnant.<sup>99</sup> Therefore, since a child with FASD cannot claim compensation under the CDA 1976 on the basis of their mother’s actions, a recourse to compensation under the CICS would pro-

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96 *CP v CICA*, C3/2014/0775 at ¶ 3.

97 CDA 1976 at § 1(2)(a) and (b).

98 *Id* at § 1(1).

99 *Id* at § 2.

vide these children with compensation that they cannot claim under tort law. The impact of *CP v CICA* would have been initially limited: given that compensation under the 2012 scheme for harm incurred in utero is excluded, the decision on the scheme would affect only cases already filed under the 2008 scheme. However, if *CP v CICA* had been decided in favour of CP, the CICS may have faced pressure to change its scheme to allow these types of claims: this opinion had already been expressed in the House of Commons before the case was heard.<sup>100</sup>

The argument for compensation under the CICS is that the FASD-affected child has been the victim of intentional or reckless cruelty that involved the infliction of physical injury, which will cause him/her lifelong and potentially devastating disabilities. For this, compensation advocates argue such a child deserves compensation.<sup>101</sup> This money could be used to support the child and improve his/her quality of life – after all, access to services on the NHS is arguably inadequate.<sup>102</sup> However, the logical counterargument is that the state's compensative money would represent 'wooden dollars,' as it would be just as well-spent if used by the local authority to provide 'rapid and long-term access to specialist services' for affected children and access to care and treatment for their mothers.<sup>103</sup>

This argument ignores the fact that the child was injured in utero, while not legally considered a person, but arguably, so too does the ability to claim compensation under the CDA – specifically, claiming compensation for the negligent acts of third parties that resulted in a child's disability. However, this argument also forgets that the harm was inflicted by the child's mother. Maternal liability for harm to her child born alive was explicitly excluded under the CDA 1976 for policy reasons relating broadly to civil maternal liability for harm to her child born alive, reasons which included: the negative effect of the mother's civil liability on relationships within a family;<sup>104</sup> the potential for liability to exacerbate the already difficult relationship between mother and disabled child;<sup>105</sup> and the inability of a mother to meet the claim for compensation.<sup>106</sup> While the latter argument does not apply in the context of the CICS, the former arguments do. The consideration of the relationship between mother and disabled child, and the stigma associated with such compensation, has particular weight in the context of the CICS because compensation is based not only on a civil wrong, but on theoretical criminal liability. Hence, the mother would effectively be labeled a criminal for compensation under

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100 HC Deb, vol 586 (cited in note 14).

101 Sugarman, *The Criminal Injuries Compensation Scheme* at 30–31 (cited in note 15).

102 Mukherjee, 12 *Fetal Alcohol Forum* at 24 (cited in note 87).

103 Zoe Williams, *There are very good reasons a foetus cannot be a victim of crime* (The Guardian, Feb 4, 2014), online at <http://www.theguardian.com/commentisfree/2014/feb/04/foetus-crime-pregnant-alcohol>.

104 Brazier, *Parental Responsibilities* at 267 (cited in note 42).

105 Law Commission, ¶ 55.1 (cited in note 80).

106 *Id* at ¶ 55.3.

the CICS to be claimed.

Given that, under the CICS, compensation comes from the state and not the mother, compensation could possibly be justified on a similar basis to maternal liability for harm caused to the child born alive by her negligent driving. Liability of a mother for harm to her child born alive caused by her negligent driving was justified partly because the real defendant would be the insurer,<sup>107</sup> and so compensation could be sought to benefit not only the child, but the family as a whole.<sup>108</sup> These arguments apply with equal force concerning the CICS, given the source of the compensation. However, the further justifications for maternal liability to her child born alive through her negligent driving do not apply to maternal liability under the CICS. For example, an important justification for maternal liability to a child born alive through negligent driving is that the duty of care that the mother owed to her child born alive was 'identical to her duty to any other passengers in the car or fellow road users.'<sup>109</sup> This argument does not apply to the theoretical criminal liability argued via s 23 OAPA to found an application under the CICS in *CP v CICA*; this is because, as was argued in chapter one, maternal liability for harm by alcohol consumption in pregnancy to the child born alive would be discriminatory towards pregnant women, because the mother would owe a unique duty to the child that she was carrying. Moreover, the broad policy arguments against compensation for maternal liability strongly deter from compensation, specifically for maternal acts during pregnancy that harm a child born alive.

The strongest reason against compensation under the CICS in *CP v CICA* is that it would have necessitated a finding of theoretical maternal liability for harm to a child born alive through excessive alcohol consumption during pregnancy under s 23 OAPA. While any finding in the case would not have affected the criminal law directly in the form of precedent, it is undeniable that the finding could be used as a basis to bring prosecutions in the future;<sup>110</sup> if the Court of Appeal had reasoned that s 23 OAPA could apply to maternal harm to the child born alive through alcohol consumption during pregnancy, then this may have been used as the basis for prosecutions for the same offence, which, as was argued in the first chapter, would be deeply problematic and undesirable. As a counterargument, one might argue that the effects of the decision would be confined to the CICS, given a) that prosecuting mothers on the basis of s 23 would need to be for the public interest, which it would not be;<sup>111</sup> and b) that, if any criminal liability did arise, it would have to be proved beyond a reasonable doubt,<sup>112</sup> which would be difficult except in the most egregious cases. However, these arguments cannot be trusted to

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107 *Id* at ¶ 60.

108 Brazier, *Parental Responsibilities* at 267 (cited in note 42).

109 *Id*.

110 *CP v CICA* at ¶ 7 (BPAS and Birthrights submissions).

111 *Id* at ¶ 8.

112 Prochaska, *Taking responsibility for fetal alcohol syndrome* (cited in note 68).

guard against the potential effects of such an interpretation on criminal law; any interpretation of the criminal law by the Court of Appeal could stand as a basis of argument to bring a prosecution in this context, and this is an unacceptable risk. Furthermore, the mere approval of the concept of criminalising women for their actions during pregnancy by the Court of Appeal would be worrying in itself, as it would show willingness to interpret other cases similarly, effectively functioning as an endorsement of such an approach. On this basis, this dissertation will now proceed to dissect the reasoning concerning the criminal law in the case and draw conclusions regarding the case's effect on the criminal law.

## II. STATUS OF THE FOETUS IN LAW

The legal status of the foetus is clear: the law draws a line between foetus and baby. The foetus is not a person in law,<sup>113</sup> but a 'unique organism,'<sup>114</sup> and so cannot be a victim of a crime of violence, except where provided for in statute.<sup>115</sup> The harm required under s 23 OAPA must be inflicted on 'any other person.' Therefore, arguments were made in *CP v CICA* in an attempt to circumvent this fact. The first argument made on behalf of CP – in favour of an interpretation of the actus reus of s 23 OAPA applying to the child born alive – was contradictory to the stance taken in law: it was argued that the foetus should be recognised as a person in law 'with rights and capable of having an existence independent of its mother long before it is born.'<sup>116</sup> Given that the European Court of Human Rights has refused to rule that a foetus has an Article 2 right to life, it would not have given the Court of Appeal a strong reason to decide differently,<sup>117</sup> especially since such a decision would be unprecedented and arguably extend beyond the jurisdiction of courts.<sup>118</sup> However, the Court of Appeal dismissed this argument. There was no authority that could be produced in support of it,<sup>119</sup> and the *A-G reference* itself, which was relied upon in the alternative argument, was 'fatal to this limb of the argument,' insofar as it clearly holds that a foetus is not a person, but a unique organism.<sup>120</sup>

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113 *A-G Reference*, AC 245 at 262.

114 *Id* at 256.

115 *Id* at 254.

116 *CP v CICA*, C3/2014/0775 at ¶ 23.

117 David Pocklington, *Drinking during pregnancy, foetal personhood and mens rea* (Law & Religion UK, Dec 8, 2014), online at <http://www.lawandreligionuk.com/2014/12/08/drinking-during-pregnancy-foetal-personhood-and-mens-rea/>, citing *Vo v France*, 40 EHRR 12 (ECtHR 2005).

118 BPAS and Birthrights submissions in *CP v CICA* at ¶ 21.

119 *CP v CICA*, C3/2014/0775 at ¶ 37.

120 *Id*.

### III. APPLICATION OF THE REASONING IN THE A-G'S REFERENCE TO MATERNAL HARM TO THE CHILD BORN ALIVE

The predominant argument in favor of the *actus reus* of s 23 OAPA, including the consumption of alcohol during pregnancy, was that the House of Lords' reasoning in the *A-G's reference* should be applied. If this had been accepted, then this dissertation has argued that this reasoning could have been used as the basis for a move to prosecute in the criminal law. However, given that the Court of Appeal rejected the reasoning, the argument would now not likely succeed.

If the foetus is subjected to violence 'which causes its death in utero,' then it is not murder, because the foetus is not 'a reasonable creature, *in rerum natura*.'<sup>121</sup> However, the born alive rule allows for a person who injures a foetus in utero, which is born alive and then dies as a result of its injuries, to be guilty of murder.<sup>122</sup> In the *A-G's Reference*, the born alive rule was applied to constructive manslaughter, where a father was held liable for constructive manslaughter of his child after he stabbed his pregnant partner in the stomach. Seventeen days later, the woman went into premature labour and gave birth. The child survived for one hundred and twenty-one days, but died from the effects of prematurity.<sup>123</sup> It was found that the stabbing had perforated the abdomen of the child when it was in utero, but that this 'made no provable contribution to her death.'<sup>124</sup> Therefore, the questions referred by the Attorney-General were whether murder or manslaughter could be found where 'unlawful injury is deliberately inflicted' on a pregnant mother where the child is subsequently born alive and then dies, and the injuries inflicted to the mother 'either causes or made a substantial contribution to the death.'<sup>125</sup> The Court of Appeal held that the child could be viewed as a part of the mother, and so intent towards the foetus was to be viewed the same as intent 'to injure her arm or her leg.'<sup>126</sup> The doctrine of transferred malice applied in the case where the 'intention is focused exclusively or partially upon the mother herself.'<sup>127</sup> Therefore, the Court of Appeal held that the crime of murder could be committed against the child born alive, where the unlawful injury was committed only against the mother.

The House of Lords overturned this finding. They found that there could be no murder: the foetus is a unique organism and cannot be viewed as part of the mother,<sup>128</sup> and the rule of transferred malice cannot be used to transfer intent from the mother to the child born alive because it would involve one fiction too far,

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121 *A-G reference* AC 245 at 254, citing *Co Inst III*, 7, 50.

122 *Id.*

123 *Id.* at 251.

124 *Id.*

125 *A-G reference* AC 245 at 252.

126 *Attorney-General's Reference (No 3 of 1994)*, 581, 593 (QB 1995).

127 *Id.* at 593.

128 *A-G Reference*, AC 245 at 256.

requiring a double transfer of intent, from mother to foetus and then from foetus to the child born alive.<sup>129</sup> However, the House of Lords held that constructive manslaughter could be established. It was enough that: the defendant had intentionally done an unlawful act, in this case, GBH to the mother; which was dangerous because it was likely to cause harm to somebody, not necessarily the victim of manslaughter; and that that unlawful and dangerous act caused the death of the child born alive.<sup>130</sup> It was irrelevant that the foetus was not a legal person at the time of the mother's injury,<sup>131</sup> and it was also irrelevant that the 'child was neither the intended victim nor could it be foreseen as likely to suffer harm after being born alive.'<sup>132</sup> Therefore, it was enough for a conviction of manslaughter against the child born alive that the defendant had intended to cause GBH to the mother, and that causation could be established between the act and the death.

In *CP v CICA*, it was argued that this reasoning could be applied to s 23 OAPA. It was argued that it was possible to equate constructive manslaughter with s 23 OAPA, such that the actus reus of s 23 OAPA could be viewed as continuous, encompass the consequences of alcohol use, and thus include the point that CP was born alive, such that she was 'any other person' for the purposes of s 23 OAPA.<sup>133</sup> That CP had suffered GBH rather than death 'made no material difference' if the mother had knowledge of the harmful consequences of alcohol during pregnancy,<sup>134</sup> and that the criminal law should 'equally protect a foetus from conduct resulting from deliberate acts causing foreseeable harm,' such as GBH evident after birth.<sup>135</sup> However, the Court of Appeal did not accept this argument. They held that the reasoning in the *A-G's reference* was confined to the context of homicide. This was based on an exception to the rule that the *actus reus* and *mens rea* must coincide, which was justified in the context of homicide only because it is not unusual for there to be a gap in time between injury and the death required to complete the *actus reus*.<sup>136</sup> This contrasts with the requirements of the *actus reus* of s 23, which requires that the noxious substance be administered to 'any other person' at the time of administration.<sup>137</sup> Therefore, because legal personhood does not materialise until birth, this argument was dismissed.

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129 *Id* at 262, 269.

130 *Id* at 274.

131 *CP v CICA*, C3/2014/0775 at ¶ 18.

132 *Id*.

133 *Id* at ¶ 32.

134 *Id* at ¶ 22.

135 *CP v CICA*, C3/2014/0775 at ¶ 24.

136 *Id* at ¶ 40.

137 *Id* at ¶ 41.



#### IV. FURTHER ARGUMENTS CONCERNING THE REASONING IN *CP v CICA*

While the general criminal law does not apply to the foetus, some specific statutes afford protection to its interests without giving it legal rights.<sup>138</sup> The relevance of these statutes was considered in *CP v CICA*. Under s 58 and s 59 OAPA, it is a criminal offence to act with intent to procure a miscarriage.<sup>139</sup> It is also a criminal offence under s 1 Infant Life (Preservation) Act 1929 (ILA 1929)<sup>140</sup> to act with intent to ‘destroy the life of a child capable of being born alive.’ Section 5 of the Abortion Act 1967 (AA 1967),<sup>141</sup> as amended by the Human Fertilisation and Embryology Act 1990,<sup>142</sup> adds that there is no offence under the s 1 of the IPA 1929 if the procedure is permitted under the AA 1967, which in itself recognizes the interests of the viable foetus, insofar as abortion is not usually permitted after 24 weeks gestation.<sup>143</sup> This legislation can also apply to mothers destroying their own foetuses, such as in the case of *R v Sarah Louise Catt*.<sup>144</sup> Therefore, this recognition of the interests of the foetus in statute could have supported a decision to apply s 23 OAPA to protect the interests of CP, once born alive.<sup>145</sup> However, it was decided that the existence of these statutes supports the dismissal of the appeal, rather than its success, because the statutes represent a ‘limited’ intervention in the relationship between the pregnant woman and her foetus. Therefore, if Parliament had intended to criminalise ‘excessive drinking of a pregnant woman,’ then it would have done so.<sup>146</sup>

Beyond this, if criminal liability for alcohol consumption during pregnancy had been deemed theoretically possible, this conclusion would have been incompatible with tort law: a mother would have been criminally liable for something that she would not be liable for in tort.<sup>147</sup> Even more illogically, potential criminal liability would enable civil compensation for a mother’s actions during pregnancy, which Parliament has expressly legislated against.<sup>148</sup>

If the argument to extend the *actus reus* of s 23 OAPA had been accepted by the Court of Appeal, then one could argue that s 13(5) Human Fertilisation and Embryology Act (s 13(5) HFEA) would have bolstered the contention that a moth-

138 Rosamund Scott, *The English Fetus and the Right to Life*, 11 *European J of Health L* 347, 348 (2004).

139 *Offences Against the Person Act*, 24 & 25 Vict ch 100 at § 58 & 59.

140 *Infant Life (Preservation) Act 1929*, 19 & 20 Geo.5 ch 34 (1929) (ILA 1929).

141 *Abortion Act 1967* (1967).

142 *Human Fertilisation and Embryology Act 1990*, ch 37 (1990).

143 *Abortion Act 1967* at § 1.

144 *EWCA Crim 1187* (Crown Court 2013).

145 *CP v CICA*, C3/2014/0775 at ¶ 23.

146 *Id* at ¶ 65.

147 *Id* at ¶ 66.

148 *Id*.

er's drug and alcohol consumption during pregnancy can be considered in legal decisions concerning her child born alive. Under s 13(5) HFEA, practitioners are obligated to take into account the future welfare of the child when assessing the eligibility of a couple for fertility treatment, which, according to the HFEA Code of Practice, can include 'drug or alcohol abuse' as a factor that may impair a parent's ability to care for the child.<sup>149</sup> However, the context of this consideration is different for criminalisation or compensation based on alcohol consumption during pregnancy; this legislation involves a limit of an infertile woman that is arguably a precursor to the autonomy enjoyed by a pregnant woman,<sup>150</sup> and so is a prior consideration for any limit that she would have when pregnant.

#### V. MATERNAL LIABILITY FOR HARM TO THE CHILD BORN ALIVE AFTER *CP v CICA*

The question therefore arises: how does *CP v CICA* affect the criminal law? It has been argued that, if the appeal had been successful and section 23 OAPA could apply to maternal liability for harm to the child born alive through alcohol consumption in pregnancy, then there could have been an unprecedented change in the treatment of the child born alive under criminal law. As was argued in chapter one, this would have been deeply problematic and could have led to criminalisation of other types of harm. However, given the decision in the case, it will be argued that this is, fortunately, not likely.

After the *A-G's Reference*, some commentators were concerned about criminal maternal liability for harm to the child born alive because the *A-G's reference* was strictly limited to its facts,<sup>151</sup> and so the issue of maternal liability for harm the child born alive was left unaddressed by the House of Lords.<sup>152</sup> Miola and Forvargue argue that this fact, combined with the court's attitude in a string of cases concerning court-ordered caesarean section operations, left open the worrying possibility that the courts could develop existing law in a way that would result in the policing of women's lives.<sup>153</sup> *CP v CICA* is an example of this concerning type of case. However, since the Court of Appeal held that s 23 OAPA cannot apply to maternal harm to the child born alive, it is arguably unlikely that any further attempt to extend general criminal legislation to the relationship between mother and child will be made after *CP v CICA*: as was discussed by the Master of the

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149 The Human Fertilisation and Embryology Authority, *HFEA Code of Practice, Eighth Addition* at ¶ 8.10(b)(ii) (Apr 5, 2015), online at [http://www.hfea.gov.uk/docs/HFEA\\_Code\\_of\\_Practice\\_8th\\_Edition\\_\(Apr\\_2015\).pdf](http://www.hfea.gov.uk/docs/HFEA_Code_of_Practice_8th_Edition_(Apr_2015).pdf).

150 Brazier, 52 *Current Legal Problems* at 361 (cited in note 27).

151 *A-G Reference* AC 245 at 265.

152 Sara Fovargue and Jose Miola, *Policing Pregnancy: Implications of the Attorney-General's Reference (No 3 of 1994)*, 6 *Med L Rev* 265, 265 (1998).

153 *Id* at 281.

Rolls, the courts should be slow to interpret the general criminal law as applying to this relationship.<sup>154</sup> It is submitted that the outcome of *CP v CICA* in this respect is desirable, as many problematic implications could stem from the criminalisation of maternal harm to the child born alive.

However, the exception to this stance is that *CP v CICA* arguably leaves open the possibility for a mother to be prosecuted for constructive manslaughter of the child born alive. After the *A-G's Reference*, commentators highlighted that it was possible for a woman to be found guilty of constructive manslaughter when, for example, 'a heroin addict... gives birth to an addicted baby, who subsequently dies as a result of the heroin in its body.'<sup>155</sup> It is important to note that for constructive manslaughter, the act that founds the offence must be unlawful.<sup>156</sup> Therefore, the death of a child born alive from excessive alcohol consumption by its mother during pregnancy would not suffice because she does 'nothing per se unlawful' by drinking alcohol during pregnancy.<sup>157</sup> However, if the death of the child was caused by an illegal act, such as illegal drug use, committed by the mother in pregnancy, then this argument could be made.

This contention is strengthened by the court's attitude in *CP v CICA* that CP's mother had the necessary mens rea for the s 23 OAPA offence due to her knowledge, through her GP visits and previous two pregnancies, that excessive alcohol consumption could harm her child born alive.<sup>158</sup> They recognised this despite the fact that CP's mother suffered from alcohol dependency, thus showing little appreciation of the context of the harm. Furthermore, the Court emphasized the fact that the extension of the born alive rule to constructive manslaughter in the *A-G's reference* was connected with the fact that death occurred,<sup>159</sup> which indicates that if death had occurred in *CP v CICA*, then they may have imposed liability. The fact that the harm to the child born alive is death, and not GBH, does not make criminalisation in this context any more desirable than criminalisation for GBH, as criminalisation would still be based on the consumption of harmful substances during pregnancy, almost certainly in the context of dependency. Hence, similar considerations regarding the autonomy of women, discrimination, the practical utility of criminalisation, and the flawed theory underlying criminalisation based on substance dependency would still apply.

As yet, while there is no official indication of an appeal to the Supreme Court, it has recently been reported that an appeal is being considered.<sup>160</sup> More-

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154 *CP v CICA*, C3/2014/0775 at ¶ 65.

155 Fovargue and Miola, 6 Med L Rev at 289 (cited in note 152).

156 *A-G Reference*, AC 245 at 274.

157 Brazier, *Parental Responsibilities* at 287 (cited in note 42).

158 *CP v CICA*, C3/2014/0775 at ¶ 52.

159 *Id* at ¶ 40.

160 Amelia Gentleman, *My mother, the alcoholic: living with foetal alcohol syndrome* (The Guardian, Apr 4, 2014), online at <http://www.theguardian.com/society/2015/apr/04/mymother-the>

over, there is motivation for an appeal because of the eighty similar cases affected by this case.<sup>161</sup> However, as this dissertation has argued, it would be undesirable for an appeal to be successful.

## VI. CHAPTER CONCLUSION

This chapter analysed the arguments in favour of a successful appeal of *CP v CICA* on the basis that it is a civil law claim for compensation. However, it was argued that these arguments are flawed and that, in any event, compensation in this context is undesirable. Moreover, it was argued that the case's inevitable effect on criminal law deters any success of the appeal. The reasoning in the case was then dissected. It was argued that *CP v CICA* has left the criminal law in relation to maternal harm to the child born alive largely unchanged, which, for the reasons concluded in chapter one, is desirable.

## CONCLUSION

This dissertation has analysed the complex moral and legal issues raised by the recent Court of Appeal decision in *CP v CICA*, and it has argued that the decision was desirable. While the harm suffered by CP was severe and preventable, this dissertation has argued that she should not be able to claim compensation under the CICS because of the decision's potential effect on the criminal law: it would have created an indirect precedent on which maternal harm to a child through alcohol consumption could be criminalised, which, as was concluded in chapter one, would have been undesirable for many reasons. It was therefore argued, in the conclusion to chapter one, that the preferable action is to provide better education to the public on the risks of consumption of alcohol in pregnancy; to provide care, support and treatment for substance dependent pregnant women; and provide better care and support for children with FASD.

The second chapter used this position as a basis for which to analyse the legal reasoning in *CP v CICA* and its effect on the criminal law and the CICS. That *CP v CICA* was a civil law case was considered, and arguments for the success of a compensation application based on this fact were analysed. However, it was concluded that the inevitable potential for the Court of Appeal's decision to indirectly affect criminal law fundamentally undermines arguments for compensation, which is not desirable in this context. Consequently, the legal reasoning in the case concerning the criminal law was analysed. It was concluded that, after *CP v CICA*, an interpretation of the criminal law that would enable criminal liability of a mother for harm to her child born alive through excessive alcohol consumption

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alcoholic-living-with-foetal-alcohol-syndrome.

161 Pocklington, *Drinking during pregnancy* (cited in note 117).

in pregnancy is not likely, and that this, based on the analysis of criminalisation of this harm in chapter one, is fortunate.

<b>ARTICLE</b>
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## **NO WET FEET: EXTENDING THE CUBAN PREFERENCE TO ALL WHO SEEK ASYLUM**

Michael Goldstein

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### I. INTRODUCTION

“Give me your tired, your poor,  
Your huddled masses yearning to breathe free.”<sup>1</sup>

After she was assembled and unveiled in 1886, the Statue of Liberty quickly became a symbol of immigration and refuge, the light from her torch welcoming destitute immigrants from all over the globe.<sup>2</sup> She was the image of American immigration, a shining symbol of freedom welcoming all who sought a better life. Unfortunately, the reality was quite different. Eleven years before the Statue of Liberty’s unveiling, the Supreme Court determined that immigration was within the purview of the federal government and not a state responsibility.<sup>3</sup> This was followed, over the next 131 years, by the passage of a never-ending series of laws that narrowed further and further which “huddled masses” were welcome.<sup>4</sup>

In the aftermath of World War Two, Congress passed the Displaced Persons Act,<sup>5</sup> temporarily allowing European refugees entry into the United States outside of 1924 immigration quotas.<sup>6</sup> This was the first statute relating to the admission of refugees, providing hundreds of thousands of displaced Europeans with a safe haven.<sup>7</sup> Unfortunately, it was also the first statute to create a complicated

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†Michael Goldstein graduated in 2016 from Southern New Hampshire University with a degree in Mathematics. He would like to thank Steve Goldstein for his input on this article and Ellie Goldstein for her support and patience.

1 Emma Lazarus, *The New Colossus*, ll. 10–11 (1883). The entire poem was engraved and placed inside the Statue of Liberty in 1903.

2 John T. Cunningham, *Ellis Island: Immigration’s Shining Center* 46–48 (Arcadia 2003).

3 *Chy Lung v Freeman*, 92 US 275, 280 (1875). See also: “The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the states.”

4 See Immigration Act of 1882, C. 376 22 Stat 214 (1882). (“That all foreign convicts except those convicted of political offenses, upon arrival, shall be sent back to the nations to which they belong and from whence they came.”); Immigration Act of 1917, Pub L No 301, 39 Stat 875 (1917). (“That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons...”).

5 Displaced Persons Act of 1948, Pub L No 80-774, 62 Stat 1009 (1948).

6 Immigration Act of 1924, Pub L No 68-139, 43 Stat 153 (1924).

7 See Harry S. Truman, *Statement by the President Upon Signing the Displaced Persons Act*, June 25, 1948.

web of technicalities and procedures that effectively excluded the vast majority of refugees.<sup>8</sup> This continued with the Refugee Relief Act,<sup>9</sup> which extended relief to groups of immigrants excluded by the Displaced Persons Act but also added additional hurdles to the process.<sup>10</sup> This sentiment lives on today in the Immigration and Nationality Act (INA),<sup>11</sup> which encompasses the whole of immigration, including the refugee<sup>12</sup> and asylum processes.<sup>13</sup>

The INA establishes the procedures for proper immigration and the removal process for those who choose to ignore them.<sup>14</sup> Immigrants, refugees, and asylum-seekers from every country undertake the daunting task of legally immigrating into the United States, circumventing the legal routes at their own peril. Cuba, however, presents a rare exception. For every non-Cuban immigrant, arriving in the United States without a visa is a quick way to be sent home;<sup>15</sup> for Cubans, however, the process is quite different. The rules for entry into the United States do not apply to Cubans,<sup>16</sup> who are granted visas automatically in all but a few limited circumstances.<sup>17</sup> This special status conflicts with more than a century-long history of immigration policy,<sup>18</sup> making Cubans the only people in the world with less restricted access to the United States.<sup>19</sup>

The Cuban Adjustment Act (CAA)<sup>20</sup> has been policy for nearly sixty years, granting immediate naturalization to any Cubans fortunate enough to reach American soil.<sup>21</sup> Those seeking to end the “special treatment” of Cubans cite inequality and discrimination, calling either for the normalization of Cuban policy<sup>22</sup> or for the extension of the same treatment to one of a few other groups of immigrants, most notably Haitians.<sup>23</sup> While both of these solutions superficially address the equality and discrimination issues, neither one addresses them in a way that preserves the

8 Id.

9 Refugee Relief Act of 1953, Pub L No 83-203, 67 Stat 400 (1953).

10 Refugee Relief Act of 1953, 67 Stat at 400.

11 Immigration and Nationality Act of 1976, Pub L No 94-571, 90 Stat 2703 (1976).

12 INA § 90 Stat at 207, 209.

13 INA § 208.

14 INA § 240.

15 Javier Arteaga, *The Cuban Adjustment Act of 1966: More than Forty Years Later a Proposal for the Future*, 3 FIU L Rev 509, 511 (2008).

16 Jarrett Barrios, *People First: The Cuban Travel Ban, Wet Foot-Dry Foot and Why the Executive Branch Can and Should Begin Normalizing Cuba Policy*, 11 Conn Pub Int L J 1, 4 (2011).

17 Adjustment of status of nonimmigrant to that of person admitted for permanent residence, 8 USC § 1255 (2008).

18 Ted Henken, *Balseros, Boteros, and El Bombo: Post-1994 Cuban Immigration to the United States and the Persistence of Special Treatment*, 3 Latino Stud 393, 394–96 (2005).

19 Arteaga, 3 FIU L Rev at 510 (cited in note 15).

20 Cuban Adjustment Act, Pub L No 89-732, 80 Stat 1161 (1966).

21 Barrios, 11 Conn Pub Int L J at 3 (cited in note 16).

22 Id at 28–29.

23 Arteaga, 3 FIU L Rev at 544–550 (cited in note 15).

sentiment of early American immigration. They simply seek to either grant extra amnesty to one or two more groups of people<sup>24</sup> or take it away altogether in the interest of “fairness.”<sup>25</sup> While this may steer the law back inside the bounds of Equal Protection, it does nothing to marry the asylum process to the expectations that immigrants have for it.

In December 2014, President Obama announced plans to normalize relations with Cuba, despite express opposition from the Republican side of Congress.<sup>26</sup> Alternatively, the President could have simply chosen not to perpetuate the special treatments afforded to Cubans, as they exist solely at the discretion of the Executive Branch.<sup>27</sup> On its face, this seems to be the better choice, as it would actively contribute to normalization efforts and obviate the need for Congressional approval.<sup>28</sup> It would also be a step backwards, lowering what should be viewed as a model of immigration to the inadequate system currently in place. With Cuban policy under the microscope, there is currently an opportunity to expand the CAA to protect all refugees. This may seem the more difficult route, given the opposition to seemingly any change in immigration policy that favors the immigrants,<sup>29</sup> but the benefits to expanding the CAA are not bound by partisan politics and can be shared by lawmakers and migrants alike.

This article proposes a reform of current immigration policy as it relates to refugees and asylum seekers. Part II of this article summarizes the history of United States immigration statutes and how they have shaped the refugee and asylum processes into the present. Part III explores in greater detail the history of the CAA and the strange place it occupies in United States foreign policy. Part IV examines the CAA’s contribution to illegal immigration, the inexplicable gap in protection that exists between Cubans and non-Cubans, and its detrimental effect on United States foreign relations. Part V proposes an amended version of the CAA that extends its protections to all refugees, examining its potential effects on migrants and administration. The article concludes by urging policymakers to seize the opportunity before them to change immigration policy for the better.

## II. THE EVOLUTION OF AMERICAN REFUGEE POLICY

The first refugees to seek asylum in the United States were the English Pilgrims who fled the Church of England for the religious freedom promised by the

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24 *Id.*

25 Barrios, 11 Conn Pub Int L J at 3 (cited in note 16).

26 See Peter Baker, *US to Restore Full Relations With Cuba, Erasing a Last Trace of Cold War Hostility* (NY Times, Dec 17, 2014).

27 Barrios, 11 Conn Pub Int L J at 28–29 (cited in note 16).

28 *Id.* at 29.

29 See Ashley Parker and Michael D. Shear, *Battle Over Immigration Poses Risks for G.O.P.*, New York Times (Nov 15, 2014).



New World.<sup>30</sup> Though not technically considered immigrants, since the colonies were under the rule of the British Empire,<sup>31</sup> these early migrants exemplified what would later define a refugee: those unwilling or unable to return to their homeland due to persecution.<sup>32</sup> This definition would, however, be left out of the United States' first Immigration Act.<sup>33</sup> Though drafted by Congress, the first iterations of the Immigration Act did little more than set a few guidelines for the individual states in the admission of aliens.<sup>34</sup> Eighty-five years later, the *Chy Lung* Court<sup>35</sup> held, in the face of a number of discordant state statutes, that the responsibility of admitting aliens belongs to Congress alone.<sup>36</sup> Taking over for the states, Congress passed a series of laws regulating immigration, adding provisions as it went along.<sup>37</sup> While the Immigration Act of 1882<sup>38</sup> arguably foreshadows the admission of political refugees, the Immigration Act of 1917<sup>39</sup> contained the first direct reference to refugees, exempting those fleeing religious persecution from the newly enacted "literacy requirement" for aliens over the age of sixteen.<sup>40</sup> This exemption, however, related only to the literacy requirement, providing no special status for refugees and asylum seekers.<sup>41</sup>

In 1924, Congress enacted a quota system that used a combination of old census data and the lineage of the entire United States population to determine the maximum number of visas available to immigrants from each country.<sup>42</sup> This effectively closed the door to many groups of refugees facing religious, political, and racial persecution by increasing the number of visas available to immigrants from Britain and Western Europe; however, this decreased the number available to immigrants from Southern and Eastern Europe, where the majority of refugees

30 John Brown, *The Pilgrim Fathers of New England and their Puritan Successors* 194 (London Religious Tract Society 1970).

31 *Id.*

32 Displaced Persons Act of 1948 § 2(c), 62 Stat 1009 (citing United Nations, *Constitution of the International Refugee Organization*, 18 UN Treaty Ser 18 [1948]).

33 Naturalization Act of 1790, 1 Stat 103 (1790).

34 Naturalization Act of 1790, 1 Stat at 103.

35 *Chy Lung v Freeman*, 92 US 275, 280 (1875).

36 *Chy Lung*, 92 US at 275, 280.

37 Beginning with the Immigration Act of 1882, 47th Cong § 2, 22 Stat 214 (1882), which prohibited any "convict, lunatic, idiot, or any person unable to take care of himself or herself" from setting foot in the United States, to the Violence Against Women Reauthorization Act of 2013, Pub L No 113-4, 127 Stat 110 (2013), Congress regulated more aspects of immigration with each codification.

38 Immigration Act of 1882 § 2, 22 Stat at 214 ("That all foreign convicts except those convicted of political offenses, upon arrival, shall be sent back to the nations to which they belong and from whence they came").

39 Immigration Act of 1917, Pub L No 64-301, § 3, 39 Stat 877 (1917).

40 Immigration Act of 1917 § 3, 39 Stat at 877.

41 Immigration Act of 1917 § 3, 39 Stat at 877.

42 Immigration Act of 1924, Pub L No 68-139, § 11, 43 Stat 159 (1924).

originated at that time and over the course of the Second World War.<sup>43</sup> This would continue until 1948 when, despite its discriminatory nature and public disapproval of President Harry Truman, Congress passed the Displaced Persons Act,<sup>44</sup> allowing refugees of war-torn Europe to claim asylum in the United States through a restrictive and exclusionary refugee policy.<sup>45</sup> Congress attempted to extend the refugee status in 1953 through the Refugee Relief Act,<sup>46</sup> but succeeded only in adding a number of requirements to the already complicated process.<sup>47</sup> Refugee status was again extended in 1965 to those fleeing Communism and persecution in the Middle East, and those displaced by natural disasters.<sup>48</sup> This measure extended relief to those fearing persecution based on political, religious, and racial grounds, as well as those struck by some “catastrophic natural calamity”; however, the quota system and procedural hoops remained.<sup>49</sup> Additionally, refugees were placed seventh in the order of preference for issuances of immigrant visas, behind all classes of aliens defined by the Act.<sup>50</sup>

The following year, the government signed into law the Cuban Adjustment Act, or the CAA.<sup>51</sup> The CAA was meant to address an overwhelming number of refugees fleeing Communist Cuba, and it offered the most liberal protections to refugees at the time, granting a special status to Cubans that continues today.<sup>52</sup> The CAA’s unique and turbulent place in United States foreign policy will be discussed more deeply in the next section.

Despite the liberal language of the CAA, Congress would continue to address the needs of other refugees and asylum seekers in piecemeal fashion until 1980 when the INA was amended to include a general refugee program.<sup>53</sup> The amendment included a new definition of the term “refugee,” expanding it to include victims of persecution or those with a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>54</sup> With this definition, victims of “catastrophic natural calamit[ies]” were no longer explicitly covered;<sup>55</sup> however, the 1980 Act authorized the president to grant refugee status to those involved in “an unforeseen emergency

43 US Dept. of State, The Immigration Act of 1924 (The Johnson-Reed Act).

44 Displaced Persons Act of 1948 § 2(c), 62 Stat at 1009.

45 Truman, *Statement by the President Upon Signing the Displaced Persons Act* (cited in note 7).

46 Refugee Relief Act of 1953, 67 Stat at 400.

47 Gil Loescher, *Calculated Kindness* 45–46 (Free 1998); Michael Mayer, *The Eisenhower Years* 127 (Facts on File 2010).

48 Immigration and Nationality Act of 1965, Pub L No 89-236, § 3, 79 Stat 913 (1965).

49 Immigration and Nationality Act of 1965 § 3, 79 Stat at 913.

50 Immigration and Nationality Act of 1965 § 3, 79 Stat at 913.

51 Cuban Adjustment Act, 80 Stat 1161.

52 Arteaga, 3 FIU L Rev at 511 (cited in note 15).

53 Refugee Act of 1980, Pub L No 96-212, 94 Stat 102 (1980).

54 Refugee Act of 1980 § 201(a), 94 Stat at 102.

55 Immigration and Nationality Act of 1965, Pub L No 89-236, § 3, 79 Stat 913 (1965).

refugee situation,” to include any “grave humanitarian concern.”<sup>56</sup> The 1980 Act added a provision addressing the entry of refugees seeking asylum upon arrival in the United States.<sup>57</sup> Under the discretion of the Attorney General, applicants for asylum could be granted admission assuming they met the definition of a refugee as defined by the Act.<sup>58</sup> These amendments greatly expanded the coverage for refugees, and the number of asylum applications increased in kind.<sup>59</sup>

Unfortunately, the number of asylees admitted to the United States did not grow at the same rate, creating a gap between those seeking refuge and those receiving it.<sup>60</sup> At the heart of this gap lies a confusing and complex asylum process compounded by vague or arbitrary decisions regarding refugee status.<sup>61</sup> These problems, along with an ever-growing gap between applications and admissions, continue to undermine the INA today. Prospective asylees face a series of barriers, many of which are often unknown until it is too late. The process begins upon arrival in the United States, at which time the government imposes an arbitrary one-year deadline to file an asylum application.<sup>62</sup> For those filing on arrival, this is not an issue; however, for those who file after entry, the one-year deadline could be the difference between admission and removal.<sup>63</sup> Several factors may contribute to this. Many refugees flee under the guise of business or travel visas and are admitted, albeit temporarily, delaying their applications for asylum.<sup>64</sup> Additionally, refugees who enter the United States illegally may be unaware of the asylum process or unwilling to approach a port-of-entry in fear of deportation.<sup>65</sup>

In many of these cases, the one-year deadline is simply unknown, leading to the denial and removal of many refugees who would otherwise be admitted into the United States.<sup>66</sup> Missing the deadline is the only reason for denial for nearly half of late applicants.<sup>67</sup> Knowledge of the deadline does not guarantee that all applicants submit on time. The one-year deadline begins upon the applicant’s “date of arrival in the United States.”<sup>68</sup> While this seems fairly straightforward, the

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56 Refugee Act of 1980 § 207(b), 94 Stat at 103.

57 Refugee Act of 1980 §§ 208, 209, 94 Stat 105.

58 Refugee Act of 1980 § 208(a), 94 Stat at 105.

59 Department of Homeland Security, Fiscal Year 2002 Yearbook of Immigration Statistics 50–51, 55 (2012).

60 *Id.*

61 Human Rights First, *How to Repair the US Asylum and Refugee Resettlement Systems* (2012), <https://perma.cc/GQZ7-CDK4>.

62 INA § 208(a)(2)(B) (2013).

63 Philip G. Schrag, et al., *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM & Mary L Rev 651, 752 (2010).

64 *Id.* at 683–684, 685.

65 *Id.* at 695, 707.

66 *Id.* at 752.

67 52 WM & Mary L Rev 651, 752.

68 INA § 208(a)(2)(B) (2013).

courts have quibbled over what exactly constitutes the “date of arrival,”<sup>69</sup> and even the exact meaning of “one year.”<sup>70</sup>

Assuming the one-year deadline is met, an application has to be properly completed, signed by all required parties, and accompanied by the proper supporting materials to the proper office.<sup>71</sup> A missing signature, an improperly completed portion of the application, or a missing supporting document could result in denial.<sup>72</sup> Again, while this may seem a simple task, by definition, refugees come from different countries. The government neither provides counsel, nor an interpreter, even to indigent applicants.<sup>73</sup> Free or low-cost resources are available, but difficult to obtain.<sup>74</sup> These handicaps greatly increase the difficulty that applicants have filing correctly and on time.<sup>75</sup>

The next barrier is the very definition of “refugee.” Applicants must prove to or justify to an asylum officer or immigration judge that they have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>76</sup> This would appear to be simple; one either does or does not meet the definition. But in reality, making this determination is often much more difficult. The first three terms are fairly self-evident. It is the latter two that historically cause problems, with membership in a social group being especially difficult to define.<sup>77</sup> Though certain precedential cases exist,<sup>78</sup> asy-

69 *Joaquin-Porras v Gonzales*, 435 F3d 172 (2d Cir 2006) (“Upon analysis, however, we conclude that the term ‘last arrival in the United States’ should not be read to include an alien’s return to the United States after a brief trip abroad pursuant to a parole explicitly permitted by United States immigration authorities. Although the use of the word ‘last’ seems to imply that there can be more than one ‘arrival,’ it is anything but self-evident that the phrase ‘arrival in the United States’ refers to any and all border crossings into the country”).

70 *Minasyan v Mukasey*, 553 F3d 1224, 1228 (9th Cir 2009) (citing *Lagandaon v Ashcroft*, 383 F3d 983 (9th Cir 2004), “At the same time, we do apply here *Lagandaon*’s commonsense conclusion that one year equals 365 days, the “one year” in this case extending from April 10, 2001, to April 9, 2002”).

71 8 CFR § 208.3 (2014).

72 8 CFR § 208.3.

73 8 CFR § 208.9(b, g). See also Schrag, 52 WM & Mary L Rev at 664 (cited in note 64).

74 Schrag, 52 WM & Mary L Rev at 665 (cited in note 63).

75 Felinda Mottino, *Moving Forward: The Role of Legal Counsel in New York City Immigration Courts* \*24 (Vera Institute of Justice, 2000), archived at <https://perma.cc/QD5V-3VR5>.

76 INA § 208(b)(1)(B)(i).

77 Fatma Marouf, *The Emerging Importance of “Social Visibility” in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L & Pol Rev 47, 48 (2008).

78 See, for example, *Matter of Acosta*, 19 I&N Dec 211 (BIA 1985) (establishing that membership in a particular social group can be based either on a shared characteristic members cannot change or should not be required to change). See also *Matter of Toboso-Alfonso*, 20 I&N Dec 819 (BIA 1990) (recognizing homosexuality as a particular social group). See also *Matter of Kasinga*, 21 I&N Dec 357 (BIA 1996) (recognizing the status of being an uncircumcised woman as a characteristic one should not be required to change). See also *Matter of A-R-C-G, et al.*, 26 I&N Dec 388 (BIA 2014) (recognizing that married women in abusive relationships who are unable to leave may constitute

lum applications are adjudicated on a case-by-case basis. This creates the potential for discrepancies among applicants with factually similar cases until and after the precedent can be established.<sup>79</sup>

Assuming the application is filed properly and on time, and the applicant satisfies the definition of a refugee, the applicant may be granted admission into the United States.<sup>80</sup> At any time before the asylee applies for adjustment of status to a permanent resident, however, the Attorney General may terminate asylum for any refugee if “fundamental circumstances” change in the country of origin or a third-party country enters agreement with the United States to resettle refugees, among other reasons that may be applied by the Attorney General.<sup>81</sup> Thus, even if an applicant successfully navigates the asylum process, they may still face removal at the discretion of the Attorney General.<sup>82</sup>

### III. THE CUBAN ADJUSTMENT ACT

In the 1950s, opposition to Fulgencio Batista’s Cuban dictatorship was growing. As his reign came to a close, his supporters left Cuba for the relative safety of the United States in greater numbers, reaching their peak when Fidel Castro took control of the small island nation in 1958.<sup>83</sup> As it became obvious that Castro was moving towards implementing a Communist regime, this demographic shifted to middle and upper class Cubans who feared a dramatic change in lifestyle.<sup>84</sup> Castro ceased all flights between the two countries in 1962, but Cubans continued to leave: the Cuban refugee was born.<sup>85</sup> The United States welcomed the Cubans with open arms, viewing their exodus as a victory for democracy and a condemnation of Communism.<sup>86</sup> Eventually, the need for order and accountability led Congress to pass the CAA in 1966, which regulated the admission and adjustment of Cuban refugees.<sup>87</sup>

Under the CAA, any citizen or native of Cuba who remained physically present in the United States for a minimum of two years could apply for adjustment to permanent resident status, so long as the applicant was otherwise admissible.<sup>88</sup> Though the side notes addressed “Cuban refugees,” the actual language of

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membership in a particular social group).

79 Compare *Matter of M-E-V-G*, 26 I&N Dec 227 (BIA 2014) with *Matter of C-A*, 23 I&N Dec 951 (BIA 2006).

80 INA § 208(b)(1) (2013).

81 INA § 208(c)(2).

82 INA § 208(c)(2).

83 Barrios, 11 Conn Pub Int L J at 1, 4 (cited in note 16).

84 *Id* at 1, 4.

85 *Id* at 1, 4.

86 *Id* at 1, 4.

87 Barrios, 11 Conn Pub Int L J at 1, 4 (cited in note 16).

88 Cuban Adjustment Act, 80 Stat 1161.

the statute applied its provisions to “any alien who is a native or citizen of Cuba,”<sup>89</sup> which was consistent with the view that anyone fleeing Cuba was a refugee of Communism.<sup>90</sup> These political refugees were typically inspected and paroled on the same day and remained permanently in the United States while enjoying work authorization and government healthcare.<sup>91</sup>

As Communism persisted in Cuba, the effects of the CAA persisted in the United States. A true Cold War policy, it was created to combat Communism by drawing productive Cubans to the United States, a tactic that was not lost on Castro or the rest of the world.<sup>92</sup> As Castro attempted to keep Cubans in Cuba, the United States amended the CAA in 1976 and again in 1980 to make immigration easier<sup>93</sup> by exempting Cubans from the INA’s numerical preference system<sup>94</sup> and reducing the physical presence requirement to one year,<sup>95</sup> respectively.

By 1990, Cuba’s economy declined, and the number of Cubans fleeing skyrocketed.<sup>96</sup> In the summer of 1994, amidst food shortages, blackouts, and government oppression, approximately 25,000 Cubans boarded boats and makeshift rafts for the United States.<sup>97</sup> Unlike the previous decades, however, the United States did not openly welcome these Cubans.<sup>98</sup> The Clinton administration, in an effort to control the mass exodus, negotiated with the Castro regime to form a new policy: Cubans interdicted at sea would immediately be repatriated to Cuba, unless they could demonstrate a credible fear of persecution.<sup>99</sup> This language would become known as the “Wet Foot/Dry Foot” policy, so named because of the dichotomy between Cubans who reach American soil and are ultimately granted adjustment under the CAA (“dry foot” Cubans) and those who are interdicted at sea and repatriated to Cuba (“wet foot” Cubans).<sup>100</sup>

The CAA and its “Wet Foot/Dry Foot” policy carved out a special place in immigration for Cubans. While the current iteration is a far cry from the warm welcome given to all Cubans fleeing Communism in the 1960s, the preferential treatment granted to Cuban refugees by the original CAA remains unchanged.<sup>101</sup> Short-

89 Cuban Adjustment Act, 80 Stat at 1161.

90 Heather Reynolds, *Irreconcilable Regulations: Why the Sun Has Set on the Cuban Adjustment Act in Florida*, 63 Fla L Rev 1013, 1017 (2013).

91 Id at 1020.

92 Id at 1032.

93 Arteaga, 3 FIU L Rev at 6 (cited in note 15).

94 Immigration and Nationality Act Amendments of 1976, amending § 8, 90 Stat 2706.

95 Refugee Act of 1980 § 203(i), 94 Stat 108.

96 Barrios, 11 Conn Pub Int L J at 6, 7 (cited in note 16).

97 Reynolds, 63 Fla L Rev at 1021 (cited in note 90).

98 Id at 1021.

99 See *The Cuban Adjustment Act of 1966: ¿Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 Harv L Rev 902, 907 (2001). See also US–Cuba Joint Communiqué on Migration, Sept 9, 1994, 35 International Legal Materials (ILM) 35.2 at 327, 330.

100 Reynolds, 63 Fla L Rev at 1023 (cited in note 90).

101 Barrios, 11 Conn Pub Int L J at 11 (cited in note 16).

ly after instituting “Wet Foot/Dry Foot,” the Clinton Administration signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRA),<sup>102</sup> which stated that any alien “present in the United States without being admitted or paroled, or who arrives...at any time or place other than as designated by the Attorney General, is inadmissible.”<sup>103</sup> Unwilling to strip Cubans of their special status, however, the Immigration and Naturalization Service (INS) then-Commissioner Doris Meissner issued a memorandum clarifying the official policy of the INS:

The policy of the Service is that the inadmissibility ground that is based on an alien’s having arrived at a place other than a port of entry does not apply to CAA applicants. All Service officers adjudicating CAA applicants will do so in accordance with this policy. So long as the applicant meets all other CAA eligibility requirements, it is contrary to this policy to find the alien ineligible for CAA adjustment on the basis of the alien’s having arrived in the United States at a place other than a designated port of entry.<sup>104</sup>

To illustrate the absurd extent to which this policy has been applied, we need merely look to a case from 1999 in which three Cubans were intercepted in Key Largo, Florida by the United States Coast Guard (USCG), of which only one was allowed to remain in the United States.<sup>105</sup> This was because while one Cuban was found physically on the beach, the other two were apprehended while wading to shore some 100 yards in the surf. Because their feet were still “wet,” they were immediately repatriated to Cuba.<sup>106</sup> This extremely literal interpretation of “Wet Foot/Dry Foot” was, and continues to be, official INS policy.<sup>107</sup> And, lest it be argued that said policy was in contravention of the IIRA, Meissner noted that “Congress recently reaffirmed the availability of this adjustment provision, by enacting that the CAA is to continue in force until there is a democratic government in Cuba.”<sup>108</sup>

This affirmation was but another step in a long history of Congressional and administrative support for the CAA.<sup>109</sup> From President Lyndon B. Johnson’s

102 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L No 104-208, 110 Stat 3009–578, codified at 8 USC § 1182(a)(6)(A)(i).

103 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat 3009–578, codified at 8 USC § 1182(a)(6)(A)(i).

104 Memorandum from Doris Meissner, Comm’r, *Eligibility for Permanent Residence Despite Having Arrived at a Place Other than a Designated Port* (Apr 19, 1999), archived at <https://perma.cc/TGA5-8VWV>.

105 Yves Colon, *Touch Land Defines Who Stays, Goes*, Miami Herald 15A (June 30, 1999).

106 *Id* at 15A.

107 *Id* at 15A (quoting Dan Geoghegan, Assistant Chief of Border Patrol in Miami).

108 Meissner Memorandum (cited in note 104) (citing Illegal Immigration Reform and Immigration Responsibility Act of 1996 § 606(a), 110 Stat 3009–695).

109 Reynolds, 63 Fla L Rev at 1024 (cited in note 90).

declaration that he was opening “the nation’s gates to all Cubans who wanted to escape the regime of Fidel Castro,”<sup>110</sup> United States policy regarding Cuba has been such that so long as Castro and Communism reign in Cuba, all Cubans are political refugees.<sup>111</sup> Congress intended this policy to continue until a government free of Communism and both Fidel and Raul Castro is in place.<sup>112</sup> Indeed, the policy remains in place today, providing the same privileges to any Cuban who sets foot on United States soil.

Fifty years after its enactment, the text of the CAA remains largely unchanged:

[T]he status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence...<sup>113</sup>

Until 1994, the CAA gave Cubans unparalleled access to the United States, exempting them from the burdens that all other refugees faced. This earned them the title of America’s “special favorites.”<sup>114</sup> They were neither required to qualify for an immigrant visa, nor required to show that they met the definition of a refugee.<sup>115</sup> After the US-Cuba Accords, this “special status,” diminished as “Wet Foot/Dry Foot,” went into force, creating a strangely disparate treatment of Cubans depending on where they first make contact with United States territory.<sup>116</sup> Cubans intercepted at sea by the USCG are treated exactly the same as any other would-be refugee, facing repatriation unless they can prove that they meet the definition of a refugee under the INA.<sup>117</sup> For those Cubans who reach United States soil, however, their “special status” remains in force.<sup>118</sup> This unique position that Cubans occupy, in which they are sometimes given preferential treatment, casts a shadow over

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110 Arteaga, 3 FIU L Rev at 513 (cited in note 15) (quoting Robert B. Semple, Jr., *US to Admit Cubans Castro Frees; Johnson Signs New Immigration Bill*, NY Times 1 (Oct 4, 1965).

111 *Adjustment of Status for Cuban Refugees: Hearings Before Subcommittee No. 1 of the Committee on the Judiciary House of Representatives*, 89th Cong, 11–20 (1996) (“Hearings”).

112 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub L No 104-114, 110 Stat 812 (1996), codified at 22 USC § 206.

113 8 USC § 1255 (2006).

114 Joyce A. Hughes, *Flight From Cuba*, 36 Cal W L Rev 39, 40 (1999).

115 *Id* at 39, 40.

116 Reynolds, 63 Fla L Rev at 1023 (cited in note 90).

117 *Id* at 1023.

118 *Id* at 1023.



United States foreign policy, exemplifying what happens when immigration policy is determined by political considerations rather than humanitarian concerns.<sup>119</sup>

#### IV. CRITICISMS OF THE CAA

The politicization of Cuban migration as part of a larger Cold War policy of economic sanctions meant to unseat the Castro regime has long been criticized as grossly ineffective while being excessively harmful to Cubans.<sup>120</sup> While legal emigration from Cuba remains difficult, Cubans will continue to undertake dangerous journeys across the Florida Straits in hopes of reaching United States soil and the promise of asylum.<sup>121</sup> Since the implementation of “Wet Foot/Dry Foot,” the 90-mile journey often ends with violent confrontations and dramatic standoffs with the USCG as Cubans try desperately to delay interdiction long enough to set foot on the beach and invoke the CAA.<sup>122</sup> The very real threat of interdiction, detention, and repatriation does little to stay the steady flow of *balseros* – those who emigrate illegally on makeshift rafts.<sup>123</sup> The myriad criticisms of the CAA fall under three major categories: illegal immigration,<sup>124</sup> unequal treatment,<sup>125</sup> and inconsistent foreign policy.<sup>126</sup>

##### *A. The CAA Promotes Illegal Immigration*

Cuban migration to the United States did not begin with the CAA, but predates Castro, Communism, and even the Cuban nation itself.<sup>127</sup> However, the period of migration that began as the Castro regime rose to power inspired the United States in its efforts against Communism.<sup>128</sup> Seeing the impoverished Cubans fleeing to American soil was an incredible propaganda opportunity for the United States – a statement to the world that a Communist government could not support its people.<sup>129</sup> By placing economic sanctions on Cuba while simultaneously welcoming its migrants, the United States sought to crush Castro’s regime from within.<sup>130</sup>

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119 Hughes, 36 Cal W L Rev at 41 (cited in note 114).

120 Deborah M. Weissman, *The Legal Production of the Transgressive Family: Binational Family Relationships Between Cuba and the United States*, 88 N C L Rev 1881, 1883 (2010).

121 Henken, 3 Latino Studies at 398 (cited in note 18).

122 Arteaga, 3 FIU L Rev at 529 (cited in note 15).

123 *Id* at 529.

124 See Reynolds, 63 Fla L Rev 1013, 1017 (cited in note 90).

125 See Arteaga, 3 FIU L Rev 509, 511 (cited in note 15).

126 See Barrios, 11 Conn Pub Int L J 1, 4 (cited in note 16).

127 Hughes, 36 Cal W L Rev at 51 (cited in note 114).

128 *Id* at 51.

129 Weissman, 88 N C L Rev 1892 (cited in note 120).

130 *Id*.

To retaliate, Castro periodically relaxed travel restrictions, encouraging mass migrations, often in response to hijackings and other violent attempts to leave the country – acts that the United States passively encouraged.<sup>131</sup> The US response was to facilitate these migrations as much as possible.<sup>132</sup> By 1980, over 750,000 Cubans had emigrated to the United States under the CAA.<sup>133</sup> The “brain drain” had effectively crippled the economy in Cuba,<sup>134</sup> but at the expense of Cuban families who found themselves separated and out of contact, often permanently.<sup>135</sup> Predictably, the United States continued to take advantage of this phenomenon. The Carter Administration temporarily ended travel restrictions and made moves to facilitate reconciliation, but the economic sanctions continued to take their toll.<sup>136</sup> The mass migrations persisted.<sup>137</sup>

As the decades changed and Castro remained in power, the United States continued its attempts to isolate and cripple Cuba.<sup>138</sup> The collapse of the Soviet Union and the socialist bloc in the early 1990s sent Cuba into an economic crisis that seriously threatened to finally end the Castro regime.<sup>139</sup> The US took this opportunity to tighten its grip on Cuba, passing the Torricelli Act,<sup>140</sup> which prohibited subsidiaries of US companies in third-party countries from doing business with Cuba and authorized the President to cut aid and debt relief to any country doing business with Cuba.<sup>141</sup> In response, Castro expanded economic ties and trade with countries outside the socialist bloc in defiance of the US sanctions.<sup>142</sup>

This prompted yet more sanctions. The Helms-Burton Act<sup>143</sup> codified all aspects of the embargo, granting Congress the sole authority to relax the restrictions and extend the embargo, ending the importation of any product “made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba.”<sup>144</sup> Congress also authorized the President to limit Cuba’s integration into the global economy.<sup>145</sup>

131 Id at 1898.

132 Id.

133 Weissman, 88 NC L Rev at 1897–98 (cited in note 120).

134 Id.

135 Guillermo Bernal, *Cuban Families* in Miren Uriarte Gastón and Jorge Cañas Martínez, *Cubans in the United States* 148–150 (Center for the Study of the Cuban Community 1984).

136 Weissman, 88 NC L Rev at 1900 (cited in note 120).

137 Id.

138 Id.

139 Id at 1904.

140 Cuban Democracy Act of 1992, Pub L No 102-484, 106 Stat 2576 (1992), codified at 22 USC §§ 6001–10.

141 Cuban Democracy Act of 1992, 106 Stat 2576.

142 Weissman, 88 NC L Rev at 1905 (cited in note 120).

143 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub L No 104-114, 110 Stat 812 (1996), codified at 22 USC § 206.

144 Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD), 110 Stat 800.

145 Weissman, 88 NC L Rev at 1906 (cited in note 120).

The continued economic stranglehold on Cuba succeeded in crippling its economy, but failed to remove Castro from power.<sup>146</sup> Instead, the spiraling economy transformed the once-political Cuban refugees into economic refugees, tens of thousands of whom fled to the United States in 1994 on makeshift rafts and in unseaworthy vessels.<sup>147</sup> Unwilling to continue a policy of open-door migration that failed to bring about change in Cuba, the Clinton Administration implemented the Wet Foot/Dry Foot policy, much to Castro's delight.<sup>148</sup>

Wet Foot/Dry Foot failed to significantly cut down on Cuban migration.<sup>149</sup> As noted, travel and visa restrictions persist from both governments, making legal emigration difficult at best.<sup>150</sup> The economic sanctions, however, remain in place, keeping the Cuban economy in a state of despair.<sup>151</sup> This gross disparity incentivizes Cubans to emigrate by any means possible, most often through illegal methods.<sup>152</sup> This is evidenced by the relatively low percentage of Cuban immigrants applying for adjustment under the CAA who arrived by legal means.<sup>153</sup> Because the threat of interdiction by the USCG is very real, many Cubans turn to smuggling rings, paying upwards of \$15,000 for the increased probability of safely landing on American soil and avoiding the need to prove credible fear of persecution – a not-so-easy task, given the shift in view of Cubans from political to economic refugees.<sup>154</sup> The contradictions between the CAA and Wet Foot/Dry Foot are directly responsible for the continued upward trend in human smuggling since the US–Cuba Migration Accords.<sup>155</sup> The promise of American prosperity and reuniting with family members is often too enticing to resist.<sup>156</sup>

These contradictions also make prosecuting human smugglers difficult.<sup>157</sup> Though Congress enacted the current smuggling statutes to prevent illegal immigration, the preferential treatment granted by the CAA, particularly through the lens of the Meissner Memorandum, makes proving either mens rea or actus reus difficult at best.<sup>158</sup> Under the common assumption that Cubans are automatically granted immigration status, one cannot knowingly transport Cuban aliens who

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146 Id at 1908.

147 Id.

148 Reynolds, 63 Fla L Rev at 1022 (cited in note 90).

149 Id at 1024.

150 Id.

151 Donald Brown, *Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States*, 33 U Miami Int-Am L Rev 273, 276 (2002).

152 Id.

153 Reynolds, 63 Fla L Rev at 1029 (cited in note 90).

154 Id at 1027, 1038.

155 Id at 1038 quoting Melanie M. Ziegler, *US–Cuban Cooperation: Past, Present, and Future* 142 (2007).

156 Brown, 33 U Miami Int-Am L Rev at 277–78 (cited in note 151).

157 Reynolds, 63 Fla L Rev at 1029–30 (cited in note 90).

158 Id.

have not been granted authorization to enter the country.<sup>159</sup> Similarly, because the inadmissibility ground “does not apply to CAA applicants,”<sup>160</sup> one cannot transport Cubans to an invalid port of entry – the rules do not apply.<sup>161</sup> The CAA and Wet Foot/Dry Foot remain thorns in the side of Congress in its attempts to quell illegal Cuban migration.<sup>162</sup>

### B. *Unequal Treatment Across Classes of Aliens*

The discriminatory nature of the CAA extends beyond the balseros and the wetness of their feet. In its eagerness to put those early Cuban refugees on display as symbols of communism’s failings and the overwhelming draw of democracy,<sup>163</sup> Congress constructed a special place just for Cubans, removing them from the teeming masses of refugees seeking asylum the old-fashioned way. Though Wet Foot/Dry Foot dampened their “special status” somewhat by shoehorning Cubans caught at sea into meeting the same requirements for asylum as any other class of alien, the stark contrast in treatment persists for those who make it to shore.<sup>164</sup> This “special status” becomes painfully obvious when Cubans reach American soil amidst a mixed group of aliens. While Haitians and other illegal immigrants scramble through traffic trying to evade Border Patrol agents, Cubans entering the United States fear no threat of detention or removal.<sup>165</sup> The epitome of this double standard is exemplified by a case in which a Haitian boat carrying 131 Haitian migrants picked up two drowning Cubans five miles off the coast of Miami.<sup>166</sup> Entering port, the Haitians were interned and repatriated, while the Cubans were whisked away to Little Havana by friends and relatives.<sup>167</sup> The only difference between the two groups was their country of origin.

For the estimated 121,000 refugees seeking asylum in the United States in 2014,<sup>168</sup> not having “Cuba” listed as their place of birth drastically decreases their chances of remaining on American soil. For example, approximately 88,400 individuals applied for asylum in the United States in 2013,<sup>169</sup> of which 25,199

159 *United States v Zayas-Morales*, 685 F2d 1272, 1277–78 (11th Cir 1982).

160 Meissner Memorandum (cited in note 104).

161 Reynolds, 63 Fla L Rev at 1029 (cited in note 90).

162 Id at 1038.

163 Barrios, 11 Conn Pub Int L J at 5 (cited in note 16).

164 Id at 8.

165 Alberto J. Perez, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 Nova L Rev 437, 456 (2004).

166 Hughes, 36 Cal W L Rev at 39, quoting a statement of Rep. Johnston at the 102 Cong, 2d Sess at 3 (1992) (cited in note 114).

167 Id.

168 *Asylum Trends 2014: Levels and Trends in Industrialized Countries* (The Office of the United Nations High Commissioner for Refugees, 2015), online at <http://www.unhcr.org/551128679.html> (accessed January 14, 2016).

169 *Asylum Trends 2013: Levels and Trends in Industrialized Countries* (The Office of the United

individuals were granted asylee status.<sup>170</sup> That amounts to a 28.5 percent approval rate for non-Cuban asylum seekers. In contrast, of the nearly 18,000 Cubans who attempted to reach the US in the same year, only 1,300 were interdicted by the USCG.<sup>171</sup> Thus, of the 29,644 applications for adjustment under the CAA, 28,077 of them were approved – 94.7 percent.<sup>172</sup> Though asylum applications are slowly rising,<sup>173</sup> the numbers do not even begin to approach the approval rates enjoyed by the Cubans.

This stark contrast in treatment appears to violate the very essence of equal protection,<sup>174</sup> a constitutional provision extended to aliens, regardless of the legality of their entry.<sup>175</sup> Unfortunately, to attack the CAA on constitutional grounds is to wade into murky waters. As they are wont to do, the Supreme Court has frequently affirmed that “the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government”<sup>176</sup> in order to more quickly adapt to an evolving landscape of foreign relations.<sup>177</sup> Moreover, while the provisions of the Fifth Amendment are “universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality,”<sup>178</sup> the Court reminds us that “Congress regularly makes rules that would be unacceptable if applied to citizens,” and that such disparate treatment is not invidious in and of

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Nations High Commissioner for Refugees, 2014), online at [http://www.unhcr.ch/fileadmin/user\\_upload/dokumente/06\\_service/zahlen\\_und\\_statistik/UNHCR\\_Asylum\\_Levels\\_and\\_Trends2013released.pdf](http://www.unhcr.ch/fileadmin/user_upload/dokumente/06_service/zahlen_und_statistik/UNHCR_Asylum_Levels_and_Trends2013released.pdf).

170 Daniel C. Martin & James E. Yankay, *Refugees and Asylees: 2013*, Department of Homeland Security Annual Flow Report (Department of Homeland Security 2014), online at [http://www.dhs.gov/sites/default/files/publications/ois\\_rfa\\_fr\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2013.pdf).

171 Wilfredo Cancia Isla, *Figures from the Stamped: 134,758 Cubans Arrived by Illegal Means in the US in the last Decade* (Café Fuerte October 17, 2014), online at <http://cafeuerte.com/cuba/18708-cifras-de-la-estampida-134758-cubanos-llegaron-por-vias-ilegales-a-eeuu-en-la-ultima-decada/>.

172 *Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status: 2013* (United States Citizenship and Immigration Services, 2014), online at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/AllForms-Q42013.pdf> (accessed January 14, 2016).

173 Martin & Yankay, *Refugees and Asylees* (cited in note 171).

174 *Buckley v Valeo*, 424 US 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”) (citing *Weinberger v Wiesenfeld*, 420 US 636, 638 n.2 [1975]).

175 *Wong Yang Sung v McGrath*, 339 US 33, 48–51 (1950).

176 *Mathews v Diaz*, 426 US 67, 81 (1976).

177 *Id.* See also *Harisiades v Shaughnessy*, 342 US 580, 588–89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”).

178 *Yick Wo v Hopkins*, 118 US 356, 369 (1886).

itself.<sup>179</sup>

To clear the waters a little, the Mathews Court<sup>180</sup> provided a rational basis test that immigration legislation must pass in order to be sustained.<sup>181</sup> In other words, this requires challenges to a statute's constitutionality to show that the legislation is "a wholly irrational means to achieve [an] end."<sup>182</sup> This is a difficult burden to meet in practice, as the Court is generally reluctant to strike down an existing law so long as Congress gave a reasonable basis for it at the time of its enactment.<sup>183</sup> This has borne out in the courts as organizations have filed suit in hopes of showing that the disparate treatment between Cubans and other migrants is an irrational means to an end.<sup>184</sup> The Court has thus far chosen to grant substantial deference to Congress in these cases, noting that while a particular line drawn by Congress should arguably have been drawn at a different point,<sup>185</sup> "it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences."<sup>186</sup> As stated above, it is almost certain that the courts will continue to defer to Congress, relying on the assumption that "even improvident decisions will eventually be rectified by the democratic process."<sup>187</sup>

### C. Inconsistent in Foreign Policy

It may be argued that Congress has been entirely consistent in its endorsement of the CAA through fifty years of public support and amendments strengthening its place in US immigration policy.<sup>188</sup> However, when viewed in a historical context, a policy consistent with anti-Communist nations quickly became a fish out of water – a statute at odds with the overall body of legislation and foreign

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179 *Mathews*, 426 US at 80.

180 *Mathews v Diaz*, 426 US 67, 81 (1976).

181 *Id* at 82–83. A succinct explanation can be found in *Am. Friends Serv. Comm. v Thornburgh*, 718 F.Supp 820, 821 (1989) ("Congress' decisions in the immigration field are entitled to the utmost deference by the judiciary, and immigration statutes are subject to such a 'narrow' standard of review that the legislature's choices must be sustained unless they are 'wholly irrational.'").

182 Arethra Chakraborti, *Alien Human-Trafficking Victims in the United States: Examining the Constitutionality of the TVPA and INA's Assistance Requirements*, 17 U Pa J L & Soc Change 55, 67 (2014).

183 *Id.* (citing *Nordlinger v Hahn*, 505 US 1, 11 (1992)). See also *Vance v Bradley*, 440 US 93, 97 (1979) ("[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational").

184 *Fed'n for Am. Immigration Reform v Meese*, 643 F.Supp 983 (1986); *Fed'n for Am. Immigration Reform v Reno*, 897 F.Supp 595 (1995).

185 *Fiallo v Bell*, 430 US 787, 798 (1977).

186 *Mathews*, 426 US at 83.

187 *Vance*, 440 US at 97.

188 Barrios, 11 Conn Pub Int L J at 2 (cited in note 16).

policy.<sup>189</sup>

In the wake of the Cuban Revolution in 1959, the United States saw an increase in Cuban emigrants. These initial refugees were fleeing for mostly political reasons, though many were a mix of political and economic refugees. The early Cuban refugees were just the latest in a growing group of “Communist refugees” to flock to the United States to escape socialism.<sup>190</sup> Viewing these refugees as excellent fodder for anti-Communist propaganda, Congress took steps to facilitate their entry.<sup>191</sup> Due to the proximity of the United States to Cuba, the sheer number of Cubans landing on American soil was staggering. To establish some semblance of order, Congress enacted the CAA – a unique piece of legislation designed to address simultaneously the continuing influx of Cubans and those already present in the United States.

The rationale for the preferential treatment in the CAA was legitimate at the time of its enactment. Cubans, like all other immigrants, were required to apply for immigrant visas outside the United States. After the US Consulate in Cuba closed in 1961,<sup>192</sup> Cubans could no longer obtain visas before emigrating, and those already in the United States were required to leave, apply for a visa, and then return as a permanent resident.<sup>193</sup> Congress, viewing this as an undue burden, sought to remedy this by granting special status to Cubans, although this was more a political move than a humanitarian one, when one takes into account a CIA report indicating that most Cuban refugees were seeking economic rather than political relief.<sup>194</sup> Still, taking into account the hardship experienced by the Cuban migrants and the financial burden the United States would undertake in removing them, the CAA easily passes the rational basis test, which only requires a reasonable basis exist at the time of its enactment.<sup>195</sup>

However, with the close of the Cold War and the shift in the last few decades of the Cuban refugee demographic from those fleeing the Castro regime to

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189 *Id.*

190 Matias F. Travieso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 Berkeley J Intl L 234, 238 (1998).

191 The progressive inclusion of Communist refugees can be seen through the various immigration reforms during the Cold War, beginning with a vague mention of “nazi or fascist regimes” in the Displaced Persons Act of 1948. The Immigration and Nationality Act of 1952 includes the first prohibition of aliens affiliated with the Communist Party. This was followed by the Hart-Celler Act of 1965, Pub. L. No. 89-236, which granted immigration status to those fleeing Communist nations or territories. Almost immediately, the CAA followed, granting unprecedented access to Communist refugees from Cuba.

192 Hughes, 36 Cal W L Rev at 52 (cited in note 114).

193 Reynolds, 63 Fla L Rev at 1018–19 (cited in note 90).

194 Hughes, 36 Cal W L Rev at 53 (cited in note 114).

195 *Nordlinger*, 505 US at 11 (“In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker...”).

those simply seeking a better economic situation, the CAA has transformed from just one part of a larger anti-Communist body of legislation to a strange vestige of Cold War policy that has persisted for a quarter century.<sup>196</sup> Indeed, the CAA has been in conflict with the goals of various administrations since the US-Cuba Migration Accords. During the congressional hearings before its initial enactment, there was some concern that the CAA would be too open-ended a piece of legislation, admitting an unlimited number of Cubans into the United States. The law's sponsors treated this less as a concern and more as a necessary side effect of the situation in Cuba.<sup>197</sup> After the balsero crisis that led to the Migration Accords, President Clinton announced a change to this policy, declaring the following:

We simply cannot admit all Cubans who seek to come here. We cannot let people risk their lives on open seas in unseaworthy rafts.... Regularizing Cuban migration also helps our efforts to promote a peaceful transition to democracy on the island. For too long, Castro has used the threats of uncontrolled migration to distract us from this fundamental objective. With the steps I have taken, we are now able to devote ourselves fully to our real, long-term goal.<sup>198</sup>

Twenty years later, that goal has not been achieved, and the stopgap policy in Wet Foot/Dry Foot has frozen Cuban migration in a strange transition where Cuban citizenship confers automatic refugee status to some and not to others, dependent solely on location. President Obama announced in December of 2014 his intentions to normalize relations with Cuba,<sup>199</sup> though the White House has denied any plans to change or repeal the CAA or Wet Foot/Dry Foot, choosing instead to continue a discriminatory policy out of fear that doing otherwise would somehow legitimize the Castro regime.<sup>200</sup>

That being Cuban confers any automatic status is in direct conflict with the Supreme Court's description of equal protection as provided by the Fifth Amendment,<sup>201</sup> and, given that a rational basis no longer exists for a continued preference for Cubans, is arguably in "wholly irrational" territory.<sup>202</sup> Though the Clinton Administration made an effort to restrict Cuban migration, so long as the CAA continues to grant special status to Cubans, illegal immigration will remain a problem,

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196 Travieso-Diaz, 16 Berkeley J Intl L 235, 239 (cited in note 190).

197 *Adjustment of Status for Cuban Refugees: Hearings Before Subcommittee No. 1 of the Committee on the Judiciary House of Representatives*, 89th Cong, 18–19 (1996).

198 William J. Clinton, US President, Remarks to the Cuban-American Community (June 27, 1995).

199 Baker, *US to Restore Full Relations With Cuba* (cited in note 26).

200 Lizette Alvarez, *Law Favoring Cuban Arrivals is Challenged*, New York Times (Feb 2015).

201 *Yick Wo*, 118 US 356, 369 (S Ct 1886).

202 *Mathews*, 426 US at 82–83. US



and the disparate treatment shown to all other refugees will continue to hurt US foreign relations.<sup>203</sup>

## V. A REFUGEE ADJUSTMENT ACT FOR THE FUTURE

President Obama's announcement gives Congress a unique opportunity to address the shortcomings of the CAA while controlling the extent to which Cuban migration approaches the status quo. The major concerns from lawmakers focus on the following: criminals abusing their special status to traffic money between the countries; the decline of political refugees and the rise of regular Cubans taking advantage of the refugee status afforded to them; and the double standard that exists so long as this "special status" continues.<sup>204</sup>

A simple solution to these issues does exist within the executive branch. While only Congress can repeal or amend the CAA, its language provides the authorization for the president, as delegated to the Attorney General, to simply stop adjusting Cubans to permanent resident status.<sup>205</sup> This does not assuage Congress' concerns, however, and would only further polarize the issue. At any rate, the White House has made no indication that it intends to take this course of action.<sup>206</sup>

President Obama has, however, indicated a strong desire to reform US immigration policy.<sup>207</sup> He should take this opportunity to work with Congress to form the refugee and asylum program by expanding the CAA to cover all refugees, creating more opportunities for legitimate refugees while limiting the abuses of the current system. Such changes would bring the current immigration system closer to President Obama's image of the Statue of Liberty "shining as a beacon to the world,"<sup>208</sup> while addressing lawmakers' very real concerns.<sup>209</sup>

### A. *The Refugee Act of 2016*

Using the text of the CAA as a foundation, one can make various changes to expand its scope while shrinking its potential for abuse. The proposed text would look something like this:

Sec. 1. That, notwithstanding the provisions of section 245(c) of the Immi-

203 Reynolds, 63 Fla L Rev at 1013, 1017 (cited in note 90).

204 Alvarez, *Law Favoring Cuban Arrivals is Challenged* (cited in note 200).

205 Barrios, 11 Conn Pub Int L J at 28–29 (cited in note 16).

206 Alvarez, *Law Favoring Cuban Arrivals is Challenged* (cited in note 200).

207 Barack H. Obama, US President, Weekly Presidential Address (Nov 21, 2014).

208 Id. ("We didn't raise the Statue of Liberty with her back to the world, we did it with her light shining as a beacon to the world").

209 Alvarez, *Law Favoring Cuban Arrivals is Challenged* (cited in note 200).

gration and Nationality Act (subsec. (c) of this section), the status of any [alien who is a native or citizen of Cuba] *refugee, as defined by section 101(a)(42)(A) and (B) of the Immigration and Nationality Act*, and who has been inspected and admitted or paroled into the United States subsequent to [January 1, 1959] *January 1, 2015* and has been physically present in the United States for one year, may be [adjusted] *granted asylum* by the Attorney General, in his discretion and under such regulations as he may prescribe, [to that of an alien lawfully admitted for permanent residence] if the [alien] *refugee* makes such an application [for such adjustment], and the [alien] *refugee* is eligible [to receive an immigrant visa] *for asylum* and is admissible to the United States for permanent residence.... The provisions of this Act shall be applicable to any spouse and child of any [alien] refugee described in this subsection, regardless of their citizenship and place of birth....

*Sec. 2. In the case of any alien who arrives at a port of entry seeking asylum or entry into the United States subsequent to the effective date of this Act, the Attorney General may admit the alien into the United States if the alien is admissible and has a reasonable likelihood of meeting the definition of a refugee as defined by section 101(a)(42)(A) and (B) of the Immigration and Nationality Act. The Attorney General shall create a record of the refugee's admission and the earliest date an application for asylum under section 1 of this Act may be made. The refugee may be granted asylum by the Attorney General under section 1 of this Act after maintaining a physical presence in the United States for a minimum of one year.*<sup>210</sup>

The Refugee Act of 2016 (the Act) addresses many of the concerns stated above. First and foremost, these changes eliminate the special status granted to Cubans by the CAA and subject them to the same requirements as any other claiming refugee status. It therefore indirectly obsolesces the Wet Foot/Dry Foot policy. Secondly, the Act streamlines the asylum process and provides a greater number of refugees the chance to file a solid application for asylum. Thirdly, the Act removes many of the incentives for illegal immigration and prevents abuse of the asylum system and the CAA.

To judge a piece of potential public policy or legislation, we can look to four major areas affected by its enactment: (1) how it will shape society, (2) its administrability, (3) its fairness, and (4) its execution.<sup>211</sup> If the proposed legislation

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210 8 USC. § 1255 (emphasis added).

211 See Richard M. Fischl and Jeremy Paul, *Getting to Maybe: How to Excel on Law School Exams* 156-165 (1999). While aimed at policy questions on law school exams, the section breaks down a three-prong test for effectively evaluating both potential and existing policy. The fourth prong, execution, was added by the author here to address the difficulties associated with policy

has a net positive effect in these four areas, it is likely worth serious consideration.<sup>212</sup>

### B. *Shaping Society*

When looking at the way a policy will reshape the legislative or political landscape, we must look at what each side of the issue will gain or lose. As with the other areas affected by policy, a simple cost-benefit analysis can be used to determine a policy's worth.<sup>213</sup> In the present situation, the question becomes one of how a more inclusive asylum policy will affect immigration. The three major parties involved in this issue are the Cubans, the rest of the world's refugees, and the United States government.

The people that most obviously benefit from the proposed changes are those non-Cuban refugees seeking asylum. Under the current system, applying for asylum is a difficult, adversarial process with low odds of success.<sup>214</sup> The proposed changes eliminate the one-year bar to asylum, which is currently responsible for a significant number of denials.<sup>215</sup> Also eliminated is the need to file an asylum application on arrival at a port of entry. Because there is currently no policy allowing refugees temporary sanctuary while they prepare their cases for asylum, many refugees are immediately put on the defensive and brought to interrogations and hearings with no preparation, no right to representation, and often poor translation services.<sup>216</sup> Defensive asylum claims make up less than 40 percent of approved applicants,<sup>217</sup> and the number of successful defensive applications made on arrival is a fraction of that number.<sup>218</sup> Offering applicants a grace period to prepare their cases allows them to seek representation or assistance and bolster their chances at approval.<sup>219</sup> More abstractly, refugees gain the assurance that their image of American immigration is consistent with its realities. The fear of removal and deportation leads many refugees to arrive in the United States either under false pretenses or by illegal means.<sup>220</sup> The proposed changes would obviate much of the illegal immigration of refugees by greatly increasing the odds of approval.

The refugee population gains much while losing nothing; however, things aren't quite as simple for the other two groups. The United States government benefits some, but suffers some cost as well. Overall, though, it appears to be a net

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change.

212 *Id.*

213 *Id.* at 156.

214 *Id.* at Part II.

215 Schrag, 52 *Wm & Mary L Rev* at 752 (cited in note 63).

216 *Id.* at 664.

217 Department of Homeland Security, Office of Immigration Statistics, *Annual Flow Report: Refugees and Asylees: 2013* (2014).

218 Schrag, 52 *Wm & Mary L Rev* at 660 (cited in note 63).

219 *Id.* at 724.

220 *Id.* at 683–84, 707.

gain. Opening the doors wider to refugees disincentivizes overall illegal immigration. Refugees have little reason to migrate illegally when parole is all but guaranteed. While migrants who are otherwise inadmissible due to criminal activity may still have incentive,<sup>221</sup> the overall level of illegal immigration will decline if otherwise admissible refugees are given reasons to migrate legally.

Processing the more than 100,000 asylum seekers for parole and creating records for each of them would require a significant increase in man-hours and spending. This would be at least partially offset, however, by a simultaneous reduction in spending in both areas due to decreases in both illegal immigration and refugees remaining unlawfully in the United States, which ultimately means a decrease in apprehension, detention, supervising, and adjudicating/removing refugees – a non-trivial portion of the \$3.3 billion dollars earmarked by DHS to “enforce and administer our immigration laws.”<sup>222</sup> Additionally, maintaining records on refugees admitted under the new law allows for accountability of a significant number of aliens entering the United States, easing the process of locating and/or apprehending those found to be precluded from asylum due to past or current criminal activity or one of the other bars to asylum that may have been concealed on entry.<sup>223</sup> While there may be an initial increase in spending and man-hours, the proposed changes offer a way to lower both while furthering the President Obama’s image of American immigration.<sup>224</sup>

Arguably, Cubans suffer the most loss from the proposed changes. Currently, they enjoy unparalleled access to the United States, fearing neither detention nor deportation.<sup>225</sup> The only legitimate threat is the USCG and its enforcement of Wet Foot/Dry Foot, but even if interdicted, illegal Cuban migrants may still avail themselves of the defensive asylum process.<sup>226</sup> It is telling that Cubans’ last-ditch effort is par for the course for 20 percent of all other refugees.<sup>227</sup>

The biggest loss for Cuban migrants would be the removal of their current exemption from the inadmissibility ground vis-à-vis entering at a proper location.<sup>228</sup> Though Cubans may currently enter at a port of entry, the difficulty many

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221 The IIRA expanded the list of prior criminal activity that bars an applicant from asylum. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat 3009.

222 The FY2016 budget allocates \$3.3 billion to “provide safe, secure, and humane detention and removal of removable individuals. . . .” This includes housing and supervising approximately 87,000 individuals daily. Additionally, the budget includes funds for the salaries of more than 40,000 Border Patrol Agents and Border Protection Officers, the continued use of the USCG in maritime interdiction, and the detention and supervision of over 100,000 unaccompanied children. DHS, *Budget-in-Brief: Fiscal Year 2016 4–5* (2015).

223 *Id.*

224 Obama, Weekly Presidential Address (cited in 207).

225 Arteaga, 3 Fla Int U L Rev at 510 (cited in 15).

226 Hughes, 36 Cal W L Rev at 40 (cited in note 114).

227 Schrag, 52 Wm & Mary L Rev at 660 (cited in note 63).

228 Meissner Memorandum (cited in note 104).

experience obtaining permission to leave Cuba coupled with the protections codified in the CAA naturally lead many to turn to illegal means.<sup>229</sup> The arduous and dangerous nature of these journeys is often offset by the promise of setting foot on American soil and the call from family members not seen, sometimes in decades – a promise worth thousands of dollars to those who choose to migrate extra-legally each year.<sup>230</sup> Removing this exemption would make illegal migration significantly less attractive, as it would place Cubans on equal footing with any other migrants who choose to enter the United States at a place other than a port of entry. While this would doubtlessly be met with indignation, disincentivizing dangerous journeys is good both for those Cubans who otherwise would be putting their lives, and possibly the lives of their children, in danger, and for US relations with Cuba, and by extension, our image with the rest of the world. Given that Wet Foot/Dry Foot would obsolesce under the proposed Act, and that the US Consulate has recently reopened in Havana, there is potential for legal migration – including for those leaving with the intent to seek asylum – to become easier and more common in the near future.<sup>231</sup>

### C. *Administrability*

There are two parts to assessing the administrability of legislation, particularly proposed legislation: the enforceability and the ease of implementation.<sup>232</sup> The former relates to those to whom the law applies, while the latter relates to those who apply the law.

As to the former, there are few potential issues. Illegal migration is dangerous, often expensive, and carries with it the significant possibility of detention and removal.<sup>233</sup> By making parole more than likely for refugees, the incentivized option becomes legal migration. For Cubans, who are used to enjoying automatic admission and parole, not much will change on that score for the legitimate Cuban refugees. The elimination of automatic adjustment, however, would deter a number of Cubans from migrating at all, particularly those seeking either to merely improve their economic situation<sup>234</sup> or to take advantage of United States citizenship to engage in criminal activity.<sup>235</sup>

In regards to the latter, there are several areas to address. The largest burden will fall on Asylum Officers who must process and create records for each

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229 Reynolds, 63 Fla L Rev at 1024 (cited in note 90).

230 Weissman, 88 NC L Rev at 1916 (cited in note 120).

231 Azam Ahmed and Julie Hirschfeld Davis, *US and Cuba Reopen Long Closed Embassies*, New York Times (July 2015).

232 Fischl and Paul, *How to Excel on Law School Exams* at 156–165 (cited in note 211).

233 Arteaga, 3 Fla Intl U L Rev at 529 (cited in 15).

234 Reynolds, 63 Fla L Rev at 1035 (cited in note 90).

235 Alvarez, *Law Favoring Cuban Arrivals is Challenged* (cited in note 200).

refugee in addition to processing the asylum applications filed by refugees already present in the United States. Wait times at ports of entry and case backlogs would almost certainly increase initially; however, funds currently allocated to increase the number of Border Patrol Agents could be applied to expanding the number of Asylum Officers. Additionally, funds currently allocated to the detention and supervision of illegal refugees could also be applied to expanding the number of Asylum Officers.<sup>236</sup> The benefit of having information on significantly more aliens present in the United States and lowering the number of aliens entering illegally grossly outweighs the increase in man-hours, training, and funding necessary to meet the requirements under the proposed law.

One major facet of the asylum process that the Act addressed is the determination of whether an alien meets the definition of refugee under the INA.<sup>237</sup> Currently, this requires a subjective determination of the credibility of the applicant's testimony, whether the applicant is unable or unwilling to return to the country of origin, and whether nexus has been established, such as whether or not the motivation behind the persecution is "on account of" one of the five protected grounds.<sup>238</sup> This determination is made either based on an affirmative application or, in the case of a defensive asylum claim, takes the form of a hearing in which the applicant may produce evidence and witnesses to support her claim. The latter is often the result of a refugee arriving in the United States without proper entry documents and being forced on the defensive with no preparation.<sup>239</sup>

The proposed law eases the burden placed on Asylum Officers in relation to processing defensive asylum claims by rendering them unnecessary for refugees arriving at ports of entry without proper entry documentation. Under the new law, all refugees who seek entry with the intention of applying for asylum may be granted temporary parole so long as they are otherwise admissible and have a "reasonable likelihood" of meeting the definition of a refugee as defined by the INA.<sup>240</sup> This part of the Act streamlines a non-trivial percentage of initial contacts, as the Asylum Officer would need only conduct a brief interview in which she would determine (1) whether the applicant is credible, and (2) whether the applicant is likely to succeed in applying for asylum. Determining the likelihood of success does not require the Asylum Officer to adjudicate the matter; rather, it requires only that she determine that the alien has more than a 50 percent chance at success.

#### D. Fairness

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236 See DHS (cited in note 222).

237 See Refugee Act of 2016, Part V. See also INA § 101(a)(42)(A).

238 US Citizenship and Immigration Services, Asylum Division, *Asylum Officer Basic Training Course: Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution* (2009).

239 Schrag, 52 Wm & Mary L Rev at 660 (cited in note 63).

240 See Refugee Act of 2016, Part V.

When the concept of “fairness” is mentioned with regard to the law, it is often conflated with the concept of “justice.”<sup>241</sup> While fairness can be found when persons with no authority over one another engage in a practice deemed to be free from conferring advantage or disadvantage over anything but the entirety of the group,<sup>242</sup> justice permits inequality so long as the practice resulting in the inequality is beneficial for all parties involved, not simply a majority.<sup>243</sup> So, when we address a law or policy’s fairness, what is really at issue is not whether it confers the same treatment on everyone, but whether the inequalities in treatment serve a purpose mutually beneficial to all parties involved.

Presently there is a demonstrated inequality of treatment across classes of aliens.<sup>244</sup> Though the Supreme Court has determined this to be within the rights of Congress and not in contravention with the Constitution unless “wholly irrational,”<sup>245</sup> the scrutiny applied in judging a law’s fairness is less narrow.<sup>246</sup> While Congress need only demonstrate a reasonable intent at the time the law was enacted to satisfy the reasonable basis test,<sup>247</sup> a law can find itself on the other side of fairness at any time. And indeed, the march of time often reveals the inequalities in the law.<sup>248</sup>

The CAA easily meets this reasonable basis test, but as time reveals it to be a failed Cold War policy, this reasonable basis no longer exists to justify the inequalities resulting from its provisions.<sup>249</sup> The Act, with its proposed changes, removes the inequalities inherent to the CAA and Wet Foot/Dry Foot, applying the same rules and standards to all who seek asylum, regardless of nationality and class. This creates a pleasant harmony between equal protection as defined by the Yick Wo Court<sup>250</sup> and justice as fairness as described by Rawls.<sup>251</sup>

### E. Execution

The most difficult aspect of implementing the Act – or any new law, for that matter – would be moving it through Congress. With the current division on immigration reform and many lawmakers intentionally opposing legislation com-

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241 John Rawls, *Justice as Fairness*, 67 *Phil Rev* at 164 (1958).

242 *Id.* at 178.

243 *Id.* at 165–67.

244 See Part IV(B).

245 *Am. Friends Serv. Comm.*, 718 F.Supp 820, 821 (1989)

246 Rawls, 67 *Phil Rev* at 167 (cited in note 241).

247 Chakraborti, 17 *U Pa J L & Soc Change* 56, 67 (cited in note 182).

248 See *Obergefell v Hodges*, 576 US \_\_\_, 1050 (S Ct 2015) (“The nature of injustice is that we may not always see it in our time”).

249 Weissman, 88 *NC L Rev* at 1883 (cited in note 120).

250 *Yick Wo v Hopkins*, 118 US 356, 369 (S Ct 1886).

251 Rawls, 67 *Phil Rev* at 167 (cited in note 241).

ing from the White House, passing any law with less restrictive provisions would likely be difficult at best.<sup>252</sup> However, difficult does not necessarily mean impossible. The current political climate, in light of America's warming relationship with Cuba, provides President Obama and his successor an excellent opportunity to propose the changes described herein.

There are aspects of the proposed law that would appeal to both sides of the aisle, and those who may initially find themselves at odds with certain provisions would also find mitigating factors that decrease the unattractiveness of those provisions to which they may object. It is unrealistic to think such drastic changes to the current immigration policies would be readily accepted, especially given the reactions in Congress to the President's steps toward normalization with Cuba.<sup>253</sup> As with any proposed policy change, however, persistence pays. Negotiation tactics in D.C. are beyond the scope of this article, but suffice to say, they do exist.<sup>254</sup>

## VI. CONCLUSION

President Obama's steps toward normalizing relations with Cuba pushed the CAA and Wet Foot/Dry Foot policy into the spotlight. Calls to repeal both have echoed across the Florida Straits, causing an increase in Cuban migration despite assurance from the White House that no plans exist to change the current policy.<sup>255</sup> Those demanding the CAA's termination cite its inherent inequalities and preferential treatment as irrational and unfair.<sup>256</sup> But the image of the United States as a beacon of open immigration does not coalesce with current immigration policies, especially with regard to refugees. The CAA should not be anathema to those seeking equal treatment, but a model for how all refugees should be treated.

Though initially designed to collapse the Cuban economy from within,<sup>257</sup> the CAA inadvertently codified a near-ideal policy on refugees. With a few changes, Congress could have a system in place that is mutually beneficial to the United States government and those seeking asylum. To sunset the CAA is to close the door on an opportunity to reclaim the image portrayed by the Statue of Liberty and the words engraved upon her.<sup>258</sup> It is an image of which we have thus far fallen

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252 Robert P. Jones, *Even Republicans Love Obama's Immigration Policies*, *The Atlantic* (Feb 12, 2015).

253 Parker and Shear, *Battle Over Immigration* (cited in note 29).

254 In the absence of a Congress willing to come to the table, the threat of simply issuing an Executive Order to stop granting adjustment under the CAA and to conform USCIS policy regarding Cubans to all other aliens could prove persuasive.

255 Nick Miroff, *Fear of Immigration Policy Change Triggers New Wave of Cuban Migrants*, *The Washington Post* (Jan 2015).

256 Arteaga, 3 Fla Intl U L Rev (cited in note 15). See also Barrios, 11 Conn Pub Intl L J (cited in note 16).

257 Reynolds, 63 Fla L Rev at 1032 (cited in note 90).

258 Lazarus, *The New Colossus* (cited in note 1).



short. Every person born in the United States is the ancestor of a migrant, many of them refugees, to this country. We are here because the doors were open. It's time to open them again.

<b>ARTICLE</b>
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## **WE HAVE A DUTY TO RESPECT A PERSON'S DESIRES IN REGARD TO THEIR DIGNITY**

Cat McMullen<sup>†</sup>

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### INTRODUCTION<sup>1</sup>

Euthanasia, an ancient Greek term that means “peaceful death,” covers a spectrum of actions that end a person’s life. On one end of the spectrum is active euthanasia. In cases of active euthanasia in the context of the medical field, an action is taken to end the life of a patient. This is distinct from passive euthanasia, where extraordinary means of extending the patient’s life are discontinued in order to allow the patient to die. This article will focus on Physician-Assisted Suicide (PAS), a form of assisted suicide performed by a physician, excluding relatives, family members or any other individuals. First, the viability of a duty requiring PAS under Kantian ethics will be examined; second, its preceding developments and the ethical arguments that surround it will be examined; third, Lord Falconer’s Assisted Dying Bill<sup>2</sup> will be assessed in order to see how it has responded to criticisms of the legalization of such a duty.

Due to its controversial nature, suicide is approached differently across Europe. The Netherlands and Belgium have legalized assisted suicide, while the United Kingdom criminalized it under the Suicide Act 1961.<sup>3</sup> The debate has gained momentum in recent years due to the publicity of three cases in particular that were appealed to the European Court of Human Rights: *Pretty v United Kingdom*,<sup>4</sup> *R*

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The law stated was correct as on 21st February 2015. Since the time of writing this paper, the Assisted Dying Bill (No. 2) 2015-16 as presented to Parliament on 24th June 2015, where it passed through the First Reading with no contention. However, the Bill was defeated by a majority of 330 voting against, at the Second Reading on 11th September 2015.

Although the defeat of the Bill for a second time will make any changes to the law much more difficult in the future, it is not impossible. The philosophical theories and reasoning, upon which this article was based, still remain valid for a debate on this topic, and can still be applied to create a viable justification for assisted dying. The objections that once again defeated this Bill are those that have appeared before, and this article has demonstrated that those reasons can be logically and successfully defeated by applying philosophical reasoning from a Kantian perspective.

1 Law stated is as at 21 Feb 2015.

2 Assisted Dying Bill, HL Bill 6 (HL 2014–15).

3 The Suicide Act 1961, 9 & 10 Eliz 2, ch 60 (1961).

4 *Pretty v United Kingdom*, 35 EHRR 1 (ECtHR 2002).

(*Purdy*) v *Director of Public Prosecutions (DPP)*,<sup>5</sup> and *R (on the application of Nicklinson) v Ministry of Justice*.<sup>6</sup> These cases, all three of which were appealed to the Strasbourg Court, involved the assistance of relatives in the applicants' suicides, which, although not specifically PAS cases, are still relevant. The issues of PAS and enlisting the help of relatives in suicide are deeply intertwined. If PAS were legalized, it would eliminate the need for relatives to participate in assisted suicide, and would aid patients who are currently forced to travel abroad to end their lives. Currently the issue of PAS falls within the United Kingdom's margin of appreciation.<sup>7</sup> The courts have ruled that any change to the law must come from Parliament, so this article will look at the present and prior attempts to introduce bills into Parliament.

As with any life-or-death statute, the moral arguments underlying PAS are essential to its analysis. This dissertation seeks to determine the compatibility of a duty under Kantian ethics with the legalization of PAS using Kant's notion of the 'inherent value' of human beings as the basis for such a duty.<sup>8</sup> Kant views rationality as the characteristic that gives us value and thus the capacity for autonomy, and the right to choose how and when to die. Traditionally, the sanctity of life has been a paramount concern, both of the courts and religious groups. In recent years, however, ethical principles such as autonomy and human rights have risen in importance, perhaps due to the inception of the Human Rights Act (HRA).<sup>9</sup> The sanctity of life is now being balanced with regard to the 'best interests' of the patient.<sup>10</sup> Currently, there are ethical discrepancies in the law regarding end of life treatment: in particular, the contrast between the legality of both suicide and the refusal of life-sustaining treatment, and the illegality of Physician-Assisted Suicide. Ethicist James Rachels believes that active euthanasia is no worse than passive euthanasia, which is legal in the United Kingdom, as he regards the moral difference between the two as negligible.<sup>11</sup> Discrepancies such as these fuel the argument for autonomy and respect for dignity. Examining an ethical duty with respect to an individual's dignity, we can evaluate compatibility with a legal duty requiring Physician-Assisted Suicide and the likelihood of its successful implementation.

## CHAPTER I: IS A DUTY REQUIRING PHYSICIAN-ASSISTED SUICIDE VIALE UNDER KANTIAN ETHICAL THEORY?

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5 *R (on the application of Purdy) v Director of Public Prosecutions*, 45, 1 (UKHL 2009).

6 *R (on the application of Nicklinson and another) v Ministry of Justice* 38, 3 (UKSC 2014).

7 *Haas v Switzerland*, 53 EHRR 33 (ECtHR 2011).

8 Immanuel Kant, *Groundwork for the Metaphysics of Morals* 393–94 (Yale 2002) (A. Wood, ed and trans).

9 Human Rights Act 1998, ch 42 (1998).

10 *Airedale NHS Trust v Bland*, 1 All ER 821, AC 789 (HL 1993).

11 See James Rachels, *Active and Passive Euthanasia*, 292 *New Eng J Med* 78 (1975).

## I. IS PHYSICIAN-ASSISTED SUICIDE PROHIBITED?

This chapter looks at deontological ethics of Physician-Assisted Suicide and the opposition to the potential imposition of such a duty requiring PAS by law. For deontologists, morality lies in adherence to the rules set out by the theory: value is placed on the action or duty performed, rather than its consequences. This can sometimes mean that by following a moral rule, the consequences can be more harmful than if the rule had not been followed. Kant is widely regarded as the most prominent figure in the field of duty ethics; his book, *Groundwork for the Metaphysics of Morals*,<sup>12</sup> sets out the three formulations of his categorical imperative, which outline what constitutes a duty. These are the Formula of Universal Law,<sup>13</sup> the Formula of Humanity as End in Itself,<sup>14</sup> and the Formula of the Realm of Ends.<sup>15</sup> His subsequent work, *The Metaphysics of Morals*,<sup>16</sup> deals with the application of these maxims. The principles set out in his works will be examined in terms of their relevance to suicide and assisted suicide.

## II. KANT

Kant's Categorical Imperative forms the basis of all duties. The first formulation of the Categorical Imperative states "I ought never to conduct myself except so *that I could also will that my maxim become universal law*."<sup>17</sup> For this reason, all rules of action must apply to everyone and everything without exception. Kant, despite having created a maxim for suicide, later rejects it since it contradicts moral law as termed by his categorical imperative. Kant rejects a maxim for suicide because "a nature whose law it would be to destroy life through the same feeling whose vocation it is to impel the furtherance of life would contradict itself and thus, could not subsist as nature."<sup>18</sup> Therefore, Kant's theory deems suicide and thus physician-assisted suicide as morally permissible. PAS could also be viewed as violating another of Kant's ultimate universal maxims: that we must not treat persons as a means to an end, but as an end in themselves.<sup>19</sup> Thus, Kant would argue that it is *not* morally permissible to use doctors to achieve death. However, elements of Kant's reasoning have been found flawed by his critics, and it can and will be demonstrated that suicide, and PAS, in particular, is not morally impermis-

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12 Kant, *Groundwork* at 420 (cited in note 8).

13 *Id* at 421.

14 *Id* at 429.

15 *Id* at 439.

16 Immanuel Kant, *The Metaphysics of Morals* (Cambridge 1996) (M. Gregor, ed and trans).

17 Kant, *Groundwork* at 402 (cited in note 8).

18 *Id* at 422.

19 *Id* at 429–30.

sible by Kant's theory.

Kant believes that suicide contradicts the principle of 'self-love.'<sup>20</sup> Iain Brassington notes that self-love can either motivate one to preserve life, which Kant references in his maxim on suicide,<sup>21</sup> or motivate one to escape from the pain or evil that makes the continuance of life unbearable.<sup>22</sup> In the case of suicide and assisted suicide, self-love will motivate the latter. If the two are completely distinct from each other, there is no contradiction. Brassington argues that since there is no contradiction, the maxim can be universalized; thus, suicide would be consistent with Kant's theory. Furthermore, "it becomes unclear why we should worry too much about enlisting someone else's help as a step towards suicide."<sup>23</sup>

Before addressing the duty that endows physicians with an active role in suicide, we will address a second argument against Kant's reasoning. Fundamental to Kant's ideas on duty and suicide is Kant's definition of 'personhood,' the quality that makes us unique as human beings. He believes that what defines human beings is their rationality, and this gives us our intrinsic value.<sup>24</sup> Thus, according to Kant, when a person commits suicide, they are destroying their personhood, or rationality; that which gives us value. However, it is strange that Kant draws no distinction between the physical body and our rationality, which is a characteristic of the mind.

Michael Cholbi<sup>25</sup> explores the arguments of Dennis Cooley<sup>26</sup> and Robert Sharp,<sup>27</sup> two recent academics who analyze Kant. They state that Kant's maxim on suicide can be read in a way that condones non-voluntary euthanasia for those with dementia or the onset of dementia. These theories relate to the loss of rationality that comes with the illness, and thus the loss of what makes us 'persons.' They argue that once we have lost our rationality, it is not immoral to commit non-voluntary euthanasia. We have no obligation towards dementia patients and they no longer have any obligations towards themselves, as their lack of rationality classes them as "non-person[s]."<sup>28</sup> Cholbi rightly disagrees with these arguments on the basis that there cannot be a moral duty to kill dementia patients purely because

20 Kant, *Metaphysics* at 7 (cited in note 16).

21 Kant, *Groundwork* at 422 (cited in note 8).

22 Iain Brassington, *Killing People: What Kant Could Have Said About Suicide and Euthanasia but Did Not*, 32 *J Med Ethics* 571, 572 (2006).

23 *Id.* at 571.

24 Kant, *Groundwork* at 393–94, 428 (cited in note 8).

25 See Michael Cholbi, *Kant on Euthanasia and the Duty to Die: Clearing the Air*, 41 *J Med Ethics* 607 (2014).

26 See Dennis Cooley, *A Kantian Moral Duty for the Soon-To-Be Demented to Commit Suicide*, 7 *Am J Bioethics* 37 (2007).

27 See Robert Sharp, *The Dangers of Euthanasia and Dementia: How Kantian Thinking Might be Used to Support Non-Voluntary Euthanasia in Cases of Extreme Dementia*, 26 *Bioethics* 231 (2012).

28 Cholbi, 41 *J Med Ethics* at 610 (cited in note 25).

they have lost their rationality.<sup>29</sup> While Cooley's arguments utilize the Kantian notion of rationality, Cholbi points out that when Cooley recognizes that dementia robs the sufferer of the characteristics that confer the Kantian obligation not to commit suicide, he "conflates two distinct aspects of agency or dignity."<sup>30</sup> The loss of dignity, which comes with the loss of agency, does not create an obligation that we commit suicide in order to spare ourselves of our own dignity, or upon others to euthanize dementia patients for the same reason. In line with Kant's definition, the use of 'agency' here is synonymous with 'rationality.' 'Dignity' in this context is meant as living in a 'dignified' way, which is similar to the courts' use of the word in *Bland*,<sup>31</sup> however not in line with Kant's use of the word. In *Bland*,<sup>32</sup> as in Cooley's definition, the loss of dignity is seen as demeaning. Cooley's is not a correct reading of Kantian ethics as he interprets it to suggest that Kant imposes a duty to commit suicide upon "the soon-to-be demented"<sup>33</sup> on the grounds that this will preserve their dignity or self-respect. While the loss of dignity is a highly relevant consideration for those who request PAS, Kant's conception of 'dignity' refers to one different from Cooley's. Kant's conception instead refers to the lack of rationality and autonomous reasoning rather than living in a 'dignified' way.

To conclude the analysis of Kant's moral views on assisted suicide, a third criticism of Kant must be introduced. Kant states that humans should never be treated as a means to an end, but as an end in themselves.<sup>34</sup> Again, Kant views this stipulation as a ground that would render assisted suicide morally wrong. But instead of looking at PAS as the patient demanding an action of the doctor and thus using the physician as a means to the end of death, Kant's objection on this ground can be avoided by looking at PAS as the doctor's duty towards the patient. In this way, it is not the patient using the doctor as a means to an end, but rather a duty placed specifically on the doctor. This duty could take two forms: a positive duty to kill all patients requesting PAS, or a duty to respect the patients' right to choose when and how to die. The duty that we are concerned with the second formulation, which arises from the patient's right to have their dignity respected by others who are bound by Kant's universal law under the first formulation of his categorical imperative.<sup>35</sup> Exactly what is meant by dignity will be examined in more detail in the next section. Although Kant's is regarded as one of the most prominent theories of deontology, his opponents highlight flaws in his theory in relation to the topics of suicide and assisted suicide. It is useful to critique Kant's idea of morality to dissolve some of the arguments against PAS; however, Kant's focus on rationality

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29 Id at 607-608.

30 Id at 610.

31 *Bland*, 1 All ER 821 at 826.

32 Id.

33 Cholbi, 41 J Med Ethics at 608 (cited in note 25).

34 Kant, *Groundwork* at 429 (cited in note 8).

35 Id at 421.

as a defining human characteristic is essential to the definition of dignity.

### C. IS THERE A DUTY REQUIRING PHYSICIAN-ASSISTED SUICIDE?

Once it has been established that Kant's theory permits a duty requiring PAS on ethical grounds, it is important to clearly define its content. This article proposes that we have a duty to respect a person's dignity in relation to a request for Physician-Assisted Suicide. This duty arises from the patient's right to self-determination, which is derived from their rationality, the characteristic that gives us 'intrinsic value,' and for which Kant's theory requires respect. This section will examine what is meant by 'dignity' and its close relation to self-determination. I must also address the courts' conception of the word 'dignity' in cases such as *Nicklinson*,<sup>36</sup> which demonstrate a different view from that of this article.

The common balance that the courts have to strike, in cases involving end of life treatment and ethics, is between the sanctity of life and the right to a degree of autonomy or self-determination. Self-determination ranks highly amongst the courts' concerns in medical law and is the most significant argument in favour of the legalization of PAS. It has been demonstrated that the sanctity of life is not regarded as an absolute rule to the same extent as it has been in the past; for example, cases such as *Re A*<sup>37</sup> gave priority to the "best interests" of the healthier twin when considering a dangerous surgical separation of conjoined twins.<sup>38</sup> It is wrong to say that the importance of the sanctity of life has diminished, but it is perhaps fair to say that with the inception of the European Convention on Human Rights (ECHR) and the HRA,<sup>39</sup> human rights have become increasingly prominent in recent decades. However, this article is not taking a rights-based approach to PAS; instead, it examines the relationship that rights have to our dignity, and in turn to the doctor's duty towards his patient requesting PAS. As stated above, the courts do refer to dignity in the judgments of cases such as *Nicklinson*;<sup>40</sup> however, they view it differently than this article does. Self-autonomy and dignity are discussed as separate arguments instead of the former constituting the latter. In accordance with Kant's ethics, autonomy is a facet of rationality, which gives us our inherent value and dignity.<sup>41</sup> Instead of defining it in this way, the courts use dignity to describe what we view as an 'undignified' way of living. This particular conception was used in *Pretty v United Kingdom*, where the fate that the patient hopes to escape is

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36 *Nicklinson*, UKSC 38 at 200.

37 *In Re A (Children) (Conjoined Twins: Surgical Separation)*, 3 FCR 577 (AC 2001).

38 *Id* at 246.

39 European Convention of Human Rights, ETS 5 (1950) (ECHR); Human Rights Act 1998, ch 42 (1998).

40 *Nicklinson*, UKSC 38 at 378.

41 Kant, *Groundwork* at 393–94, 428 (cited in note 8).

“endur[ing] terrible suffering and indignity.”<sup>42</sup> Rather than a Kantian conception of dignity, a reduced state of being that would be considered ‘embarrassing’ is applied here. *Nicklinson*, too, associates dignity with words such as “indignity”<sup>43</sup> and “demeaning,”<sup>44</sup> which demonstrate its different conception from that of Kant’s. However, the Supreme Court in *Nicklinson* develops the idea of dignity as intrinsic value further than previous cases, showing that this is coming under the courts’ consideration.<sup>45</sup> It is important to recognize the distinction between ‘dignity’ and ‘indignity’ as used by the courts, as it is significant for defining the conception of dignity in this article.

Dignity is defined in this article as that which gives us, as human beings, intrinsic value,<sup>46</sup> and so it is this characteristic that needs to be discussed. Kant’s notion of rationality is key to the concept of dignity. It is rationality that enables us to think for ourselves and gives us free will, defining us as human beings and justifying our right to self-determination. In the case of PAS, our capacity to make rational choices is the point at which our rationality matters. Matti Häyry argues that Kant fails to unite the two central concepts of the autonomy of the individual and dignity as what gives us value because “his emphasis on the absolute inner worth of our collective humanity made it impossible for him to embrace fully the personal self-determination of individuals, as it is usually understood in today’s liberal thinking.”<sup>47</sup> Häyry focuses on Kant’s distinction of the terms ‘man’ and ‘humanity’ to distinguish between an empirical ‘man’ and “humanity in general” which are respectively our ‘noumenal’ and rational parts.<sup>48</sup> While autonomy and dignity are connected in the ‘noumenal’ part, we do not have to respect the choices that our empirical bodies make, which are based on “individual concerns”<sup>49</sup> or compulsions to act morally, and thus means that there is a lack complete self-governance. Häyry cites the example of suicide to demonstrate the incompatibility of these empirical and ‘noumenal’ choices. However, using the reasoning of the categorical imperative, this article has already shown that suicide is not morally impermissible. Häyry’s interpretation of Kant’s argument is flawed. Häyry explicitly states that dignity and autonomy are connected; however, it is Häyry’s distinction between the empirical demands of ‘man’ and the autonomy of will, or ‘noumena,’ and thus the absolute governance of the individual that holds the problem. These demands do not solely belong to the empirical world: since all actions are governed by our

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42 *Pretty*, 35 EHRR at 35.

43 *Nicklinson*, UKSC 38 at 380.

44 *Id* at 299.

45 *Id* at 382, 396.

46 Kant, *Groundwork* at 435 (cited in note 8).

47 Matti Häyry, *The Tension Between Self-Governance and Absolute Inner Worth in Kant’s Moral Philosophy*, 31 *J Med Ethics* 645 (2005).

48 *Id* at 646.

49 *Id*.



rationality and the ability to choose how to act, they are therefore intertwined with the noumenal world, given that “[morality] is the relation of actions to the autonomy of the will[...].”<sup>50</sup> Kant’s categorical imperative requires compliance with all universal laws, which form our duties. However, all persons have the autonomy to choose whether or not to act in accordance with these universal laws, even though non-compliance would be immoral. Contrary to Häyry’s interpretation, rationality governs all actions, and individuals possess the capacity to choose to act immorally if they desire. If we have the choice to act immorally in accordance with ‘empirical demands’ then there is complete self-governance. Kant’s philosophy does in fact unite ‘empirical demands’ and rationality.<sup>51</sup>

The ability to feel pain is a factor that can support a duty for PAS. Peter Singer proposes his pain theory in *Practical Ethics*,<sup>52</sup> in which he discusses the “life and death decisions of terminal patients.”<sup>53</sup> It is extremely important to note that Singer is a proponent of a different ethical theory than Kant: utilitarianism. Singer believes in maximizing the greatest amount of pleasure for the greatest number of people, and for Singer, maximizing pleasure means relieving pain and suffering. This reasoning also supports the ethical work for which Singer is most famous: arguing that animals, as sentient or conscious beings, have the capacity to feel pain, making them equal to humans, and therefore should not be used for animal testing.<sup>54</sup> Pain is highly relevant to PAS, as the vast majority of the requests for assisted suicide are caused by the desire to relieve the pain and suffering experienced by patients, usually with terminal or incurable conditions. Thus, it is often thought that actively ending a patient’s life is more “humane” than a protracted, painful death.<sup>55</sup> Pain can be relevant to PAS and Kantian ethics, as Singer demonstrates that it is a choice and so is an exercise in rationality. It is our rationality that enables us to choose what we as individuals view as pain and pleasure; the capacity to choose allows us to decide what we want to or can endure in terms of pleasure and pain.<sup>56</sup> Kant’s theory states that we ought to protect this choice, as rationality gives us inherent value. Singer also asks why assistance in dying should not be a choice that everyone should have, focusing on the “dubious” distinction between the refusal of treatment and actively asking for assistance to end one’s life.<sup>57</sup> This grey area will be discussed further in the next chapter, as the current ethical ambiguities in the law provide an argument in favour of PAS. Focusing on

50 Kant, *Groundwork* at 439 (cited in note 8).

51 Häyry, *The Tension Between Self-Governance* at 646 (cited in note 47).

52 Peter Singer, *Practical Ethics* at 158 (Cambridge 2d ed 1993).

53 *Id.* at 159.

54 Peter Singer, *Animal Liberation* 10–12, 15–17 (Harper Collins 2002).

55 Rachels, *Active and Passive* at 292 (cited in note 11).

56 Peter Singer, *The Right to Die* (Project Syndicate, Jan 15, 2007), online at <http://www.project-syndicate.org/commentary/the-right-to-die>.

57 *Id.*

the autonomous choice aspect of Singer's pain theory, it can be demonstrated that this argument supports Kant's reasoning for a duty requiring PAS.

In answer to the question of whether there is a duty requiring PAS, from a philosophical perspective, it can be concluded that there is a strong argument in its favour. Under Kant's theory, human beings have a certain characteristic that gives them 'intrinsic value;' this is what constitutes their dignity, and for which there is a duty to respect. This characteristic is rationality which, as it has been effectively argued above, encompasses our capacity to choose, or our autonomy. Contrary to Häyry's argument, rationality, as the characteristic that gives us dignity, enables us to have autonomy, and thus they are capable of coexisting. Singer further supports the argument for a duty requiring PAS, as pain is an exercise in rationality. Our rationality gives us the ability to make autonomous decisions as to what we view as pain and pleasure. This ethical argument, therefore, strongly suggests that it would be possible to acknowledge the requirement for a duty requiring PAS.

## CHAPTER II

### THE CURRENT UK LAW ON ASSISTED SUICIDE AND ITS INCONSISTENCIES WITH KANT'S ETHICAL THEORY

This chapter will examine the current law on PAS in the United Kingdom, and analyze its inconsistencies; it will then look at the proposed amendments and bills that have been introduced into Parliament, in order to ascertain why it was not possible to legislate a duty requiring PAS. According to current UK law, assisted suicide is illegal under the Suicide Act 1961; there is no duty requiring PAS. PAS is a specific classification of assisted suicide, which is encompassed within the definition under Section 2 of the Suicide Act 1961.<sup>58</sup> The term Physician-Assisted Suicide narrows the scope to solely doctors or medical professionals, thus excluding family members, friends or other individuals who may assist. It is thought that PAS is more 'dangerous' than when relatives assist in suicide because the majority of relatives are motivated by sympathy, whereas it is much harder to assess the motivations of doctors who assist the ill.<sup>59</sup> It is not a crime for those such as travel agents who assist with the travel arrangements of those who intend to commit suicide where there is no knowledge of the patient's intention. However, individuals who travel abroad with patients are liable for prosecution under the Act,<sup>60</sup> as also noted in *Pretty*<sup>61</sup> and *Purdy*.<sup>62</sup> It is arguable that a system that regulates PAS would firstly reduce the number of individuals that feel they have no option other than to travel abroad, and secondly, would relieve relatives of the responsibility placed on

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58 The Suicide Act 1961, 9 & 10 Eliz 2, ch 60 § 2 (1961).

59 *R v Adams* [1957], *Crim LR* 365 (1957); *R v Cox* 12 BMLR 38 (1992).

60 The Suicide Act 1961, 9 & 10 Eliz 2, ch 60 § 2 (1961).

61 *Pretty*, 35 EHRR at 21.

62 *R (Purdy)*, UKHL 45 at 386.

them.<sup>63</sup>

An important element in the PAS debate is the prior cases which have led to progress, both in the law and in society's attitude. There are three notable cases which have been referenced throughout and which cannot be excluded from a more thorough analysis: *Pretty v UK*,<sup>64</sup> *R(Purdy) v DPP*,<sup>65</sup> and *R (on the application of Nicklinson)*.<sup>66</sup> It was held in each of these cases that there was no duty requiring PAS.

In Diane Pretty's case, she sought permission for her husband's assistance in her suicide and argued that the illegality of assisted suicide violated her rights under Articles 2, 3, 8, 9, and 14 of the ECHR; it was found that there was no violation of any Article.<sup>67</sup> The Court was not satisfied that Article 2, the right to life, could be viewed in a negative way, meaning that it could not constitute a right to die.<sup>68</sup> Raising a breach of Article 3 is interesting as it reflects the different conceptions that the word 'dignity' holds, as discussed in the previous chapter. It provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>69</sup> The Court's interpretation of dignity when delivering judgments in assisted suicide cases does not account for 'rationality' in this dissertation's conception of the word. As the House of Lords found in their earlier judgment, if Article 3 had been used in reference to a relative's involvement, it would have extended the concept of the word "treatment"<sup>70</sup> beyond the ordinary meaning of the word.<sup>71</sup> In this judgment, Article 3 was not breached, as it had to coincide with Article 2, of which there was no violation.<sup>72</sup> Article 8, the right to respect for private and family life, perhaps the most relevant to PAS, was found to be engaged; however, the interference of the Court, as a "public authority," was justified as "necessary in a democratic society"<sup>73</sup> in order to protect the rights of more vulnerable individuals.

The issue of Article 8<sup>74</sup> was again discussed in detail in *Purdy*.<sup>75</sup> The House of Lords' judgment explained that the difference between the *Pretty v DPP*<sup>76</sup> judg-

63 *Pretty*, 35 EHRR at 27, 102.

64 *Id* at 59.

65 *Id* at 345.

66 *Nicklinson*, UKSC 38 at 200.

67 *Pretty*, 35 EHRR at 59.

68 *Id* at 39.

69 ECHR, Art 3 (Prohibition of torture).

70 *Id*.

71 *Pretty*, 35 EHRR at 60.

72 *Id* at 54.

73 ECHR, Art 8(2).

74 ECHR, Art 8 (Right to respect for private and family life).

75 (*Purdy*), UKHL 45 at 60.

76 *Pretty*, 35 EHRR at 55.

ment and that in *Pretty v United Kingdom*,<sup>77</sup> was that “article 8(1) prohibits interference in the way in which an individual leads his life and...does not relate to the manner in which he wishes to die.”<sup>78</sup> In *Purdy*, an appeal was allowed as it was held that Article 8 was engaged.<sup>79</sup> Under Article 8(2), it was held that the DPP should clarify its Code<sup>80</sup> in regard to guidance for those assisting in suicide.

*Nicklinson* also raised Article 8, the most contentious element of the prior two judgments. *Nicklinson*'s application submitted that Section 2 of the Suicide Act 1961 was incompatible with Article 8 in regard to his autonomy and dignity,<sup>81</sup> concepts that this dissertation has found to be central to the argument in favour of PAS. The Court referenced *Haas v Switzerland* in *Nicklinson*<sup>82</sup> to highlight the fact that the right of an individual to choose how and when to die is compatible with Article 8;<sup>83</sup> the Court also ruled that states have a wide margin of appreciation when they are concerned with voluntary euthanasia.<sup>84</sup> It was held that Section 2 did engage Article 8.<sup>85</sup> However, as the matter of whether to impose a “blanket ban” on assisted suicide lay within the United Kingdom's margin of appreciation,<sup>86</sup> it was also a matter for Parliament to decide whether a declaration of incompatibility should be issued.<sup>87</sup> The case law thus acknowledges that individuals have a right to die under the ECHR, but the Strasbourg Court recognises that since the issue falls within the United Kingdom's margin of appreciation, any future change to the law would have to stem from a change to UK law through Parliament.<sup>88</sup>

The argument for a duty requiring PAS has been fuelled in part by the ethical and legal inconsistencies in the current law relating to life-ending practices, which advocates of such a duty use to support their arguments. It is therefore useful to examine the current duties that doctors legally hold in order to highlight the distinction and discrepancies between legal and illegal life-ending practices. Doctors' duties presently include those that end life, both through the withdrawal and withholding of life-sustaining treatments, and the administration of lethal doses of pain-relieving medication. It is difficult to see why in some cases there is a justifiable legal distinction between these duties and PAS, which is usually requested for the same reasons: relieving pain and suffering.

77 *Id* at 59.

78 (*Purdy*), UKHL 45 at 35.

79 *Id* at 38.

80 Director of Public Prosecutions, *The Code for Crown Prosecutors* (2013).

81 *Nicklinson*, UKSC 38 at 228.

82 *Nicklinson*, UKSC 38.

83 *Haas v Switzerland*, 53 EHRR 33 at 51.

84 *Nicklinson*, UKSC 38 at 234.

85 *Id* at 361.

86 *Id* at 314.

87 *Id* at 286, 267.

88 *Nicklinson*, UKSC 38 at 408.

One such case involving end of life treatment is *Bland*,<sup>89</sup> in which involved a patient in a permanent vegetative state (PVS), who, despite having a functioning brain stem, had no chance of recovery. The hospital applied to the Court for permission to withdraw the ventilator and feeding tubes with the consent of his parents. This case also called into question the absolutism of the sanctity of life principle against the benefit of continuing life-sustaining treatment. Upholding the sanctity of life principle has long been held as the paramount duty of the doctor, as reflected in cases such as *R v Cox*,<sup>90</sup> where it was stated that there is an “absolute prohibition on a doctor purposefully taking life as opposed to saving it.”<sup>91</sup> Here, this principle was weighed against whether continuing treatment was in *Bland*’s “best interests,”<sup>92</sup> and whether he and his family would have wanted him to be kept alive, given the medical prognosis.<sup>93</sup> The Court held that it was not unlawful for doctors to withdraw treatment from patients in a PVS where sustaining life was of no benefit to the patient. By a majority, the Court held that despite *Bland* being alive there was no question of his ‘quality of life,’ as there was no hope of recovery for the patient. As the patient was held to be alive, he did have interests that were protected under the sanctity of life principle; it was found, however, that the principle did not require that he be kept alive.<sup>94</sup> The judgment in *Bland* played a key part in reevaluating the sanctity of life principle and created the possibility that it was not an absolute rule to preserve life, but that there could be lawful exceptions. As mentioned in the previous chapter, cases like *Bland*, which demonstrate a development in legal thinking away from the sanctity of life principle, are significant in the argument for PAS. Although the Court held that their reasoning fell within the sanctity of life principle, in reality the reasoning represented a balancing of other interests in regard to the patient. It is important to note, however, that *Bland* is significantly different from PAS cases, as patients in a PVS do not have capacity under the Mental Capacity Act 2005,<sup>95</sup> whereas capacity is necessary for rationality, and thus is key to the argument supporting a duty requiring PAS.

Doctors also have a duty to respect a patient’s wishes if they choose to reject life-prolonging treatment. It was stated in *Bland*<sup>96</sup> that “a person of full age may refuse treatment for any reason or no reason at all, even if it appears certain that the result will be his death.”<sup>97</sup> Despite these remarks being obiter, due to lack

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89 *Bland*, 1 All ER 821 at 789.

90 *R v Cox* 12 BMLR 38 (1992).

91 *Id* at 829.

92 *Bland*, 1 All ER 821 at 834.

93 *Id* at 824–34.

94 *Id* at 825–56.

95 Mental Capacity Act 2005, Eliz. 2, ch 9 § 2 at 2 (2005).

96 *Id* at 789.

97 *Bland*, 1 All ER 821 at 827.

of mental capacity, they were later reaffirmed in *Re B*.<sup>98</sup> Similarly, according to *Re B*, advance refusals of treatment lawfully must be acknowledged.<sup>99</sup> This duty to not intervene is defined by the Court as an 'omission.' It is not unlawful to respect patients' wishes by not acting as long as there is no duty of care that should be performed; in fact, it would be a criminal offence to intervene without permission to do so.<sup>100</sup>

Why is it ethical to respect patients' wishes in this way, but not under a duty to respect a patient's wishes to end life through administering life-shortening treatment? In both cases the patient wishes to end their life, but in the second instance there may not be any treatment available to them that they have the choice of rejecting; instead they are usually left only with the option of rejecting food and water, and thus starving themselves to death. If the legalization of a duty requiring PAS were successful, this ethical contradiction would disappear, as the duty would require a positive act on the part of the doctors.

Perhaps the most controversial aspect of the illegality of PAS is the doctrine of double effect, whereby a doctor is legally allowed to administer a lethal dosage of a pain-relieving drug if the primary aim is to relieve pain rather than to end the patient's life. In this scenario, death is an unintended and unfortunate side effect of the pain relief. It is another way of avoiding the violation of the sanctity of life principle. It can be lawful as long as death, or murder, is not the primary intention of the doctor.<sup>101</sup> It is important to note that this treatment is not euthanasia; the distinction can be seen if the cases of *R v Cox*<sup>102</sup> and *R v Adams*<sup>103</sup> are compared. Dr. Adams was acquitted, as it was shown that he administered pain-relieving drugs, whereas Dr. Cox's choice of drug had no pain-relieving qualities. This distinction surely carries with it as many ethical questions as PAS. How can we be sure that doctors would not take advantage of the patients, contrary to their Kantian dignity, which is one fear that opponents of a duty requiring PAS have? After all, Dr. Adams "had been named as a beneficiary in [an elderly patient's] will."<sup>104</sup> There is currently no statute or rule to prevent doctors, under the doctrine of double effect, from coercing their patients into assisted suicide for their own motivations. This type of action is not murder or euthanasia because its main objective is to relieve pain, but somehow, in the eyes of the law and from a moral perspective, it significantly differs from PAS. There seems to be little difference between the two, yet PAS has had great difficulty progressing through the legal system. In terms of

98 *Re B*, EWHC 429 (2002).

99 Houses of Parliament Postnote, *Mental Capacity and Healthcare*, Number 381, 3 (June 2011).

100 *Bland*, 1 All ER 821 at 823.

101 *R v Adams* [1957], Crim LR 365 (1957); cited in Patrick Devlin, *Easing the Passing: The Trial of Doctor John Bodkin Adams* (Bodley Head 1985).

102 *Cox* 12 BMLR 38 at 57.

103 *Adams* [1957], Crim LR 365.

104 Shaun D. Pattinson, *Medical Law and Ethics* 539 (Sweet and Maxwell 3d ed 2011).

a duty, doctors who choose this line of treatment believe that their duty of care – to relieve pain and suffering – extends this far and are prepared to enter into this grey area of ethics in order to fulfill it. It is also only performed if the doctor judges that it is necessary or beneficial. Therefore, if we apply the same principle of relieving pain if the patient chooses and ensures a doctors' assessment of the situation, this could be viably applied to a duty requiring PAS.

In conclusion, the case law at present prohibits a duty requiring PAS. *Bland*, despite not involving the same subject matter and differing in the mental status of the patient, still has significance in end of life treatment and shares some elements with PAS cases. It shows the diminishing importance of the sanctity of life principle and the growing recognition of the quality of life with connection to personal autonomy. In regard to end of life treatment, discrepancies in the current law demonstrate that there seems to be little moral difference between abstaining from action and taking positive action in order to end the life of a patient. The doctrine of double effect is another ethically grey area, in that it is performed solely at the discretion of the doctor, is currently unregulated, and seems dangerously close to euthanasia. There seems to be no strong reason why acting positively under a duty requiring PAS is morally different from adhering to a patient's request for refusal of treatment, where in both cases a patient has decided to end their life through rational decision in compliance with Kantian ethics. Similarly, why is PAS a worse alternative to a doctor administering a lethal dose of pain relief at a patient's request, when PAS too aims to respect a patient's desire to relieve pain? Of key importance under Kantian ethics is the patient's desire to choose when and how to die. In both choices, the patient wishes to die, and a doctor should comply with a duty to respect these wishes, regardless of whether the act of assisted suicide itself be a negative or a positive act. The main case law in this area shows how patients with no other choice are forced to travel abroad and are thus forced to involve another individual in a crime. Through the development of the case law, it is acknowledged that the right to die falls under Article 8 of the ECHR, and that it is engaged in assisted suicide cases.<sup>105</sup> If Strasbourg has recognized that there is a right to die under the ECHR, the only obstacle being that it would be Parliament's jurisdiction to change the law, then it is possible that Strasbourg would support both a duty requiring PAS, and the Assisted Dying Bill<sup>106</sup> currently in Parliament. Lord Falconer's Assisted Dying Bill,<sup>107</sup> which will be discussed below, provides the opportunity for the legalization of PAS to be realized.

### CHAPTER III CRITICAL ARGUMENTS IN OPPOSITION TO A DUTY REQUIRING

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105 ECHR, Art 8 (Right to respect for private and family life).

106 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

107 *Id.*

## PHYSICIAN-ASSISTED SUICIDE, AND AN EXAMINATION OF LORD FALCONER'S ASSISTED DYING BILL

This third chapter aims to look at the compatibility of Kant's reasoning with a legal duty requiring PAS. It will raise critics' concerns and examine Lord Falconer's Bill<sup>108</sup> and the safeguards that have been proposed in light of these fears. The primary concern of the courts and Parliament is the protection of the vulnerable: it is feared that the legalization of assisted dying will put pressure on "fragile, deranged, angry and distressed"<sup>109</sup> patients to end their lives once the option for assisted suicide is open to them, as they may feel like a burden to the health system or loved ones. Nevertheless, as PAS has been proven to be viable in other European countries, and the Bill's acknowledgment of the concerns surrounding the debate has made it the most successful Bill to be introduced into Parliament to date, this dissertation will discuss the possibility of the legalization of a duty requiring PAS.

Lord Falconer's Assisted Dying Bill<sup>110</sup> was first introduced into the House of Lords in 2013, where it did not progress beyond the First Reading. After its reintroduction in the 2014–15 session, it is now in the Committee Stage of the House of Lords. It is questionable whether the Bill will get far enough through Parliament to be enacted before the general election; however its progression thus far suggests that even if this does not happen before the election, it is conceivable that it would be enacted at a later date. The Bill's success to date can perhaps be attributed to the publicity received by *Purdy*,<sup>111</sup> *Pretty*<sup>112</sup> and *Nicklinson*,<sup>113</sup> whether this is because these cases progressed furthest through the European Courts, or because society's views on PAS are changing, in tandem with the demand to reform the law on PAS. Peter Singer cites the example of Terri Schiavo's case<sup>114</sup> as a comparison. The publicity of this case "triggered a surge in the number of people completing advance declarations, making it clear that they do not wish to continue to live in circumstances in which Schiavo lived for the fifteen years before her death."<sup>115</sup> Although Schiavo's case involved the removal of life support, it spurred the reopening of other end of life debates such as the one for PAS. These signifi-

108 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

109 Matthew Holehouse, *Prof Winston Warns Assisted Dying Will Put Pressure on 'Fragile and Distressed' Elderly* (The Telegraph, Jan 16, 2015), online at <http://www.telegraph.co.uk/news/uknews/assisted-dying/11351202/Prof-Winston-warns-assisted-dying-will-put-pressure-on-fragile-and-distressed-elderly.html>.

110 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

111 *R (Purdy)*, UKHL 45 at 345.

112 *Pretty*, 35 EHRR at 35.

113 *Nicklinson*, UKSC 38 at 200.

114 See *Bush v Shivo*, 885 So 2d 321 (Fla 2004).

115 Peter Singer, *Making Our Own Competency Should be Paramount: Decisions about Death*, 25 Free Inquiry 36 (2005).



cant cases were also accompanied by proposed amendments and clarifications to the law on PAS, as outlined below.

In 2004, Lord Joffe introduced the Assisted Dying for the Terminally Ill Bill into the House of Lords “to enable a competent adult who is suffering unbearably as a result of a terminal illness to receive medical assistance to die at his own considered and persistent request; and to make provision for a person suffering from such a condition to receive pain relief medication.”<sup>116</sup> This bill followed a similar one he proposed in 2003<sup>117</sup> which did not succeed but was also submitted under the same premise as stated above. Later, Lord Falconer proposed an amendment to the Coroners and Justice Bill 2008-9<sup>118</sup> to alleviate a person of liability if their involvement in a suicide was purely assisting in travel arrangements, with no knowledge of the patient’s intention. This amendment could have protected these individuals from being used as a means to an end, which contradicts Kant’s morality, but it was defeated by a majority vote of 194 votes to 141.<sup>119</sup> The DPP’s prosecution policy<sup>120</sup> on this matter was challenged by Debbie Purdy in *Purdy*.<sup>121</sup> Her request for a clarification of the policy on assisted dying was prompted by the inconsistency between the law, which states that it is illegal for individuals to assist suicide, and reality, which is that the DPP is reluctant to prosecute those individuals.<sup>122</sup> The most recent Crown Prosecution Service (CPS) figures show that out of 101 cases referred to the CPS between April 2009 and October 2014, 69 were not proceeded, and 16 were withdrawn by the police.<sup>123</sup> Following *Purdy*, an interim policy was released in 2009, followed by a full consultation; a final new policy was published in spring 2010,<sup>124</sup> which was upheld in *Nicklinson*.<sup>125</sup> It outlined the factors both for and against prosecuting an individual in an assisted suicide case, and stressed that “[i]t does not override the will of Parliament. What it does do is to provide a clear framework for prosecutors to decide which cases should proceed to court and which should not.”<sup>126</sup> The new policy is significant as it reiterates the view of the courts that any change to the law would have to come from Parliament.

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116 Assisted Dying for the Terminally Ill, HL Bill 17 53/3 (2003-04).

117 Patient (Assisted Dying) HL Bill 37 53/2 (HL 2003).

118 Now the Coroners and Justice Act 2009, ch 25 (2009).

119 Sally Lipscombe and Sarah Barber, *Assisted Suicide*, House of Commons Library Standard Note SN/HA/4857 (updated Aug 20, 2014).

120 Director of Public Prosecutions of Crown Prosecution Services, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (Feb 2010, updated Oct 2014).

121 *R (Purdy)*, UKHL 45 at 30.

122 *Id* at 97.

123 Crown Prosecution Service, *Assisted Suicide: Latest Assisted Suicide Figures* (Oct 2014).

124 *Id* at 48.

125 *Nicklinson*, UKSC 38 at 333.

126 CPS, *Assisted Suicide* (cited in note 123).

<sup>127</sup> This then outlines the backdrop against which the 2014–15 Bill<sup>128</sup> entered Parliament.

The success of the Bill's progress may also owe heavily to the provision of safeguards, in recognition of fears in regard to PAS. In analyzing the most significant clauses of the Bill, we can address the criticisms of a duty requiring PAS, and how they have been met. Firstly, Clauses 1(1) and 2(1) limit the applicability of the Bill to those who are terminally ill and who have less than six months to live,<sup>129</sup> addressing the slippery slope argument, and concerns that PAS could lead to unregulated euthanasia. Proponents of the slippery slope argument highlight the possibility of a descent from PAS to non-voluntary euthanasia (NVE).

Smith's essays look at both the practical slippery slope<sup>130</sup> and the logical slippery slope arguments.<sup>131</sup> He concentrates on Keown as the main advocate for both of these slippery slope arguments. Keown believes that "the legalization of PAS and some acceptable kinds of euthanasia will lead to less acceptable forms of euthanasia."<sup>132</sup> If PAS became legalized, the next logical step could be euthanasia, as some would argue that "the physical difference between intentionally ending the patient's life, and intentionally helping the patient to end his or her own life, can be negligible."<sup>133</sup> Keown views the moral distinction between PAS and AVE as "tactically negligible,"<sup>134</sup> and thus believes that campaigners may use PAS as a doorway to the legalization of euthanasia. Keown references the Netherlands,<sup>135</sup> one of the few countries that has legalized PAS, as a case study, using statistical facts to support his arguments. Smith, however, warns that the reader should be skeptical of Keown's figures: Keown's figures are much higher than those recorded, as they include practices which are already legal, such as the withdrawal of life support.<sup>136</sup> In fact, there has been no increase in the number of cases of NVE since the legalization of PAS in the Netherlands,<sup>137</sup> providing insufficient evidence that the legalization of PAS in the United Kingdom would encourage more people to use it or create the opportunity for doctors to abuse their position. The arguments

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127 *Nicklinson*, UKSC 38 at 391.

128 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

129 *Id* at Clause 2(1)(b).

130 See Stephen W. Smith, *Evidence for the Practical Slippery Slope in the Debate on Physician-Assisted Suicide and Euthanasia*, 13 *Med L Rev* 17 (2005).

131 See Stephen W. Smith, *Fallacies of the Logical Slippery Slope in the Debate on Physician-Assisted Suicide and Euthanasia* 13 *Med L Rev* 224 (2005).

132 *Id* at 226; John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legislation* 70–80 (Cambridge 2004).

133 *Id* at 33.

134 *Id* at 36.

135 See John Keown, *Euthanasia in the Netherlands: Sliding down the Slippery Slope*, 9 *Notre Dame J L Ethics Pub Pol* 407 (1995).

136 Stephen W. Smith, *Evidence* at 35 (cited in note 131).

137 *Id* at 35.

presented by Keown show that the slippery slope argument fails to take into consideration factors such as procedural safeguards, and that cases would have to be assessed on an individual rather than universal basis. However, the Netherlands is a good example of how it is possible to allow PAS and continue to give sufficient protection to Kantian dignity. The dignity of the patients is protected, as the Dutch law<sup>138</sup> affords them the freedom to choose when to die if the request was “voluntary and well considered,”<sup>139</sup> thus respecting the patient’s rationality.

Singer has been criticized for the dangerous way in which his arguments relating to rationality in assisted suicide create a slippery slope that leads to ideas of genocide.<sup>140</sup> Although ultimately a utilitarian philosophy on PAS, this aspect concerning rationality is significant to this dissertation, as it could create a strong opposing argument to a duty requiring PAS based on Kant’s theory of rationality. Singer believes that not everyone is worth saving; he therefore supports the idea of NVE in some cases. He argues, however, that the use of the Nazi analogy in relation to his arguments is “utterly misleading.”<sup>141</sup> Disabled infants, and people who lack mental capacity, lack the characteristics such as “rationality, autonomy and self-consciousness”<sup>142</sup> which are important in giving us value and making us self-conscious beings. He argues that as they lack these characteristics, they cannot be considered “normal human beings”<sup>143</sup> and so it is possible to show that NVE is acceptable in some cases. He cites the withdrawal of the drug thalidomide after it was found to cause serious fetal deformities, which demonstrates the fact that disabilities are viewed as undesirable by society. He concludes that “killing a disabled infant is not morally equivalent to killing a person,”<sup>144</sup> and that “it is difficult to see the point of keeping such human beings alive if their life is, on the whole, miserable.”<sup>145</sup> It is clear to see why advocates of the slippery slope have concerns, when Singer puts forward such an extreme point of view. However, we need not be too concerned by his argument. Herlinde Pauer-Studer finds that Singer’s arguments in favour of AVE and NVE are inconsistent, since he uses a different type of utilitarianism to justify each type of euthanasia.<sup>146</sup> He uses preference utilitarianism, in which “it is better to satisfy more preferences than less,”<sup>147</sup> to support AVE and the killing of rational beings, where they so choose death over life. However, he relies upon classical utilitarianism, in which “it is better to maximize the sum total

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138 Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 26 n 137 (2002) (Netherlands euthanasia law).

139 *Id* at 2(1)(a).

140 Singer, *Practical Ethics* at 175 (cited in note 52).

141 *Id* at 175.

142 *Id* at 182.

143 *Id*.

144 Singer, *Practical Ethics* at 191 (cited in note 52).

145 *Id* at 192.

146 Herlinde Pauer-Studer, *Peter Singer on Euthanasia*, 72 *The Monist* 135, 140 (1993).

147 *Id* at 143.

of pleasure”<sup>148</sup> to support NVE and the killing of “non-persons,”<sup>149</sup> demonstrating that it can be justifiable to kill those without capacity by taking into account their “future expected pleasure.”<sup>150</sup> The argument for classical utilitarianism and NVE involves an objective judgment that ignores rationality and thus goes against Kantian ethics.

Under Kantian ethics, however, infants and other non-rational humans can be protected against NVE despite their lack of full capacity or rationality. It would initially appear that NVE may be acceptable as they lack rationality, the characteristic that gives them intrinsic value. However, the precautionary argument demonstrates that non-rational beings should still be protected. The basic idea of the precautionary argument is that where beings display “the characteristics or behavior of an expected agent,”<sup>151</sup> they might be called an “ostensible agent,”<sup>152</sup> and it is morally safer to treat them as a rational agent than to mistake them as a non-agent. This can be applied to non-rational beings, which is highly relevant to this dissertation and the fears regarding PAS. Beings cannot be treated as agents on the mere possibility that they are one; they must be an “ostensible agent.”<sup>153</sup> Thus, moral duties are imposed “in proportion to the probability”<sup>154</sup> that the being might be an agent. For infants, Kant hints at the theory that they will develop into fully rational beings and that there is a duty to protect them, since they will develop into fully rational humans in the future.<sup>155</sup> Although they may only be “partial agents,” we must comply with these “duties of protection” that “safeguard the benefits that it would receive if [the infant or other non-agent] had rights and chose to exercise them.”<sup>156</sup> Contrary to Singer’s theory, the precautionary argument demonstrates that non-rational beings should be given protection due to the possibility that they are agents, partial agents, or will develop into fully rational agents. The precautionary argument shows that fears over NVE and the slippery slope are unjustified, and that these groups would also be protected under Kantian ethics.

The slippery slope argument is closely related to the capacity or rationality of the patients, and the protection of the vulnerable. This is perhaps the greatest concern that opponents have in regard to a legal duty requiring PAS. Subsections of Clauses 1 and 3 of the Bill aim to safeguard against this fear. Clause 1(2)(a)

148 Id.

149 Id at 137.

150 Pauer-Studer, *Peter Singer on Euthanasia* at 137 (cited in note 146).

151 Deryck Beyleveld and Shaun Pattinson, *Precautionary Reasoning as a Link to Moral Action*, in Michael Boylan, ed, *Medical Ethics* 39, 41 (Prentice Hall 2000).

152 Id.

153 Deryck Beyleveld and Shaun Pattinson, *Defending Moral Precaution as a Solution to the Problem of Other Minds: A Reply to Holm and Coggon*, 23 *Rato Juris* 258, 261–62 (2010).

154 Id.

155 Kant, *Metaphysics* at 443 (cited in note 16); Immanuel Kant, *Lectures on Ethics* 21 at 459 (Cambridge 2001).

156 Beyleveld and Pattinson, *Precautionary Reasoning* at 42 (cited in note 151).

states that the Bill can only apply where a person “has a clear and settled intention to end his or her own life.”<sup>157</sup> This clause can be read as the requirement for mental capacity, which is explicitly stated again in Clauses 3(3)(b) and 3(3)(c).<sup>158</sup> Capacity is judged by the *Gillick*<sup>159</sup> competency test and the Mental Capacity Act 2005,<sup>160</sup> as the recognized standards and accepted tests applied by doctors in medical cases. The doctor’s judgment in terms of the patient’s capacity, and susceptibility to abuse, plays a vital role alongside the *Gillick* test, in ensuring the protection of the vulnerable. Furthermore, the patient’s declaration has to be countersigned by two doctors who have both assessed the patient’s illness and mental capacity.<sup>161</sup> We must therefore exclude those patients who do not have mental capacity from any discussion of PAS since they cannot make a rational or autonomous decision for themselves. There is no duty to respect a decision they make to die under Kantian ethics.

Judging mental capacity is not always clear-cut since Kantian ethics rest on rationality, and it is difficult to decide at which point these patients are incapable of forming a rational decision. There are concerns that doctors could abuse their power, such as the doctrine of double effect, and whether the patients would still understand the consequences of the wishes previously expressed, such as in cases of gradual mental deterioration from diseases like Alzheimer’s and dementia. The Bill<sup>162</sup> has attempted to protect against this as far as is reasonably possible. Clause 3 ensures that the decision must be reached without “coercion or duress,”<sup>163</sup> the patient is well-informed of alternative treatment<sup>164</sup> and has the power to revoke the declaration at any time,<sup>165</sup> and that the assisted suicide will not be performed within 14 days of signing the declaration, to create more certainty that this is the current decision of the patient.<sup>166</sup> The current legal duty to adhere to advance refusals of treatment may make the decision for end of life treatment easier in some cases of deteriorating mental capacity; however, “this powerful principle is...attenuated by the ease with which [it] can be rendered legally ineffective.”<sup>167</sup> The courts ruled in *HE v Hospital Trust*<sup>168</sup> that an advance refusal could be overridden when a Jehovah’s Witness was given a blood transfusion, and that it could be overridden with-

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157 Assisted Dying Bill, HL Bill 6 at Clause 1(2)(a) (HL 2014–15) (cited in note 2).

158 *Id* at Clause 3(3)(b–c).

159 *Gillick v West Norfolk and Wisbech*, 112 AC (AHA 1986).

160 Mental Capacity Act 2005 at 2.

161 Assisted Dying Bill, HL Bill 6 at Clause 3(1)(b) (HL 2014–15) (cited in note 2).

162 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

163 *Id* at Clause 3(3)(c).

164 *Id* at Clause 3(4).

165 *Id* at Clause 3(6).

166 Assisted Dying Bill, HL Bill 6 at Clause 4(2)(d) (HL 2014–15) (cited in note 2).

167 Pattinson, *Medical Law and Ethics* at 532 (cited in note 104).

168 *HE v Hospital Trust*, EWHC 1017 (Fam 2002).

out a written statement.<sup>169</sup> The case stated that a revocation of an advance refusal was possible where the patient had shown conflicting conduct, but did not answer the question of what happens when an advance refusal “appears to conflict with his current (incapacitated) wishes and feelings.”<sup>170</sup> This specific area still poses some issues for a duty requiring PAS, regarding revocation of requests by patients who have become incompetent and in measuring declining capacity; however, the precautionary argument, as outlined above, can be employed to protect those who are vulnerable against NVE, and the safeguards in Lord Falconer’s Bill address most of the significant concerns of critics.

The provision that the decision must be reached without “coercion or duress”<sup>171</sup> is also an important provision to Onora O’Neill. She has concern for those patients that have capacity, and thus fall within the sphere that the Bill applies to, but may be vulnerable in other ways. These are likely to be the elderly, or those who are dependent on others; they may feel that they are a burden on their family. O’Neill believes that we need more than a “minimal state”<sup>172</sup> of autonomy, where complete autonomy is accepted without consideration, and the desire of the patient is immediately acted upon. Otherwise, “how are we to distinguish requests to be killed that express individual autonomy, from requests that express compliance with the (unspoken) desires of burdened carers and relatives, not to mention expectant heirs?”<sup>173</sup> She concludes that “legislation should not be based on an unrealistic assumption that we can discriminate choices that are genuinely autonomous from others that are not.”<sup>174</sup> In this way, O’Neill proposes the concept of principled autonomy as an alternative to individual autonomy, which appears to resolve some of these concerns. Principled autonomy establishes a series of obligations or duties and requires us to “reject both coercion and deception.”<sup>175</sup> This theory provides a “basis for relations of trust”<sup>176</sup> which would alleviate concerns that the vulnerable would be coerced into requesting PAS. As a result, there would be a duty upon others not to coerce patients and to respect their autonomy and rational decisions. This is essential to Kant, as we should not use others as a means to an end.<sup>177</sup> O’Neill’s alternative autonomy demonstrates that if it is followed correctly, the protection of the vulnerable need not be as great a concern as some think.

Another argument against a duty for PAS is that PAS does not acknowl-

169 *Id* at 37.

170 *Id* at 39.

171 Assisted Dying Bill, HL Bill 6 at Clause 3(3)(c) (HL 2014–15) (cited in note 2).

172 Onora O’Neill, *Real Life is Too Complex* (The Guardian, 30 July, 2010), online at <http://www.theguardian.com/commentisfree/belief/2010/jul/30/assisted-suicide-legislation>.

173 Onora O’Neill, *Questions of Life and Death*, 372 *The Lancet* 1292, 1293 (11 Oct 2008).

174 *Id*.

175 Onora O’Neill, *Autonomy and Trust in Bioethics* 97 (Cambridge 2002).

176 *Id*.

177 Kant, *Groundwork* at 429 (cited in note 8).

edge the rights and autonomy of the doctors or physicians who are under a duty to perform PAS. This position would claim that if a blanket duty were imposed, doctors would have to assist in the suicide, regardless of their own moral views, and would not have the option of abandoning responsibility. JK Mason concludes that “assisting in suicide is so much a matter of individual professional conscience [...] that it is impossible to reach an acceptable consensus.”<sup>178</sup> However, Clause 5 of the proposed Bill<sup>179</sup> recognizes those who may have a conscientious objection and states that they “shall not be under any duty (whether by contract or arising from any statutory or other legal requirement) to participate in anything authorised by this Act.”<sup>180</sup> Currently, it is legally permissible in the United Kingdom for a doctor to morally abstain from giving a reference for an abortion, as long as he recommends another doctor who will help.<sup>181</sup> It is possible that the same procedure could viably be adopted in regard to PAS, so that doctors with strong ethical objections would not have their autonomy violated. Although a duty requiring PAS rests on patient autonomy, if a doctor objects to the moral responsibility involved, it would not place an undue burden on him.

This chapter has thus outlined the main criticisms of assisted suicide, which mainly concern the protection of the vulnerable and the fear that the legalisation of a duty requiring PAS will lead to the legalisation of other forms of euthanasia such as NVE. With the other bills that have failed to legalize PAS, it is likely that these fears may have ultimately stopped their progression through Parliament. However, with a shift in public opinion and the recognition of the importance of safeguards, Lord Falconer’s Bill,<sup>182</sup> which is currently in the Committee stage of the House of Lords, is much more likely to succeed and to allay the fears of its opponents. The Bill itself is not radical; it is not proposing a blanket law on all types of euthanasia, and it is reliant upon an individually assessed, well-informed, and autonomous decision. The conflicting and confusing case law surrounding advance refusals may need reform in the future, as it only compounds the concerns over those who lose mental capacity through degenerative illness or old age. However, the uncertainty in this area is not so great that it cannot be addressed by the safeguards considered above. Concerns regarding the slippery slope under Kantian ethics in this area are also alleviated by the use of the precautionary argument, which demonstrates that a slippery slope towards NVE is unlikely; it stresses the dangers of mistaking a human being’s rationality, erring on the side of caution and reinforcing Kant’s view of the importance of rationality.

#### CHAPTER IV:

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178 John Kenyon Mason, *Human Life and Medical Practice* 41 (Edinburgh 1988).

179 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

180 *Id.* at Clause 5.

181 Abortion Act 1967, ch 87 (1967).

182 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

## CONCLUSION

It thus remains to connect the philosophical theory behind Kant's ethical duty and the legal practicalities of implementing safeguards for a duty requiring PAS. Kant's objections to suicide and PAS can be compatible, ethical and legal discrepancies in the current law lend favour to PAS, and Lord Falconer's safeguards have made his Bill<sup>183</sup> the most successful yet. These facts establish that a duty requiring PAS is possible under Kantian ethics.

Kant believes that morality lies in the performance of a duty, rather than its consequences.<sup>184</sup> If there is a duty that requires us to respect an individual's dignity, it is moral to do so, regardless of the consequences. Kant's categorical imperative, which underpins his duty ethics, at first appears problematic to the subject of suicide and therefore specifically to PAS. However, Brassington opposes Kant's belief that we cannot kill ourselves out of self-love as this is a contradiction of reasoning; instead, there are two different conceptions of 'self-love.'<sup>185</sup> We act out of a different type of self-love to Kant's conception of self-love as preservation, when we seek to avoid the pain that prolonging life may bring. Secondly, Kant defines human beings as having an 'intrinsic value,'<sup>186</sup> the characteristic which gives us this intrinsic value is our rationality, and this is what gives us dignity. It is not a contradiction of self-love to commit suicide: suicide is an exercise of our rationality rather than a destruction of it. Rationality gives us the capacity to choose what we view as pain and pleasure, what we are capable of enduring, and whether we want to live or die. Thus Singer, too, supports a Kantian duty requiring PAS, since he believes that pain and suffering should be minimized. If we rationally choose to avoid at the pain that would come with prolonging life, out of self-love, then this would be consistent with a Kantian duty to respect a patient's dignity. A positive duty imposed upon doctors also ensures that patients are not using them merely as a means to an end.

The current law in the United Kingdom prohibits a duty requiring PAS under s2 of the Suicide Act 1961.<sup>187</sup> This prevents both relatives and medical professionals from assisting patients to end their lives. There are, however, ethical contradictions within the law: there seems to be little moral distinction between letting a patient die through the refusal of treatment, and actively ending a patient's life upon their request. If the law requires us to respect a patient's autonomous decision in the first instance, then, under Kant's theory, a patient's request to actively end their life should also be respected. Since our rationality gives us the capacity to choose what we view as pain or pleasure, prolonging a life is morally wrong under

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183 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

184 Kant, *Groundwork* at 394 (cited in note 8).

185 Brassington, 32 J Med Ethics at 572 (cited in note 22).

186 Kant, *Groundwork* at 393, 428 (cited in note 8).

187 The Suicide Act 1961, 9 & 10 Eliz 2, ch 60 § 2 (1961).



Kant's theory, rather than actively assisting a suicide, which the patient desires, in order to alleviate pain. Both the law and society accept the doctrine of double effect as a valid legal and moral practice. Doctors are legally allowed to administer a lethal amount of drugs if the primary intention is to relieve pain rather than cause death. Doctors who do so must believe that their duties as physicians extend to relieving pain in this way; otherwise, they would not risk potential prosecution in this unregulated area. As Kant's theory shows that PAS is morally acceptable, there seems little reason why a duty could not be imposed given its similarity to the doctrine of double effect.

In the case law regarding PAS,<sup>188</sup> the Strasbourg Court has acknowledged that the right to die falls under Article 8 of the ECHR,<sup>189</sup> but that the interference by the courts is justified as the law in this area falls under the UK's United Kingdom's jurisdiction. The courts use a different conception of dignity to Kant's rationality: the 'indignity' that comes with the loss of bodily function and reliance on others, the quality of life, and the pain that a patient suffers are factors in this. However, they regard autonomy as underlying the Article 8 right to die, and, as has been argued above, Kant's rationality provides us with the capacity for autonomous choice in regard to what we view as pain, pleasure, and an 'undignified' way of living. It is therefore possible to relate the conception of dignity proposed in this dissertation with the courts' judgment that it would fall under Article 8.

Strasbourg has ruled that it is for Parliament to pass legislation if the law on PAS is to be changed.<sup>190</sup> In the past, several attempts have been made to amend the current legislation and to pass new bills, but these have not made it through the House of Lords. The obstacle that *Nicklinson*,<sup>191</sup> *Purdy*,<sup>192</sup> and *Pretty*<sup>193</sup> encountered, by way of the justification of interference, may be defeated if Lord Falconer's Bill<sup>194</sup> is successful. It is more likely than ever before. The Bill has progressed further through Parliament than any other. This could be due in part to the changing social attitude towards PAS in recent years and in part to its acknowledgment and incorporation of safeguards. These safeguards aim to alleviate some of the fears that are held by opponents of PAS, and are required by Kant's justification for PAS; for example Clause 3(3)(c), regarding coercion and duress,<sup>195</sup> ensures that patients are not used by others as a means to an end.<sup>196</sup> The main criticism of PAS is the protection of the vulnerable, where there is a fear that a legal duty requiring

188 *R (Purdy)*, UKHL 45 at 345.

189 ECHR, Art 8.

190 *Nicklinson*, UKSC 38 at 408.

191 *Id.*

192 *R (Purdy)*, UKHL 45.

193 *Pretty*, 35 EHRR.

194 Assisted Dying Bill, HL Bill 6 (HL 2014–15) (cited in note 2).

195 *Id.*

196 Kant, *Groundwork* at 429 (cited in note 8).

PAS could lead to the legalization of all forms of euthanasia. These safeguards aim to allay these fears; moreover, concerns about a slippery slope argument can also be alleviated ethically, as this dissertation has demonstrated that those who may be vulnerable to NVE and euthanasia can be protected. Under Kantian ethics, rationality or capacity is paramount to the application of a duty requiring PAS;<sup>197</sup> in this way, this duty could not be applied to any individual who lacked capacity, and a request for PAS by an incompetent patient could not be acted upon. The precautionary argument states that we should also seek to protect non-rational agents. Partial agents, and those who are “ostensible agents,”<sup>198</sup> should be treated as rational agents, since it is safer to presume that they have capacity rather than to mistake them as non-agents. Therefore, opponents who fear that non-rational individuals will be subject to NVE can see that Kantian ethics would instead protect these individuals.

A duty to respect a patient's desires in regard to PAS would remove an unfair burden from those individuals who are forced to assist patients in their suicide, and would relieve the courts of a number of prosecution cases that are perhaps unnecessary. Placing the duty on doctors instead, this area of medical law would be regulated to a much greater extent. Overall, it would gradually make this a safer route to ending the life of terminally ill patient and one which respects Kantian ethics.

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197 *Id* at 39–94, 428.

198 Beyleveld and Pattinson, *Precautionary Reasoning* (cited in note 151).





