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INTRODUCTION TO THE EDITION

Isabelle Looi
Editor-in-Chief

It is my great pleasure and privilege to introduce the 15th Edition of the Oxford University Undergraduate Law Journal (OUULJ).

As the Journal marks its 15th edition, this milestone offers a moment to reflect on that mission and to reaffirm its continued importance. Legal scholarship, at its best, is a conversation that invites participation, rewards curiosity and develops through the exchange of diverse perspectives. Laying the path for young minds to engage meaningfully with this conversation has never been more important. It allows both authors and readers to sensibly navigate a world where multiple jurisdictions face threats to the rule of law, where Artificial Intelligence has disrupted how the law is taught, understood and practiced. This is what fuels the Journal's mission to make legal academia accessible to undergraduates.

The publication of long-form legal articles by undergraduates remains the core of the Journal. This year's seven articles were chosen from a strong pool of submissions from around the world. The final selection reflects contributions from undergraduate students spanning seven different institutions, marking the greatest institutional diversity the Journal has seen to date. Together, they exemplify the breadth of perspective and originality that undergraduate legal scholarship can offer.

This year, we have the honour of The Right Hon Lord John Dyson and President of the Supreme Court, The Right Hon The Lord Reed of Allermuir, adjudging the best Private and Public Law submissions. Thanks to the generous support we have received, we have also introduced two new Honourable Mention prizes to reward more authors for the high calibre of their work. In their thoughtful forewords, their Lordships highlighted the importance of legal scholarship for the development of the law as a whole. Lord Reed will be speaking about proportionality in the human rights context at our Publication Evening and Lord Dyson will also be gracing the event as a guest of honour. The significance of having two of the most eminent members of the Judiciary supporting the Journal and its mission cannot be understated. I sincerely thank their Lordships for their willingness to engage with undergraduate students. In doing so, they help to nurture the earliest stages of the ecosystem, cultivating the seeds of legal scholarship from its undergraduate beginnings.

The complementary limbs of the Journal also work to increase accessibility to high-quality legal academia in synergistic ways. The Oxford University Undergraduate Blog (OUULB), led by Esther and staffed by our Blog Editors, has published two articles, with two more in the works. The Oxford Undergraduate Law Podcast (OULP), led by Yvette and staffed by our Podcast Editors, has published four episodes, featuring both academics and practitioners. We are most grateful to our podcast guests for joining us and to the Oxford Law Faculty for collaborating with us on the episode featuring the 2025 Clarendon Law Lecture's guest speaker, Professor Sheila Jasanoff.

On the events front, led by Navin, we hosted our annual Academic Writing Workshop. Navin led a hands-on editing

exercise, while our General Editor, Ju Rae, moderated a panel consisting of Jordan English (Associate Professor at Magdalen College), Angelo Ryu (DPhil candidate at St John's College), and William Cann (Law finalist at Magdalen College). We sincerely thank our panelists for sharing their insights and experiences with the attendees. Further, our Essay Competition returned once again, asking participants to consider questions involving interpretation and judicial review. We also continued fostering a culture of collaboration, collaborating with the Fordham Undergraduate Law Review and the LSE Law Review.

The Journal reaching its 15th Edition is no accident, it stands as a testament to the generosity of those who believe in our mission and have sustained our work, to whom we extend our sincere gratitude. First, to Lord Dyson and Lord Reed, our judges for the best submissions and for supporting the Journal's Publication Evening. Second, to the Oxford Law Faculty, our Dean and Vice-Dean, Professor John Armour and Professor Donal Nolan for their steadfast support and invaluable guidance. My thanks also to Professor Timothy Endicott for moderating the discussion at Publication Evening and to the members of the Law Faulty administrative team that make all our events possible.

Third, to the firms and chambers that support the Journal: Sullivan & Cromwell LLP, Simmons & Simmons LLP, 4 Stone Buildings, Francis Taylor Building (FTB) Chambers, Crown Office Chambers, 3 Verulam Buildings (3VB), South Square, Serle Court Chambers, One Essex Court, and Maitland Chambers. Their generosity has been instrumental in making both this publication and the Journal's broader work possible.

Fourth, to the 15th Editorial Board. To our Podcast Editors, who have skilfully blended their technical expertise with their wonderful hosting skills and legal knowledge to produce such high-quality episodes. To our Blog and Associate Editors, who have consistently approached their editorial work with care and commitment. I was particularly struck by the quality of many of the edits I had the opportunity to review, which reflect both precision of thought and a keen engagement with the material.

Lastly, to the 15th Senior Editorial Board. To our General Editor, Ngiam Ju Rae, for providing clear direction and steady guidance throughout the term and for her tireless dedication to the Journal. To our Vice-Editors, Esther Goddard, Navin Sivakumar and Yvette Young, for sustaining their strong commitment and playing a vital role in advancing the Journal's vision with creativity and precision. To our Administrative Director and Publicity Officer, Chris Ye and Seng Junn Fong, for ensuring that every aspect of the Journal's operations ran smoothly and effectively. My final personal thanks goes to my Vice-Editors-in-Chief, Nicole Yee and Libertad Seoane de la Fuente, for their unwavering loyalty to the Journal, for stepping up when faced with adversity and for continuing to provide the 15th Edition with assistance and advice.

I recall sitting in the Gulbenkian Lecture Theatre as a first-year student, listening to Professor Nolan's address. He mentioned being so impressed by an OUULJ article that he added the article to his lecture reading list. Recognising that the Journal, its authors and its editors can produce work that sits alongside academic heavyweights and be recommended as reading in this institution sets a demanding standard to meet. Nonetheless, it is the shared commitment to giving undergraduates a platform to

thrive in the legal academia world that keeps the flame alive. It is my hope that decades later, our shelf in the Law Library will have dozens of editions and we will still be contributing a copy of the OUULJ to the library's collection every year.

FOREWORD (PUBLIC LAW)

The Rt. Hon. The Lord Reed of Allermuir
President of the Supreme Court of the United Kingdom

It is a sign of the strength of law as a subject at Oxford University that the Oxford University Undergraduate Law Journal is now in its 15th year of publication, and continues to offer an opportunity for undergraduates to develop their skills in legal research and writing. It also continues to attract high quality articles.

This year's public law articles all display careful research and analysis. They are varied in subject matter. One of them concerns a traditional public law subject: ouster clauses. Another of them concerns a question which is of wider significance, although approached in the context of public law: the value of uncertainty in the law. Another concerns an interesting question of comparative law: how the law's approach to the concept of detention in Canada and in the UK affects the operational effectiveness of the police. The fourth addresses a significant question of public international law: whether the obligation to provide facilities for detained individuals to receive consular assistance extends to individuals who are citizens of the detaining state but are also citizens of another state.

In the first article, *'Some Ousters Are More Equal Than Others: Rethinking Section 2 of the Judicial Review and Courts Act 2022'*, Prakruti Rao argues that it is regrettable that an ouster clause was introduced by section 2 of the Judicial Review and Courts Act 2022, in order to restrict the ability to seek judicial review of decisions of the Upper Tribunal. In her view, it would have been

preferable for such a restriction to have been introduced by means of judicial development of the common law. As she acknowledges, that would have required the reversal of the judgment of the Supreme Court in *Cart v Upper Tribunal*[1]. The Supreme Court is very slow to reverse its own decisions, and *Cart* was a decision on an issue of principle by an enlarged bench of seven justices. A challenge to its correctness would face a number of problems. What error was there in the reasoning in *Cart*? What could be said to have changed since it was decided, apart from the identities of the judges? Any attempt to have *Cart* reversed would also have to have been brought by the government after losing a judicial review of an Upper Tribunal decision, which was an uncommon event. It might have been thought simpler and safer for the government to achieve the desired result by legislation, implementing a recommendation of the Independent Review of Administrative Law[2], which had been requested by judges to look at the question because of the volume of *Cart* reviews and their very low rate of success. Those were also matters of legitimate concern to the government, not only because of the implications for the courts, but also because of the consequences for the implementation of controls on immigration and asylum.

In the second article, '*Constructive Uncertainty in Public Law*', Wei Pheng Koon conceptualises uncertainty as to the law as a principle which has a number of valuable aspects in public law. One is that it encourages comity between different branches of government, as uncertainty as to the legal limits of their powers

[1] [2011] UKSC 28, [2012] 1 AC 663.
[2] The Independent Review of Administrative Law, CP 407 (2021), Introduction, para 10.

incentivises them to avoid conflict with one another which could result in those limits being tested and determined, possibly to their disadvantage. This is an idea which has previously been developed by Professor Aileen Kavanagh.[3] A second aspect is that the fuzzy boundaries of legal principles provide the law with the flexibility to adapt its solutions to particular circumstances. This idea, rooted in Hart's conception of legal rules as possessing an 'open texture' or 'penumbra of doubt',[4] has also been developed by Professor Endicott.[5] An example given by the author in the context of public law is the adaptability of the requirements of a fair hearing to the circumstances. The third aspect is that decision-makers' recognition of their own uncertainty encourages them to exercise restraint and to defer to others possessing greater expertise. Although, as I have indicated, this is not altogether virgin territory, the article presents a thoughtful synthesis of a number of strands of thought.

In the third article, '*How Does the Definition of Detention Restrict the Police? A Comparative Analysis of Canada and the United Kingdom'*, Ibrahim Ejaz enters an area of the law which is less familiar to British public lawyers. The focus is on how the legal definition of 'detention' by the police, triggering procedural protections for the detainee such as protection against self-incrimination and the right to legal advice, can affect day to day policing, and in particular the ability of the police to promote public order and protect the public. The author shows how the Canadian definition can result in 'detention' occurring at a much earlier stage of an investigation than in the UK, and how the

[3] The Collaborative Constitution (2023).
[4] HLA Hart, *The Concept of Law* (1961).
[5] TAO Endicott, *Vagueness in Law* (2000).

triggering of protections at that earlier stage can inhibit the ability of the police to pursue their investigations effectively. Uncertainty as to when detention will be held to have occurred is shown to incentivise caution by the police in pursuing their inquiries—consistently with one of the themes of Wei Pheng Koon's article, but not necessarily in the public interest. The Canadian case law is analysed in greater detail than the corresponding British law, and the impact of the European Convention on Human Rights on the latter might be worth greater consideration. However, this is an interesting and original article.

In the fourth article, *'Two Passports, One Right? Reimagining Consular Protection in the Age of Dual Nationality'*, Laura Romero carries out a timely examination of an important question in public international law. Article 36 of the Vienna Convention on Consular Relations applies where a national of a state (the 'sending state') is arrested or detained in another state (the 'receiving state'), and requires the receiving state to inform the consulate of the sending state and to allow its consular officers to visit their national and to arrange for his legal representation. The question is whether that obligation applies where the national of the sending state is also a national of the receiving state. The circumstances may vary greatly from one case to another. Take, for example, the case of a person born in the UK to Bangladeshi parents, who has lived in the UK all her life. She possesses both British and Bangladeshi citizenship. She may be arrested in the UK. Is she entitled to the assistance of the Bangladeshi consulate? The view might be taken that no useful purpose would be served by such an interpretation of article 36: she is for all practical purposes in the same position as any other British citizen. What if she travels to Bangladesh and is arrested there. Is she entitled

to the assistance of the British consulate? Its assistance would serve a useful purpose, as she is not in the same position as other Bangladeshi citizens. She may, for example, not speak Bengali, have any knowledge of Bangladeshi criminal procedure, or know how to instruct a Bangladeshi lawyer. So should article 36 be interpreted as applying to dual nationals as it does to every other national of the sending state? Or should it be interpreted as having no application to dual nationals? Or should its application to dual nationals depend on some assessment of whether their 'effective' or 'predominant' nationality is that of the receiving state or the sending state, or on an assessment of their individual need for assistance? Should the issue be approached on the basis that article 36 is concerned with diplomatic relations between states, or on the basis that its concern is to provide procedural protection to individuals? The problem is analysed carefully in a most interesting and well-written article.

FOREWORD (PRIVATE LAW)

The Rt. Hon. Lord Dyson
Former Justice of the Supreme Court and Master of the Rolls

In a postscript to his masterly judgment in *The Spiliada*[6] case, Lord Goff said:

> *'I feel that I cannot conclude without paying tribute to the writings of jurists which have assisted me in the preparation of this opinion.... They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding'.*

Lord Goff's image of pilgrims journeying together along the road marked a distinct shift in attitude. The conventional approach had kept the pilgrims at more than arms' length from each other. The distance was so great in fact that judges were only able to entertain conversation of sorts once the jurists' journey through life had ceased. This ridiculous convention was circumvented by some extraordinarily disingenuous practices. Counsel were permitted to adopt as part of their submissions the views of academics taken directly (even verbatim) from their articles and textbooks, so long as they did not attribute them to the academic or the book from which they were taken. Even worse, even if counsel did not adopt the views of academics in this way, judges would surreptitiously adopt them and, without

[6] *The Spiliada* [1987] AC 460, 488

acknowledgement, parade the academic writing as if it were the product of their own brilliance.

These days, judges are far more open about these things. Judgments are peppered with references to academic writings. That is, of course, how it should be. The influence of academic writings on judicial decision-making is considerable. To give one striking example, Professor Glanville Williams had noted in an article that the House of Lords in *Anderton v Ryan*[7] had failed to keep out of the '*intellectual minefield*' of the law regarding attempts to commit an offence which it is impossible to commit. Their Lordships had, in his words, failed to '*heed the 'Keep out' notice*' which Parliament had erected through section 1 of the Criminal Attempts Act 1981; a notice which was intended to ensure that the courts did not keep making '*asses of themselves*'.

Within a year of the decision in *Anderton*, and as Lord Bridge acknowledged in no small part owing to Glanville Williams' criticism, the House of Lords in *Shivpuri*[8] overturned its earlier decision.

The contribution of good quality academic writings to the development of the law is growing and cannot be overstated. It has been a great pleasure and privilege to read the three private law articles that are being published in the Oxford University Undergraduate Law Journal this year. Each of them is carefully researched and expressed in language of exemplary clarity. Each treats of a subject that is relatively new and which calls for a novel

[7] *Anderton v Ryan* [1985] AC 560
[8] *R v Shivpuri* [1987] AC 1

approach. They illustrate how the law adapts to accommodate societal and technological developments.

'*A Home, not a House*?' addresses the difficult question of how domestic property of cohabiting unmarried couples should be allocated between them when their relationship breaks down. In recent years, this important subject has attracted the attention of senior courts in a number of common law jurisdictions. This article argues that there is a fundamental conceptual distinction between the acquisition and the quantification of interests in such a home. There is and should be scope for the exercise of judicial discretion (based on justice and fairness) in determining how such rights, when acquired, are quantified. But there is, or should be, no room for such judicial discretion in proving the acquisition of such interests in the first place. The instinctive desire to secure fairness at the acquisition stage should be rejected. To allow the court to apply vague notions of fairness and context to the acquisition stage would be a blow to the certainty and predictability of property law.

'Algorithmic Contracts and the Resilience of the Common Law' tackles questions for the law of contract formation and performance which are posed by the increasing prevalence of artificial intelligence and algorithm-driven automation. The article argues that the courts of the United Kingdom, Canada and Singapore have shown that the common law of contract is able to adapt to meet these new challenges just as it has evolved to adapt to other technological challenges in the past—for example, the arrival of the telex machine and e-commerce. The law can be so developed without undermining established legal principles. The author discusses the perceived concerns inherent in the use of AIs in contracting, namely (i) attribution and liability; (ii)

intention and consent; and (iii) predictability and transparency and suggests that these concerns are exaggerated. For example, regarding the particular question of who, as between an AI and its employer, should bear the liability for a contractual mistake, the author argues convincingly that it is doctrinally more sound to adopt by analogy the principle of vicarious liability in tort and fix the employer with liability.

'The Judicial Construction of Fiduciary Loyalty: A Case for English Stewardship'. This article addresses the issue of fiduciary loyalty in modern corporate governance with a particular focus on sections 172 and 174 of the Companies Act 2006 and the comparable Delaware law. The author argues that section 172 should not be interpreted as requiring only that a director act in what he or she honestly believes to be in the company's interests. It should also be interpreted as requiring a director to act for purposes the law recognises as objectively appropriate to the office. Section 172 is too often treated through subjective good faith and this has made the provision appear difficult to police. The Delaware approach is to address governance failures by stretching loyalty through the language of good faith and conscious disregard. But the author says that this solution is conceptually unstable because it blurs loyalty and care: it treats culpable inattention as a species of infidelity.

PRIZES

Best Public Law Submission to the Fifteenth Edition of the Oxford University Undergraduate Law Journal:

Two Passports, One Right? Reimagining Consular Protection in the Age of Dual Nationality

Laura Patricia Romero y Pino
Universidad Panamericana

The Public Law Prize winner was selected by The Rt. Hon. The Lord Reed of Allermuir, President of the Supreme Court of the United Kingdom

Best Private Law Submission to the Fifteenth Edition of the Oxford University Undergraduate Law Journal:

The Judicial Construction of Fiduciary Loyalty: A Case for English Stewardship

Boris Liu
University College London

The Private Law Prize winner was selected by The Rt. Hon. Lord Dyson, Former Justice of the Supreme Court and Master of the Rolls

The Editorial Board wishes to thank our prize sponsors:

Francis Taylor Building—*for their funding of the Public Law Prize*

Serle Court—*for their funding of the Private Law Prize*

PUBLIC LAW ARTICLES

Some Ousters Are More Equal Than Others: Rethinking Section 2 of the Judicial Review and Courts Act 2022

Prakruti Rao*

Abstract—Section 2 of the Judicial Review and Courts Act 2022 introduces a partial ouster of the High Court's supervisory jurisdiction, legislatively reversing the Supreme Court's decision in *Cart v Upper Tribunal*. The prevailing framework for evaluating ouster clauses focuses on their nature: the extent to which judicial oversight is preserved. This article contends that such an assessment, while valuable, is incomplete. A comprehensive evaluation must consider two further dimensions: the origin of the restriction (whether internal or external to the judicial infrastructure) and its changeability (whether it is dynamic or static). Section I maps the evolution of a spectrum of ouster clauses through *Anisminic v Foreign Compensation Commission*, *Cart v Upper Tribunal*, and *Privacy International v Investigatory Powers Tribunal*,

* University College London; King's College, University of Cambridge. I am grateful to the Editorial Board of the OUULJ for their generous and considerate feedback on earlier drafts of this article. All errors remain my own.

demonstrating the courts' increasing sensitivity to varied restrictions on oversight. Section II examines the judicial acceptance of s 2, arguing that, assessed through the lens of nature alone, it constitutes a doctrinal continuation of the preceding case law. Section III applies the novel tripartite framework in full, contending that the statutory origin and fixed character of the ouster render it ill-suited to the institutional and rights context of Cart, where the courts were better placed than Parliament to calibrate the appropriate level of restriction.

I. Introduction

By introducing a new partial ouster of the High Court's supervision of the Upper Tribunal, s 2 of the Judicial Review and Courts Act 2022 (JRCA 2022) legislatively reverses the Supreme Court's decision in *Cart v Upper Tribunal*.[1] The courts' acceptance of s 2 reignites a simmering debate within the case law and literature: how should we evaluate the appropriateness of restrictions on judicial oversight, and which constitutional actor is best placed to make that determination?

This article contends that the prevailing framework for assessing ouster clauses—which focuses on the 'nature' of the restriction—while invaluable, is on its own incomplete. Comprehensive evaluation must consider three factors: the *nature* of the ouster, its *origin*, and its *changeability*. Crucially, this tripartite framework is not exclusively addressed to the courts. It provides a workable tool for all those engaged in constitutional debate—including Parliament, the executive, academics, and broader civil society—to scrutinise restrictions on judicial oversight.

Applying this framework to s 2 reveals a critical tension. While the nature of the ouster is consistent with the principles of judicial oversight established in prior case law, its statutory origin and fixed character render it ill-suited to the specific context of *Cart*. It is not contended that Parliament lacked the authority to legislate in this area. Rather, this article advances a more precise claim: in the *Cart* jurisdiction, where the rights at stake were acute and the High Court had developed a finely calibrated working relationship with the Upper Tribunal, the courts were better

[1] *Cart v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 ('Cart').

placed than Parliament to determine the appropriate level of restriction on oversight. The risk of losses in rights protections is felt most directly in asylum and immigration cases, as *Ali v Upper Tribunal*[2] illustrates.

The article proceeds as follows. Section I outlines the gradual judicial recognition that ousters exist across a spectrum, based on the nature and extent of restriction on oversight, most clearly displayed through three landmark cases: *Anisminic v Foreign Compensation Commission*,[3] *Cart v Upper Tribunal*, and *Privacy International v Investigatory Powers Tribunal*[4]. Having mapped the preceding case law, Section II then introduces the JRCA 2022 ouster clause. The courts' assessment of the clear statutory language, the partial nature of the ouster, and the competence of the Upper Tribunal displays a doctrinal continuation, rather than a reversal, of previous judicial reasoning. The article therefore acknowledges that the 'nature' of the ouster supports its enforcement. Section III applies the novel tripartite framework to s 2 JRCA 2022 in full, assessing its statutory origin and fixed character against the specific institutional and rights context of *Cart*.

[2] [2024] EWCA Civ 372, [2024] 1 WLR 5097.
[3] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) ('Anisminic').
[4] *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491 ('Privacy International').

II. The Evolution of a Spectrum of Ouster Clauses

Anisminic, *Cart*, and *Privacy International* capture the courts' increasing sensitivity to varied restrictions on court oversight, from scepticism towards tribunals to nuanced apportionment of judicial workload. This evolution has been illuminatingly synthesised by Hooper,[5] who identifies four considerations relevant to assessing the nature of ousters: the clarity of statutory language, the extent of the restriction on oversight, the character of the institution to which oversight is reallocated, and the impact on legality through risks to fundamental rights or the development of local law. Hooper's framework is certainly compelling; however, it captures only one dimension of a fully adequate assessment of ousters. The nature of an ouster cannot be assessed in isolation from its origin and changeability; it is the introduction of these two additional axes that this article advances in Section III.

A. *Anisminic*: Taming the Unruly Child

Anisminic serves as the symbolic starting point in understanding how courts engage with restrictions on oversight. Although conventionally read as drawing a firm line against ousting judicial review despite Parliament's intent, deeper analysis reveals the beginnings of a more nuanced consideration of statutory context, the competence of the Foreign Compensation Commission, and the rule of law interest in maintaining judicial oversight. The

[5] Hayley J Hooper, 'No Superior Form of Law? R. (Oceana) v Upper Tribunal' [2024] PL 1-11.

Court's engagement with this mosaic of factors anticipates a more sophisticated judicial appreciation of ousters that resists a binary conflict between judicial oversight and executive decision-making which subsequent case law would develop more explicitly.

Anisminic has been described as a '[rebellion] against Parliament'[6] to uphold the rule of law despite clear legislative intention to oust oversight. This tension is certainly apparent in the Court's approach to statutory interpretation. The Foreign Compensation Act 1950 contained a provision that any determination of the Foreign Compensation Commission 'shall not be called in question in any court of law.' The Court found that, as a matter of construction, the ouster did not preclude judicial inquiry into whether an order of the Commission constituted a nullity. Although appearing to disregard Parliament's intent to oust oversight, the better view is that the Court's reasoning provided the foundations for identifying which factors point towards an effective ouster clause. Lord Reid emphasised that if 'Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry'.[7] much more specific language would be expected. Considering the following case law, Lord Reid's remarks should not be viewed as a textual bar against ousters. Rather, they reflect a deeper judicial proposition that the clarity of statutory language is itself an indicator of the strength and seriousness of parliamentary intent to oust review and is a factor determining the nature of the ouster itself. As explored further in the discussion of s 2, demonstrating

[6] Forsyth CF and Ghosh J, Wade & Forsyth's Administrative Law (12th edn, OUP 2022) 589.
[7] Anisminic, 170.

respect for legislative competence can provide constitutional weight behind giving effect to the ouster.

The engagement with parliamentary intent in *Anisminic* extends beyond textualism; an often-underappreciated factor of the ruling is that the purpose of the underlying statutory framework equally shaped the level of judicial supervision required. Lord Wilberforce observed that the Commission's interpretation effectively excluded Anisminic from compensation, despite the company's inclusion in Annex E of the Order, which listed entities eligible for compensation.[8] Its misinterpretation thwarted the legislative intent of providing compensation to those who had suffered loss in Egypt. His Lordship found that 'the solution [is] in the thickets of subsidiary legislation',[9] rather than the technical terms of 'jurisdiction' or 'nullity'. The approach to judicial oversight involved evaluation of the Commission's efficacy in performing its adjudicative role in the context of the specific statutory purpose, rather than an attempt to establish a general principle against ousters.

The relevance of the Commission's competence is also visible through the Court's analysis of its *institutional* features. The House of Lords acknowledged the Commission's 'predominantly judicial' functions.[10] Yet the crux of the judgment is that, while judicial in substance, the Commission is executive in form. The reference in the ruling to the Commission 'asking the wrong question'[11] implies a degree of institutional paternalism from the Court; that despite their judicial function, tribunals cannot reliably

[8] Anisminic, 214.
[9] Anisminic, 206.
[10] Anisminic, 207.
[11] Anisminic, 154.

identify the limits of their own power. Consequently, the substantive evaluation of the Commission demonstrates an appeal to the rule of law interest in ensuring effective judicial accountability. This point is crucial; it provides a stark contrast to the collaborative relationship identified between the Upper Tribunal and the High Court in the following cases, a development that bears directly on this article's argument that the modern judicial landscape relevant to the *Cart* context favoured a judicially managed restriction on oversight.

Interestingly, however, this rule of law argument is implicitly made elsewhere in the judgment through an appeal to parliamentary sovereignty. Lord Wilberforce captured this most precisely, observing that it would be a 'contradiction in terms'[12] for Parliament to define limits to the Commission's power while simultaneously allowing for such limits to be 'safely passed.'[13] As a necessary counterpart of the Commission's autonomy, the courts must ensure those limits are observed.[14] Therefore, the Court's adherence to parliamentary sovereignty extends to enforcing Parliament's intention by policing the Commission's exercise of its mandate. Although the argument that recourse to an authoritative judicial source is 'not a denial of legislative sovereignty, but an affirmation of it' is most notably associated with Laws L.J.'s remarks in the High Court in *Cart,*[15] I suggest that its roots originate earlier. The Court's analysis demonstrates that judicial supervision cannot be reasoned as purely an act of

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[12] Anisminic, 209.
[13] Anisminic, 207.
[14] *Anisminic*, 208. This is echoed elsewhere in the judgments; Lord Pearce approvingly cited the comments of Farwell L.J. in *Rex v. Shoreditch Assessment Committee, Ex parte Morgan [1910] 2 K.B. 859* that a tribunal that determined the limits of its own powers would be 'autocratic, not limited' at 197.
[15] *Cart v Upper Tribunal* [2009] EWHC 3052, 2009 WL 4113756 at [38].

resistance to parliamentary sovereignty; upholding oversight was a principled enforcement of parliamentary sovereignty itself by enforcing the Commission's bounded discretion.

Anisminic therefore reflects an early model of judicial oversight that is more sophisticated than its reputation as an act of defiance suggests. To some extent, there is an evident conflict between statutory language and the Court's interpretation of jurisdiction and nullity. However, beneath the surface of textual interpretation lies a contextual assessment of four interlocking factors: Parliament's clarity in ousting review, the purpose of the underlying statutory framework, the institutional characteristics of the Commission, and the rule of law interest in maintaining independent oversight. The subtleties of the House of Lords' reasoning in *Anisminic* are noteworthy; the four factors, corresponding to Hooper's framework, sowed the seeds for judicial appreciation of a spectrum of ousters in *Cart* and *Privacy International*.

B. *Cart*: Institutional Trust and Proportionate Justice

Cart builds upon the latent factors for assessing ousters proposed by *Anisminic*. What is particularly noteworthy, however, is that beyond merely considering the four factors, *Cart* signals an implicit move towards using them as a criterion for differentiating acceptable from disproportionate restrictions on judicial oversight, therefore recognising a 'spectrum' of ousters.

The Tribunal, Courts and Enforcement Act 2007 (TCEA) included a provision that 'the Upper Tribunal is to be a

superior court of record.'[16] The Divisional Court, Court of Appeal, and the Supreme Court in *Cart* unanimously agreed that the section did not fully oust judicial review.[17] The debate, however, lay in the *extent* of restriction. The Divisional Court and the Court of Appeal agreed that limiting review to 'exceptional circumstances'[18] was preferable. However, the Supreme Court found that the 'second appeals test',[19] requiring a case to have a reasonable prospect of success and either raise an important point of principle or practice, or for there to be some other compelling reason to hear it, provided a more proportionate safeguard against fossilisation of serious legal errors within the tribunal system.

The Supreme Court ruling echoes Lord Reid's signal in *Anisminic* that clear and explicit statutory language is required to oust review, reinforcing the fact that statutory language is itself an indicator of the strength of parliamentary intent to restrict oversight. However, the judgment explicitly highlights the historic role of the High Court in providing judicial accountability. The fact that the High Court's supervisory jurisdiction may only be ousted by 'the most clear and explicit words'[20] is bolstered by a description of the Court as an 'artefact of the common law.'[21] The emphasis placed on the Court's well-established position is noteworthy; it anchors an interpretative presumption in protecting the High Court's jurisdiction in

[16] *Cart*, [24].
[17] *Cart*, [34].
[18] *Cart*, [34].
[19] *Cart*, [57].
[20] *Cart*, [30].
[21] *Cart*, [32]. Indeed, all three courts note the well-established history of the High Court, notably through Laws L.J.'s in-depth scholarly account of its link to the Curia Regis of William I in *Cart v Upper Tribunal* [2009] EWHC 3052, 2009 WL 4113756 at [28].

constitutional language. Here, the reading of legislative intent is not purely textual; it develops *Anisminic* and is informed by the constitutional value of judicial oversight.

Moreover, *Cart* steers clear of framing ousters as a binary conflict between tribunals and the courts. Importantly, the judgments from all three courts are characterised by extensive engagement with the statutory framework and policy foundations of the tribunal system. Laws L.J described the Upper Tribunal as the 'alter ego'[22] of the High Court since it sits at the apex of a comprehensive structure and exercises a cognate judicial review jurisdiction. In the Court of Appeal, the focus shifted to the TCEA as a 'newly coherent and comprehensive'[23] judicialisation of tribunals, while Lady Hale's judgment in the Supreme Court devotes significant space to the 'comprehensive' overhaul[24] instigated by the Act. A parallel can clearly be drawn with Lord Wilberforce's discussion of the compensation statutory framework in *Anisminic*, suggesting that purposive engagement with the institutional features of tribunals against their legislative frameworks is a consistent feature of judicial reasoning of ousters. Here, however, the dicta point towards an appreciation for the judicial expertise of the tribunals.

In addition to the judicial nature of tribunals, Lord Phillips stressed the institutional 'partnership'[25] between Parliament and the judiciary in managing resource constraints.[26]

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[22] *Cart*, [94].
[23] *Cart v Upper Tribunal* [2010] EWCA Civ 859, 2010 WL 2832927, [42].
[24] *Cart*, [54].
[25] *Cart*, [89].
[26] For a rich discussion of how the approach in Cart of 'taking legislation seriously' is not novel, *see* Bell J, 'Rethinking the Story of Cart v Upper Tribunal and Its Implications for Administrative Law' (2018) 39 Oxford

The adjudicative competence of the tribunal system and recognition of institutional collaboration therefore point in favour of redistributing some level of supervisory oversight to the tribunal. In light of the expertise and policy reasoning for the ouster, the Supreme Court adopted the second appeals test as a compromise, which has been compellingly described as 'proportionate dispute resolution'[27] reasoning between safeguarding against the fossilisation of bad law and resource concerns.

At first glance, the approach may appear to sideline rule of law concerns. In particular, it may appear to compromise the individual's right to access the courts. Such a reading, however, is incomplete: the rule of law may be *furthered* by addressing resource constraints. Lord Brown captures this tension; the rule of law is weakened if significant resources are devoted to 'finding a very occasional grain of wheat on a threshing floor full of chaff.'[28] It can hardly be said that a right to access the courts is protected if individuals *en masse* are effectively denied any form of legal redress due to a disproportionate expenditure of resources, while other claimants are reviewed by both the Upper Tribunal and the High Court. This interpretation of the rule of law can be termed the 'collective rule of law approach'. The orthodox individual

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Journal of Legal Studies 74. To illustrate, Bell draws attention to the fact that judicial reasoning in seminal cases, such as *Puhlhofer*, can be explained by the courts' approach of taking the empowering legislation - in that case, the Housing (Homeless) Act 1977- as the starting point of analysis. Such a doctrinal approach fosters sensitive engagement with the policy goals Parliament intended to achieve, rather than focusing on applying strict doctrinal categories in outlining administrative jurisdiction.

[27] Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) CLJ 71(2), 297.

[28] *Cart*, [100].

approach focuses on protecting one's right to access the courts and personal freedom from arbitrary decision-making. Contrastingly, the collective approach analyses rule of law concerns through a systemic lens. It is crucial to recognise both limbs of the rule of law in the ouster context; restrictions on judicial oversight often provoke discussion of a false dichotomy between the rule of law, understood as protection of individuals, and good governance. On a closer look, the Manichaean approach flattens the rule of law interests both for and against upholding ousters.

The rejection of binary framing, the purposive reading of legislative intent, and the calibration of oversight to institutional context together refine the 'nature' assessment initiated in *Anisminic* into something more explicit and workable. *Privacy International* would develop this reasoning a step further.

C. *Privacy International*: Restriction or Redistribution of Oversight?

The final case preceding s 2 that this article considers is *Privacy International*. By a majority of 4-3, the Supreme Court held that s 67(8) of the Regulation of Investigatory Powers Act 2000, which stated that decisions of the Investigatory Powers Tribunal '(including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court,' did not oust the High Court's supervisory jurisdiction. The judgments draw together three strands of reasoning visible in the previous caselaw: the necessity of clear language as an indicator of parliamentary intent to restrict review, the interaction between institutional competence and the collective and individual

requirements of the rule of law, and, crucially, increasingly explicit recognition of a spectrum of ousters.

Firstly, the majority reaffirmed the 'fundamental presumption'[29] against ousting the High Court's supervisory jurisdiction. To successfully exclude judicial review, Parliament must 'squarely confront what it is doing'[30] by using the most clear and explicit words. Building on *Cart*, the constitutional importance of judicial oversight places presumptive weight against ousters, signalling to Parliament that the clarity threshold remains demanding and the primary indicator of the legislature's seriousness in restricting oversight.

Notably, all the judgments in the case pay close attention to the statutory framework and judicial character of the tribunal, though the majority and dissenting judgments draw different conclusions regarding the rule of law implications. Despite finding that the provision did not completely oust review, the Court stated that it is highly artificial, and somewhat insulting, to describe a reasoned tribunal judgment as a 'nullity' merely because of disagreement over a point of law.[31] Lord Sumption's dissent also critiques the conceptualisation of the ouster clause as a 'putative turf war'[32] between the High Court and tribunals. The tenor of the dicta points towards collegiality between courts and tribunals and judicial respect for tribunal competence. Lord Sumption's judgment stresses that, because of this competence, the judicial character of the Tribunal 'sufficiently vindicate[s]'[33]

[29] Privacy International, [99].
[30] Privacy International, [100].
[31] Privacy International, [82].
[32] Privacy International, [199].
[33] Privacy International, [172].

the rule of law, which also incorporates legal certainty and Parliament's freedom to allocate determinative 'finality' to a specific body. Contrastingly, Lord Lloyd-Jones and Lord Carnwath echoed *Anisminic*'s fears of unbounded executive discretion, describing judicial oversight as a 'necessary corollary of the sovereignty of Parliament'.[34] What unites the various judgments is the shared appreciation that ousters do not necessarily provide a binary choice between judicial paternalism and permitting executive bodies to operate in legal black holes. Rather, tribunals provide a certain type of oversight. The majority and dissenting judgments reach different conclusions on the permissible extent of the ouster in light of their differing interpretations of the rule of law. However, both are rooted in a collaborative, rather than adversarial, approach to the partnership between courts and tribunals. Consequently, as visible in the division between an 'individual' and a 'collective' reading of the rule of law, it is difficult to reduce the issue of ousters to a flat conflict between the rule of law and legislative intent.

Particularly significant for our evaluation of s 2 JRCA 2022 is the discussion in *Privacy International* of varying degrees of intrusion into judicial oversight. The case reiterates that ousters are not inherently a zero-sum game between judicial protection and parliamentary sovereignty. Lord Carnwath argued that there is a 'strong case'[35] for holding that the rule of law precludes a clause that wholly excludes the High Court's supervisory jurisdiction. Importantly, what is stressed is the exhaustive nature of this hypothetical ouster. On the facts, the Court *did* find that the ouster was of some effect: five of the seven Justices concluded

[34] Privacy International, [160].
[35] Privacy International, [144].

that the clause was sufficiently clear to preclude review of jurisdictional errors of fact. Lord Carnwath's judgment continues to differentiate between restriction and reallocation of review. The separation of powers dictates that administrative bodies should not determine the legal questions that frame their own decision-making process. However, 'a different constitutional analysis may be required,'[36] when an ouster empowers a 'judicial body of like standing and authority'[37] to provide oversight. The questions of which grounds are restricted and whether oversight is redistributed to another body are crucial in identifying the efficacy of ousting review.

Taken together, the three cases depict the courts as sensitive evaluators of tribunal competence, legislative intent, and the requirements of the rule of law, echoing the factors outlined by Hooper. Critically for the following analysis of s 2, the cases demonstrate a growing appreciation for a spectrum of restraints on judicial oversight, from full judicial review at one end, to various partial restrictions and reallocations of review, and then complete exclusion of oversight.

II. Reversing *Cart*: Doctrinal Continuation

Replacing the ruling's second-tier appeals criteria known as Cart judicial review (Cart JR), s 2 JRCA 2022 inserts a partial ouster of review of Upper Tribunal decisions into the Tribunal, Courts and Enforcement Act 2007. The Upper Tribunal's decisions to refuse permission to appeal are now to be 'final, and not liable to be

[36] Privacy International, [40].
[37] Privacy International, [252].

questioned or set aside in any other court'.[38] The strict wording that 'the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision'[39] reflects a deliberate attempt to by Parliament to meet the clarity threshold outlined in the preceding case law. Four narrow exceptions remain under s 11A (4): (a) the lack of a valid application, (b) the tribunal being improperly constituted, (c) bad faith, or (d) a fundamental breach of natural justice. Interestingly, the section therefore mirrors the 'exceptional circumstances' test adopted by the lower courts in *Cart*, which limited review to 'outright' excesses of jurisdiction or a fundamental denial of procedural justice. One can therefore place the ouster in the centre of the spectrum identified in Section I; it provides a more restrictive approach than the *Cart* second appeals test yet maintains a safety valve through judicial review of exceptional cases and reallocates oversight to a competent and judicial body, the Upper Tribunal.

At first glance, it may seem that judicial acceptance of s 2 departs from the nuanced approach to ousters in the previous case law in favour of upholding parliamentary sovereignty. Indeed, the Independent Review of Administrative Law (IRAL) expressly stressed that Parliament should not be considered supine;[40] emphasising that parliamentary sovereignty was a clear incentive for reform. Appeal to parliamentary sovereignty is particularly visible in *R (on the application of Oceana) v Upper*

[38] Tribunals, Courts and Enforcement Act 2007, s 11A (2).
[39] Tribunals, Courts and Enforcement Act 2007, s 11(A)(3)(a).
[40] *Independent Review of Administrative Law. (2021). The Independent Review of Administrative Law: Report*. London: Ministry of Justice. Available at: https://assets.publishing.service.gov.uk/media/6053383dd3bf7f0454647fc4/IRAL-report.pdf (Accessed: 11 October 2024), 25.

Tribunal,[41] the first case upholding the ouster. Saini J asserted that, besides some obiter comments and academic critiques, the most fundamental rule of our constitutional law is that Parliament is sovereign and, therefore, courts must give effect to the ouster.[42] Appeal to parliamentary sovereignty in form and language in response to the explicit s 11A ouster should not be mistaken, however, for a substantive step back; it is preferable to consider the clarity of language as a more prominent factor influencing judicial acceptance of the ouster.

Alongside recognition of parliamentary sovereignty, the case law demonstrates engaged analysis of tribunal competence and resources, reminiscent of *Anisminic*, *Cart*, and *Privacy International*. Three features of the s 2 ouster can be extracted. First, the judgments display a sensitive evaluation of fairness in the context of the modern tribunal framework and parliamentary intent. That is to say, a fair system is not necessarily a strictly court-centred one. In *Oceana*, Saini J found that the 'natural justice' exception imposes a 'substantial hurdle',[43] as only an error 'so grave as to rob the process of any legitimacy'[44] would meet the threshold. The high jurisdictional gateway was justified because of the Upper Tribunal's 'necessary skill and independence'[45] and the overarching aim of the legislation. Saini J stated that 'principles of fairness are not to be applied by rote identically in every situation.'[46] More specifically, what is required by natural justice is shaped by the legal and administrative context

[41] *R (on the application of Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin), [2023] 4 WLUK 19 ('Oceana').
[42] Oceana, [52].
[43] Oceana, [31].
[44] Oceana, [33].
[45] Oceana, [39].
[46] Oceana, [32].

and not be given a meaning which frustrates the purpose of the statutory framework. Consequently, in light of the Upper Tribunal's competence and the clear legislative intention to reallocate workload to the tribunal system, Saini J interpreted the ouster exceptions restrictively so as not to undermine the statutory purpose or respect for tribunal competence. This approach is not novel; *LA (Albania) v Upper Tribunal*[47] acknowledges that a margin of legal error is accepted in *Cart's* second appeals test itself and the acknowledgement that Parliament is entitled to allocate determinative finality is reminiscent of Lord Sumption's comments in *Privacy International*. Here, the needs of fairness are coloured by tribunal competence and the administrative purpose of the ouster, a combination of respecting legislative intent and tribunal function.

The second feature is that the ouster is not absolute; exceptions remain for bad faith and in the interests of natural justice. The spectrum of ousters established in the preceding case law contains five identifiable points: full judicial review at one end; total exclusion at the other; and between them, in increasingly restrictive order, the exclusion of jurisdictional errors of fact from *Privacy International*, the second appeals test from the Supreme Court in *Cart*, and the exceptional circumstances test from the lower courts in *Cart*. Placing the ouster on the proposed spectrum visible in the caselaw, it remains close to the 'exceptional circumstances' stage. This is crucial; the reform does not pose a binary choice between parliamentary intent and judicial oversight. Nor does the ouster amount to the constitutional showdown envisaged in previous cases, such as *R (Jackson) v*

[47] *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337, [2024] 1 WLR 1673, [34] ('LA(Albania)').

Attorney General and *AXA General Insurance v Lord Advocate*, by completely frustrating legal accountability.[48] Instead of rejecting the possibility that the rule of law could preclude ousters, the cases demonstrate that, on the facts, the rule of law does not need to.[49] The Court of Appeal in *LA (Albania)* distinguished s 11A from the hypothetical 'total ouster'[50] criticised by Lord Carnwath in *Privacy International*. Thus, the court held that the rule of law is sufficiently vindicated because review remains available for egregious, pre-*Anisminic* jurisdictional errors. In *Singh v Secretary of State for the Home Department,*[51] the Court briefly addressed that Parliament may indeed not be supreme in the 'extreme examples'[52] but that the established rule in practice is that the legislature is sovereign, building on the spectrum of restraints of judicial oversight offered in *Cart* and *Privacy International*.

The third limb is the partnership approach to legislation, echoing Lord Phillips' comments in *Cart*; the reasoning is structurally underpinned by respect for the legislature's

[48] See, for example, *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262, [101]-[102] and *AXA General Insurance v Lord Advocate* [2011] UKSC 46, [2012] 1 A.C. 868, [51]. The cases operated against different factual backgrounds: *Jackson* concerned the validity of the Parliament Act 1949 and the Hunting Act 2004, while *AXA Insurance* centred on the whether the Damages (Asbestos-related Conditions) (Scotland) Act 2009 was outside the competence of the Scottish Parliament. The wider importance of the cases lies in the obiter comments that the courts would potentially not give effect to legislation that completed ousted judicial scrutiny, suggesting that parliamentary sovereignty may indeed be limited.

[49] For more detailed warnings against pitting the rule of law and parliamentary sovereignty against each other, *see* Murray, P. (2024) 'Cart revisited: ouster clauses and the Upper Tribunal', CLJ 83(1) 8.

[50] LA (Albania), [31].

[51] Singh v Secretary of State for the Home Department (Ragbir Singh) [2025] CSIH 4, 2025 SLT 146.

[52] *Singh*, 6.

competence. The semantics of the case law are intriguing; 'Parliament has now addressed'[53] the issue raised by Lord Hope in *Eba v Advocate General for Scotland* and has engaged with the judicial remarks on case workload. As noted, the Government Response to the IRAL evidences a clear intention overcome the complications of the post-*Anisminic* language of nullity and jurisdiction. Dingemans L.J. in *LA (Albania)* noted that by using this language, Parliament had tackled the issue of nullity 'head on',[54] leaving the courts no room for a restrictive *Anisminic* interpretation of jurisdiction. Consequently, the judicial reception suggests self-restraint and respect for legislative capacity in the face of deliberate intent to meet the judicial standard of textual clarity.

The prima facie impression that the provision concretely cements parliamentary sovereignty as the sole *superior* constitutional principle is therefore somewhat misguided; the courts do not, and consistently have not, unquestioningly deferred to legislative intent. Rather, the policy aim of the legislation is an influential factor to be read alongside the nature of the ouster itself and the competence of the tribunals. As established in Section I, Hooper's four factors – clarity of language, extent of restriction, institutional character, and legality impact – provide the analytical framework within which the judicial reception of s 2 operates. Ouster interpretation remains a contextual and sensitive interpretative exercise rather than submission to parliamentary sovereignty. It reflects a ripened appreciation that resource concerns, institutional partnership, and

[53] Lord Hope's comments in Eba were cited in *Sooy v Secretary of State for the Home Department* [2023] CSOH 93, [2024] SLT 1 at [78].
[54] LA(Albania), [35].

the efficacy of judicial oversight offered by the tribunals do not require a terse reading of statute that characterised the *Anisminic* era. What the 'nature' assessment of ousters cannot alone resolve, however, is whether the origin and fixed character of s 2 are equally well-suited to the institutional and rights context of *Cart*. It is to those two remaining axes of the tripartite framework that this article now turns.

III. Reversing *Cart*: Static/Dynamic Changeability and Internal/External Origin of Ousters

This article contends that the decision to implement the ouster through legislation was the wrong one in the specific context of *Cart*. Sections I and II have examined that the nature of the s 2 ouster, assessed through Hooper's four factors of clarity of language, extent of restriction, institutional character, and legality impact, support its judicial acceptance. It is contended, however, that a closer look at the features of restrictions on judicial review is required.

There are two often neglected characteristics of ouster clauses: the origin of the restriction and its temporal changeability. While ousters are mostly associated with legislative provisions, the courts have historically developed their own internal restrictions on review.[55] Ousters from courts and

[55] For example, referencing Lord Diplock in *R v IRC, ex parte National Federation of the Self-Employed*, the Court of Appeal in *Cart* accepted that the rules of standing in judicial review were judge-made and capable of development to preserve the integrity of the rule of law in light of changing social and governmental structures. What this demonstrates is that the courts

Parliament can be differentiated: judicial restrictions are often more dynamic, as they can be gradually developed through the case law in comparison to 'static' legislative provisions. Furthermore, they are internal: the restrictions originate from within the judicial oversight infrastructure and can operate as informal workload arrangements between courts and tribunals, an insight the legislature lacks due to sitting externally to judicial oversight mechanisms. By 'external' to the judicial process, I refer to Parliament's lack of contact with the granular development of case law and public law principles, and its distance from the closed feedback loop between tribunals and courts in developing judicial practices. It is not contended that static or external restrictions are never appropriate; as Laws L.J. noted in *Cart*, Parliament is free to adapt procedures of judicial review.[56] However, in the specific context of Cart JR and the serious legal issues in question, an internal and dynamic ouster – such as the second appeals test espoused by the Supreme Court – is preferable and Parliament operates at an epistemic disadvantage. Dynamic, internally generated restrictions permit incremental recalibration in response to evolving resource pressures, tribunal performance, and rights sensitivity, whereas statutory change freezes a particular empirical and institutional snapshot into law.

The Court of Appeal and the Supreme Court in *Cart* analysed how judicial restrictions have functioned in practice. The judgments draw attention to three illustrative examples*: R (Sivasubramaniam) v Wandsworth County Court,*[57] *R (Wiles) v Social*

have an inherent power to shape the requirements for access to judicial review based on the shifting needs of judicial oversight.

[56] Cart v Upper Tribunal EWHC, [40].

[57] *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, ('Sivasubramaniam').

Security Commissioner,[58] and *Gregory v Turner.*[59] In *Sivasubramaniam*, judicial review applied in principle to judges of the county court. However, the case held that permission to apply for it would not be granted where a satisfactory alternative recourse existed, whether or not it had been exhausted. Notably, in exceptional cases such as asylum claims, this restriction might not be enforced. Importantly, there was no statutory ouster; the Court outlined for itself an internal restriction scheme which provided 'fair, adequate and proportionate protection against the risk' of jurisdictional error while also preserving the statutory framework.[60] In *Gregory v Turner*, despite having grounds to show the lower court had fallen into error, the Court followed *Sivasubramaniam*, stating that 'every system contains a percentage of error; and if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt'[61] echoing the proportionality analysis in *Sivasubramaniam*. In *Wiles*, judicial review remained available on 'orthodox' public law grounds because this had been the established practice for 30 years. However, the judgment confirmed a common practice of 'judicial restraint' or 'appropriate caution', where reviewing courts should not be 'astute to find error'[62] but should instead presume that expert tribunals are likely to have correctly applied complex, technical legislation. Such limitations are not formally labelled ousters*;* however, in substance, they constitute precisely the type of

[58] R (Wiles) v Social Security Commissioner [2010] EWCA Civ 258, ('Wiles').
[59] *Gregory v Turner* [2003] EWCA Civ 183.
[60] *Cart*, [34].
[61] *Cart*, [80].
[62] Cart, [49].

organic reallocation of workload that the tripartite framework identifies as dynamic and internal to judicial infrastructure.

Having analysed dynamic and internal ousters of review, there is a stronger conceptual basis to contrast s 2 with the second appeals test in *Cart*. Firstly, the second appeals test is internal in the sense that it is founded upon lived experience from figures within the judicial system. In justifying the test, the judges drew on their professional expertise. Lord Phillips agreed on the need for continued supervision of the Tribunal, 'having considered the judgment of Lady Hale, who has great experience in this field.'[63] Lord Clarke also reflected that his 'experience as Master of the Rolls was that such a test worked well for second appeals.'[64] However, the internal nature of the ouster is not solely based on individual expertise. The vantage point of the courts permits consideration of the on-the-ground working relationship between courts and tribunals. This is particularly pertinent in the context of the Upper Tribunal and High Court, where there is a necessity to ensure legal consistency between the bodies and avoid the development of local law. As Lady Hale noted, the courts have established a principle of judicial restraint when considering decisions of expert tribunals.[65] Lord Dyson developed this point, stating that 'if this principle towards decisions of the UT is respected, then judicial review of unappealable decisions provides a system of justice which is proportionate and appropriate to protect the rule of law. Further restrictions on the scope of judicial review are unnecessary.'[66] The last two comments neatly capture how 'internal' restraints on judicial oversight can

[63] *Cart*, [92].
[64] *Cart*, [104].
[65] *Cart*, [49].
[66] *Cart*, [113].

instinctively develop through professional comity within the closed feedback loop between courts and tribunals. Through awareness of judicial respect and common practice towards tribunals, the judges can conduct a more precise proportionality assessment of restrictions that achieves restraint without requiring excessive legislative intervention.

The internal/external distinction is sharpened further by the courts' sustained institutional familiarity with rights balancing. Through the adjudication of common law rights and proportionality assessments under the European Convention framework and EU law, the courts have developed a sustained familiarity with balancing public interests against individual rights. This is especially pertinent in relation to Cart JR. Cart JR claims frequently arose in the context of asylum and immigration law, where claimants are particularly vulnerable to severe legal outcomes, including removal and infringements of Convention rights. As the Court observed in *Sivasubramaniam*, in asylum cases 'the most anxious scrutiny of individual cases is called for...and review by a High Court judge is a reasonable, if not an essential, ingredient in that scrutiny.'[67] Assessment of how far review can be ousted in this context therefore requires an intimate understanding of rights language that cannot be reduced to good governance calculations alone. This institutional limitation of Parliament's external perspective is compounded by the static nature of the legislative intervention, which demanded a robust empirical foundation at the moment of enactment, precisely because, unlike a dynamic judicial restriction, it cannot self-correct as the evidence develops.

[67] *Cart*, [79].

Parliament is well placed to make macro-political assessments of resource allocation; however, rights analysis does not always lend itself to neat calculations. The empirical record of Cart JR exemplifies this challenge. Firstly, as the Government Response to the IRAL acknowledges,[68] success is notoriously difficult to measure in judicial reviews. Both academic literature and submissions to the Government raised serious concerns about the accuracy of the Panel's calculation that the Cart JR success rate was 0.22%.[69] The Ministry of Justice undertook a fresh analysis of the data following the criticisms, finding a success rate of 3%.[70] Moreover, it is important, however, to note the inherent disparity between Cart JRs and non-Cart JRs. As highlighted by Barczentewicz's study,[71] direct comparison cannot capture the fact that the Cart JR test already contains a threshold filter, nor can it quantify claims' importance. Defining success purely through a numerical lens neglects the fact that there is significant value in certain claims—such as issues of general importance or acute rights issues—receiving additional oversight. The concern is not that Parliament lacked authority to legislate under conditions of empirical uncertainty or in areas affecting rights. Rather, the displacement of a judicially developed, rights-sensitive threshold demands robust evidential grounding. By

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68 Ministry of Justice (2021) Judicial Review Reform Consultation: The Government Response, Annex E.

69 IRAL, 3.46. For detailed discussion of the concerns with the IRAL's assessment, *see* Joe Tomlinson and Alison Pickup, 'Putting the Cart Before the Horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews', (UK Const. L. Blog, 29 March 2021) < https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/>.

70 Ministry of Justice, 35.

71 Mikolaj Barczentewicz, 'Cart Challenges, Empirical Methods, and Effectiveness of Judicial Review' (2021) 84 MLR 1360.

committing to a fixed position based on a contested empirical assessment, Parliament foreclosed precisely the kind of incremental adjustment that the courts, operating within the closed feedback loop of judicial oversight, were better placed to provide. It can certainly be contended that Parliament maintains the competence to legislate regardless of this empirical uncertainty. While that may be true, the central point here is that the courts possess the superior vantage point from within the judicial framework. Parliament's institutional disadvantage is compounded by a democratic one; the legislature's superior democratic credentials over the courts are arguably weakened when the restriction risks compromising the rights of those outside the political community, such as migrants and asylum seekers.[72]

The practical implications of narrowing review are illustrated by *Ali*. The claimant was refused entry clearance after losing their documents abroad. The First-tier Tribunal misapplied precedent on re-entry, and the Upper Tribunal refused permission to appeal on the basis that the claim was 'not arguable.'[73] The Court of Appeal ultimately held that the refusal of re-entry could engage Article 8 of the ECHR and remitted the case for a proportionality assessment; the Court's finding was only possible because the refusal pre-dated the coming into force of the JRCA ouster. The human consequences were stark; the

[72] Space precludes further examination of the role of democracy in assessing ousters. However, I propose that an institution's democratic credentials are a valuable aspect of an ouster's 'origin'. There is a further substantial, on-going discussion to be considered regarding the role of courts in upholding rights protections in a functioning democracy, see, for example, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1999); *cf* Jeremy Waldron, *Law and Disagreement* (OUP 1999).

[73] Ali v Upper Tribunal, [7].

claimant had well-established family ties in the UK, having moved as a young child with his mother and siblings to join his father. He had already been separated from his family for six and a half years prior to being able to apply for returning resident entry clearance due to financial constraints and lack of assistance from the British Embassy.[74]

The complications of s 2's external perspective are exacerbated by the intrinsically fixed nature of legislation. Lord Phillips in *Cart* was 'persuaded that there is, at least until we have experience of how the new tribunal system is working in practice, the need for some overall judicial supervision of the decisions of the Upper Tribunal.'[75] The striking point of this comment is that it acknowledges that oversight is necessary 'at least until' the courts have a better understanding of tribunal workings. The restriction is therefore regarded as dynamic and subject to review. Its enforcement is conditional on its necessity in light of the practical working relationship between the courts and tribunals. Contrastingly, the legislative ouster ossifies the judiciary's ability to develop the application of these principles. Of course, Parliament would be free to legislate again and implement a new ouster clause, perhaps more along the lines of the original Cart JR test, if it found that s 2 was overly restrictive. However, the drivers for change at the judicial and legislative levels are different. Statutory amendment is macropolitical and episodic, reliant on another wave of political interest in judicial review. Contrastingly, informal internal ousters through the case law can develop incrementally and incorporate new exceptions when needed. This is particularly relevant in the context of Cart JR, which, as noted,

[74] *Ali*, [23].
[75] *Cart*, [92].

largely featured asylum and immigration cases. Adopting an external, static ouster in this context risks calcifying a system which cannot proactively adapt to mitigate unfairness and, at best, can only react after the harm has been disproportionately felt by individual cases that fall through its gaps.

The analysis of origin and changeability does not suggest that Parliament is never empowered to oust review. The crucial issue is that, in the specific context of Cart JR, the close partnership between the Upper Tribunal and the High Court and the potential rights complications favour a restriction that originates from within the judicial framework and maintains flexibility.

IV. Conclusion

The judicial reception of the ouster clause in s 2 JRCA 2022 constitutes a doctrinal continuation of the preceding case law in a novel constitutional register. The courts' acceptance of the provision reflects an established pattern in which parliamentary sovereignty, expressed through legislative intent, is assessed alongside substantive considerations of how the rule of law operates in practice, particularly within a system of increasingly specialised and competent tribunals. This reasoning, demonstrated by *Oceana*, *LA (Albania)*, and *Ragbir Singh*, is structurally comparable to *Anisminic*, *Privacy International*, and *Cart* itself.

Despite the doctrinal continuity, the parameters of judicial review of the Upper Tribunal should have remained set by the courts. The case law and literature demonstrate an appreciation for a spectrum of restrictions, from total oversight,

the second appeals test, exceptional circumstances, and complete ousting of review. However, in addition to this one-dimensional assessment of the level of judicial oversight preserved by ousters, it is contended that the origin and the changeability of restrictions should be evaluated as well. Considering the close working relationship between tribunals and courts and the potentially high stakes of Cart JR claims, any ouster on review should be both dynamic, as in subject to revision, as well as internal, developed by judicial bodies themselves.

Constructive Uncertainty in Public Law

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Abstract—Uncertainty exists when there is no single right answer to a question of law or fact, or to a question of the application of the law to the facts of a case. English public law has not sat well with this principle of uncertainty. That has at least been the orthodox position, expressed by both scholars and judges. In response, this article sets out a conception of constructive uncertainty, which posits that uncertainty might not simply exist, but indeed serve useful purposes. Three purposes are discussed: (i) *cautioning* constitutional actors in their relations with one another; (ii) *contextualising* the law to fit particular circumstances; and (iii) *cognising* constitutional actors of their institutional limits. Taken together, it is argued that constructive uncertainty can be systematically conceptualised using the three-fold model proposed. This is not a defence of uncertainty *tout court*. Rather, given recent judicial shifts toward certainty and bright-line rules, this article explores how uncertainty is present in, and can contribute to, public law. In turn, through a more systematic appreciation of the functions it may play, it is hoped

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that uncertainty can begin to be appreciated as a lens through which public law may be viewed.

I. Introduction

English public law has traditionally not sat well with uncertainty. As the House of Commons Political and Constitutional Reform Committee has noted, one of the main objections against the United Kingdom (UK)'s uncodified constitution comes from fears that '[t]he sprawling mass of common law, Act of Parliament and European treaty obligations, surrounded by a number of important but sometimes uncertain unwritten conventions is impenetrable to most people'.[1]

There have also been fears of uncertainties created by particular judicial approaches to interpretation. Commenting on the Human Rights Act 1998, for instance, Lord Sales warned that

> [s]ection 3 necessarily creates a significant degree of uncertainty about the meaning of legislative provisions, since the particular words may not reflect their ordinary meaning. That has a significant impact on the stability of the meaning of legislative provisions and can cause tension with rule of law values concerning the accessibility, ease of interpretation and predictability of application of such provisions.[2]

It was in this context that Lord Sales criticised *Re G*,[3] which permitted the use of the section 3 power even when the European Court on Human Rights determines that a statute has

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[1] Political and Constitutional Reform Select Committee, Second Report of Session 2014-2015, *A New Magna Carta?*, HC 463.
[2] Lord Sales, 'The Developing Jurisprudence of the Supreme Court on Convention Rights' [2024] PL 444, 448-449.
[3] Re G (A Child) (Adoption: Unmarried Couples) [2008] UKHL 38; [2009] 1 AC 173.

complied with its obligation under the European Convention on Human Rights (ECHR). In fact, it was precisely because of concerns that *Re G* would, *inter alia*, 'undermine legal certainty' that it was flatly 'disapproved' by Lord Reed in *Elan-Cane*.[4]

In a similar vein, due to fears that the principle of legality would result in a 'radical interpretive surgery', Lord Sales recently denied its use 'in the absence of a relevant established fundamental right or legal principle'.[5] In doing so, there was a clear preference for 'inapposite categorical distinctions' between rights- and non-rights-based cases over the need to 'grapple with the subtle questions of normative ordering'.[6]

At the same time, courts have recognised 'a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public'.[7] As Christopher Forsyth would have it, '[c]ertainty in the law is a goal not a guarantee'.[8]

The above account evinces a view that uncertainty is to be avoided and, where possible, discarded in public law. This article, however, seeks to situate itself from the opposite starting point. Indeed, what is equally apparent beyond simply that

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[4] R (fElan-Cane) v Secretary of State for the Home Department [2021] UKSC 56 [108] (Lord Reed).
[5] R (The Spitalfields Historic Building Trust) v London Borough of Tower Hamlets [2025] UKSC 11 [72] (Lord Sales).
[6] Mark Elliott, 'Administrative Law Doctrine and Constitutional Principle in the Supreme Court' (2025) 84 CLJ 229.
[7] R (Nadarajah and Abdi) v Secretary of State for the Home Department [2005] EWCA Civ 1363 [68] (Laws LJ).
[8] Christopher Forsyth, 'Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66 CLJ 325, 335.

uncertainty is often met with suspicion seems to be that it pervades public law. I hence consider a less explored view: might uncertainty play a useful role in public law?[9] In other words, might what I intend to brand as 'constructive uncertainty' exist? If it does, what ends does it serve?

I will argue that constructive uncertainty does exist and has taken hold, often in very familiar areas of public law. To do so, section II first begins by sketching out what I understand as 'uncertainty'. Sections III, IV and V then distil a range of examples under three key headings. The sections respectively explore how uncertainty aids in (i) *cautioning* different branches of Government, promoting institutional comity; (ii) *contextualising* the law to fit particular circumstances; and (iii) *cognising* constitutional actors of the limits of their competence, which encourages intelligible, expertise-based decision-making. Section VI concludes.

Why does uncertainty merit such an analysis? Two points may be made. The first relates, as noted above, to its relative abundance in public law. Yet the role *un*certainty plays remains under-theorised. This is not to say that the value of uncertainty has never been recognised. As will be observed below, the value of uncertainty is inherent in public law, although frequently only implicitly recognised in isolated instances. The novelty this article

[9] I am not, of course, the first to explore the role of uncertainty in the law. Timothy Endicott, *Vagueness in Law* (OUP 2000), for example, has observed that 'indeterminacy' is an unavoidable feature of both the linguistic and non-linguistic aspects of the law. By exploring 'uncertainty' – which, as I explain below, shares great similarities to Endicott's understanding of 'indeterminacy' – specifically in the public law context, I hope to complement these previous studies in shedding more light on the functions the concept may serve.

seeks to provide, therefore, is to *integrate* analyses of these sources and purposes of uncertainty.

There is also a broader purpose of urgency. Recently, there has been an (at least partial) judicial shift towards a preference for certainty and consistency[10] and an appetite for 'bright lines and categories'.[11] This should prompt us to consider how uncertainty features in public law, and ultimately whether it serves any useful purposes.

II. Defining Uncertainty

Let me begin by clarifying what I understand as 'uncertainty'. In adopting the term, I have in mind the notion of 'indeterminacy'. What is indeterminacy? For Timothy Endicott, 'the law is indeterminate when there is no single right answer to a question of law, or to a question of the application of the law to the facts of a case'.[12]

While I adopt a similar notion of indeterminacy, I will broaden Endicott's definition slightly. Public law is not merely concerned with the content of the law. There is, additionally, a keen element sounding in the *political* constitution, which is

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[10] Lewis Graham, 'Has the UK Supreme Court Become More Restrained in Public Law Cases?' (2024) 87 MLR 1073, 1107-1108.
[11] Mark Elliott, 'Taking the Constitution Seriously: A Response to Lord Sales' (*Public Law for Everyone*, 7 December 2025) <https://publiclawforeveryone.com/2025/12/07/taking-the-constitution-seriously-a-response-to-lord-sales/> accessed 31 December 2025.
[12] Endicott, *Vagueness in Law* (n 9) 2. A similar understanding of legal indeterminacy was put forth in Ken Kress, 'Legal Indeterminacy' (1989) 77 California Law Review 283, 287.

founded on political methods of accountability.[13] What occurs *in fact* outside courts (for example, between Members of Parliament and the executive in Parliament), and not merely what sounds *in law*, is therefore important. Only considering *legal* indeterminacy may therefore be insufficient for the particular context adopted in this article.

Therefore, for the purposes of the discussion here, I will take there to be uncertainty—or indeterminacy—when there is no single right answer to a question of law *or fact*, or to a question of the application of the law to the facts of a case. This definition is broader and, I hope, more fit for purpose in the particular public law context considered here.

III. Caution

We are now ready to consider a first sense in which uncertainty might be considered constructive. As I will suggest, uncertainty exists in the relationships and interactions between different branches of Government. In turn, uncertainty *cautions* each branch as no one branch is encouraged to test the unknown limits and predispositions of another branch. This is constructive because it promotes comity.

It is helpful to make these arguments by layering three propositions. First, the importance of inter-institutional comity is canvassed. Second, it is argued that comity rests on constitutional balance, where no one branch of Government can unilaterally

[13] See Se-Shauna Wheatle, 'Collaborative Constitutional Authority' in Matthew Flinders and Chris Monaghan (eds), *Questions of Accountability: Prerogatives, Power and Politics* (Hart Publishing 2023) for a distinction between political and legal constitutionalism.

trump another. Third, I show how it is with uncertainty—and the corresponding sense of caution it imposes on each branch of Government—that the constitutional balance is sustained.

A. Constitutional Comity and Constitutional Balance

Inter-institutional comity exists where each branch of Government respects the others.[14] On this view, each branch provides *leeway* for the other branches while *mutually supporting* their decisions, either through implementing their substantive decisions or by interpreting their decisions in line with the other branch's underlying objectives.[15] Such comity, I argue, is not only a *necessary* part of the constitution, but also a *desirable* characteristic.

First, comity is valuable because it is necessary, given the interdependence between each branch of Government. Parliament, for example, is dependent on the courts to give meaning to general rules and to resolve indeterminacies, while fitting legislative provisions into general legal principles.[16] Meanwhile, courts depend on Parliament and the executive to provide the funding and structure required for the judiciary to operate effectively.[17] A culture where each branch provides leeway and mutual support to each other is therefore crucial since different branches are not kept in separate compartments.

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[14] Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 22.
[15] Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 236.
[16] Kavanagh, 'The Constitutional Separation of Powers' (n 15) 235.
[17] Aileen Kavanagh, *The Collaborative Constitution* (CUP 2023) 100.

Second, comity is desirable. Consider the protection of rights. The legislature enjoys the democratic legitimacy to balance rights and policy considerations outside the confines of legal doctrine. By contrast, courts are not democratically accountable but can better represent minority interests. Comity is therefore valuable to make the most of the relative strengths of different branches of Governments.[18]

If comity is desirable, how is it achieved and sustained? This is less controversial: there is broad agreement that comity is achieved only when it is not possible for any one branch of Government to unilaterally trump over another. In other words, it is *constitutional balance* that sustains comity. Indeed, as Luc Tremblay puts it, comity is achieved only when no one branch can 'impose by *fiat* where the dialogue should lead, and no hierarchy must confer in advance on one or more of the participants the authority to settle the disagreements.[19] Likewise, Aileen Kavanagh[20] observes the need for a 'heterarchical—rather than hierarchical—nature of the relationship between the branches [of Government]'.[21]

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[18] Stephen Gardbaum, The Commonwealth Model of Constitutionalism: Theory and Practice (CUP 2013). See also Alison Young, Democratic Dialogue and the Constitution (OUP 2017) 148-152.

[19] Luc Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617, 632.

[20] It should be noted that Kavanagh and Tremblay in fact propose two competing visions of the constitution. While Tremblay champions a so called 'dialogue-based' model of the constitution, Kavanagh advances a view of a 'collaborative constitution'. On this disagreement, see generally Kavanagh, *The Collaborative Constitution* (n 17). Despite this wider disagreement, the fact that they both converge on the importance of constitutional balance demonstrates the broad support the view adopted here has received.

[21] Kavanagh, The Collaborative Constitution (n 17) 102.

B. The Role of Uncertainty

Constitutional comity, therefore, is desirable and constitutional balance is required for comity. However, what allows us to secure constitutional balance—namely, the idea that different branches interact in a spirit of 'mutual accommodation'?[22] My third proposition is to suggest that a crucial puzzle piece here lies in constructive uncertainty. This claim can be made in two parts.

First, if it is uncertainty that secures constitutional balance, we must begin by establishing that uncertainty *exists* in the relationships between different branches. Consider the relationship between the courts and Parliament, an area where Michael Foley has contended that the 'constitution's silences [have] become far more comprehensible than its substantive elements'.[23] While the traditional Diceyan narrative that '[p]arliamentary sovereignty is a fundamental principle of the UK constitution' is still repeated,[24] it has also been suggested that the 'pure and absolute' conception of parliamentary sovereignty is 'out of place in the modern United Kingdom'.[25] This raises the *possibility* that fundamental constitutional values *might* serve as hard constraints on Parliament's legislative authority. Yet there is no definitively right answer, given the uncertainty as to how deep these fundamental constitutional values run. To attempt to answer this question would be to 'stare into a constitutional

[22] Kavanagh, The Collaborative Constitution (n 17) 102.
[23] Michael Foley, *The Silence of Constitutions* (Routledge 1989) 92.
[24] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [43].
[25] *R (Jackson) v Attorney-General* [2005] UKHL56, [2006] 1 AC 262 [102] (Lord Steyn).

abyss'.[26] Uncertainty hence conditions the relationship between Parliament and the judiciary.[27]

Uncertainty also exists between Parliament and the executive. Ministers depend on backbenchers to ensure a majority in the House of Commons. Backbenchers have also become increasingly independent, and have regularly challenged the Government.[28] The Opposition also proposes amendments to legislation. Even if few are sincere attempts at policy change, these amendments 'signal' to groups outside Parliament and may be part of 'gameplay' to embarrass the Government.[29] Furthermore, the House of Lords supply an additional layer of scrutiny in a multi-party environment. Defeat in the House of Lords entails great political cost because it forces a difficult choice between presenting a controversial policy in the House of Commons or abandoning it wholesale.[30] All this is to say that before a Bill is introduced in Parliament, the executive can never be sure as to how other parliamentary players might react. Uncertainty arises because there is no way to definitively know how a Bill might be received. Hence, any calculation of the potential for political backlash can at best only be an approximation.

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[26] Mark Elliott, 'Parliament Sovereignty in a Changing Constitutional Landscape' in Jeffery Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019).
[27] Elliott, 'Parliament Sovereignty in a Changing Constitutional Landscape' (n 26).
[28] Meg Russell and Daniel Gover, Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law (OUP 2017) 273-279.
[29] Russell and Gover, *Legislation at Westminster* (n 28) 273-279.
[30] Meg Russell and Philip Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence' (2016) 29 Governance 121.

The second part of the claim can now be made: it is these uncertainties inherent in the relationships between the different branches of Government that sustain the constitutional balance. Consider again the courts and Parliament. In the face of uncertainty, both institutions are caught in a necessary tension where neither is inclined to risk bruising confrontation pursuing an outcome that cannot be known. Courts, of course, have in the past declared that '[p]arliamentary sovereignty is no longer, if it ever was, absolute'.[31] Such assertions, however, remain broadly 'academic'.[32]

Recent ouster clause cases, in fact, disclose quite a contrasting inclination. Bold claims were laid in *Privacy International* that 'binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court'.[33] However, it is clear that courts have since become uncertain, and ultimately apprehensive, of the impacts such dicta might produce. Lord Reed has expressed concern that parliamentarians might start to 'frame provisions conferring discretionary powers in language which is as wide as possible, so as to stymie judicial review'.[34] Inherent in Lord Reed's comments are clearly worries that Parliament might respond to the courts in a hostile manner. How such a response might be framed, and how

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[31] *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 [104] (Lord Hope). See also [102] (Lord Steyn) and [159] (Lady Hale).
[32] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [50] (Lord Hope).
[33] R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22; [2020] AC 481 [144] (Lord Carnwath).
[34] Lord Reed of Allermuir, 'Trust in the Courts in an Age of Populism', 12 June 2025, available at <https://supremecourt.uk/uploads/speech_lord_reed_13062025_88f834d8f5.pdf> assessed 24 December 2025.

strongly Parliament might retaliate, however, ultimately remains a black box. In light of such worries, it appears that courts have retreated. Instead, it is now asserted that 'legislation enacted by the Crown with the consent of both Houses of Parliament is supreme'.[35] In a clear sign of having been cautioned, courts have made it clear that 'effect must be given to Parliament's will expressed in legislation'.[36]

This development shares great similarities with the ouster clause Parliament attempted to pass through clause 11 of the Asylum and Immigration (Treatment of Claimants etc) Bill. This ouster clause was one that went further than that in *Anisminic*,[37] and which could potentially avoid the interpretative solution used there.[38] The courts issued warnings of serious judicial consequences if Parliament pressed on with clause 11. Lord Woolf went so far to forecast that abolishing judicial review of asylum and immigration decisions, if implemented, might be 'so inconsistent with the spirit of mutual respect between the different arms of Government that it could be the catalyst for a campaign for a written constitution'.[39] So tight was the relationship between immigration, asylum and human rights that Lord Woolf argued that '[t]he response of the Government and the House of Lords to the chorus of criticism of clause 11 will produce the answer to the question of whether our freedoms can

[35] *R (Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin) [52] (Saini J). See also *R (LA (Albania)) v Upper Tribunal* [2024] 1 WLR 1673 [36] (Dingemans LJ).
[36] *R (Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin) [52] (Saini J).
[37] Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 1 All ER 208.
[38] Elliott, 'Parliament Sovereignty in a Changing Constitutional Landscape' (n 26).
[39] Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63 Cambridge Law Journal 317, 329.

be left in their hands under an unwritten constitution'.[40] Again, however, it was clear that Parliament was uncertain as to how courts might respond to the Bill. In turn, just as the courts retreated from their hard-edged attitude towards ouster clauses following Parliament's warnings, politicians voluntarily withdrew the clause.[41] Taken together, one might therefore gather that uncertainty plays a constructive role in evincing the form of 'mutual respect, restraint and co-operation' that is so essential to 'our ability to cope without a written constitution'.[42]

What of the executive and Parliament? At first glance, there may be an inclination to buy into narratives that Parliament is 'much of the time, either peripheral or totally irrelevant',[43] caught in a 'fusion'[44] with the executive branch,[45] breeding an 'elective dictatorship'.[46] Uncertainties arising out of a potential backbench rebellion and the political costs of the Opposition's and House of Lords' parliamentary scrutiny as canvassed above, however, show that this is far from true. Instead, what has been observed empirically is a great sensitivity to 'anticipated reactions', wherein the executive pre-empts pushback and attempts to avoid it.[47] Ministers actively court parliamentarians' support, offering concessions and compromises to avoid conflict. Uncertainty therefore aids in 'generating fear',[48] pushing the

[40] Lord Woolf, 'The Rule of Law and a Change in the Constitution' (n 39) 329.
[41] Elliott, 'Parliament Sovereignty in a Changing Constitutional Landscape' (n 26).
[42] Lord Woolf, 'The Rule of Law and a Change in the Constitution' (n 39) 329.
[43] Anthony King and Ivor Crewe, *The Blunders of Our Governments* (Oneworld 2013).
[44] Walter Bagehot, *The English Constitution* (Chapman & Hall 1867) 12.
[45] Lord Hailsham, *The Dilemma of Democracy* (Collins 1978) chap 20.
[46] Lord Hailsham, *The Dilemma of Democracy* (n 45).
[47] Russell and Gover, *Legislation at Westminster* (n 28) 268-269.
[48] Russell and Gover, *Legislation at Westminster* (n 28) 268-269.

executive to think through Parliament's potential responses to bills prior to their introduction, which in turn tempers legislative ambitions. Constitutional balance hence emerges in a relationship built on the executive's efforts to accommodate Parliament's wishes, knowing that it cannot have the last word without risking substantial reputational risks, parliamentary time, and political capital.

Inherent in both sets of relationships is therefore a sense of uncertainty that cautions constitutional actors, and which fosters a culture of compromise and comity. Parliament is cautioned from legislating in gross infringements of constitutional values. It is also cautioned to seek out, accommodate and compromise with the views of the executive. Meanwhile, courts are cautioned from running roughshod over Parliament's enactments. Each branch pays heed to another, not knowing, and not having the appetite to test, the ultimately unknown limits and predispositions of other branches. By preventing such testing, uncertainty stabilises constitutional relations: conflicts that neither side can predict are conflicts both sides avoid. In turn, a sense of comity is fostered. This is constructive, not least because it bolsters a strong foundation of constitutional stability while making the most of the 'institutional and perspectival diversity'[49] that comes with 'a plurality of governing institutions'.[50]

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[49] Eoin Carolan, 'Leaving Behind the Commonwealth Model of Rights Review: Ireland as an Example of Collaborative Constitutionalism' in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar 2016) 118.

[50] Andrew Sabl, Ruling Passions: Political Offices and Democratic Ethics (Princeton University Press 2002) 2.

Before moving on, one matter must be clarified. Nothing here is meant to imply that uncertainty is the *only* factor contributing to a culture of comity. Constitutional conventions, for example, also help to resolve disputes between different branches.[51] Yet the value of conventions lie in the *certainty* they bring. Being stable and slow to change, conventions allow different branches to *know* what the rules of the constitutions are, making compliance more likely.[52] Such certainty, however, does not displace the role of uncertainty. Constitutional conventions 'operate successfully only if they are accepted by people',[53] which necessarily presupposes a *pre-existing* inclination to work in comity. Of course, this will not always be the case. The executive has, for example, found occasion to declare 'how offensive it is, once again, to have a ruling by a court that flies in the face of common sense'.[54] Uncertainty is therefore essential, through its cautioning function, in supplying an incentive to act in comity where this inclination is weaker.

IV. Contextualisation

A first source of uncertainty, then, is that which arises out of inter-institutional interactions between different branches of Government. This section considers a second source of

[51] Peter Morton, 'Conventions of the British constitution' (1991-1992) 15 Holdsworth Law Review 114, 163. See also David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change – A Festschrift for Vernon Bogdanor* (Hart Publishing 2013) 94.
[52] Adam Perry, *The Conventional Constitution* (OUP 2025) 205-206.
[53] David Feldman, *Key Ideas in Constitutional Law* (Hart Publishing 2025) 144.
[54] HC Deb 16 February 2011, col 955. This comment was made by the Prime Minister in the aftermath of *R (F and Thompson) v Home Secretary* [2010] UKSC 17, where the Sex Offenders Register was found in breach of the right to respect for private life.

uncertainty which emerges from the *particularities* of the case at hand. As will be argued, it is by *engaging with*, rather than avoiding, uncertainty that courts are able to *contextualise* particular doctrines to specific circumstances encountered.

To illustrate these claims, I utilise the example of procedural review to undertake a three-part analysis. First, I set out how uncertainty arises as a result of procedural review's response to the particularities of a case. Second, it is argued that the resulting uncertainty invites judicial discretion. Third, two ways in which this discretionary approach necessitated by uncertainty can be seen as constructive are suggested.

A. The Development of Procedural Fairness

Today, it is clear that requirements of fair procedures 'are not engraved on tablets of stone'.[55] This has, however, not always been the case. Indeed, for some time, there existed a technical distinction between 'judicial' and 'administrative' functions, with the courts only able to impose principles of natural justice, as had then been known, on 'judicial' proceedings. [56] It was only in *Ridge v Baldwin* that these rigid labels became abandoned.[57]

In the place of bright-line distinctions, a 'strong form of contextualisation' eventually grew out, with judges paying

[55] *Lloyd v McMahon* [1987] AC 625. See also *R (Pathan) v Secretary of State for the Home Department* [2020] UKSC 41 [55] (Lady Arden) and *R (HAM) v London Borough of Brent* [2022] EWHC 1924 (Admin) [13] (Swift J).
[56] R v Electricity Commissioners, ex parte London Electricity Joint Committee [1924] 1 KB 171 (CA) at 185. See also R v Legislative Committee of the Church Assembly, ex parte Haynes-Smith [1928] 1 KB 411 (KB) and Nakkuda Ali v Jayaratne [1951] AC 55 (PC).
[57] [1964] AC 40 (HL).

attention to the 'minute detail of myriad decision-making procedures'.[58] Such contextualisation is inevitably tied to increased uncertainty: if it is the particular facts of a case that determines what the content of fairness requires, it becomes difficult to conclusively declare *ex ante* what 'fair procedure' entails in a particular case. Moreover, even if there are *ex ante* principles, *ex post* rules might emerge in the course of adjudication, influencing a decision.[59]

For example, the fact that the Parole Board is a 'judicial body independent of the Secretary of State and the prisons management organisation' while the Category A Review Team and the Deputy Director of Custody-High Security are 'officials of the Secretary of State carrying out the management functions in relations to prisons' may mean that different procedures are required vis-à-vis each of the decision-maker.[60]

Furthermore, with the growth of legislation, procedural requirements in many areas of public administration today are animated by specific legislative schemes and procedural codes which can greatly vary.[61] Procedural review is in turn an area

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[58] Carol Harlow and Richard Rawlings, 'Proceduralism and Automation: Challenges to the Values of Administrative Law' in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020) 286.

[59] An example of this would be the extension of the duty to give reasons in *Kent* and *Oakley*, as discussed below.

[60] R (Hassett) v Secretary of State for Justice [2017] 1 WLR 4750 [51] (Sales LJ).

[61] Paul Craig, 'Perspectives on Process: Common Law, Statutory and Political' [2010] PL 275. The Guide to Drafting Tribunal Rules issued in 2003, for example, contained 110 rules dealing in such excruciating detail with aspects like the start of proceedings and the action to be taken by the applicant, tribunal, respondent and additional parties, expert evidence and the tribunal's power to seek expert evidence, and detailed rules related to the hearing itself.

where 'judges [are] navigating, evaluating and commenting on, whole thickets of legislatively sanctioned administrative procedure'.[62] Depending on the legislative background, courts are beginning from considerably different 'starting-points'.[63]

The upside, then, is that formalism no longer constrains procedural review. Rather, a confluence of contextual factors leave an *ex ante* question mark on what fairness inherently requires. Indeed, the label of 'fair procedure' remains an incomplete vessel in itself, filled only when particular facts present themselves, with competing considerations weighed up and a fact-sensitive analysis applied.

B. Uncertainty and Discretion

In turn, *Ridge* and the developments it heralded have seen courts adopting Trevor Allan's advice to 'confront the conditions of uncertainty…as they bear on the individual's case'.[64] In doing so, uncertainty necessitates a significant degree of judicial discretion to give tangible shape to what is otherwise an amorphous concept of fairness.

That such discretion is desirable, however, is not uncontroversial, not least because it departs from Lord Bingham's advice that '[q]uestions of legal right and liability should ordinary be resolved by the application of the law and not the exercise of discretion'.[65] Quite the opposite, the 'ordinary' way through

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[62] Harlow and Rawlings, 'Proceduralism and Automation' (n 58) 286.
[63] Joanna Bell, *Anatomy of Administrative Law* (Hart Publishing 2020) 103.
[64] Trevor Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 OJLS 497, 501.
[65] Lord Bingham, *The Rule of Law* (Allen Lane 2012).

which procedural review will be conducted today is through particular application of judicial discretion. The question for us is therefore what senses such uncertainty—and the resulting discretionary approach it prompts—may be considered constructive. Two in particular will now be suggested.

The first sense concerns the way in which uncertainty invites a form of contextualisation that benefits the *specific* case at hand. Public law cases oftentimes present themselves as 'something of a ragbag'.[66] In turn, responding to such cases require a degree of flexibility so that we avoid fitting contortions into a 'procrustean bed'.[67] Where circumstances demand that a decision be taken as a matter of urgency, for example, requiring a time-consuming, participative procedure for fairness will be ill-suited.[68]

Moreover, in other cases, a propensity to eviscerate uncertainty can threaten fundamental rights. This can be seen in the line of cases concerning the issue of whether a fact-specific proportionality assessment must be undertaken when convicting an individual for offences that might infringe articles 10 and 11 of the ECHR. While *Ziegler*[69] held that a proportionality

[66] Joanna Bell, 'The Resurgence of Standing in Judicial Review' (2024) 44 OJLS 313, 339.
[67] Robert Thomas, '*Ridge v Baldwin*: Executive and Judicial Approaches to Administrative Law Before and During the Quartet Years' in T.T. Arvind, Richard Kirkham, Daithi Mac Sithigh and Lindsay Stirton (eds), *Executive Decision-Making and the Courts: Revisiting the Origins of Modern Judicial Review* (Hart Publishing 2021) 51-57.
[68] R (Bourgass) v Secretary of State for Justice [2015] UKSC 54.
[69] Director of Public Prosecutions v Ziegler [2021] UKSC 23.

assessment must be made in relation to the particulars of each case at hand, it has since been held that

> it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights.[70]

Rather, an offence can be 'intrinsically proportionate' simply as a result of the ingredients of the offence.[71] As has been argued, this development appears to be driven by an inclination to purge uncertainty.[72] However, as Richard Martin rightly criticises, by constructing a '*de facto* ouster' on the review of criminal convictions that attract human rights considerations, there is now a 'lacuna in accountability for rights interferences in the criminal process'.[73] This is because there is now less scope to do justice to particular circumstances of an individual as the individual facts of a case becomes irrelevant.

A second sense in which uncertainty adds constructive value comes in terms of its broader *general* contribution to

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[70] Director of Public Prosecutions v Cuciurean [67]. This holding in Cuicurean has been affirmed in Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32 [42].

[71] AG's Ref No 1 of 2022 [42].

[72] Richard Martin, 'Convicting Peaceful Protestors: Proportionality's Place at Criminal Trial' (2024) 44 OJLS 342, 364.

[73] Martin, 'Convicting Peaceful Protestors: Proportionality's Place at Criminal Trial' (n 72), 364.

procedural review. Consider the duty to give reasons, a duty which emerges only when particular exceptional circumstances present themselves.[74] Curiously, such exceptional circumstances have traditionally been, as Joanna Bell observes, confined to cases involving particularised decision-making,[75] in response to claims that procedural review ought to be driven by dignitarian concerns.[76]

Outside this traditional class of cases, however, there is less clarity. In *Kent*[77] and *Oakley*,[78] for example, the courts dealt with judicial review challenges to a local planning authority's grant of planning permission for the development of land. As was accepted, both cases ushered in significant uncertainty. In the Court of Appeal in *Kent*, it was admitted that this was 'an unusual case',[79] just as the Court of Appeal in *Oakley* accepted that the facts featured 'a number of distinct features'.[80] Despite these initial observations, it was held that planning authorities must give reasons if it authorised developments that would 'harm…an Area

[74] R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 564.

[75] Joanna Bell, '*Kent* and *Oakley*: A Re-examination of the Common Law Duty to Give Reasons for Grants of Planning Permission and Beyond' (2017) 22 Judicial Review 105. See for example *R v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310 (concerning an *individual's* criminal injuries compensation), *R (Awale) v Secretary of State for Justice* [2024] EWHC 2322 (Admin) (concerning an *individual's* circumstances of detention) and *R v Ministry of Defence ex parte Murray* [1998] COD 134 (concerning an *individual's* sentence).

[76] Allan, 'Procedural Fairness and the Duty of Respect' (n 64).

[77] R (Campaign to Protect Rural England, Kent) v Dover District Council [2016] EWCA Civ 936. See also Dover District Council v CPRE Kent [2017] UKSC 79.

[78] Oakley v South Cambridgeshire District Council [2017] EWCA Civ 71.

[79] *Kent* (n 77) [32] (Laws LJ).

[80] *Oakley* (n 78) [56] (Elias LJ).

of Outstanding Natural Beauty'.[81] Significantly, as the court considered the particularities of the case, it carved out a new 'normative trigger', based not on dignity but the broader national planning policy. Considerations that the administrative decision was 'not consistent with the local development plan and involves development in the Green Belt' were therefore squarely taken into account.[82]

It was, in other words, by applying a discretionary approach prompted by the underlying uncertainty that the courts expanded the normative trigger for reason-giving. This is a positive development, given that fundamental public interests and considerations like broader national planning policies equally justify a more extensive range of fair procedures.[83] Seen in this light, uncertainty prevents the stagnation of the law.

C. Two Criticisms

A critique might argue that the developments in *Kent* and *Oakley* in fact undermines uncertainty's constructive role. After all, the expansion of normative triggers for reason-giving has made it *more* certain when a duty to give reason arises, especially in non-particularised decision-making. This criticism can be met in two ways. First, it is unclear that *Kent* and *Oakley* have removed all hints of uncertainty. How far, for example, would courts go in

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[81] *Kent* (n 77) [21] (Laws LJ). When *Kent* was further appealed to the Supreme Court, it was held that the Environmental Impact Assessment Regulations themselves were sufficient to impose a duty to give reasons. However, if necessary, the circumstances of *Kent* would also have given rise to a common law duty to give reasons. See *Dover District Council* (n 77) [56]-[60].

[82] *Oakley* (n 78) [56] (Elias LJ).

[83] Bell, '*Kent* and *Oakley*' (n 75).

further recognising a duty to give reasons beyond cases involving particularised decisions? What might come under the umbrella of fundamental public interests and considerations? Recognising that such uncertainty continues to exist is to be alive to the reality that the duty to give reasons is a doctrine neither fully defined nor developed. Furthermore, even if *Kent* and *Oakley* have added greater certainty to the contours of the duty to give reason, one ought not to lose sight of the importance of uncertainty in the *process* of shedding light on the purpose and scope of the duty.

A different criticism would likely come from the fear that uncertainty diminishes consistency, which poses a threat to the rule of law. This seemed to drive Lord Bingham's advice to limit judicial discretion.[84] However, neither of the above two senses of constructiveness advocates for an ever-increasing dose of uncertainty. It is also not true that the doctrines described above have become a purely contextual, unruly area of law. In procedural review, both procedural codes and a consistent pattern of applying the common law have added much structure,[85] even while space is left for discretion. This is similar to how legislatures commonly 'establish general rules but then leave it to courts (or delegate to administrative bodies) to determine how the open-textured standards or pre-defined exceptions are to apply in a given case'. [86]Furthermore, it is not clear that increased uncertainty inevitably threatens the rule of law. Consider the developments since *Ziegler*. While the class of 'intrinsically proportionate' offences adds certainty to the

[84] See above Lord Bingham, *The Rule of Law* (n 65).
[85] Bell, Anatomy of Administrative Law (n 63) 112-128.
[86] Martin, 'Convicting Peaceful Protestors: Proportionality's Place at Criminal Trial' (n 72) 364.

proportionality inquiry, does it not also throw up questions of how consistently the jurisprudence of the European Court on Human Rights is applied? If Strasbourg has time and again emphasised that a proportionality assessment must be made 'having regard to the facts and circumstances prevailing in the specific case before it',[87] it is perhaps the more uncertain, fact-specific approach championed in *Ziegler* that would allow the rule of law ideal of consistency with the European case law to be realised.[88]

V. Cognisance

A third source of constructive uncertainty arises as a result of the institutional and epistemic limits of a particular branch of Government. Such uncertainty is constructive because it *cognises* decision-makers of the constraints they face, which in turn fosters a more intelligible approach that encourages expertise-based decision-making. To illustrate these claims, I focus on the courts, considering their application of expertise-based deference and treatment of section 31(2A) of the Senior Courts Act 1981 (SCA).

A. Uncertainty and Expertise-Based Deference

Talk of restraint would likely first call to mind the concept of deference, which makes this a most natural starting point. My focus here is on the court's exercise of expertise-based

[87] Sunday Times v the United Kingdom (1979) 2 EHRR 245 [65].

[88] See also Lord Mance, 'Should the Law be Certain?', 11 October 2011, available at <https://supremecourt.uk/uploads/speech_111011_342362219c.pdf> accessed 31 December 2025 [28] for a similar argument.

deference.[89] The effect of such deference is for courts to attach significant weight to the executive decision-maker's opinion on grounds that the executive's judgement is 'worthy of respect', given its 'superior claims or qualities'.[90] While the value of a doctrine of deference is not universally embraced,[91] I will accept as my starting point that a doctrine of expertise-based deference is desirable not only because it aids in purchasing the propriety of substantive judicial review,[92] but also because it guides courts towards tapping on the epistemic ability of the most suitable branch of government.[93]

Where uncertainty contributes to this debate is when one asks a further question: when does a decision-maker *know*, or at least *foresee*, that another's claim will be superior? This is an important question. Without understanding how the courts might be alerted to the possibility of needing to exercise expertise-based deference, there will be difficulties not only in tracking whether its application is appropriate but also in answering the prior question of when expertise-based deference might come into play.

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[89] For those interested in exploring other forms of deference like democracy-based deference, see generally Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Anne Scully-Hill and Michael Ramsden (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010).

[90] Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2009) 187.

[91] See eg Trevor Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 CLJ 671.

[92] Mark Elliott, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017).

[93] Alison Young, 'In Defence of Due Deference' (2009) 72 MLR 554.

A potential answer is that expertise-based deference is triggered when engaging with issues that call for expertise.[94] This answer, however, only begs a further question: when would we know that we are dealing with such expertise-based questions? I suggest that the primary litmus test is the *acknowledgement of one's uncertainty*.[95] In other words, it is when one recognises their fallibility in being unsure of what the correct assessment should be that one becomes *cognisant* that they are dealing with a question requiring an expertise they lack. Consider an analogy. We often defer to doctors on medical matters, but there are equally times when we can self-medicate without professional advice. Where do we draw the line? The answer advanced here is that we will know to seek out medical advice when we *recognise that we are uncertain of how we should treat ourselves*. We will unlikely go to the hospital over a common flu, but a complex heart disease will most likely prompt the need to find a heart specialist. Uncertainty therefore *cognises* us as to what we are unsure of, which leads us to seek out another expert who can offer a better answer.[96]

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[94] Elliott, 'Proportionality and Deference' (n 89) 272.

[95] As with above, in making this suggestion, I do not intend to make the broader claim that uncertainty is the *only* trigger for such expertise-based deference, merely that it is an important one. As Kavanagh has noted, deference may be shown even when a decision-maker does not recognise that another judgment is superior because of a particular expertise. See Kavanagh, 'Deference or Defiance' (n 90) 188.

[96] I should note that I do not mean that this cognisance will *always* lead us to defer to another expert. Uncertainty merely *signals* to the need to *inquire into* whether there is a need for deference. In some cases, this inquiry might yield a response that deference is not called for, notwithstanding the court's uncertainty. This will be the case, for example, in cases where the courts find that a decision-maker *refuses* to exercise its expertise. See for example *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, where Baroness Hale (at [37]) made clear that 'the views of the local authority are bound to carry less weight where the local authority has made no attempt to

This analogy plays out in the case law. In *Shvidler*, it was recognised that 'the Government has access to relevant experts and a wide range of information, some of which may be secret'.[97] Hence, in assessing proportionality-based challenges to sanctions imposed under the Russia (Sanctions) (EU Exit) Regulations 2019, expertise-based deference strongly tempered the court's judgment in allowing the executive wide scope to contain Russia's invasion of Ukraine.

Likewise, *U3* concerned challenges to the approach with which the Special Immigration Appeals Commission (SIAC) should take in citizenship and refusal of leave appeals.[98] Delivering the unanimous opinion of the court, Lord Reed highlighted that the Secretary of State acts with the benefit of 'expert advice, including advice from the Security Service'.[99] Such expertise would unlikely be possessed even by 'persons formerly involved in intelligence work' such as some members of the SIAC, still less the courts, given that they 'have no close or current involvement'.[100] Hence, the Supreme Court exercised deference and held that 'public safety should be primarily the responsibility of the Government'.[101]

Seen in this light, uncertainty is constructive because it cognises decision-makers of their own limits, which then calls forth a consideration of whether a more restrained approach

address the question' of whether sex shop owners' right to sell pornographic material should be restricted in the interests of the wider community.

[97] Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs [2025] UKSC 30 [129] (Lord Sales and Lady Rose).

[98] U3 v Secretary of State for the Home Department [2025] UKSC 19.

[99] *U3* (n 98) [66] (Lord Reed).

[100] *U3* (n 98) [66] (Lord Reed).

[101] *U3* (n 98) [67] (Lord Reed).

ought to be adopted. In doing so, courts are better cognised as to when giving weight to a decision-maker's expertise could assist in producing a more intelligible answer.

A clarification is warranted here. Up to now, my analysis appears to assume that deference on grounds of institutional expertise is an appropriate judicial response in cases where courts are cognisant of a significant degree of uncertainty on their own part, relative to the decision-maker's expertise. However, as Mark Elliott has cautioned, adopting (or at least ascribing particularly significant weight to) the decision-maker's expert view is neither the only possible nor an uncontroversial response.[102] Another response, says Elliott, might see 'the court taking steps to equip itself better to evaluate arguments' before making a decision.[103] Such concerns, however, should not encumber the present analysis because I do not argue that deference is *the* required—or desired—approach. Rather, I merely claim that where courts lack a certain expertise, a more tailored approach would be required. While I have considered the issue through the lens of deference, given the tendency of the courts to adopt this approach, a desire for another approach does little to alter my argument. Whatever the preferred method, the cognisance function remains the same: it signals to courts that it ought to restrain from straightforwardly making a decision without considering modulating its response in some way or form, given its lack of expertise.

[102] Elliott, 'Proportionality and Deference' (n 89) 274.
[103] Elliott, 'Proportionality and Deference' (n 89) 274.

B. Treatment of Section 31(2A) of the SCA

Uncertainty's cognisance function is therefore essential to facilitate expertise-based decision-making. I wish to further explore why this recognition is critical through a case study offered by section 31(2A) of the SCA. This provision dictates that relief *must* be denied 'if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred'.[104]

Viewed through the lens of uncertainty's cognisance function, section 31(2A) is far from desirable. The provision imposes a *compulsory* duty for courts to 'recreate a world that never was'.[105] Considering such hypotheticals necessarily lead courts to assess the merits of a decision, given that courts must imagine what decision-makers might do. However, courts are not well-placed to undertake merits-based assessments.[106] Furthermore, courts must consider causation,[107] an undertaking they have traditionally resisted from given that the law is 'strewn with examples of open and shut cases which, somehow, were not'.[108] A first point, therefore, is the potential risks that come with ignoring uncertainty's cognisance function. To the extent that

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[104] Senior Courts Act 1981, s 31(2A). There is an exception built into this provision, which specifies that relief will still be granted if 'reasons of exceptional public interest' are found.
[105] R (Associated Society of Locomotive Engineers and Firemen) v Secretary of State for Business and Trade [2023] EWHC 1781 (Admin) [199] (Linden J).
[106] Lisa Lawton, 'Section 31(2A) of the Senior Courts Act 1981 in the Courts' [2025] PL 239.
[107] Paul Craig, UK, EU and Global Administrative Law: Foundations and Challenges (CUP 2015) 159-162.
[108] *John v Rees* [1970] CH 345, 402.

uncertainty might be helpful in cognising courts of their institutional and epistemic limits, and hence play a role in encouraging intelligible, expertise-based decision-making, section 31(2A) artificially imposes a duty that runs contrary to that constructive function.

The upshot, then, is the way uncertainty's cognisance function continues to play a significant role in shaping the judicial approach. Indeed, while courts have accepted that it 'must consider section 31(2A) of its own initiative',[109] it is curious *how* the 'no difference' analysis has been undertaken. As the courts have made clear, they will only be prepared to 'act on the evidence it has or on reasonable inferences from it'.[110] This greatly reduces the need to speculate and confines courts to acting only in areas where they have can make intelligible assessments.

Cooper makes this point clear.[111] This case concerned the unlawful granting of a planning permission. In refusing to apply section 31(2A), the court observed that the decision-maker had placed 'significant weight' on the need for further gypsy and traveller sites. Therefore, a final determination on the lawfulness of the planning permission would depend on 'what additional weight (if any) she [the decision-maker] would have accorded to the limited harm that the proposed developments would cause in light of those policy considerations'.[112] However, because the available evidence did not allow the court to determine the weight

[109] *R (Cooper) v Ashford BC* [2016] EWHC 1525 (Admin); [2016] PTSR 1455 [107] (John Howell QC).
[110] Cooper (n 109) [107] (John Howell QC). See also R (Bradbury) v Awdurdod Parc Cenedlaethol Bannau Brycheiniog (Brecon Beacons National Park Authority) [2025] EWCA Civ 489 [71] (Lewis LJ).
[111] *Cooper* (n 109).
[112] *Cooper* (n 109) [106] (John Howell QC).

the decision-maker would have placed on the countervailing considerations, it was hesitant to override its sense of uncertainty and ascribe what *it* thought *may* have been the weight the decision-maker *could* have assigned. Therefore, section 31(2A) did not apply.[113] Crucially, the court did not have the appetite to look beyond the material before it.

Taken together, section 31(2A) reveals two important takeaways. The first, as noted above, is the risks inherent in ignoring—or attempting to usurp—one's cognisance of its limited expertise in the face of uncertainty. The second takeaway relates to the resilience of the cognisance function, which is seen through the court's continued commitment to it. Where legislative amendments appear to push courts towards acting even when they are uncertain, courts have found means to continue to pay heed to their sense of uncertainty and limit the extent with which they have to make ambiguous conjectures, even while remaining true to their statutory duty. Uncertainty's cognisance function, in turn, reveals itself as firmly lodged within the court's jurisprudence.

VI. Conclusion

This article has sought to establish constructive uncertainty's place in the public lawyer's toolbox. It proposed that constructive uncertainty might not simply exist in the content of legal rules, but more fundamentally within the relationships between different branches of Government, and in the way a particular branch understands its own institutional limits.

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[113] *Cooper* (n 109) [109] (John Howell QC).

It is hence hoped that the present study alerts us to the recognition that constructive uncertainty already permeates across public law. Such uncertainties do not simply exist as isolated instances which stand alone, but may be systematically conceptualised, as demonstrated, using the three-fold model proposed. This is, of course, not to suggest an exhaustive list of purposes constructive uncertainty serves, but rather to propose a starting point on which further purposes of constructive uncertainty might be built upon. In turn, uncertainty can begin to be meaningfully utilised—and not merely trenchantly dismissed—as a lens through which we view the constitution and its operation.

In closing, I wish to raise some questions for the future. As I have said, nothing in this paper advocates for an unrestrained application of uncertainty. An undue insistence on uncertainty will be disastrous. Significant uncertainty in institutional relationships between different branches of Government, for example, can well lead to constitutional paralysis, wherein it becomes unclear how one branch can work with another. Similarly, undue uncertainty introduced by a commitment to contextualism may well create a chaotic Tennysonian wilderness of single instances. That said, uncertainty has the potential to sit alongside instruments that promote certainty. Constitutional conventions, as shown above, add a significant degree of certainty into how different branches relate to one another. Structure injected by procedural codes and a common pattern of applying the common law also contribute certainty, even while uncertainty is inherent in the fact-based approach to procedural review. Uncertainty, in turn, may be a matter of degree. Therefore, while I have sought here to make a case for *why* we might embrace

uncertainty in public law, the question of *how much* remains unclear. More specifically, how much constructive uncertainty does the law require, and past what point would its constructiveness evaporate? What factors might influence the appropriate degree of uncertainty we ought to tolerate in relation to each of the functions uncertainty serves? These are interesting questions in themselves and perhaps ever more relevant given a clearer appreciation of uncertainty's inherent constructiveness.

How Does the Definition of Detention Restrict the Police? A Comparative Analysis of Canada and the United Kingdom

Ibrahim Ejaz*

Abstract—This article provides a comparative analysis of how the courts in Canada and the United Kingdom define police detention, and how these restrict the police's ability to exercise their role. It draws on Miller's conception of the role of policing as the promotion of public order and protection of the public, even at risk to the officer's own safety. This understanding is used as a lens to view the jurisprudence of the Canadian and British courts. It argues that the courts' definitions of definition impose both direct restrictions, through the triggering of detainee's rights, and indirect restrictions, arising from the uncertainty in identifying when detention occurs in day-to-day policing. The article uses these judgments to understand how the courts themselves view the role of the police and how that affects their

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judgments. The article finds that British courts impose relatively limited restrictions, maintaining clearer thresholds for detention and exhibiting deference to authorities in their determinations. By contrast, Canadian courts impose more extensive direct and indirect restrictions on the police, driven by an understanding of the police owing a fiduciary duty to the public. While this approach enhances the protection of individual rights by giving the police greater responsibilities when exercising their detention powers, it often does so at the expense of clarity.

I. Introduction

This article will examine whether the definition of detention in Canada and the United Kingdom creates an excessive restriction on the role of the police. It seeks to unpack the paradigm between the law on paper and its practical effect on day-to-day policing.

In Part I, I establish the general definition of detention and the direct and indirect restrictions which arise, before exploring how each jurisdiction expands on this definition. I use Miller's definition of the role of the police as a comparator to demonstrate where restrictions on the police become excessive.

In Part II, I consider what the case law and previous analysis show about how the courts view the role of the police in these jurisdictions, to develop a deeper understanding of how their judgments were grounded, and for what purpose. While the UK conforms quite closely to Miller, with high levels of deference to the authorities, the Canadian court takes a different approach with a view that more closely aligns with the police owing a fiduciary duty to the public.

Overall, I conclude that the United Kingdom's approach does not provide excessive restriction on the police, while the Canadian approach does. The Canadian approach, in seeking to address inequities in the system, expands the role of the police, such that it encroaches upon that of the legislature and executive. In doing so, it exacerbates the direct and indirect restrictions on the police. By contrast, the UK's jurisprudence points towards an approach that gives the police significant discretion, utilising a detainee's rights to bridge informational gaps.

Part I: Understanding Detention in Canada and the UK

Detention, at its simplest, is 'mandatory restraint.'[1] When lawfully done, this will be at the behest of entities who are legally empowered to detain someone, such as the police. However, as this article will show, the way that Canada and the United Kingdom expand on this definition varies greatly.

Arbitrary detention, though, arises where the reason for detention is 'based alone upon one's will, and not upon any course of reasoning and exercise of judgment.'[2] It occurs where the reason for detaining an individual is not substantially founded in the law, or an otherwise clear rationale for justifying detention. There are many potential consequences of arbitrary detention, ranging from personal sanctions against officers and, more critically, to loss of important evidence in a prosecution. It is, therefore, an outcome that the police ought to avoid.

The Role of the Police

This article adopts Miller's definition of the role of the police, in which he describes their duties as follows:

[1] Daphne Dukelow and Betsy Nuse, *The Dictionary of Canadian Law* (Thomson Professional Publishing Canada 1991) 279.
[2] 'arbitrariness' in Bryan A Garner (ed), Black's Law Dictionary (11th edn, Thomson Reuters 2019) 104. See also Carla Ferstman, *Conceptualising Arbitrary Detention: Power Punishment and Control* (Bristol University Press 2024)

> '[T]he police are individuals who use their powers in accordance with duties to (5) promote public order and (6) protect the public, (7) even at risk to the officer's own safety.'[3]

Miller builds this definition through the governance model of the police and describes the police as being 'executive agents delegated limited authority to restore public order whenever it is disturbed.'[4] They do so because the state, from which their power and authority stems, has a duty to govern and resolve social needs. The police are the state's resolution to the need to maintain public order and their unique powers, such as that to use force, satisfy that need.[5]

Miller's view stands in contrast with one of the most famous accounts of the police's role, developed by Bittner. Bittner emphasises the police's ability to use force and argues that 'policemen direct, control and discipline persons from all walks of life.'[6] The fundamental function of the police is to intervene where there is 'something-that-ought-not-to-be-happening-and-about-which-someone-had-better-do-something-now.'[7]

However, Miller demonstrates that Bittner's narrow view of the police ignores the scope and breadth of the police's

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[3] Eric J Miller, 'The Concept of the Police' (2023) 17 Crim L and Philosophy 573, 587 – 588 (emphasis added).

[4] Miller (n 3) 587 – 588.

[5] Miller (n 3) 579 – 579.

[6] Egon Bittner, *Functions of the Police in Modern Society* (National Institute of Mental Health 1970) 120; Miller (n 3) describes Bittner's conception of the police as a 'paramilitary bureaucracy'.

[7] Egon Bittner, 'Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police' in Tim Newburn (ed), *Policing: Key Readings* (Routledge 2005) 162.

practical function[8] and does not take into account the way that the police deal with social exigencies in practice, which often rely more on soft skills than force.[9]

A more unorthodox reading of the police's role is expounded by Galoob. Galoob draws an analogy of fiduciary duty from private law and applies this to the police's relationship with the public.[10] When the police exert coercive power, they have 'special duties that the fiduciary owes… in law, the paradigmatic fiduciary responsibility is the duty of loyalty, which prescribes the fiduciary's loyal behaviour and prohibits betrayal.'[11] Galoob continues that the police (the fiduciary) must act with correct motivation and must monitor and alter their behaviour to satisfy their duty to the public (the beneficiary), in light of the special powers that they possess and the potential for this power to be abused.[12] This is not incompatible with Miller, but puts a greater onus on the police to serve the public, rather than to simply promote public order and protect the public. As will later be shown, this aligns more closely with the Canadian approach.

For the purposes of this article, whether the detention threshold causes an excessive restriction on the role of the police will be a matter of determining the extent of its impediment to the police's ability to promote public order and protect the public, even at risk to an officer's own safety.

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[8] Miller (n 3), 586 – 587.
[9] See David H Baley, *Police For the Future* (OUP 1994) 34.
[10] Stephen Galoob, 'A fiduciary principle of policing' (2023) 17 Criminal Law and Philosophy 615.
[11] Galoob (n 10) 618.
[12] Galoob (n 10) 618.

This article will explore two separate, but interrelated ways in which the definition of detention restricts the role of the police.

Direct Restriction

In Canada and the UK, reaching the threshold of detention restricts the freedom of the police in their interactions with an individual. It places a direct restriction to respect the individual's rights and protections. Such rights protect the individual from self-incrimination, such as those relating to the acquisition of counsel and information of the charge for which they are suspected.[13]

Penny and Stribopolous argue that a definition of detention which too easily triggers the rights of the detainee would inhibit the ability of the police to engage in their duties, such as carrying out investigative enquiries.[14] They also argue that the law may cause the threshold for detention to be reached too easily and trigger an individual's rights before the police have been able to fully carry out their legitimate functions and enquiries, or before they have been able to reasonably ascertain that detention had occurred.[15] They give the example of the officer who has a suspicion that an offence is being committed, but do not yet have reasonable and probable grounds to detain the individual, as will be seen in the discussion of *Grant*.[16] Where the crystallisation of

[13] Canadian Charter of Rights and Freedoms, s.9 and s.10; Police and Criminal Evidence Act 1984, Code C, para 3.1.

[14] Steven Penney and James Stribopoulos, "'Detention" under the Charter after *R v Grant* and *R v Suberu'* (2010) 51 Supreme Court Law Review 439, 451.

[15] Penney and Stribopoulos (n 14) 468.

[16] *R v Grant,* 2009 SCC 32.

[17] Carla Ferstman, Conceptualising Arbitrary Detention: Power Punishment and Control (Bristol University Press 2024) 51-82.

detention occurs too easily, the officers may be unable or uncomfortable engaging in preliminary investigative enquiries even though doing so may be critical to protecting the public.

Indirect Restriction

It also creates an indirect restriction where the police act cautiously to avoid crossing the threshold into detention.

The police may find it difficult to determine when detention has crystallised where detention crystallises too easily, and complications may later arise, such as the evidence gained being rendered inadmissible. If the police are unable to easily ascertain when they have detained an individual, they risk unwittingly detaining an individual arbitrarily, or without providing that individual the rights they are entitled to.[17] In practice, this may occur where an individual had been *de facto* detained, but the officer was not aware that the circumstances they created amounted to a detention. This uncertainty also prevents them from carrying out legitimate enquiries that promote public order and protect the public, lest arbitrary detention manifest.

The combination of these restrictions can make day-to-day policing difficult, and, where they are particularly exaggerated, excessively restrictive. One workaround could be informing detainees early that they are not required speak to the police. However, as Woollcombe suggests, if the officer informs the individual that they need not interact with the police to avoid detention crystallising, this 'almost suggests that the person

[17] Carla Ferstman, Conceptualising Arbitrary Detention: Power Punishment and Control (Bristol University Press 2024) 51-82.

should leave.'[18] This would lead to the loss of valuable evidence that could be procured more easily absent these formalities, and may otherwise unnecessarily prolong interactions with a potentially innocent member of the public.[19]

That is not to say that individuals should have weaker rights or that the police ought not be cautious. The balance between the two, however, must be carefully tuned so the police can exercise their role within the parameters of the direct and indirect restrictions.

A. Canada

The Canadian jurisprudence represents the more expansive view this article will explore. The rights owed to the individual upon the crystallisation of detention are set out in the Canadian Charter,[20] while much of the definition for reaching this threshold is set out in Canadian case law.

Rights Owed to Detainees

The rights owed to a detainee are set out in sections 9 and 10 of the Canadian Charter of Rights and Freedoms.[21] These are tempered by section 1 of the Charter which allows for 'such reasonable limits prescribed by law as can be demonstrably

[18] Jennifer Woollcombe, 'Grant, Suberu and Harrison: Detention, the Right to Counsel and a New Analysis under Section 24(2): Some Practical Impacts' (2010) 51 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 479, 488.
[19] Woollcombe (n 18) 468.
[20] Canadian Charter of Rights and Freedoms ('the Charter'), s 9 and s 10.
[21] Charter (n 20). See Penny and Stribopoulos (n 14) 451.

justified in a free and democratic society',[22] allowing the court to engage in balancing exercises of these rights. Section 9 of the Charter gives everyone 'the right not to be arbitrarily detained or imprisoned'.[23] When detention crystallises, the detainee becomes entitled to their section 10 rights to be informed (a) of the reasons for their detention[24] and (b) of their right to counsel.[25] As such, it is important that it is clear when detention arises and when these rights become applicable, so that the police are properly apprised of the direct restrictions placed upon them.

When Does Detention Arise?

Detention in Canada is not limited to physical detention. Per the Supreme Court of Canada (SCC) in *Therens,* detention crystallises 'when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel.'[26] Detention, and its direct restrictions, also occurs when an individual is psychologically detained.

Psychological detention will crystallise when a 'reasonable person is likely to err on the side of caution…and comply with the demand'[27] because there is a 'reasonable perception of suspension of freedom of choice.'[28] *Therens*

[22] Charter (n 20) s 1.
[23] Charter (n 20) s 9.
[24] Charter (n 20) s 10(a).
[25] Charter (n 20) s 10(b). See also *R v Suberu,* 2009 SCC 33. It was held here that the s 10(b) right to counsel must be communicated when detention has crystallised.
[26] *R v Therens,* 1985 CanLII 29 (SCC) [53].
[27] Therens (n 27) [57].
[28] Therens (n 27) [57].

establishes that this may arise even where there is no legal compulsion to comply. This recognises that many citizens do not know whether they are legally required to comply, especially given the inherent power imbalance in police interactions.[29]

As a result, the threshold of detention is lower than solely physical detention, but it is also more ambiguous. This increases the propensity of indirect restrictions, since the analysis is predicated on various contextual factors from the perspective of the reasonable person in that situation, which the police may find difficult to objectively assess and therefore be uncomfortable engaging in.[30] The analysis includes the characteristics of the person that may exacerbate power imbalances, such as their age, or how the officer's actions may be interpreted in their word choice and tone.

Arbitrary Detention: *Grant and Ladouceur*

In assessing whether a detention is arbitrary, the Canadian approach is formulated in *R v Ladouceur*.[31] The appellant was stopped by the police during random traffic stops to check the documentation of motorists and was charged for driving with a suspended licence. The appellant later asked the court to dismiss the evidence collected during this stop, as he had been placed under arbitrary detention in violation of section 9 of the Charter.

The SCC, by a narrow 5–4 majority, ruled that the stop amounted to an arbitrary detention, detailing that arbitrary detention arises where the discretion to stop is exercised with 'no

[29] Therens (n 27) [57].
[30] Therens (n 27) [57].
[31] 1990 CanLII 108 (SCC).

criteria, express or implied, which govern its exercise.'[32] Notably, the majority found the arbitrary detention to be part of a legitimate aim, justifiable under section 1 of the Charter as it could be 'reasonably and demonstrably justified in a free and democratic society'.[33] In doing so, they determined that random traffic stops satisfied the test set out in *Oakes,*[34] requiring that provisions that may violate Charter rights are proportional to addressing a 'pressing and substantial'[35] concern. The majority were convinced by evidence of high mortality rates on the highways for the former criteria to be satisfied, and the latter in being 'rationally connected'[36] to the aim, with minimal infringement on the individual's rights.

This was further seen in *Grant.*[37] Grant, a black teenager, was walking around the vicinity of a school at a time of increased police presence, due to high local crime levels. Grant was spotted acting suspiciously, looking nervously at officers and fidgeting. He was approached by a uniformed officer on the advice of plain-clothes officers nearby. The uniformed officer engaged him, asking him questions about his details, including his name and address. A crucial part of this interaction was when Grant was asked to put his hands in front of him after fidgeting with his jacket. Two other plain-clothes officers then identified themselves as the police before standing behind the uniformed officer. Following further questioning, Grant told the police he was transporting a firearm and a small amount of cannabis. The

[32] Ladouceur (n 32) 1277.
[33] Ladouceur (n 32) 1278-88; Charter (n 20) s1.
[34] *R v Oakes* 1986 CanLII 46 (SCC) [1986] 1 SCR 103.
[35] Oakes (n 35) 105-106.
[36] Oakes (n 35) 105-106.
[37] *Grant* (n 16).

SCC held that the incriminating statements made by Grant were procured after the initiation of detention and before Grant was made aware of the rights associated with his detention, namely his section 10(b) right to counsel.[38] It was on this basis that the appellant sought to have the evidence against him dismissed.

In this case, the SCC held that detention crystallised when Grant was told to 'keep his hands in front of him.'[39] This was the point where he was due his rights, and direct restrictions on the police ought to have arisen. While the majority did not view this act to be conclusively indicative of detention, it utilised a holistic approach that viewed the entire context of the situation. This included the particular characteristics and vulnerabilities of the individual, the nature of the police's conduct in both language and actions, and the circumstances giving rise to the encounter, among other factors.[40] The SCC found that the uniformed police officer's initial approach and his preliminary questioning did not preclude the reasonable person from believing they may choose how to act. 'The sustained and restrictive tenor of the conduct'[41] that followed was a marked shift. Grant had been directed to 'keep his hands in front of him',[42] two other officers took 'tactical adversarial positions'[43] and the nature of the interaction morphed into an interrogation, with Grant experiencing a high level of intimidation.[44] The 'police had no information whatsoever that

[38] *Grant* (n 16) [58].
[39] *Grant* (n 16) [52].
[40] *Grant* (n 16) [45] – [57].
[41] *Grant* (n 16) [51].
[42] *Grant* (n 16) [52].
[43] *Grant* (n 16) [49].
[44] *Grant* (n 16) [49].

[Grant] may have been implicated in criminal activity',[45] barring suspicions emanating from his behaviour. Therefore, the detention was arbitrary as there was no justification for Grant to have been detained at that point.[46] Grant is a prime example of ambiguity in detention definitions, causing excessive indirect and direct restrictions. It is hard to see what more the police could have done to ascertain that Grant was transporting a firearm, without reaching the detention threshold arbitrarily. The police's actions here fulfilled their role of protecting the public, especially given the risk to themselves in the presence of a nervous individual possessing a firearm.

It is worth nothing that while the Court found a breach of Grant's Charter Rights, they did not exclude the physical evidence obtained.[47] Under section 24(2) of the Charter, the Court may exclude evidence that would bring the administration of justice into disrepute due to the manner in which it was obtained.[48] This is a three-part test that considers the seriousness of the Charter-infringing conduct, the impact on the interests of the defendant, and society's interest in the case being tried with the evidence.[49] They concluded that the breach of Grant's rights was 'significant, although not at the most serious end of the

[45] *Grant* (n 16) [182].
[46] *Grant* (n 16) [129] – [140].
[47] *Grant* (n 16) [129] – [140].
[48] Canadian Charter (n 20) s 24(2).
[49] *Grant* (n 16) [129] – [140].

scale',[50] the police's conduct was 'neither deliberate nor egregious'[51] and that the gun was 'highly reliable'[52] evidence.

As such, even if rights violations and arbitrary detention had occurred, the Courts, through section 1 or section 24(2), can still admit the unlawfully gathered evidence. While this lessens the impact of misconstruing the detention threshold, seemingly alleviating the indirect restriction that comes from ambiguity, I will show in Part II how this only creates more confusion and ambiguity that exacerbates the indirect restriction on the police's role.

B. The United Kingdom

Rights Owed to Detainees

In the United Kingdom, under the Police and Criminal Evidence Act 1984 (PACE), a detainee must be informed of their right to consult with a solicitor and their free availability, to have someone informed of their arrest, to be informed about the offence for which they are arrested, as well as their right to review the code of practice, and request an interpreter.[53] They will also be provided with a written notice of their rights and how to exercise them.[54] There is a further common law duty on the police to re-caution, and remind a detainee of their rights where the detainee is being considered for an offence greater than that for which they

[50] *Grant* (n 16) [140].
[51] *Grant* (n 16) [133].
[52] *Grant* (n 16) [139].
[53] Police and Criminal Evidence Act (PACE) 1984, Code C, para 3.1.
[54] PACE (n 55) Code C, para 3.2.

were previously being considered.[55] Similarly, it is important for the police to understand when these direct restrictions arise.

Detention and Arbitrary Detention in the UK: *Gillan*

At the House of Lords, *Gillan* presented a challenge to statutory stop and search powers under the Terrorism Act 2000.[56] The appellant, in accordance with the Act, had been stopped and searched in a designated area for the police to prevent crime at protests.[57] The appellant had been stopped without reasonable suspicion and had his rucksack searched for 20 minutes.[58] The appellant argued that such a power was contrary to Article 5(1) of the European Convention on Human Rights that '[e]veryone has the right to liberty and security of the person',[59] prohibiting unlawful detention. Lord Bingham delivered the unanimous judgment which contended Gillan was not 'detained in the sense of confined or kept in custody, but more properly being detained in the sense of kept from proceeding or kept waiting'.[60] Lord Bingham disputed the idea that deprivation of liberty or detention arose, with the lack of the detainee being 'handcuffed, confined or removed'[61] contributing to that assessment. This language suggests the Court would expect detention to crystallise where the police had exercised significant and continued coercive power, rather than the momentary interruption of someone's

[55] *R v Kirk* [2000] 1 WLR 567.
[56] Terrorism Act 2000, ss 44 – 47.
[57] R(Gillan) v Commissioner of Police of the Metropolis [2006] UKHL 12, [2006] 2 AC 307 [2].
[58] *Gillan* (n 59) [2].
[59] European Convention on Human Rights, art 5(1).
[60] *Gillan* (n 59) [25].
[61] *Gillan* (n 59) [25].

movement.[62] The latter not necessitating an individual require the protection of their rights.

Lord Bingham had not contested that the individuals were unable to leave, only that the manner in which it was conducted did not rise to the level of detention.[63] From this case, we can infer that the threshold for detention in the UK leans towards physical detention that results in a significant impediment on liberty.

Furthermore, the Lords in *Gillan* disagreed that the arising detention constituted arbitrary or unlawful detention.[64] The Lords recognised the wide and sweeping power the Terrorism Act confers on the police, however, they posited that the powers are sensibly moderated by checks and balances.[65] Namely, that the powers had to be approved by a senior police officer, where the power is expedient for the prevention of terrorism, with a limited spatial and temporal scope, among other safeguards.[66] As such, the Lords believed that the powers 'are very closely regulated'[67] and therefore retain their legality, as arbitrary or discriminatory use of the powers is unlikely, and such an issue could be remedied through civil litigation.

Of course, like Canada, where there is arbitrary detention or when the detainee's rights in relation to detention are breached,

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[62] One could also see this as the Court seeing the stop and search as an assessment of whether an individual needs to be detained, or a confirmation that an individual does not need to be detained.
[63] *Gillan* (n 59) [22] – [26].
[64] *Gillan* (n 59) [92].
[65] *Gillan* (n 59) [14].
[66] *Gillan* (n 59) [14].
[67] *Gillan* (n 59) [14].

the judiciary may exclude evidence under section 78 of the Police and Criminal Evidence Act.[68] This would, rightly, occur where the breach was 'significant and substantial'[69] and would affect the fairness of the trial.[70] This is less likely to cause clarity issues that cause indirect restrictions, as when detention and detainee's rights arise is sufficiently clear.

Insofar as the Lords are satisfied with the police operate within a sufficiently regulated framework—albeit one largely self-regulated by the police themselves—there is less indirect restriction and more certainty that detentions made in accordance with their powers will be valid.

By way of comparison, it appears that there are less significant direct and indirect restrictions on the police in the UK, compared to Canada.

Psychological detention in the Canadian approach, compared to a physical threshold in the UK, naturally, makes it easier for direct restrictions to arise, and less clear about when they do arise.

Whether a detention is arbitrary in the UK is dependent on whether it is prescribed by law. This affords the police considerably greater certainty and discretion, as compliance with the prescribed law is sufficient to insulate against a finding of arbitrariness, thereby reducing indirect restrictions. By contrast, the Canadian court looks beyond the mere existence of a legal basis and examine the underlying rationale for the particular

[68] PACE (n 53) s 78.
[69] *R v Walsh* (1981) 91 Cr App R 161.
[70] PACE (n 53), s 78; *Scott v R* [1989] AC 1242 (PC).

detention, introducing a layer of evaluative uncertainty that the UK framework avoids.

Part II: The Courts' Perception on the Role of the Police

Drawing from the previous analysis, it is now easier to understand how the courts view the role of the police.

A. The United Kingdom

Deference to the Authorities

The UK's detention jurisprudence aligns closely with Miller's conception of the police's role: the pursuit of public order and public protection, even at risk to the officer's own safety. It achieves this alignment through a consistent posture of judicial deference to the authorities. This deference is of practical significance because the police can confidently rely on exercising the powers prescribed to them by law in day-to-day policing, resulting in clarity and fewer indirect restrictions.

This deference extends to the legislature and executive, who are afforded considerable latitude in determining which matters warrant police intervention and how the resulting powers should be exercised, as *Gillan* illustrates. It is worth noting that *Gillan* was decided shortly after the 7/7 bombings in London, which meant the Court was likely to be particularly receptive to the government's argument that the Terrorism Act was necessary

for safety.[71] This rationale and deference is made clearer when understanding the opposing ruling from the European Court of Human Rights (ECtHR).

The ECtHR disagreed with the Lords' assessment, and expressed concern over the 'breadth of the discretion conferred on the individual police officer'[72] by the Act. In the first instance, they indicated disagreement with the Lords' on what constituted deprivation of liberty. While they appreciate the short length of time of the search, they expressed the view that the appellants 'were obliged to remain where they were…if they had refused they would have been liable to arrest…. This element of coercion is indicative of a deprivation of liberty'.[73] Furthermore, they were dissatisfied with the safeguards and disagreed as to their sufficiency, fearing potential abuse, a critical divergence from the Lords'. The ECtHR were further unimpressed by the looseness of the Act's wording considering the extensive power it confers, and were of the opinion that such a lack of precision leaves available an arbitrary abuse of power.

The judgment from the ECtHR raises legitimate concerns about the Lords' justifications. They disagree both with the assessment that detention did not crystallise, and that the safeguards in place were sufficient.

This bolsters the idea that the Lords exercised deference to the authorities, since much of the differences between their

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[71] *Gillan* (n 59) [48] ;The Human Rights Act 1998 had only been in force for 8 years, and the 7/7 bombings had occurred in the year prior to the judgment.
[72] *Gillan and Quinton v United Kingdom* App No 4158/05 (ECtHR, 12 January 2010) [83].
[73] *Gillan and* Quinton (n 74) [57].

judgments can be seen as the Lords having greater trust in the authorities not only to act responsibly with these powers, but also to say that this is a power they ought to have, without being encumbered by the duties that arise from detention or the sanctions for arbitrary detention.

The fact that there is deference in the UK courts is no secret. Lord Justice Laws provides the guideline that 'greater deference will be due to democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility'[74] and that 'greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure.'[75] Detention, especially when considered in the context of terrorism legislation as it ultimately was, would fall into the responsibility of the 'democratic powers',[76] even more so as it was with regard to an Act of Parliament.[77]

As such, the police in the UK are less prone to overly burdensome indirect restrictions in their interactions with the public, as their caution is tempered by a confident understanding of when detention, and direct restrictions, will and will not arise.

Duties Placed Upon the Police

The degree to which detention arising becomes a significant inhibitor on the role of the police, would also be dependent on

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[74] International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158, [2002] 3 WLR 344 [85] – [86].
[75] International Transport Roth (n 76) [83].
[76] International Transport Roth (n 76) [85].
[77] See also Clive Walker, Blackstone's Guide to the Anti-Terrorism Legislation (3rd ed, OUP 2014) 109.

the scale of the duties that become incumbent on the police officer. Specifically, whether such duties are at the expense of the police's role and beyond the extent required to maintain the rights of the detainee. The extent of the direct restrictions incumbent on the officer is to inform, and does not rise to the level of being at the expense of the police's role.

A good example is *Kirk*,[78] where the Court of Appeal affirmed that the police 'must, before questioning or questioning further, either charge the suspect with the more serious offence…or at least ensure that he is aware of the true nature of the investigation.'[79] They consider this necessary for the detainee to make an informed choice of how to respond, and the legislation presumes that the detainee is aware of what they are being charged with.[80]

I see this as consistent with the court imposing fairly mild duties in favour of detainees. The obligation does not extend to placing further duties at the expense of the police's ability to exercise their role. Instead, it ensures that the detainee has the same level of information as the police and are given the opportunity to exercise their rights. Here, the rights of the detainee are protected, and the ability of the police to exercise their role is not compromised.

Overall, the impact of the police to promote public order and public safety even at their own risk is minimally restricted, directly and indirectly, by the duties arising from detention in the UK. The thresholds for detention and arbitrary detention are

[78] *Kirk* (n 57).
[79] *Kirk* (n 57) 572.
[80] *Kirk* (n 57) 572.

generally favourable towards the police, due to the trust and deference UK courts afford the authorities. The main obligation of the police at the point of detention is to inform. The UK courts have resisted such obligations existing at the expense of the police's ability to exercise their role, the opposite of which can be found in the Canadian jurisprudence.

B. Canada

Canadian jurisprudence shows the courts taking a stronger approach to the rights owed to the individual, including both on the duties that become incumbent upon the police at the point of detention, and on defining detention. As such, I find the jurisprudence of the Canadian courts excessively restricts the police's role. The Canadian courts view the role of the police more closely as the police having a fiduciary duty to the public, as expounded by Galoob.[81] In many ways, this can be seen as the Canadian courts treating the police as a means of correcting deficiencies in the administration of justice, even at the expense of their ability to carry out their role.

Reconciling The SCC Case Law with The Police's Role: Fiduciary Duties

I argue that the SCC construes the police's role more consistently to Galoob's idea that there exists a fiduciary duty between the police and the citizenry, which 'impose requirements on both the behaviour and the cognition of police officers',[82] rather than a

[81] Galoob (n 10).
[82] Galoob (n 10) 616.

police force which ought to promote public order and protect the public, even at risk to themselves.

To show this, let us return to *Grant*. The court emphasises the officer telling Grant to 'keep his hands out in front of him'[83] as the moment when detention crystallised. However, it is unclear whether the intention of the officer here was to control Grant or was instead a knee-jerk reaction to ensure the officer's safety in light of Grant's fidgeting. The SCC does not take a firm position on the officer's intentions, but the majority considers that the reasonable person would have felt controlled and unable to leave the situation, but that is not wholly convincing. A young, visible minority in a high-crime area being questioned by a uniformed police officer was never likely to walk away; Grant's compliance despite being visibly nervous is sufficient to show this. While detention may have occurred, the SCC's emphasis on this particular moment is confusing.

I believe that it was at this point where the Court would be justified in saying the officer ought to have known psychological detention had arisen, and that the direct restrictions and fiduciary duties arose. This requires the police officer to have understood their actions, and when they crossed the threshold. The problem with this, is that it requires an objective standpoint to be assumed by the officer in the moment, in a job that necessarily puts them at risk, without a clear line for them to look out for. Vagueness is expected in a jurisdiction that recognises psychological detention, it will simply not be as clear as physical detention. Indeed, the majority here recognise that 'the point at which an encounter becomes a detention is not always clear, and

[83] *Grant* (n 16) [52].

is something with which courts have struggled',[84] but the judgment in *Grant* does little to clarify this and instead only exacerbates this vagueness. Such a concern is alluded to by Deschamps J, who did not think that the police intentionally detained Grant and that he 'would not want what is said in this judgment to discourage [the police] from intervening.'[85] As such, the SCC gives officers significant responsibility, without clear guidance on how to exercise their powers to satisfy that responsibility, thereby exacerbating both direct and indirect restrictions.

Penney and Stribopoulos note that it is 'unrealistic to expect police to consider a host of situationally variable factors in deciding whether they have crossed the detention threshold', with the judgment likely to lead to increased errors in practical policing.[86] It exacerbates indirect restrictions, as it will either inhibit them from exercising their power due to them being unsure of whether their conversation would reach the threshold of detention, or it will lead to arbitrary detentions as the line, marred by vagueness, is easily crossed. This is not a concern lost on the SCC, which in *Suberu* does recognise a tension between the need for individuals to be informed about their right to counsel and the need for the police to undertake legitimate inquiries.[87]

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[84] *Grant* (n 16) 133.

[85] *Grant* (n 16) 193.

[86] Penney and Stribopoulos (n 14) 451.

[87] *Suberu* (n **Error! Bookmark not defined.**) [41]; part of the rationale for delivering such a clear and direct requirement in *Suberu* for the detainee to be informed of their right to counsel at the point of detention is that any temporal requirement would be ill-defined and lead to confusion and misunderstandings.

The Canadian court's tendency to imbue the police with significant responsibility, exacerbating direction restrictions, is further seen in *Prosper*.[88] *Prosper* addressed a detainee's right to counsel, when a detainee can waive this right, and when evidence may be gathered from a detainee. The appellant was arrested outside of normal working hours. He was informed of the availability of legal aid and was given a list of lawyers which he diligently searched through, but was unable to contact any and was unable to afford a private lawyer. He then waived his right to counsel and took a breathalyser test, which was to be taken in two hours, which he failed. The court dismissed the breathalyser evidence as Prosper's right to counsel had been violated, and that the violation necessitated this dismissal to avoid bringing the administration of justice into disrepute.[89][90] Of particular interest was that the Court took it to be the case that a detainee's section 10(*b*) rights took precedence over the statutory right of the Crown to rely on an evidentiary presumption,[91] dismissing the idea that the breathalyser evidence needed to be taken at that point. The majority attributed the loss of the time-sensitive breathalyser evidence to the State's failure to provide accessible duty counsel, and that insofar as the provision of accessible duty counsel was not taken up by the State, the State effectively forfeits the default presumption that there is urgency.[92]

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[88] *R v. Prosper* 1994 CanLII 65 (SCC).

[89] *Prosper* (n 88); *Charter* (n 20) s 24(2).

[90] In future, *Propser* warnings are given to detainees who exercise diligence but cannot contact counsel - 'an additional informational obligation on police is triggered once a detainee, who has previously asserted this right, indicates a change of mind and no longer wants legal advice.'

[91] *Prosper* (n 88) 25.

[92] *Prosper* (n 88) 25.

Notably, the majority in *Prosper* acknowledged that 'requiring police to advise detainees…increases the likelihood that detainees will seek legal advice and thereby be informed of their rights and obligations.'[93] They created a presumption that because this obligation would better the detainee's likelihood to invoke their rights, it ought to be done, and that the police ought to be the ones to do this.

Stuart notes the heavy burden this places on the police, especially where the police are helpless in providing further assistance for access to counsel when it is genuinely unavailable.[94] This view is persuasive. The police fulfilled all obligations incumbent upon them to assist the appellant. Even if it was not the fault of the appellant that they could not access counsel, it also was not the fault of the police. It was the fault of the state for not providing duty counsel, and the discounting of time-sensitive evidence worsens the ability of the police to fulfil their role of protecting the public. The SCC imposes a further direct restriction that occurs at the expense of the police's role.

Galoob's characterisation of the police's fiduciary duties aligns with the responsibilities that the Supreme Court of Canada intended to impose upon the police. This further responsibility placed on the police officer is an indicator of this fiduciary duty, by ensuring that the police take on the role of facilitating the rights of the detainees, even if it is beyond their role.

The expansive use of police powers for this purpose is not, in principle, objectionable. If the police are able to effectively

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[93] *Prosper* (n 88) 30.

[94] Don Stuart, *Charter Justice in Canadian Criminal Law* (7th ed, Thomson Reuters 2018) 428-452.

promote justice for detainees, they ought to. However, such expansive use of power should create duties that are compatible and complementary to the police's role, rather than those that are at the expense of the police's ability to exercise their role. The case law emerging from the SCC falls into the latter category, creating vague indirect restrictions on police power which generates further uncertainty about how they may carry out their role, with a lack of clarity on how to do so without infringing individual rights.

Flexibility on Exclusion of Evidence: A Remedy?

It could be argued that the revision of the exclusion of evidence test, and that violations of the Charter Rights that will not automatically lead to an exclusion of evidence under section 24(2), may lessen the concern of ambiguity and indirect restriction. Conversely, it creates another layer of ambiguity, not only for the police who will not know how their actions will be interpreted by the court due to the range of factors to consider, but it would also result in a large variance in judgments. Individuals will also have less clarity on what remedy they may achieve from a Charter violation.

The other potential consequence is that officers may feel indemnified against poor conduct if the case is serious enough. Cases after *Grant* exclude evidence because of how egregious the disregard for the appellant's Charter rights were. *Morelli* is a pertinent example of this confusion and ambiguity, as the evidence was excluded despite it being an extremely serious case concerning child pornography, due to the unlawful search and

seizure of the appellant's computer.[95] It begs a number of questions. Are Charter breaches permissible if the case is serious enough? Are Charter breaches permissible if people would be outraged that the evidence was excluded due to the nature of the case?

It appears that the balancing tests of section 1 and section 24 on whether to exclude evidence are a substitute for a lack of deference; in that instead of granting the police a wide berth as in the UK, it grants them a narrower one with potential for the courts to mitigate the restrictive effects of that narrow berth. However, it comes too late in the criminal process to not be an excessive indirect restriction in day-to-day policing.

II. Conclusion

To conclude, the definition of detention does cause an excessive restriction on the police in Canada, but not in the United Kingdom.

While the police in both jurisdictions do have to work around direct and indirect restrictions, in the United Kingdom, the police retain a lot of discretion about powers that are prescribed to them by law, as well as a clear threshold for detention set at the higher bar of physical detention. Furthermore, the rights for detainees are primarily informational. As a result, the arising direct restrictions are clearly laid out, thereby reducing the indirect restrictions which arise out of uncertainty. This aligns closely with Miller's conception on the role of the police.

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[95] *Prosper* (n 88) 25*; R v Morelli* 2010 SCC 8, [2010] 1 SCR 253.

By contrast, the Canadian courts impose greater obligations on the police and more expansive direct restrictions, while simultaneously generating greater ambiguity that exacerbates indirect restrictions. The use of psychological detention generates this ambiguity and is furthered by unclear guidance from the SCC. Furthermore, the SCC imposes obligations on the police that are beyond informational, and instead, utilise the police to address inequities that are the usual reserve of the legislature and executive. As such, I demonstrate that the Canadian approach views the police more closely to Galoob in which the police owe fiduciary duties to the public.

Two Passports, One Right? Reimagining Consular Protection in the Age of Dual Nationality

Laura Patricia Romero y Pino*

Abstract—This article examines the legal uncertainties surrounding the right to consular assistance under Article 36 of the Vienna Convention on Consular Relations ('VCCR') in cases involving dual nationals. It begins by analysing how dual nationality complicates the identification of the sending state and leads some authorities to deny consular rights where the detainee also holds the nationality of the detaining state. The article traces the evolution of consular assistance from a state-based privilege to an individual procedural guarantee, drawing on international jurisprudence including *LaGrand*, *Avena*, *Jadhav* and *Advisory Opinion OC-16/99*. It then evaluates three interpretive frameworks: a strict formalist reading of nationality, the doctrine of effective nationality and the pro persona principle. It argues

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that denying consular assistance based solely on local nationality is incompatible with the object and purpose of the VCCR and with contemporary human rights standards. Finally, the article proposes a set of interpretive and institutional measures that distinguish between the normative framework governing consular rights and the practical mechanisms required for their implementation, ensuring that dual nationality does not operate as a legal void for procedural protection.

I. Introduction

What happens when a dual national of State A and State B is detained in State A? Under Article 36 of the Vienna Convention on Consular Relations ('VCCR') foreign nationals have the right to communicate with their consular authorities upon arrest or detention.[1] Yet the VCCR does not clarify whether this guarantee applies when the detainee also holds the nationality of the detaining state.[2]

This ambiguity has generated divergent practices with significant consequences in criminal proceedings, particularly where the absence of consular notification may compromise procedural guarantees.[3] While some states treat local nationality as a basis for excluding consular access, international jurisprudence has increasingly recognised consular assistance as an individual procedural safeguard rather than a purely inter-state privilege.[4] Decisions of the International Court of Justice (*LaGrand*, *Avena*, *Jadhav*) and the Inter-American Court of Human Rights (OC-16/99) illustrate this shift.[5]

This article examines the legal status of consular notification in cases involving dual nationals. It argues that

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[1] Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, art 36(1)(a).
[2] International Law Commission, 'Draft Articles on Consular Relations with Commentaries' [1961] II YBILC 92, 112–113.
[3] Inter-American Court of Human Rights, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion OC-16/99, 1 October 1999) Series A No 16 [84].
[4] *LaGrand (Germany v USA)* (Judgment) [2001] ICJ Rep 466 [77]–[78].
[5] *LaGrand* (n 4); *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12; *Jadhav (India v Pakistan)* (Judgment) [2019] ICJ Rep 418; Advisory Opinion OC-16/99 [124]–[125].

denying consular access solely on the basis of local nationality undermines the protective purpose of Article 36. To address this problem the article evaluates three interpretive frameworks: a strict formalist reading of nationality, the doctrine of effective nationality and the *pro persona* principle.

It proceeds in two steps. First, it analyses these competing frameworks and their doctrinal limits. Second, it examines the institutional and practical mechanisms through which consular protection may be implemented in cases of dual nationality. It argues that in situations of vulnerability the individual's right to effective consular assistance should prevail over formal nationality classifications.

II. The Right to Consular Assistance and Dual Nationality

Consular assistance refers to the support a state provides to its nationals when detained abroad, aimed at mitigating vulnerability within an unfamiliar legal system. This includes notification, communication, consular visits and access to legal representation. This section sets out the formalist baseline from which the article proceeds, examining how Article 36 VCCR has been interpreted through a strict reading of nationality that limits consular rights to individuals considered 'foreign', a position contested in dual nationality cases.

A. Article 36 of the Vienna Convention

Article 36 of the VCCR constitutes the central provision regulating consular involvement in cases of arrest or detention of

foreign nationals. Although its character as a rights-conferring norm has been subject to doctrinal debate, the provision establishes a set of entitlements that operate directly upon the individual. It requires that, upon arrest or detention, the person be informed 'without delay' of the possibility of consular notification. It recognises the competence of consular officers to visit, communicate with and assist their nationals, including through facilitation of legal representation.[6]

Notably, Article 36 does not distinguish between individuals holding a single nationality and those possessing multiple nationalities. It refers simply to 'nationals of the sending State', without clarifying how the provision applies where the individual is also a national of the receiving state. This silence reflects the drafting focus of the VCCR, which prioritised the modalities of consular communication rather than complex questions of nationality.[7] As a result, the provision leaves unresolved whether dual nationality affects the availability of consular protection.

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[6] VCCR (n 1), art 36 (1)(b) and (c): 'if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner … The said authorities shall inform the person concerned without delay of his rights under this subparagraph.
Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.'

[7] International Law Commission (n 2) 112, 113; United Nations Conference on Consular Relations, 'Official Records, Vol I: Summary Records of the Plenary Meetings and of the Meetings of the First and Second Committees' (1963) UN Doc A/CONF.25/16 [85]–[88].

In practice, this ambiguity has generated divergent interpretations. Some receiving states have argued that individuals who possess the nationality of the detaining state are not 'foreign' for the purposes of Article 36 and therefore fall outside its scope.[8] Other approaches, however, emphasise the protective function of consular assistance, particularly in situations where individuals face linguistic, legal or procedural disadvantages within an unfamiliar system.[9]

This tension between formal nationality and functional protection lies at the core of the dual nationality problem under Article 36. As the following sections will argue, resolving this ambiguity requires moving beyond strict formalist interpretations towards approaches that better reflect the protective purpose of the VCCR.

In sum, Article 36 establishes a normative framework that remains neutral as to competing claims of nationality while privileging the function of consular protection. What is not neutral, however, are restrictive interpretations that elevate local nationality into an automatic exclusion from the scope of the provision.

[8] ME Wojcik, 'Consular Notification for Dual Nationals' (2013) 38(1) South Ill ULJ 73, 85.
[9] WJ Aceves, 'The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies' (1998) 31 Vanderbilt J Transnatl L 257, 263.

B. Individual Rights and the Humanisation of Consular Law

Against this background, it is necessary to consider how international law has understood the function of consular assistance. Traditionally, consular notification and assistance were conceived as instruments of inter-state diplomacy rather than mechanisms of individual protection. Failures to notify a consulate were generally addressed through diplomatic channels, often remedied by protest, apology or political negotiation between states, without direct legal consequences for the individual concerned.

This understanding began to shift through the jurisprudence of international courts interpreting Article 36 of the VCCR. What is often described as the 'humanisation' of consular law does not involve the creation of new treaty obligations, but a reinterpretation of existing ones from a purely state-centred conception of consular functions towards an approach that recognises the detained individual as a direct beneficiary of certain procedural guarantees.

The shift towards recognising the individual dimension of consular protection is reflected in the jurisprudence of the International Court of Justice ('ICJ'), beginning with *LaGrand (Germany v USA)* ('*LaGrand*'), which held that a detained foreign national is not merely an object of diplomatic protection but a direct beneficiary of the VCCR's guarantees.[10] The case concerned the arrest, conviction and execution of two German nationals in the United States without their being informed of

[10] *LaGrand* (n 4) [13]–[22].

their right to consular notification under Article 36 VCCR. The ICJ held that this failure constituted a breach of Article 36 and, crucially, interpreted the provision as conferring rights on the individual.[11] In practical terms, this means that consular notification is not merely a matter of diplomatic interest between states, but a safeguard that directly affects the detainee's ability to understand proceedings, communicate with counsel, and prepare an effective defence.[12]

At the same time, the enforcement of these rights at the international level remains mediated through the sending state. While the individual is recognised as a rights-holder, they cannot independently bring a claim before the ICJ; it is the state of nationality that must invoke responsibility under the Optional Protocol.[13] This dual structure of individual entitlement combined with inter-state enforcement continues to shape the legal framework of consular protection.

The court further clarified this approach in *Avena and Other Mexican Nationals* (*Mexico v USA*) ('*Avena*'), where it addressed the failure of United States authorities to provide consular notification to 51 Mexican nationals sentenced to death.[14] Building on *LaGrand*, the court held that Article 36 obligations cannot be circumvented by domestic procedural doctrines where their application would deprive the individual of the practical effectiveness of consular notification.[15] A breach of Article 36 therefore requires review and reconsideration of the

[11] *LaGrand* (n 4) [77].
[12] *LaGrand* (n 4) [78].[13] *LaGrand* (n 4) [77].
[13] *LaGrand* (n 4) [77].
[14] *Avena* (n 5).
[15] *Avena* (n 5) [112]–[114].

conviction and sentence in light of the violation. This confirms that consular notification functions as a procedural safeguard rather than a matter confined to inter-state diplomatic relations.[16]

A related clarification emerged in *Jadhav (India v Pakistan)* ('*Jadhav*').[17] In that case, Pakistan argued that allegations of espionage justified denying consular access under Article 36. The ICJ rejected this position, reaffirming that the VCCR does not recognise categorical exceptions based on the nature of the charges.[18] Although the case arose in the context of national security, the court's reasoning underscored that the obligations contained in Article 36 remain applicable even in politically sensitive circumstances, and even though the enforcement of those obligations at the international level continues to depend on inter-state mechanisms.[19]

The ICJ has stopped short of framing consular notification as a universal human right. While it has linked Article 36 to due process guarantees and recognised that its breach produces legal consequences for the individual, it has not incorporated these protections into the broader framework of international human rights law. This position is evident in *LaGrand*, where the court acknowledged that Article 36 creates individual rights but declined to determine whether those rights qualify as human rights.[20] Within the triadic framework adopted in this article, this jurisprudence marks a partial shift away from

[16] *Avena* (n 5) [121]–[123].
[17] *Jadhav* (n 5).
[18] *Jadhav* (n 5) [75].
[19] *Jadhav* (n 5) [73], [75], [89].
[20] *LaGrand* (n 4) [77]–[78].

formalism: the individual is recognised as a rights-holder, yet enforcement remains state-mediated.

A clearer contrast emerges when the ICJ's cautious approach is placed alongside the jurisprudence of the Inter-American Court of Human Rights, a regional tribunal established under the American Convention on Human Rights with an explicit mandate to protect individual rights. Whereas the ICJ has framed consular notification primarily as an individual procedural guarantee grounded in the VCCR, the Inter-American Court has interpreted consular access as part of international human rights law. In its Advisory Opinion OC-16/99, the court held that the right to be informed of consular assistance forms part of the minimum guarantees of due process.[21]

Unlike the ICJ's more cautious approach, the Inter-American Court characterised consular notification as an autonomous right accruing directly to the individual, which must be guaranteed independently of diplomatic intervention by the sending state.[22] This interpretation is significant because it detaches consular protection from inter-state discretion and frames it as a safeguard of individual defence.

By grounding consular access in due process rather than diplomatic protection, the court adopted a nationality-neutral rationale in which the decisive factor is the individual's

[21] Advisory Opinion OC-16/99 (n 5) [113]–[114]. In comparison to the ICJ's contentious jurisdiction under the VCCR, the court was operating in an advisory capacity within the Inter-American human rights system, which partly explains its broader rights-oriented interpretation.
[22] Advisory Opinion OC-16/99 (n 5) [117]–[119].

vulnerability within a foreign legal system.[23] This approach is particularly relevant in cases of dual nationality, where a strict reliance on formal citizenship may exclude individuals from protection altogether. As the next section will examine, this tension between formal status and functional protection underpins the need for a more flexible, *pro persona* interpretive framework.

III. Doctrinal and Practical Limits of Consular Protection in Dual Nationality Cases

A. The Formalist Approach to Nationality

When applied to situations of dual nationality, this rights-oriented logic exposes the limitations of approaches that rely exclusively on formal citizenship categories. Consular notification is best understood as a procedural safeguard aimed at mitigating the structural disadvantages faced by individuals navigating a foreign criminal process. On this view, the presence of an additional nationality does not in itself negate the need for protection. A denial of consular access must therefore be assessed considering its impact on the individual and the effectiveness of procedural safeguards, rather than through abstract assertions of sovereignty or exclusive national allegiance.

Despite growing international jurisprudence recognising consular assistance as an individual procedural entitlement, state

[23] Advisory Opinion OC-16/99 (n 5) [121]–[124].

practice in dual nationality cases remains fragmented. This divergence reflects two competing approaches: a formalist view that treats nationality as a strictly legal status excluding Article 36 VCCR when the detainee holds the receiving state's nationality, and a functionalist view emphasising the individual's effective ties and the protective purpose of consular assistance. This section argues that such fragmentation reflects the persistence of a formalist approach that prioritises legal status over the protective function of consular assistance, undermining the effectiveness of Article 36 in dual nationality cases.

A clear illustration of this divergence appears in the *Avena* case previously discussed. In its application before the ICJ, Mexico deliberately excluded a detainee who held both Mexican and United States nationality from the list of protected nationals.[24] This has been widely criticised in scholarly commentary as a strategic litigation choice aimed at avoiding a potential jurisdictional challenge regarding the applicability of Article 36 VCCR to dual nationals.

Wojcik argues that Mexico's decision undermined the protective scope of Article 36 VCCR by reinforcing a restrictive assumption that dual nationals are categorically excluded from consular protection when one of their nationalities coincides with that of the detaining state.[25] By failing to contest this premise, Mexico tacitly accepted a formalist conception of nationality that equates local citizenship with the forfeiture of foreign consular rights. However, this is not a necessary reading of Article 36, which does not require nationality to operate as an exclusionary

[24] *Avena* (n 5) [38].
[25] Wojcik (n 8).

criterion. Moreover, alternative arguments grounded in the continuing protective function of consular assistance would also have been available.

Since such a reading is not mandated by the VCCR, which remains silent on the treatment of dual nationality, states interpret their obligations inconsistently. In some jurisdictions, local nationality is treated as a legal barrier to consular notification on the basis of sovereignty and the presumption that nationals do not require external protection.[26]

However, this rigid approach has been challenged in rights-oriented domestic jurisprudence. A notable example is *Amparo Directo en Revisión* 1979/2015, decided by the Supreme Court of Mexico.[27] The case involved a detainee who failed to disclose their second nationality at the time of arrest, raising the question of whether authorities had a continuing obligation to provide consular notification once the dual nationality became known. The court held that while authorities cannot be expected to act on undisclosed or unknown information, the obligation to notify the relevant consulate arises immediately upon discovery of the individual's second nationality.[28] This reasoning represents a clear rejection of formalist premises, as it treats consular notification as a continuing obligation grounded in the protective purpose of Article 36 rather than in rigid nationality classifications.

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[26] Aceves (n 9) 311.

[27] **Suprema Corte de Justicia de la Nación**, *Amparo Directo en Revisión 1979/2015* (Primera Sala, 25 January 2017).

[28] Amparo Directo (n 27) [45].

In his concurring opinion, Justice Arturo Zaldívar emphasised that a detainee's silence or unawareness of their rights does not relieve the state of its international obligations. While acknowledging that requiring authorities to act on unknown information would be unreasonable, he stressed that failure to act after acquiring knowledge of the second nationality would constitute a breach of consular obligations. This reasoning reflects an understanding of Article 36 VCCR as imposing positive duties on the receiving state, duties that persist notwithstanding administrative oversight or the complexities of multiple nationality. This approach better aligns with the protective purpose of consular notification, namely mitigating the procedural disadvantages faced by individuals in a foreign legal system.

This divergence has significant consequences for the practical effectiveness of consular protection. When states oscillate between formalist interpretations that prioritise sovereign control over nationals and functionalist interpretations that emphasise procedural fairness, consular assistance becomes unpredictable. While some jurisdictions have embraced a more rights-oriented, functional approach, others continue to treat local nationality as a categorical bar to consular involvement, thereby restricting access to protection.[29]

B. Effective Nationality and Its Doctrinal Limits

The concept of effective nationality refers to a functional criterion in international law used to determine whether a state may validly

[29] Aceves (n 9) 311.

exercise diplomatic protection on behalf of an individual. Unlike formal nationality, which depends solely on the legal attribution of citizenship under domestic law, effective nationality focuses on the individual's genuine social and territorial links with the state concerned. The doctrine is most closely associated with the ICJ's decision in *Nottebohm Case (Liechtenstein v Guatemala) ('Nottebohm')*, where the court held that nationality, for the purposes of diplomatic protection vis-à-vis a third state, must reflect a genuine connection between the individual and the protecting state.[30] Although developed in the context of diplomatic protection, this reasoning raises an important question for cases of dual nationality: whether formal citizenship alone should determine access to consular safeguards. This section argues that, while effective nationality challenges formalist interpretations, it cannot provide a stable basis for consular protection in dual nationality cases.

In *Nottebohm*, the ICJ examined whether Liechtenstein could exercise diplomatic protection on behalf of an individual who had recently acquired its nationality. The court reasoned that diplomatic protection presupposes a real and effective link, grounded in factors such as habitual residence, the centre of interests, family ties and the individual's attachment to the state.[31] This approach marked a departure from purely formal conceptions of nationality by privileging genuine social connections over legal status alone. At the same time, the court did not reject formal nationality altogether, holding that, in the context of diplomatic protection vis-à-vis a third state, nationality

[30] [1955] ICJ Rep 4 [22]–[24].
[31] *Nottebohm* (n 30) [22]–[23].

must correspond to a genuine connection.[32] The judgment nevertheless left significant uncertainty as to how this requirement should be applied, as it offered no clear guidance regarding the weight or combination of factors necessary to establish such a link. In practice, the court assessed this 'genuine link' through factors such as habitual residence, centre of interests and family ties, although without specifying how these elements should be weighed.

The relevance of effective nationality to consular assistance remains limited. Unlike diplomatic protection, which operates at the inter-state level, consular assistance functions at detention and seeks to mitigate immediate vulnerability. Nonetheless, some states have relied on formal nationality to deny consular access to dual nationals, prompting arguments that effective nationality may offer an alternative basis for determining access to protection.

In consular cases, rather than the application of the full *Nottebohm* test, a contextual approach drawing on the logic of effective nationality may be more appropriate. The focus shifts from identifying which nationality is 'real' to assessing which consular authority is best positioned to reduce the individual's risk of procedural disadvantage. Relevant factors may include habitual residence, primary language, familiarity with the legal system of the detaining state and the location of close family members. This reframing aligns consular assistance with its protective function,

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[32] *Nottebohm* (n 30) [24].

[33] W Arévalo-Ramírez and RJB Maclean, 'Dual Nationality and International Law in Times of Globalization: Challenges and Opportunities for Consular Assistance and Diplomatic Protection in Recent Cases' (2020) 17(2) *Revista de Direito Internacional* 287, 292.

grounding its operation in practical effectiveness rather than abstract status. This approach does not replace the doctrine but adapts its underlying logic to the immediacy of consular protection.

This functional orientation has found support in legal doctrine. Arévalo-Ramírez and Maclean argue that effective nationality may guide the identification of the protecting state in dual nationality cases, particularly where one nationality is merely formal or dormant.[33] At the same time, the authors acknowledge boundary cases, such as individuals who have lived their entire lives in the detaining state. Even in such scenarios, however, they suggest that where the individual expressly requests contact with the other consulate, access should be granted, an approach consistent with individual choice and the *pro persona* orientation later discussed in this article.

The doctrine of effective nationality, however, is not without significant limitations. *Nottebohm* itself was treated with caution in subsequent jurisprudence, and its reasoning attracted substantial criticism at the time. In his dissenting opinion, Judge Klaestad questioned whether international law contained any established rule requiring a '*genuine link*' as a condition for the international effectiveness of nationality,[34] emphasising the absence of consistent and uniform state practice supporting such

[33] W Arévalo-Ramírez and RJB Maclean, 'Dual Nationality and International Law in Times of Globalization: Challenges and Opportunities for Consular Assistance and Diplomatic Protection in Recent Cases' (2020) 17(2) *Revista de Direito Internacional* 287, 292.

[34] In this context, the 'international effectiveness' of nationality refers to the extent to which a nationality attributed under domestic law is recognised by other states for the purposes of diplomatic protection and the exercise of international claims.

a requirement.[35] He further criticised the court's severance of nationality from diplomatic protection, warning that this approach introduced uncertainty and exceeded what the parties had argued before the court.[36] While these criticisms highlight the indeterminacy of the 'genuine link' requirement, they do not fully negate its analytical value. Rather, they underscore the difficulty of translating the concept into a consistent legal standard, particularly in contexts requiring immediacy, such as consular assistance.

Moreover, the ICJ's reliance on effective nationality has remained largely confined to the realm of diplomatic protection. Its application to consular law has never been articulated as obligatory and remains interpretive rather than binding.[37] This doctrinal gap allows states to selectively invoke or disregard the concept, thereby perpetuating inconsistent practice. As a result, while effective nationality offers a valuable analytical tool for challenging formalistic exclusions of consular access, it cannot on its own provide a stable or comprehensive solution to the problem of dual nationality in consular protection.

C. The Rights-Based Approach: The *Pro Persona* Principle

The third approach is a rights-based interpretation grounded in the *pro persona* principle, which requires that legal norms be interpreted in the manner most favourable to the individual.

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[35] *Nottebohm (n 30)* (Dissenting Opinion of Judge Klaestad) [28]–[31].
[36] *Nottebohm* (n 30) [31]–[33].
[37] Peter J Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (NYU Press 2016) 65.

While prominent in the Inter-American system, it is not unique to it. The Inter-American Court has applied this approach, notably in Advisory Opinion OC-16/99, to maximise individual protection.[38] Its relevance to consular law becomes evident when Article 36 VCCR is examined through the lens of due process and access to justice. Although the VCCR is not formally a human rights treaty, consular notification enables detainees to understand the charges against them and communicate with counsel in an unfamiliar legal system.

Structurally, the *pro persona* principle does not merely resolve interpretive doubt; it reorders the analytical framework governing Article 36 VCCR. Rather than asking whether dual nationality excludes consular protection, the starting point becomes a presumption of notification. Where an individual holds multiple nationalities, notification should be the default rule unless the detainee expressly refuses assistance.[39] This approach aligns with the Inter-American Court's characterisation of consular information as an autonomous safeguard of due process, designed to protect the individual's capacity to defend themselves effectively.[40]

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[38] Sabina Veneziano, 'The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights' (2018) 49 Geo J Int'l L 501.

[39] Practical limitations may occasionally affect the implementation of this presumption. For instance, notification may be difficult where the sending state lacks a consular presence in the receiving state, or where contact with the consulate could expose the detainee to specific risks. These situations, however, concern the practical modalities of implementation rather than the underlying interpretive principle that consular notification should ordinarily be available when requested.

[40] Advisory Opinion OC-16/99 (n 5) [84], [124]–[125].

Second, the burden of justification shifts. If consular notification is treated as a due process guarantee rather than a discretionary inter-state courtesy, the detaining state must justify any refusal to notify a second state of nationality (although international law has yet to define clear criteria for such justifications). This reverses the formalist logic under which the individual must prove why assistance should be granted. Rights-based approaches to Article 36 require that procedural obstacles, including domestic default rules, cannot neutralise the substance of the guarantee. Potential justifications may include situations where notification is materially impossible or where it would expose the detainee to a demonstrable risk, though such exceptions must remain narrowly construed.

Third, the structural reading affects remedies. If denial of consular access compromises the fairness of proceedings, the remedy cannot be limited to symbolic acknowledgment. While the ICJ has required 'review and reconsideration' following violations of Article 36,[41] under the approach advanced in this article the *pro persona* principle would require an inquiry into whether the violation materially affected the defence, particularly in capital or pre-trial detention cases. Where prejudice is established, procedural correction must be effective, not merely formal.[42] This remedial focus resonates with approaches that assess whether the absence of consular assistance caused material

[41] *LaGrand* (n 4); *Avena* (n 5).
[42] Aceves (n 9) 311.

prejudice to the defence, rather than treating the violation as formally harmless.[43]

The *pro persona* principle therefore provides a coherent framework for addressing the dual nationality dilemma under Article 36 VCCR. It reverses the presumption that formal nationality operates as a ground for excluding consular notification and supports an interpretation that prioritises the effective enjoyment of procedural safeguards. Although the VCCR remains silent on dual nationality, this silence should not be read in isolation from the broader evolution of international law towards recognising the individual as a subject of rights.[44]

IV. Institutional and Practical Responses to Dual Nationality Reframing

A. Bilateral and Institutional Mechanisms: The *Pro Persona* Principle as an Interpretive Solution

Bilateral and multilateral mechanisms refer to inter-state arrangements through which states seek to clarify or coordinate the application of consular notification obligations, particularly in situations not explicitly addressed by the VCCR. These uncertainties are threefold. First, the VCCR remains silent on

[43] John Quigley, 'Application of Consular Rights to Foreign Nationals: Standard for Reversal of a Criminal Conviction' (2005) 11 ILSA J Int'l & Comp L 403.

[44] Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Jonathan Huston tr, CUP 2016); Advisory Opinion OC-16/99 (n 5) [84], [125].

whether a detainee who also possesses the nationality of the receiving state is entitled to notification of another state of nationality—a question that formalist interpretations frame as whether such a right exists at all. Second, judicial practice has not resolved the issue, as illustrated by the strategic exclusion of a dual national from the protected group in *Avena*, which left the question substantively unaddressed.[45] Third, domestic courts (particularly in the United States) have applied procedural doctrines, most notably procedural default, which allows domestic courts to deny remedies where claims are not raised in a timely manner, even where a violation of Article 36 has occurred.[46]

This domestic–international disconnect has been analysed as a recurring obstacle to the effectiveness of Article 36, particularly where domestic procedural doctrines neutralise the remedial value of consular notification.[47] Bilateral mechanisms are therefore presented not as amendments to the VCCR, but as practical coordination mechanisms through which states clarify the practical operation of notification obligations in cases of multiple nationality.

B. Soft Law and State Practice

International bodies have attempted to mitigate uncertainty through non-binding instruments. The International Law

[45] *Avena (n 5) [*38].

[46] *LaGrand* (n 4).

[47] Lorena Rincón Eizaga, 'International v. United States Courts: In Search of a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations' (2006) 7 Rev Colomb Derecho Int 221.

Commission, in its Draft Articles on Diplomatic Protection, addressed the problem of dual nationality by proposing the criterion of 'predominant nationality' as a balancing test.[48] Unlike effective nationality, which focuses on an individual's genuine connection to a state, predominant nationality requires a comparative assessment between nationalities, which may introduce uncertainty and limit its usefulness in time-sensitive consular contexts.

Scholarly commentary has similarly suggested that clearer interpretive standards could reduce inconsistent recognition of consular rights between states, particularly in United States–Mexico practice.[49] Such standards might include presumptions in favour of notification in cases of dual nationality or procedural guidelines requiring authorities to verify possible foreign nationality at the time of detention. Yet these efforts remain soft-law guidance. They provide orientation but do not create enforceable obligations unless incorporated into treaty practice or domestic law.

Beyond soft law, state practice also illustrates how consular protection may be operationalised through diplomatic initiative. In the case of Manuel Guerrero Aviña, a dual British–Mexican national detained in Qatar, Mexican authorities were able to provide consular support despite the absence of a specific

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[48] International Law Commission, 'Draft Articles on Diplomatic Protection with Commentaries' [2006] II YBILC 24, art 7.

[49] Sergio Méndez Lara, 'Los estándares en torno al derecho a la información consular en México y Estados Unidos y la cuestión de la asistencia consular' (2012) 1(3) *Revista Métodhos* 6, 15.

bilateral treaty addressing dual nationality with Qatar.[50] While the extent of Qatar's formal consent is not fully documented, the assistance appears to have taken the form of diplomatic access rather than intervention, highlighting the flexibility of such arrangements.

The significance of this case lies not only in a judicial ruling clarifying Article 36, but in the demonstration that states may adopt expansive interpretations of their consular obligations through diplomatic initiative. The Mexican authorities characterised their response as part of a broader human rights-based consular policy. This example illustrates not just the operational potential of institutional cooperation but also its contingent nature: assistance depended on proactive diplomatic engagement rather than on a clearly defined legal rule governing dual nationality.

C. Practical Cooperation and Its Limits

Despite its practical flexibility, cooperation grounded primarily in diplomatic initiative raises structural concerns. Where consular protection depends on goodwill rather than on an enforceable entitlement, the individual lacks a legally secure position. This distinction is particularly significant in high-stakes cases. The ICJ in *Jadhav* rejected the argument that allegations of espionage justify exclusion from Article 36 obligations, reaffirming that the VCCR does not create categorical exceptions based on the nature

[50] Secretaría de Relaciones Exteriores (México), 'Juez en Qatar presenta decisión en el caso de Manuel Guerrero Aviña' <https://www.gob.mx/sre/prensa/juez-en-qatar-presenta-decision-en-el-caso-de-manuel-guerrero-avina> accessed 1 August 2024.

of the charges.[51] The case illustrates that disputes over consular notification often arise in contexts where states invoke national security or similar grounds to restrict access. In such situations, reliance on discretionary diplomatic cooperation may leave detainees without effective protection when the guarantees of Article 36 are most needed.

Accordingly, while bilateral and institutional arrangements can facilitate coordination and reduce friction, they do not eliminate the underlying normative question. Without a rights-based interpretive foundation, cooperative mechanisms risk functioning as exceptional diplomatic interventions rather than as stable guarantees.

D. The Equality Objection: The Detaining State's Perspective

An objection frequently raised in state practice and academic commentary is that affording differentiated treatment to dual nationals may violate the principle of equality before the law.[52] Under this view, once an individual possesses the nationality of the receiving state, they must be treated in the same manner as any other national. To permit external consular intervention may be criticised as conferring a procedural advantage unavailable to single-national citizens, thereby creating unequal treatment.

From this perspective, once an individual holds the nationality of the receiving state, international consular protection

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[51] *Jadhav (n 5)* [73]–[75].

[52] James Crawford, Brownlie's Principles of Public International Law (9th edn, OUP 2019) 511–514.

becomes unnecessary as the individual is presumed to benefit from the same legal protections as any other citizen. However, equality in contemporary constitutional and human rights reasoning is not confined to formal symmetry. Substantive equality permits differential treatment where such differentiation pursues a legitimate aim and responds to relevant distinctions in situation. Although the Inter-American Court did not address the equality objection directly, its characterisation of consular notification as a safeguard of due process underscores the importance of ensuring effective access to justice.[53]

In the dual nationality context, the relevant distinction lies not in citizenship status but in the detainee's effective ability to exercise procedural rights. A dual national may formally be a citizen of the receiving state while lacking meaningful familiarity with its legal system, language or institutional practices. In such circumstances, consular assistance does not confer an advantage but mitigates a structural disadvantage. In response to the objection that dual nationals should rely solely on their state of nationality, this approach recognises that procedural guarantees must operate at the point of vulnerability, irrespective of formal status.

Treating dual nationality as an automatic bar to consular notification creates an arbitrary exclusion, as it applies irrespective of the detainee's actual vulnerability or need for assistance. Article 36 does not expressly prohibit notification in cases of multiple nationality.[54] Reading such an exclusion into the text would elevate formal citizenship over the protective function of the

[53] Advisory Opinion OC-16/99 (n 5) [84], [125].
[54] VCCR (n 1), art 36.

VCCR. As the ICJ has clarified, Article 36 establishes concrete obligations whose application does not depend on discretionary political assessments of the individual's status.[55]

Accordingly, recognising the availability of consular notification to dual nationals does not undermine equality. Where differentiation responds to demonstrable procedural disadvantage and remains proportionate to the aim of ensuring access to justice, equality before the law is preserved rather than compromised.

V. Conclusion

Under current international law, this article argues that the most coherent interpretation of Article 36 of the Vienna Convention on Consular Relations is that it applies to all nationals of the sending state, irrespective of whether they also possess the nationality of the detaining state. This interpretation reflects the functional purpose of the VCCR and aligns with jurisprudence recognising the procedural significance of consular notification, including its characterisation as a safeguard of due process. While not universally accepted, this reading reflects the broader evolution of international law toward recognising the individual as the primary beneficiary of procedural guarantees.

Within this framework, the doctrines of effective nationality and the *pro persona* principle support a rights-based interpretation of Article 36. This approach is principled because it prioritises the effective protection of the individual and aligns

[55] *LaGrand (n 4)*; *Jadhav (n 5)* [73]–[75].

the VCCR with due process guarantees. Rather than treating consular assistance as a matter of diplomatic discretion, it understands consular notification as a procedural safeguard ensuring that individuals can exercise their defence effectively in an unfamiliar legal system.

Translating this interpretive framework into practice requires a tiered operational approach. First, at the judicial level, consular notification should be presumed available to the detainee unless expressly waived. Where notification is withheld, the detaining state must justify the restriction. Violations should trigger review and reconsideration capable of assessing whether the absence of consular notification affected the fairness of proceedings and, where appropriate, the provision of effective remedies.

Second, at the administrative level, authorities should adopt protocols requiring notification to all states of nationality once dual citizenship becomes known. Simultaneous notification avoids disputes over nationality hierarchy and ensures that procedural safeguards do not depend on rigid classifications that may obscure the detainee's actual vulnerability.

Third, at the institutional level, states should pursue bilateral or multilateral arrangements clarifying notification practices in cases of dual nationality, such as agreements establishing default notification rules or coordination mechanisms between consular authorities. While these instruments cannot replace a rights-based interpretation, they can support more consistent and predictable application in practice.

These measures reflect a complementary approach in which rights-based interpretation provides the normative foundation, while institutional mechanisms support its practical implementation.

In the context of dual nationality, excluding individuals from consular safeguards on the basis of formal citizenship alone produces arbitrary and unequal outcomes. A rights-based interpretation therefore does not expand Article 36 beyond its text; it ensures that its protective function operates effectively. Consular notification is not a discretionary privilege, but a necessary safeguard of procedural fairness in situations of vulnerability.

PRIVATE LAW ARTICLES

A Home, Not a House? Hohfeldian and Comparative Lessons for the Common Intention Constructive Trust

Philip Nedelev and Gareth Tan*

Abstract—This article holds that acquiring and quantifying a beneficial interest in common intention constructive trusts are two distinct judicial exercises. It begins by summarising the current state of the law, exploring the extent of *Stack v Dowden* and challenging its mistaken calls for a 'single legal regime.' Drawing on a Hohfeldian framework, this article shows that acquisition concerns whether a proprietary rights even exists, while quantification concerns only its extent. Error at acquisition illegitimately creates rights ex post, while error at quantification merely mismeasures rights already intended to exist. As each question carries its own risks and considerations, each may admit differing degrees of judicial discretion; pre-legal considerations like fairness may inform quantification but must not affect acquisition. This article concludes with a brief comparative analysis, finding the acquisition and quantification distinction

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crucial in preserving methodological clarity and avoiding incompatible discretionary and remedial frameworks seen in other Commonwealth jurisdictions.

I. Introduction

As so famously illustrated in *Jarndyce and Jarndyce*, equity has long grappled with how best to allocate domestic property when relationships break down. Equity's preoccupation with the question 'who gets the home?' pervades to this day. With more couples choosing to cohabit before marriage, or to opt out of such matrimonial schemes altogether, equity's flexibility is needed to recognise the vast range of domestic arrangements in determining how property interests are distributed. Without recourse to statutory provisions for the allocation of property on divorce, common intention constructive trusts ('CICTs') are increasingly determining what happens to domestic property should those non-marital relationships break down.

The CICT was only concretised in *Stack v Dowden*,[1] following its earlier mention in Lord Diplock's speech in *Gissing v Gissing*.[2] As a relatively recent doctrine, at least in its current developed form, much remains uncertain about the CICT. The extent of its application to cases where only one party has been registered as the legal owner is particularly unclear, while the normative force of its justification is further dubious. The two most recent Supreme Court cases of *Stack* and *Jones,*[3] while seminal, substantively focused on the apportionment of equitable interests held by joint legal owners, leaving much unsaid about the prior establishment of such interests.[4] Both cases broadened the type of evidence capable of adducing a 'common intention'

[1] [2007] UKHL 17, [2007] 2 AC 432.
[2] [1971] AC 886 (HL).
[3] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.
[4] Brian Sloan, 'Keeping up with the *Jones* Case: Establishing Constructive Trusts in Sole Legal Owner Scenarios' (2015) 35 LS 226, 229.

that the beneficial interests were to be allocated differently from the registered legal interests. Though commendable in some ways, caution must still be exercised to avoid prejudicing existing property rights.

The CICT and the family home definitionally raise important questions that lie at the intersection of oftentimes competing family and property law. How to best balance these two legal contexts in the *acquisition* and *quantification* of interests in such a home remains uncertain.[5] Judicial discretion must be controlled in this field. While rigid adherence to land law principles might seem inapposite for the deeply personal and varied context of family homes, a purely discretionary approach, one oftentimes linked to family law adjudication, appears antithetical to the 'bright line' certainty and predictability prioritised in the former. Finding a just *via media* seems a Herculean task.

This article argues that English legal orthodoxy demands that proving *acquisition* of a property right be distinguished from how such a right, when acquired, be *quantified*. For the purposes of this article, *acquisition* refers to the stage in CICT cases that determines whether a party has obtained, as the result of the parties' common intention, a beneficial interest in the home upon which a proprietary claim may be founded. *Acquisition* is agnostic to the specific extent of that claim. In the interest of clarity, it must be noted that though the *acquisition* question exists in both single and joint name cases, it is framed differently in practice. In joint name cases, rather than asking whether the non-registered party has obtained an interest in and of itself, as in single name

[5] Rebecca Probert, 'Equality in the Family Home?' (2007) 15 Fem LS 341.

cases, the courts rather ask if both parties continue to intend to each hold a portion of the beneficial interest, or to depart wholly from their registered presumption. *Quantification*, on the other hand, necessarily follows the *acquisition* question and refers to the apportionment of these already-*acquired* rights. The question becomes one of quantum, rather than of existence altogether.

Due to these differing exercises, cases where only one party has been registered ('single name cases') and cases where both parties have been registered ('joint name cases') necessitate different standards of proof and, by extension, allow for different degrees of judicial discretion. Legal registration of a given party provides a rebuttable presumption that such a party has, in fact, acquired a proprietary interest. Ignoring this distinction risks collapsing the English constructive trust beyond its origins into a remedial instrument, where courts adduce proprietary rights retrospectively as they deem just and fair. This latter approach has been favoured by the Canadian courts' endorsement of the Remedial Constructive Trust ('RCT'), a corrective mechanism that must be rejected as inconsistent with English orthodoxy and tradition.

The Basic Rule

In joint name cases where both A and B are registered as joint legal owners and single name cases where only A is registered as a legal owner, the basic rule provides that beneficial interests *prima facie* mirror the legal interests per the maxim — 'equity follows the law'.[6] In joint name cases, A and B are presumed to hold the beneficial interests as joint tenants in equity. In single name cases,

[6] *Stack* (n 1) [33] (Lord Walker), [109] (Lord Neuberger).

A is presumed to hold the whole beneficial interest as the 'less' of his 'greater' legal estate.[7] As the sole registered party, A is the only one with a legal interest and is similarly presumed to be the only one with the corollary beneficial interest. These different starting points necessitate different burdens of proof.[8]

Joint registration itself ought to constitute evidence that 'both parties were intended to have some beneficial interest.'[9] Regardless of whether the intention in practice was to hold the property in equity as a joint tenancy (as presumed) or a tenancy in common in equity, no further evidence is required to prove that both parties had *acquired* some beneficial interest. As such, the *acquisition* question is already *prima facie* answered in such cases. At this *acquisition* stage, a court need only further query whether sufficient evidence exists to displace the joint tenancy presumption. The issue only then lies in deciding in what proportions the beneficial interests are to be held — equally or in some other ratio. Therefore, without evidence of an alternative agreement, the only outstanding concern for B in joint name cases lies in the *quantification* of his interest.[10] On the contrary, in single name cases, A's sole legal registration proves the very opposite of any claim that B (the unregistered party) was intended to have an

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[7] *Vandervell v IRC* [1967] 2 AC 291 (HL) 311 (Lord Upjohn). Note other incompatible views suggesting that once A is found to be the absolute owner, both at law and in equity, he is considered to hold no equitable interest in that property altogether (*Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 706 (Lord Browne-Wilkinson)).

[8] *Stack* (n 1) [4] (Lord Hope), [56] (Lady Hale).

[9] ibid [116] (Lord Neuberger).

[10] nb Establishing a CICT also requires proof of detrimental reliance prior to the second *quantification* stage (*Hudson v Hathaway* [2022] EWCA Civ 1648, [2023] KB 345 [90] (Lewison LJ)). This article does not dispute this separate requirement and instead focuses on common intention as the main element in finding a CICT.

equitable interest. Given that the presumption is that A holds the entire beneficial interest, the onus is on B to adduce evidence from which an intention — that B was to have acquired some beneficial interest — may be inferred.

These different standards of proof belie a conceptual distinction between *acquisition* and *quantification*. It is uncontested that the paragraph [69] factors of *Stack* may be used to answer the *quantification* question. These factors include *inter alia* 'any advice or discussions at the time of the transfer', 'the purpose for which the home was acquired', the financing of the purchase, and the presence of children to whom the parties were responsible to provide a home.[11] However, given that *Stack* was itself only a joint name case, it remains unclear whether the paragraph [69] factors may also be capable of answering the *acquisition* question in single name cases.

II. The Scope of *Stack v Dowden*

Prior to *Stack*, the type of evidence capable of meeting the *acquisition* question in single name cases was settled in *Lloyd's Bank v Rosset*: only direct contributions to the purchase price (whether initially or in mortgage instalments) would suffice to allow an unregistered party to prove that they had acquired a beneficial interest;[12] it was 'at least extremely doubtful whether anything less [would] do.'[13]

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[11] *Stack* (n 1) [69] (Lady Hale).

[12] *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL) 133 (Lord Bridge).

[13] ibid 133. Note further that Lord Bridge's analysis continues to find a constructive trust in cases of express agreements, no matter how imperfectly or imprecisely remembered, that had been detrimentally relied on, ibid 132.

In fact, the *Rosset* direct contributions requirement was consistent with prior case law. Lord Reid's judgment in *Pettitt v Pettit* first admitted the possibility of such contributions supporting an unregistered party's claim. He ruled that while greater weight would still be given to an express agreement, contributions beyond that 'of an ephemeral character' were also capable of sustaining an inference of intention that the unregistered party would acquire a beneficial interest.[14] Lord Reid would later explicitly reaffirm this view in *Gissing*.[15]

The only suggestion that *Rosset* took too narrow an approach as to the type of evidence relevant to the *acquisition* question was in Lord Diplock's speech in *Gissing*. In his view, contributions to household expenses which *causally allowed* for the registered party to meet the mortgage payments could also be relied upon by an unregistered party.[16] Lord Diplock's extension was only obiter as the point went undiscussed in the other speeches but, in any event, this article rejects the suggestion. As will be later argued, looking to such subsequent factors risks imputing an intention to the parties that they did not hold at the time.

The charge levied by Lady Hale and Lord Walker in *Stack* that *Rosset* was so conservative as to even be inconsistent with the earlier *Gissing* case thus appears somewhat misplaced.[17] It would seem that they had conflated the distinction between *acquisition* and *quantification,* collapsing the two stages into one overarching

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[14] *Pettitt v Pettitt* [1970] AC 777 (HL) 796 (Lord Reid).
[15] *Gissing* (n 2) 895 (Lord Reid).
[16] ibid 908 (Lord Diplock).
[17] *Stack* (n 1) [26] (Lord Walker), [42] (Lady Hale).

analysis. *Stack,* perhaps unintentionally,[18] focused almost exclusively on the process of adducing intentions contrary to the joint tenancy presumption when determining the *extent* of each party's shares—an inherently allocative exercise.[19] As in *Stack*, Lord Reid's espousal of 'a more rough and ready evaluation' in *Gissing* to recognise a party's indirect contributions should also be better understood as directed at the *quantification* stage. Lord Reid specifically mentions that 'a more rough and ready evaluation' should only be undertaken when 'it is less easy to evaluate [an unregistered party's] share' due to a lack of direct payments. His analysis assumes that the unregistered party has acquired a share to begin with to refute the presumption that such a share should not 'as a rule [be quantified] as a half-share'.[20]

This article aligns with the academic view that single name cases remain governed by *Rosset* while only joint name cases are bound by *Stack*.[21] Earlier statements in *Rosset* were never explicitly overruled by the Supreme Court, with later decisions merely asserting that the law has 'moved on'.[22] Further in support of this, a survey of all the single name cases heard at the High Court and Court of Appeal in the two years post-*Jones* found that almost all abided by *Rosset*; very few correctly adopted the *Jones* methodology; others mistakenly applied the latter in form only.[23]

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[18] eg ibid [56] (Lady Hale).
[19] ibid [58] (Lady Hale).
[20] *Gissing* (n 2), 897 (Lord Reid).
[21] Matthew Mills, 'Single Name Family Home Constructive Trusts: Is *Lloyds Bank v Rosset* Still Good Law?' [2018] Conv 350.
[22] *Stack* (n 1) [26] (Lord Walker); Simon Gardner, 'Family Property Today' (2008) 124 LQR 422, 425. See also *Abbott v Abbott* [2007] UKPC 53, [2008] 1 FLR 1451 [4]–[6] (Lady Hale).
[23] Sloan (n 4).

Direct contributions thus appear to be the only evidence capable of reliably satisfying the *acquisition* stage of a claim.

III. A Unitary Approach to *Acquisition* and *Quantification*

Still, the Supreme Court has explicitly stated its preference for a 'single legal regime' in both single name and joint name cases.[24] Under the CICT model, that would mean paragraph [69] factors ought to cover both the *acquisition* and *quantification* stages such that the same type of evidence used to determine the ratio in which the beneficial interests were intended to be held may also be used to defeat the presumption that the legal registration reflects the parties' intention of how the beneficial interests are truly held.

Lord Neuberger's dissent in *Stack* also advocates for a unitary model. His purchase money resulting trust ('PMRT') approach is consonant with *Rosset* and makes clear that direct contributions are to be the sole measure of the *quantification* stage too. On his PMRT approach, an unregistered party may only prove that they had acquired a beneficial interest if they made a direct contribution to the purchase price and that such a share is coterminous with the relative proportion of said direct contribution. This somewhat myopic focus on superficial coherence misses that *acquisition* and *quantification* are fundamentally different exercises. While indirect contributions

[24] *Jones* (n 3) [16] (Lord Walker and Lady Hale).

are inappropriate to admit for the former, they need not be excluded from the latter.

Indeed, while both the CICT and PMRT purport to give effect to intention, they do so in fundamentally different ways. The CICT claims to be able to infer intention from the paragraph [69] factors, while the PMRT rigidly adheres to the notion that intention can only be soundly inferred from direct contributions to the purchase price. Lord Neuberger justifies inferring intention from direct contributions alone, however, by validly identifying the dangers of attempting to infer an intention from the paragraph [69] factors at the *acquisition* stage: given the variability of reasons why the parties might not have formed an express agreement on the beneficial interests, they may also genuinely not have formed a common intention.[25]

Interestingly, however, Lord Neuberger's caution remains strictly related to the *acquisition* stage, rather than more broadly to *quantification*, and rather rightfully so. Research has raised doubts as to whether couples who *do* complete a declaration of trust understand its implications and much less can still be said for those couples that *do not*.[26] That this is the case squares with the very nature of close relationships. In the throes of cohabitating intimacy, parties are hardly inclined to engage in unromantic discussions as to beneficial ownership.[27] After all, such discussions would only be consequential if the relationship

[25] *Stack* (n 1) [146] (Lord Neuberger), [113]–[114] (Lord Neuberger).
[26] Gillian Douglas, Julia Pearce and Hilary Woodward, 'Dealing with Property Issues on Cohabitation Breakdown' [2007] Fam Law 36.
[27] *Pettitt* (n 14) 810 (Lord Hodson).

failed or ended for another reason; most parties are unlikely to have concluded *any* agreement at all.

In sole name cases, similar indifference is often observed regarding the implications of single registration. In *Sandhu v Sandhu*, for example, the parties decided to register property in one party's sole name as the other was too old to take out a mortgage,[28] while in *O'Neill v Holland*,[29] the poor credit history of one of the parties made it necessary to opt for such an arrangement. In these cases, however, sole name registration was almost always paired with concomitant understandings and agreements that the beneficial interest should be shared. Sole registration was entirely instrumental and did not conclusively prove the beneficial exclusion of the other unregistered party.

As such, when evaluating evidence of similar agreements and understandings, judges should avoid making hasty inferences, or worse, imputing the intention of the parties. Unlike the contractarian analysis suggests, it is perfectly plausible and perhaps even probable, that the parties did not reach any such agreement or, that if they did, did not understand the impact it could have.[30] In the absence of such an agreement and where only one party is registered, judges would be imputing, rather than inferring, an intention to share beneficial ownership. The unregistered party would thereby *acquire* an interest from the registered party even if there was no such intention on the part of the latter. This risk does not exist at the *quantification* level, as will be explained below.

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[28] *Sandhu v Sandhu* [2016] EWCA Civ 1050, [2016] 10 WLUK 79 [7] (Floyd LJ).
[29] *O'Neill v Holland* [2020] EWCA Civ 1583, [2021] 2 FLR 1016.
[30] *Gissing* (n 2) 896 (Lord Reid); *Stack* (n 1) [18] (Lord Walker).

IV. Hohfeldian Analysis

Imputing intention, especially at the *acquisition* stage is wholly illegitimate. That much has been said. Hohfeld's rights-based theory of jural relations, applied to a series of examples, clarifies the conceptual basis for distinguishing *acquisition* from *quantification*.[31]

> *Example 1*:
>
> A and B have purchased Whiteacre from C; A is the sole legal owner of Whiteacre having contributed £900,000 to the purchase price while B contributed the remaining £100,000; despite cohabiting, A and B never discussed how the beneficial interest of Whiteacre was to be held; B is now claiming for a 10% share in equity of Whiteacre on the basis of his direct contribution of £100,000.

In *Example 1*, were the law to only recognise registered legal interests, A would have obtained the entire beneficial interest. B would be left with nothing despite having contributed £100,000 of his own money. Hohfeldian analysis rationalises the intuitive unfairness of such an outcome.

Assuming that A and B had £900,000 and £100,000 in their respective bank accounts, they would both have a claim-right to their relevant monies against their bank; the correlate of these claim-rights being the duties of their bank to pay the

[31] *Stack* (n 1) [127] (Lord Neuberger).

relevant account balance to A or B when demanded.[32] Annexed to these claim-rights is a multital immunity against the rest of the world that the claim-right not be destroyed.[33] Only A and B, through the exercise of a power, are able to extinguish or alter the extent of their claim-right.

When A and B contract with C to transfer their account balances to purchase Whiteacre, A and B exercise powers to assign their choses in action (bank balances totalling £1,000,000) to C. As part of performing the same contract, C exercises powers to transfer all Hohfeldian prerogatives (claim-rights, liberties, powers, and immunities) appertaining to ownership of Whiteacre to A as the newly registered legal owner. Focusing on A's and B's powers and immunities, it becomes clear that the normative effect of any assignment of their bank balances depends solely on their intention in exercising such a power. Being bound by the same multital immunity, A is unable to vary the extent of B's claim-right through any of her own actions and *vice versa*. Therefore, looking at the intentions B could have possibly had in exercising his power to assign his bank account balance, two options emerge.

Firstly, B could either have intended to assist A in the purchase of Whiteacre as a gift, thereby leading to no resulting

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[32] Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 30–32.

[33] Wesley N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710. A multital legal relation refers to one relation of within a class of fundamentally similar relations between the right-holder and a very large class of persons. In practice, a multital right is a right *in rem*. A multital immunity similarly avails against a large class of persons, preventing them from altering the legal position of the right-holder.

trust in B's favour for *any* share of the beneficial interest.[34] Or, secondly, B could have intended to burden A's new Hohfeldian prerogatives over Whiteacre with an obligation to use these prerogatives in B's favour to a particular extent—a trust obligation owed to B as a beneficiary by A *qua* common intention constructive trustee.[35] The first suggestion must be rejected. While the legal registration *prima facie* suggests that B intended to assign his account balance to C so that A receives legal ownership and the entire beneficial interest of Whiteacre as a gift, the court has demonstrated an aversion to recognising such a presumption of advancement in cases of married couples, much less between unmarried cohabitors where the presumption never applied.[36]

Instead, while the sole registration of A definitively settles the matter of who is to hold the legal interest, it is not novel for English law to look beyond legal ownership where no consideration was given for a transfer of property. The PMRT has historically presumed the second possible intention of B—for A to hold interests at law subject to an equitable obligation to B—where A provides no consideration to B. In exercising his power to assign his bank balance to C so that A would acquire the Hohfeldian prerogatives relating to ownership of Whiteacre, B is presumed to have intended for A's new Hohfeldian prerogatives to be held subject to trust duties in B's favour. A's trust duties are owed to the extent of B's beneficial interest which is

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[34] *Fowkes v Pascoe* (1875) LR 10 Ch App 343.

[35] Ben McFarlane, 'Avoiding Anarchy? Common Law v. Equity and Maitland v. Hohfeld' in John CP Goldberg,
Henry E Smith and PG Turner (eds), *Equity and Law* (CUP 2019) 336–39.

[36] *Stack* (n 1) [16] (Lord Walker), [112] (Lord Neuberger).

proportionate to B's direct financial contributions to the purchase price.[37]

However, *Example 2* reveals the flaws of the PMRT in only looking to direct contributions:

> *Example 2*:
>
> D purchased Blackacre from F for £900,000, registering D and E as the joint legal owners of Blackacre. D paid the entirety of the purchase price of £900,000. Over the course of cohabiting with D at Blackacre, E contributed £100,000 to meet all household expenses. Despite cohabiting, D and E never discussed how the beneficial interest of Blackacre was to be held; E is now claiming for a 10% share in equity of Blackacre on the basis of his indirect contribution of £100,000.

Despite being a joint name case, the PMRT approach would not give E a 10% share as E failed to make any direct contributions to the purchase price. However, unlike in *Example 1*, the legal registration of E as a joint legal owner supports an inference that D intended to exercise her power such that E has some of the beneficial interest. With the question of *acquisition* answered, the paragraph [69] factors may be considered to *quantify* the exact extent of E's beneficial interest.

> *Example 3*:
>
> G purchased Greyacre from I for £900,000 as a home for herself and her partner H. Only G was registered as

[37] *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 30 ER 42.

> the sole legal owner of Greyacre. G contributed the entirety of the purchase price with her own money. Over the course of cohabiting with G at Greyacre, H contributed £100,000 to meet all household expenses. Despite cohabiting, G and H never discussed how the beneficial interest of Greyacre was to be held; H is now claiming for a 10% share in equity of Greyacre on the basis of his indirect contribution of £100,000.

In *Example 3*, the CICT approach (*viz*, the approach in *Stack*) would rule that H's contributions would be sufficient to ground a claim to 10% of the beneficial interest in Greyacre. Such a result would nonetheless be contrary to the requirement that there be some evidence from which it can be inferred that G intended to exercise her power in transferring her £900,000 bank balance to I and vest some beneficial interest in H. Without answering the *acquisition* question, there is nothing for the paragraph [69] factors to bite on. The CICT approach errs in imputing an intention where there is none. There is no presumption of advancement, in the case of unmarried couples, such that G cannot be taken to have intended to have gratuitously exercised a power to create an interest in H. Nonetheless, per the CICT approach, G's Hohfeldian prerogatives over Greyacre are subjected to trust duties owed to H. In this way, G's multital immunity against having her claim-right to the property exchanged for her £900,000 is violated by the courts.

The PMRT is thus overly restrictive in only granting B an interest in *Example 1*; the CICT is overly generous in even granting H an interest in *Example 3*. Focusing on the possible inferences of intention relating to A, D, and G's powers and associated multital immunities in the absence of other evidence,

only legal registration of B, E, and H will suffice to answer the *acquisition* question in the affirmative. Failure to do so would violate their existing legal interests.

All this is not to overstate Hohfeld's ability to provide answers. Hohfeldian analysis is agnostic to what might be called *pre-legal* reasons which justify a particular legal relationship. For example, one's right to be treated fairly is *pre-legal* in the sense that it justifies more concrete legal rights like a claim-right against unjust imprisonment. Nonetheless, Hohfeldian analysis clarifies what it means for someone to have a 'right' once the *pre-legal* has so crystallised—*what* is the content of the correlative duty and *who* is the duty-bearer.[38] This section has identified that *acquisition* concerns whether a power has been exercised at all where *quantification* seeks to ascertain, when exercised, the precise normative effect of such a power. It would be a mistake to conclude that English law solely admits static legal rights and is incapable of giving effect to dynamic *pre-legal* reasons.[39] But judges should be cautious when purporting to protect the latter under the aegis of legal orthodoxy. Hohfeld reveals that the CICT approach *creates* a property right in the unregistered party *ex post*, rather than *recognises* a pre-existing one. If legal decisions may be likened to astronavigation, Lord Wilberforce's words in *National Provincial Bank v Ainsworth* are still the cynosure:[40]

[38] Charlie Webb, 'Three Concepts of Right, Two of Property' (2018) 38 OJLS 246, 248–49.
[39] Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011) 1.
[40] *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL) 1242 (Lord Wilberforce).

> 'The ultimate question must be whether such persons can be given the protection which social considerations of humanity evidently indicate without injustice to third parties and a radical departure from sound principles of real property law.'

V. Conflicts of Judicial Discretion in the Search for Intention

The foregoing Hohfeldian analysis identifies the different stakes for the *acquisition* and *quantification* of beneficial interests in the family home. Wrongly finding *acquisition* creates a property right that was never intended whereas an error at *quantification* miscalculates the size of a share that both parties already intended to exist. The exercise of judicial discretion to give effect to *pre-legal* notions such as 'fairness' should be attentive of and reflect these different underlying risks.

Trusts of the family home, while firmly anchored in property law, fall within a specific sub-species of land law which interacts with important family-related *pre-legal* considerations.[41] *Stack* ushered the explicit separation between 'domestic' and 'commercial' CICT arrangements[42] to promote 'avowedly family-centric legal principles', the distinctive nature of the home, and a

[41] John Dewar, 'Land, Law, and the Family Home' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 327, cited in Andrew Hayward, '*Stack v Dowden*, *Jones v Kernott*' in Nigel Gravells (ed), *Landmark Cases in Land Law* (Bloomsbury 2013) 241, 246.
[42] *Stack* (n 1) [68]–[69] (Lady Hale).

more nuanced appraisal of non-commercial scenarios where parties might be more impacted by emotional considerations.[43]

The significance of the CICT lies in this very intersection between family and property law. Though the nuances of familial disputes should not be overlooked, the instinctive urge to secure 'fairness' must be mediated by the well-worked orthodoxy of property law. This article argues that the courts have not been sufficiently attentive to the latter, leading many to decry recent CICT developments as proof of the 'familiarisation of property law,' a process whereby 'both judges and the legislature have modified general principles of land law or trusts to accommodate the specific needs of family members'.[44] Miles and Probert, for instance, have argued that the presumption of beneficial joint tenancy and the explicit *pre-legal* fairness dialogue of *Jones* today mimic the 'yardstick of equality' created by the House of Lords in family law cases like *White*[45] and *Miller,*[46] approaching the ambit of matrimonial ancillary relief.[47]

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[43] Hayward (n 41) 247. Attention should be paid to cases like *Marr v Collie* [2017] UKPC 17, [2018] AC 631 which extended the application of the CICT to other domains like investment property. This contextual extension is uncertain and has been widely criticised. It must be reconciled with the *dicta* in *Stack* which advocates for a contextual approach to the CICT, clearly splitting family and commercial cases.

[44] Dewar (n 41) 328, cited in Hayward (n 41) 253.

[45] *White v White* [2001] 1 AC 596 (HL) 605 (Lord Nicholls): 'Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.'

[46] *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618.

[47] Joanna Miles and Rebecca Probert, 'Sharing Lives, Dividing Assets: Legal Principles and Real Life' in Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart Publishing 2009) 12.

Unlike matrimonial breakdowns governed by the Matrimonial Causes Act 1973, however, CICT-type breakups do not fall under an equivalent statutory umbrella. Parliament has not authorised a court to use statutory discretionary factors to decide questions relating to title or possession of property between cohabitants 'as [it] thinks fit'.[48] As Lord Denning MR stated in *Bernard v Josephs*, 'if [the cohabiting couple] had been husband and wife, our matrimonial property legislation would have given the Family Division a very wide discretion to deal with all these problems…. But there is no such legislation for couples like these.'[49] Lord Denning MR went on to cryptically suggest that 'justice requires that the courts should have a discretion to apportion the shares', analogising Pearson LJ's reasoning in the matrimonial case of *Hine v Hine,*[50] 'to persons living together, as if husband and wife'.[51]

The current state of the law is thus a reaction to this statutory gap, grappling to give effect to the unique context-specific and fairness-driven considerations of the CICT, ascertainable only by close reference to the facts, while remaining true to orthodox property law principles. Indeed, policy, justice, and fairness all require a certain amount of discretion to fill the lacunae left by the statutory regime. Goodin has termed this judicial exercise 'informal discretion', an implicit and assumed discretion where a statutory mandate lacks, necessary given the

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[48] Married Women's Property Act 1882, s 17 provided that a judge may decide, 'as he sees fit', any question as to title or possession of property between husband and wife.

[49] *Bernard v Josephs* [1982] Ch 391 (CA) 397 (Lord Denning MR).

[50] [1962] 1 WLR 1124 (CA).

[51] *Bernard* (n 49) 398 (Lord Denning MR).

vulnerability of many of the claimants concerned.[52] Such a process, however, when completed in the absence of parliamentary guidance, forces courts to be vague, non-committal and cautious in their judgments. It must also be borne in mind that some unwritten communications, as those present in CICT-type breakdowns, can be inherently silent and inconclusive on particular matters of importance.[53]

In the absence of explicit statutory licence, the two-step methodology, separating *acquisition* from *quantification*, finds purchase to discipline judicial discretion. Boundless judicial discretion has traditionally been shunned in English law, and even more so in the property law context.[54] Land holds distinctive importance as a permanent and finite resource. It mandates certain, predictable, and 'bright line' rules to serve its various social functions, to promote dynamic security and protect third-party purchasers, all while acting as 'an instrument of social engineering' capable of exerting 'a fundamental influence upon the lifestyles of ordinary people'.[55] More recently, in the trusts context, the Court of Appeal in *Re Polly Peck International (No 2)* decisively rejected a discretionary RCT precisely fearing the *ad hoc*

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[52] Robert Goodin, 'Welfare, Rights and Discretion' (1986) 6 OJLS 232, 234.

[53] Rory Gregson, 'The Limits of Implication' (2025) 141 LQR 413, 421, 430–431.

[54] Graham Virgo, 'The Genetically Modified Constructive Trust' (2016) 2 CJCCL 579, 584; see also Lord Camden in *Doe v Kersey* (1795) (CP): 'the discretion of a judge is the law of tyrants … In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion, to which human nature is liable', cited in Edward Wynne, *Euonymus, or, Dialogues Concerning the Law and Constitution of England: with an Essay on Dialogue*, (5th edn, S Sweet, R Pheeny and R Millikin 1822) 91.

[55] Kevin J Gray and P.D Symes, *Real Property and Real People: Principles of Land Law* (Butterworths 1981) 4, cited in Hayward (n 41) 255.

variation of property rights without parliamentary consent.[56] Canadian courts have nonetheless pioneered the RCT model, an approach which will be discussed subsequently in this article.

In its current form, the law governing CICTs seems to stray too far towards family law aspirations. Both *Stack* and *Jones* expanded the scope of judicial discretion and did so indiscriminately and imprecisely across both *quantification* and *acquisition* stages. Fairness considerations, for instance, the hallmark of family law adjudication, have been loosely employed in *Jones*. Lord Walker suggests that considerations of fairness should not be used as 'the criterion for determining whether or not the property should be shared' and should be reserved for use only when imputing intention when it is 'impossible to divine a common intention'.[57]

Though the court attempted to restrict this appeal to fairness to the *quantification* stage, it seems unrealistic to expect that these *pre-legal* principles will not broadly permeate judicial reasoning moving forward. Indeed, in the case of *Graham-York v York,* Tomlinson LJ made clear that in deciding what shares are fair 'the court is not concerned with some form of redistributive justice'. In that case, though the female claimant enduring years of abusive conduct by her partner 'attracts sympathy', it did not 'enable the court to redistribute property interests in a manner which right-minded people might think amounts to appropriate compensation'.[58] The search for proof of a common intention

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[56] *Re Polly Peck International (No 2)* [1998] 3 All ER 812 (CA). See Lord Neuberger's comments at 827 on the 'unprincipled, incoherent and impractical nature' of this remedial regime.

[57] *Jones* (n 3) [31]–[34] (Lord Walker and Lady Hale).

[58] [2016] 1 FLR 407 [22] (Tomlinson LJ).

can thus easily disintegrate into an analysis of what the court deems fair with regards to beneficial allocation in such a way.[59] As Hayward points out, evidentiary difficulties of pinpointing express and inferred common intentions may result in 'a more intensive engagement with the residual concept of fairness and, in turn, the continuation of this more holistic, discretionary method of adjudication',[60] termed 'palm tree justice'[61] by some. As Behrens J states in *Aspden v Elvey,* final quantified figures are 'somewhat arbitrary' but are unfortunately 'the best [judges] can do with the available material'.[62]

VI. A *Via Media* for Discretion

The foregoing section reveals a judiciary caught between two gravitational pulls. This dilemma is however not irresolvable if one recognises that the *acquisition* and *quantification* stages of the CICT inquiry need not be governed by the same standard of discretion. While discretion can and should be allowed at the *quantification* stage, the same level of fairness- and context-driven discretion is not necessary, and should be avoided, at the *acquisition* stage. Indirect financial contributions and other nuanced factors are not inherently misplaced when apportioning beneficial shares—as reflected in Lady Hale's reasoning at [69] of *Stack*. Adhering to this methodology, courts avoid the risk of

[59] Virgo (n 54) 593.
[60] Hayward (n 41) 254–55.
[61] *Rimmer v Rimmer* [1952] 2 All ER 863 (CA) 865 (Lord Evershed MR).
[62] [2012] EWHC 1387 (Ch), [2012] 2 FLR 807 [128] (Behrens J).

creating property rights unreservedly under the cover of 'justice' or 'fairness'.[63]

As *quantification* and *acquisition* are conceptually and normatively distinct judicial exercises, different levels of judicial discretion can be admitted at each step. To allow the court to apply vague notions of fairness and context to the *acquisition* stage, where the very existence of beneficiary protections and benefits is in question, would be a significant blow to the certainty and predictability of land law. Courts should be incredibly cautious and consistent if they choose to exercise such a discretionary power to alter the legal position of parties in such a way. They should also remember that the imposition of a trust has several important implications for the beneficiary, including priority over the trustee's creditors as regards claims to the trust property in the case of insolvency, and the power to impose an equitable property right against innocent third parties who have received and retained the trust asset or its traceable substitute.[64] Moreover, informal disposition of a proprietary interest is already restricted in English law, requiring an array of formality conditions.[65] Formalities avoid inappropriately validating mistaken or unintended disposals of property rights, rather than modifying their very content. As a result, the remnants of *pre-legal* fairness and context-driven considerations can adequately be dealt with at

[63] See Charlie Webb, 'The Myth of the Remedial Constructive Trust' (2016) 69(1) CLP 353, 356-57.
[64] eg Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2001] Ch 437 (CA).
[65] Law of Property Act 1925, s 53(1); Law of Property (Miscellaneous Provisions) Act 1989, s 2.

the *quantification* stage, wary of the same risks to the certainty and predictability of property law.[66]

Though some might critique this approach as overly restrictive, claiming that the power of the *quantification* pales in comparison to its *acquisition* counterpart, it must be remembered that a right quantified at a negligible sum is almost as powerless in practice as a right that never existed. It would be deeply unfortunate if a constructive trust and proprietary remedy were adduced at the first *acquisition* stage only for the resultant interest to be quantified at zero.[67] Though such a risk is far less realistic in practice, it explains imposing a higher burden of proof in answering the *acquisition* question, which is focused on a registered party exercising his Hohfeldian powers to dispose of/transfer his interest.

As such, a CICT that allows for broader judicial discretion at the *quantification* stage that gives effect to the unique context of trusts of the family home should not be feared as a usurpation or break from broader constructive trusts doctrine. By advocating for a clearer separation in these stages, applying a different standard of discretion in each, a middle ground can be reached between overly rigid and certain proprietary rules and overly vague family law notions that might seem inappropriate to some. Collapsing these distinctions would only risk turning the CICT, a proudly Institutional Constructive Trust ('ICT'), into a discretionary RCT as some other common-law jurisdictions have.

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[66] Webb, 'Myth of the Remedial Constructive Trust' (n 63) 357.
[67] John Gardner, 'Problems in Family Law' (2013) 72(2) CLJ 301, 306.

VII. Looking Across the Common Law

The extent to which judicial discretion must be controlled thus reflects a broader debate on whether English law should recognise RCTs. As the main point of comparison, the RCT has been controversially pioneered by the Canadian courts. The doctrine finds its roots in Laskin J's dissent in *Murdoch v Murdoch*.[68] In *Murdoch*, the majority were unwilling to find a common intention that the property's beneficial interest was to be held otherwise than solely by the registered party.[69] Laskin J concurred on the absence of a common intention but argued for the opposite result through a 'constructive trust which does not depend on evidence of intention'.[70]

Laskin J's approach was adopted seven years later: where marital or quasi-marital relationships break down, Canadian courts will find a constructive trust if satisfied (a) that unjust enrichment has occurred, and (b) that it would be appropriate, given the circumstances, to award a proprietary rather than a personal remedy.[71] The constructive trust remedies any unconscionability arising from one party holding the entire beneficial interest, wholly rejecting the common intention approach.[72] It is within, and solely within, the courts' discretion

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[68] 1973 SCC 193, [1975] 1 SCR 423.
[69] ibid 439 (Martland J).
[70] ibid 454 (Laskin J).
[71] *Pettkus v Becker* 1980 SCC 22, [1980] 2 SCR 834, 848-849 (Dickson J); *Sorochan v Sorochan* 1986 SCC 23, [1986] 2 SCR 38, 47-48 (Dickson CJ) ; *Kerr v Baranow* 2011 SCC 10, [2011] 1 SCR 269 [50] (Cromwell J).
[72] *Kerr* (n 71) [26] (Cromwell J).

to decide whether a proprietary remedy should be granted. If unjust enrichment is made out, Canadian courts emphasise that the usual remedy will be the personal remedy of monetary compensation.[73] Proprietary relief has nevertheless been steadily preferred in cases involving the division of matrimonial or cohabitated property.[74]

The RCT, unlike the ICT, is a 'judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court'.[75] It arises through the exercise of judicial discretion whenever it is considered just for the claimant to have an equitable proprietary interest in property received by the defendant.[76] A claimant need only show some 'reason to grant [him] the additional rights that flow from the recognition of a right to property' with seemingly any relevant policy factor capable of being taken into account.[77] An ICT, on the other hand, arises by operation of law from the date of the qualifying event which gives rise to it.[78] Once these events have occurred, the court declares the existence of the trust and awards the applicable proprietary remedies.[79]

The key distinction between the two can be so distilled: 'is the purported beneficiary able, as of right, to elect a proprietary

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[73] *Rawluk v Rawluk* 1990 SCC 152, [1991] 1 SCR 70, 73 (Cory J).
[74] ibid 85-86 (Cory J).
[75] *Westdeutsche* (n 7) 714 (Lord Browne-Wilkinson).
[76] *Soulos v Korkontzilas* 1997 SCC 346, [1997] 2 SCR 217 [34] (McLachlin J); Virgo (n 54) 582.
[77] *Lac Minerals Ltd v International Corona Resources Ltd* 1989 SCC 34, [1989] 2 SCR 574, 678 (La Forest J).
[78] *Westdeutsche* (n 7) 714 (Lord Browne-Wilkinson).
[79] Virgo (n 54) 592.

remedy in response to the relevant event?'[80] If yes, then the trust is institutional. The beneficiary's claim is staked on an extant right to be recognised by the court. If the answer is no, then the trust is remedial. Here, the beneficiary appears before the court with only an *expectation* of being granted a proprietary remedy. A successful claim relies on a right being recognised *ex post* by the court.[81] Where the ICT *declares*, the RCT *creates* a constructive trust.

VIII. Lessons to be Learned

The RCT offers some appeal and could 'prove a satisfactory way forward' for developing proprietary restitutionary remedies.[82] It takes account of deprivation that is unjust, enables the position of innocent third parties to be considered, and renders available restitutionary defences like change of position.[83] Moreover, it enables more case-specific solutions while allowing courts to meet shifting social norms head-on, instead of hiding behind the façade of purely institutional trusts.

Yet, despite its advantages, the RCT is hardly reconcilable with English conceptions of common-law rights and remedies. English property rights 'are determined by fixed rules and settled principles' and 'do not depend upon ideas of what is "fair, just, and reasonable".'[84] Lord Neuberger, extra-judicially,

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[80] Orestis Sherman, 'Orthodoxy Reasserted: Tempering the Support for the RCT' (2018) 24(9) T&T 860, 860.
[81] ibid.
[82] *Westdeutsche* (n 7) 716 (Lord Browne-Wilkinson).
[83] Donovan Waters, 'Resulting Trusts, and the Canadian Remedial Constructive Trust: Reconciling the Two' (2014) 20(3) T&T 234, 241.
[84] *Foskett v McKeown* [2001] 1 AC 102 (HL) 127 (Lord Millett).

expressed distrust of RCTs, seeing them as an unpredictable affront to this common-law view and as a judicial usurpation of the role of the legislature to create new property rights.[85] It is no surprise then that the Canadian RCT has been rejected by the UK Supreme Court in *FHR European Ventures*: it is 'authoritatively…not…part of English law'.[86]

The chief reason for this incompatibility is the fact that the RCT, by creating equitable property rights anew and imposing them retroactively on parties, undermines how fixed and predictable the rules for a land law regime are, while empowering courts to more flexibly achieve fairness *inter partes*. As such, the RCT addresses the *acquisition* and *quantification* questions in restitutionary terminology—*(acquisition) has* there been unjust enrichment and *(quantification)* if so, *how* should the court remedy it? The RCT creates new Hohfeldian relations without any prior exercise of a relevant power by a pre-existing right holder. From the court's determination, the beneficiary of an RCT gains an array of Hohfeldian prerogatives in a manner foreign to English law. English property law is inherently allocative and certain; property consequences flow from the pre-determined content of the recognised rights.[87] An English court that imputes intention, in the guise of fairness at the *acquisition* and *quantification* stage, veers dangerously close to Canadian discretionary remedialism.

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[85] Lord Neuberger, 'The Remedial Constructive Trust – Fact or Fiction' (Speech at Banking Services and Finance Law Association Conference, Queenstown, 10 August 2014) <https://supremecourt.uk/uploads/speech_140810_9c66db6801.pdf> accessed 30 December 2025.

[86] *FHR European Ventures v Cedar Capital Partners* [2014] UKSC 45, [2015] AC 250 [47] (Lord Neuberger).

[87] Sherman (n 80) 866.

Yet the main English lesson from the Canadian experience should be one of honesty. Canadian courts openly admitted the difficulty of finding a common intention and instead opted for a remedial approach. Meanwhile, under the auspices of giving effect to common intention, English courts allowed similar *pre-legal* considerations of 'fairness' and 'context' to distort its CICT reasoning at both *acquisition* and *quantification*. The uncertain scope of imputed intention is further proof of this judiciary compromise.

The need for a stricter segregation between *acquisition* and *quantification* thus becomes all the clearer. Despite the Law Commission's recommendations, statutory guidance in this area is still lacking.[88] The judiciary is then implicitly trusted as custodian of the English property regime. Attention to the *acquisition/quantification* distinction helps judges remain rigorous, institutional and sensitive in their pronouncement of proprietary rights. By clearly asking two different questions at each stage, the court is reminded that it must merely *declare* the limits of already-extant rights, rather than create them anew.

IX. Conclusion

Homes should necessarily be treated with proper sensitivity to the personal investment of those concerned. This does not, however, warrant a departure from established property law principles.

In single name cases, Hohfeldian analysis illustrates the gulf between answering whether an unregistered party has *acquired*

[88] Law Commission, Cohabitation: The Financial Consequences of Relationship Breakdown (Law Com No 307, 2007) paras 8.1–8.24.

an interest *vis-à-vis* answering how an unregistered party's interest, once established, is to be *quantified*. While unitary, the PMRT and CICT approaches only achieve superficial coherence through oversimplifying the picture. The differentiated approach advocated for by this article may not be the most satisfyingly straightforward, but family disputes never are. Proprietary certainty must be balanced with familial flexibility. The latter demands discretion while the former requires that such discretion be controlled. Disregard of such limits would transform the CICT into a remedial instrument of the kind used in Canada; judicial avowals of proprietary orthodoxy would be empty. Thus, to answer the titular question, the two are not mutually exclusive: homes are still houses.

Does AI Warrant Doctrinal Reform? Algorithmic Contracts and the Resilience of the Common Law

Noor Syed*

Abstract—The increasing prevalence of artificial intelligence and algorithm-driven automation pose pressing questions for the law of contract formation and performance. This article argues that the common law of contract can accommodate algorithmic contracting within existing doctrinal tools and will not need a doctrinal overhaul. It relies on the limited deterministic AI cases seen and develops the central claim that, despite their differing levels of 'automation', when probabilistic AI forms begin to appear in litigation, they will largely pose the same challenges for contract law as those raised in deterministic AI cases. The article draws connections to previous developments faced by the common law, such as industrialisation and the adoption of instantaneous communications, electronic commerce, and

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electronic signatures. It contends that the emerging Commonwealth case law reflects a consistent judicial preference for treating algorithms as tools embedded within existing legal structures rather than as entities requiring new personhood or modified formation rules. In acknowledging the valid concerns around developments such as the 'black box problem', this article endorses and develops an underexplored connection between tort law doctrines as complementary remedies to contract law doctrines to confront the emerging challenges.

I. Introduction

Few topics today are as widely discussed as the impact artificial intelligence ('AI') and algorithms will have on societal functions. More often than not, these discussions are catastrophist and depict sharp departures from social normality. Contract law is no exception. However, arguably, the common law's greatest strength is its capacity to evolve and adapt with the times. As compellingly described by Laws LJ, 'the methods of the common law are evolution, experiment, history and distillation',[1] a process which continues to define the development of law, both old and new. In 1607, it waded through the complex question of whether a king could act as a judge in *Prohibitions del Roy*;[2] in 1932, it formed the modern basis of negligence through the 'neighbour principle' in *Donoghue v Stevenson*;[3] and today, it finds itself grappling with complex questions on algorithmic contracting. As a polarising contemporary challenge, legal practitioners and academics find themselves somewhere on a spectrum between two opposing camps: (i) the pragmatists, who contend that existing legal mechanisms can manage the complications arising from algorithmic contracting;[4] and (ii) the reformists, who advocate that substantial legal reform is needed to confront emerging

[1] Laws LJ, Lord Justice Laws, 'Our Lady of the Common Law', (ICLR Lecture, 1 March 2012) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-laws-speech-our-lady-of-common-law.pdf> accessed 21 April 2025.

[2] [1607] 12 Co Rep 63, 77 ER 1342 (KB).

[3] [1932] AC 562 (HL).

[4] Eliza Mik, 'Much Ado about Artificial Intelligence or: the Automation of Contract Formation' (2022) 30(4) International Journal of Law and Information Technology 484.

issues that are significant and novel for contract law.[5]

This article endorses the more pragmatic view and contends that contract law is doctrinally versatile and is capable of relying on existing doctrinal mechanisms, such as incremental development. It will not need extensive reform like a new legal personhood category or a revision of formation rules to cope with the challenges posed by algorithmic contracting. The article will additionally draw comparisons with other areas of private law and will argue that where contract law is unable to deal with certain challenges, other doctrines within the common law, found in areas such as tort law, may provide appropriate solutions. It will argue that the common law is defined by gradual development, and that reforming current doctrine will encourage an unsustainable model of legal adaptation. At a time of rapid technological development and expansion, a reliable and resilient legal system is of paramount importance to keep contractual parties protected.

II. The Recurring Cycle of Technology and Contract Law

To assess contract law's ability to adapt to new challenges, it is helpful to begin by examining how the common law has addressed comparable issues in the past. Academics such as Brownsword refer to the late 19th century and the notable changes made to tort, criminal and contract law in response to rapid industrialisation as justification for a 'bespoke regulatory

[5] Lauren Henry Scholz, 'Algorithmic Contracts' (2017) 20(2) Stanford Technology Law Review 128.

response' to contemporary challenges.[6] Therefore, it may be tempting to deduce that, since contract law has not grappled with algorithms that form and perform contracts before, there is a need for substantial legislative and regulatory reform. However, a closer analysis of tort law following the industrial revolution, for example, illustrates a considerably circumspect approach closely formed around established doctrinal principles. The seminal case of *Donoghue v Stevenson* arose in the context of the rise in heavily industrialised supply chains with numerous distributors, often leaving end consumers without any contractual relationship and no remedies against negligent producers or suppliers. The response to this emerging challenge was not a doctrinal overhaul, but rather a decision following an incremental line of cases, such as *Heaven v Pender*[7] and *George v Skivington*[8], to develop a duty of care through the 'neighbour principle'. *Donoghue* illustrates the longstanding mechanism of incremental development within the common law to deal with emerging challenges and demonstrates the ability of the common law to adapt to changing environments and circumstances.

Returning to contract law, one of the most significant periods in recent times was the rise of contracting through technology, where, for the first time, contracts were formed via the use of new methods of communication. In many of these cases, an incremental approach was once again critical to addressing the evolving challenges. A prime example of this is the line of cases following *Entores Ltd v Miles Far East Corporation*,[9]

[6] Roger Brownsword, *Law 3.0: Rules, Regulation and Technology* (Routledge 2021) ch 4, 17–18.
[7] (1883) 11 QBD 503.
[8] (1869) LR 5 Ex 1.
[9] [1955] 2 QB 327 (CA).

which concerned whether the postal rule applied to instantaneous communications, such as telex messaging. These rulings illustrate a critical point about the general life-cycle relationship between technology and contract law, where initially every new development raises significant contractual anxiety, common law largely adapts, and the next technology raises significant concerns once again. In *Entores*, Lord Denning stated that a 'contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received',[10] ruling that it is insufficient for acceptance if a party only sent a telex; it must have been received. Lord Wilberforce subsequently introduced an element of flexibility in the later House of Lords case of *Brinkibon Ltd v Stahag Stahl GmbH,*[11] and clarified that 'no universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie'.[12] This incremental approach was then extended to emails through the judgment by Blair J in *Thomas v BPE Solicitors*,[13] where he relied on the decisions in *Entores* and *Brinkibon* and stated that 'in my view the same principle applies to communication by email, at least where the parties are conducting the matter by email, as the solicitors were in this case'.[14] As seen through the judgment in *Thomas*, a pragmatist approach tethered to previous decisions with similar technologies or questions of law is the most efficient method for adopting emerging software-driven challenges.

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[10] *Entores* (n 10) 334.
[11] [1983] 2 AC 34.
[12] *Brinkibon* (n 12) 42.
[13] [2010] EWHC 306 (Ch).
[14] *Thomas v BPE Solicitors* (n 14) [86].

This recurring trend with technology is depicted throughout the development of contract law and is also notably seen with e-commerce, which raised significant concerns in the 1990s during the dotcom boom. For example, in 1999, Brownsword and Howells stressed that 'it will not always be straightforward for the law to implement or respond to the reasonable expectations of Internet contractors'.[15] Fast forward to 2026, and e-commerce is a universally accepted forum for contracting, achieving this without significant doctrinal reform. Contracts formed with a telex machine, emails, and e-commerce act as insightful case studies into how courts have addressed questions around the use of particular technology and illustrate how they successfully integrate them within wider contractual principles, such as offer and acceptance.[16] There is an evident trend that the common law responds to new technologies with reasoning by analogy, and forms an incremental line of cases with open-ended assertions, allowing courts to flexibly accommodate subsequent developments in the future.

We are now in a new cycle defined by AI, and the common law must not overstate the impact these technological developments will have on contract law. It should remain consistently grounded, given the long history of uncertainty that new technologies have raised for the common law and its demonstrated resilience. However, it is still true that the common law finds itself at the centre of an uncertain future as a result of the unfamiliar rate at which these technologies develop and their

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[15] Roger Brownsword and Geraint Howells, 'When Surfers Start to Shop: Internet Commerce and Contract Law' (1999) 19(3) Legal Studies 287, 287.
[16] Juliet M. Moringiello and William L. Reynolds, 'From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting' (2013) 72(2) Maryland Law Review 452, 455.

widespread impacts across different sectors and processes. Therefore, it is clear that consumers and corporations will need a reliable and dependable common law of contract to base their transactions on in the midst of this uncertainty. The common law must strike a crucial balance to avoid stalling progress while assessing which developments present wider risks. A process the common law has previously engaged through cases such as *J Pereira Fernandes SA v Mehta*,[17] concerning the adoption of e-signatures as a valid form of acceptance, where widespread general reform, like allowing an automatically inserted email address to act as a signature, was ruled to be impractical as it would have 'widespread and wholly unintended legal and commercial effects'.[18] However, later on, in cases such as *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd*[19] and *Bassano v Toft*,[20] this approach was refined to adapt to a new era of contracting where 'the conclusion of commercial contracts…by an exchange of e-mails…is entirely commonplace'[21] and accommodate new forms of e-signatures, such as those where 'the signature is made by the electronic communication of the words "I Accept".[22] A carefully calibrated approach is therefore necessary, one that protects established principles while allowing the law to adapt its scope to new developments and commercial settings. Despite reasonable concerns that AI presents a serious obstacle to contract law, these challenges must be mitigated cautiously to ensure the common law framework being developed

[17] [2006] EWHC 813, [2006] 1 WLR 1543.
[18] [2006] EWHC 813, [2006] 1 WLR 1543 [30].
[19] [2012] EWCA Civ 265, [2012] 1 WLR 3674.
[20] [2014] EWHC 377 (QB).
[21] Golden Ocean Group Ltd (n 19) [22].
[22] *Bassano* (n 20) [45].

is both progressive to new developments, while also being inoffensive to established doctrinal principles.

III. Contextualising Algorithmic Contracting

In the context of AI, a particularly important development for the common law is the formation and performance of algorithmic contracts. As defined by the European Law Institute (ELI), an 'algorithmic contract' means a 'contract where one or both parties use a digital assistant to automate some or all aspects of their contractual relations'.[23] Algorithms exist on a wide spectrum of automation, and algorithmic contracting is not exclusive to a single technology but is instead an umbrella term. Critically important in this definition is the involvement and usage of a 'digital assistant'. A versatile term, 'digital assistants' are currently assessed by academics through both (i) existing systems and (ii) reasonably foreseeable or hypothetical technological advancements. For example, Twigg-Flesner refers to existing applications such as Alexa, Siri and Cortana as 'digital assistants' and distinguishes them from futuristic applications such as a 'self-ordering fridge', which he refers to as 'digital delegates'.[24] Given the largely untraversed legal terrain of AI-driven disputes, the current landscape of algorithmic contracts today is formed from deterministic algorithms using preset parameters with largely

[23] European Law Institute, 'Guiding Principles and Model Rules on Digital Assistants for Consumer Contracts' ('ELI DACC Model Rules, P-2022-28a, 2025) 13.

[24] Christian Twigg-Flesner, 'Consumers and Digital Delegates' in Larry A DiMatteo, Cristina Poncibó and Geraint Howells (eds), *The Cambridge Handbook of AI and Consumer Law: Comparative Perspectives* (CUP 2024) 75, 76.

consistent outputs from a particular input. As a result, much of the discussion around the impact of more advanced probabilistic algorithms, which could, for example, negotiate on behalf of two contracting parties, is speculative.

The key distinction between 'digital assistants' and 'digital delegates' is, one between deterministic AI and probabilistic AI, with the former 'based on programs written, or hand-coded by humans'[25] like optimised GPS navigation, and the latter 'commonly associated with terms like 'machine learning' or 'deep learning'[26] such as e-commerce recommendation systems based on previous purchases. Deterministic AI returns the same result when given a particular request without variance (A will always return B). In contrast, probabilistic AI responds differently to requests depending on the data it has and the context of the request (A may return B or C or even Z).

The lack of predictability in probabilistic AI is a major concern, as it is diametrically opposed to the universally accepted culture of English contract law, where parties desire clearly defined and predictable rules.[27] A new lack of predictability for commercial actors means similar complications for courts now presented with an intermediary tool that can take over decision-making and leave a contracting party with an outcome they did not want or expect. The natural assumption may therefore be that probabilistic AI is intrinsically more problematic to the status quo of contract law than deterministic AI. However, this article will argue that both forms of AI raise the same contractual concerns,

[25] Mik (n 4) 494 – 495.
[26] Mik (n 4) 494 – 495.
[27] Rex Ahdar, 'Contract Doctrine, Predictability and the Nebulous Exception' (2014) 73(1) Cambridge Law Journal 39, 60.

with probabilistic AI's reputation as a more doctrinally difficult technology stemming from its ability 'to perform cognitive functions we associate with human minds'.[28] The root concern with both forms of AI remains the shared feature of a contracting party delegating what once were wholly human responsibilities to an entity that bears no direct liability. While the level of 'autonomy' in these AI forms is of reasonable significance, the recurring element of all AI contractual disputes is an algorithm failing to sufficiently execute a previously human-led responsibility; an error by an algorithm remains an error regardless of whether it came from a deterministic or probabilistic AI form. This article, therefore, relies on the limited deterministic AI caselaw there is and contends that courts can sufficiently adopt the same pragmatist approach seen so far as the use of probabilistic AI becomes more prevalent and litigation begins to arise.

It is also worthwhile to clarify the role that algorithms play in algorithmic contracts. Essential is the understanding that 'despite automating the transaction process to varying degrees, humans are never completely removed from the process'.[29] Algorithms take over elements of the contracting process from humans, often acting as an intermediary with human parties remaining on both ends of the contract. A commonly cited probabilistic AI example is a 'self-ordering fridge' which orders food when it detects that storage is running low, behind which would exist both a consumer and a supplier.[30] Forming a contract

[28] Iria Giuffrida, 'Liability for AI Decision-Making: Some Legal and Ethical Considerations' (2019) 88(2) Fordham Law Review 439, 441.
[29] Eliza Mik, 'From Automation to Autonomy: Some Non-existent Problems in Contract Law' (2020) 36(3) Journal of Contract Law 205, 226.
[30] Twigg-Flesner (n 24) 76.

through a complete intermediary is considerably novel and, as Rizzi and Skead argue, 'the level of trust, dependence and deference that a contracting party places in the operation of the algorithm arguably gives rise to a *sui generis* (unique) form of [contractual] relationship'.[31] However, it is the characterisation of this relationship when a dispute arises that is central to the current legal debate. Particularly when an algorithm creates an outcome that one or both of the contracting parties did not foresee, and can no longer disassociate themselves, as the algorithm's role was central to the contract's formation and performance. Therefore, important questions are raised as to when a party may be able to separate themselves from something their employed algorithm did. Overall, the major considerations lie in the level of responsibility contractual parties should hold when algorithms err and how this will evolve as technology becomes more autonomous.

Lastly, before proceeding, it is helpful to construct a typology of potential problems an algorithm creates in the formation and performance of a contract. An algorithm can: (i) execute an authorised contract contrary to a party's intentions as a result of its data processing or its misconstrued understanding of the parties' objectives, both with and without defined parameters; (ii) execute an unauthorised contract and create an unconscionable bargain due to a programming error or a potential bug; or (iii) fail to execute a contract altogether and leave parties vulnerable as a result of the non-formation and performance of an expected contract.

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[31] Marco Rizzi and Natalie Skead, 'Algorithmic Contracts and the Equitable Doctrine of Undue Influence: Adapting Old Rules to a New Legal Landscape' (2020) 14(3) Journal of Equity 301, 323.

IV. The Common Law's Digital Resilience: Debunking the Hype

With the historical foundation and context now established, it is important to dissect the specific legal challenges posed by algorithmic contracting. As is the argument of this article, the conceptual concerns faced by courts so far in deterministic AI cases across common law jurisdictions have largely laid much of the doctrinal groundwork for future probabilistic AI cases, given the similar inherent challenges they pose for contract law. The concern around the use of AI in contracting stems from blurred lines around three critical areas of contract law: (i) attribution and liability; (ii) intention and consent; and (iii) predictability and transparency. The following sections attempt to demonstrate how these concerns are inflated and how probabilistic AI should cause no additional doctrinal concern when it begins to become the subject of litigation.

A. *Moffat v Air Canada* and the Attribution Question

Perhaps the most significant of all concerns is the question of who bears the liability for a contractual mistake when an AI errs in forming or performing a contract as intended. Given the autonomous nature of probabilistic AI, it is often suggested that it would be unreasonable to hold an AI's employer liable for something they have no direct control over. This is an unreasonable argument, as, for example, if an individual were to release a dog from a leash and it subsequently attacked someone, an offence would likely have been committed. The liability of

keeping a dog under 'proper control'[32] is attributed to its owner as the law recognises the position of power an owner holds over their dog. As a sentient being, a dog is clearly objectively more living and autonomous than AI, yet the courts will not hold the dog liable. Conversely, when probabilistic AI is employed by an individual or company, and something goes wrong, questions are raised on who should be held responsible, i.e., should the AI be given a separate legal personality distinct from its operators? While questions of 'legal personality' are more closely associated with probabilistic AI forms, the recent deterministic AI Canadian tribunal case of *Moffat v Air Canada*[33] demonstrates the argument that, although the two AI forms may drastically differ in their levels of autonomy, they raise the same kinds of legal questions.

Moffat is one of the few cases seen which concern a dispute at the heart of which is a form of deterministic AI. The case involves a chatbot providing incorrect information about the right to a retroactive claim of a bereavement fare, which raised eyebrows following Air Canada's claim that 'the chatbot is a separate legal entity that is responsible for its own actions'.[34] Tribunal Member Christopher Rivers described this as 'a remarkable submission',[35] clarifying that 'it should be obvious to Air Canada that it is responsible for all the information on its website'.[36] It demonstrates a clear scepticism from courts to treat deterministic AI as anything more than a tool employed by its

[32] Dangerous Dogs Act 1991, s 3(1).
[33] 2024 BCCRT 149.
[34] *Moffat* (n 33) [27].
[35] *Moffat* (n 33) [27].
[36] *Moffat* (n 33) [27].

user, as 'while a chatbot has an interactive component, it is still just a part of Air Canada's website'.[37]

The judicial reasoning is an optimistic display of courts adopting the simplest possible approach, where the attribution of liability should be allocated to an AI's employer. Comparisons can be drawn to the principle of vicarious liability in tort, where cases such as *Lister v Hesley Hall Ltd*[38] demonstrate that 'if [an employer] entrusts the performance of that duty to an employee and that employee fails to perform the duty, they are still liable'.[39] Instead of allocating liability to an AI or ceding to suggestions about prescribing AI with a legal personality, it is more doctrinally sound to adopt a more vicarious liability approach and consistently allocate liability to the employer of an AI. Such an approach would prevent the widespread risk of people and corporations using unconscious AI forms with legal personality to vicariously achieve questionable objectives and escape responsibility. Applying this straightforward approach simplified the judgment in *Moffat* and should continue to be applied in cases with the emergence of probabilistic AI software. The justification behind much of vicarious and enterprise liability is the philosophy that employers should bear the burden of a risk they take in the employment of an employee.[40] It would not follow for a company or an individual to reap the benefits of using an AI system and then absolve themselves of liability when a mistake arises. As Lord Toulson defines in *Mohamud v WM Morrison Supermarkets*

[37] *Moffat* (n 33) [27].
[38] [2001] UKHL 22, [2002] 1 AC 215.
[39] *Lister* (n 38) [55].
[40] Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71(3) Cambridge Law Journal 615, 618.

plc,[41] 'vicarious liability in tort requires, first, a relationship between the defendant and the wrongdoer, and secondly, a connection between that relationship and the wrongdoer's act or default'.[42] Absolving a contractual party from the liability of its algorithm, which has both a close connection to its employer and a potential wrongdoing, would be the equivalent of a factory owner employing workers and reaping the benefits of larger production, and then escaping liability when something goes wrong, because the workers fall under a separate legal category. In the context of algorithmic contracting, where a contracting party entirely relies on an algorithm to perform a contract on its behalf, there is a strong case in favour of this representing as close a connection as an employee, in this case an AI software, can have with its employer, the contracting party, as possible. As Lord Steyn states in *Lister*, 'the question is whether the [employee's] torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable'.[43] In the context of algorithmic contracting, it would be unfair and unjust to allow AI employers to escape liability under the weak technicality of probabilistic AI holding a form of autonomy.

Having said this, the chatbot in *Moffat* is a non-autonomous deterministic AI and does not have machine learning capabilities. However, the question of attribution is largely identical across all AI forms. For example, if the common law is to adopt a vicarious liability approach, it holds that this approach will be largely identical regardless of the level of autonomy in question. In other words, an employed algorithm would be held liable for an error it

[41] [2016] UKSC 11, [2016] AC 677.
[42] *Mohamud* (n 42) [1].
[43] *Lister* (n 38) [28].

makes through the same mechanisms and legal foundation in both probabilistic and deterministic forms. A possible comparative analogy is seen with large multinational corporations and small family-owned businesses. Regardless of their operating levels, vicarious liability for an employer is a possible outcome in the context of an employee committing a tort. Similarly, questions of attribution will likely not be different because an AI is more intelligent or less predictable. For now, however, *Moffat* acts as a signpost for the future of automation. It therefore seems clear that, arguably, the most significant concern raised by AI technology is quite simply resolved with a doctrinally conservative response inspired by principles of vicarious liability.

B. *Quoine Pte Ltd v B2C2 Ltd* and the Treatment of an Algorithmic Mistake

Algorithmic contracting also raises questions about whether the absence of human intention and consent can potentially undermine the validity of contracts, as it becomes difficult to determine the 'objective' meaning of contracts at the formation stage, where algorithms may be forming both the offer and acceptance, such as with two AIs employed to negotiate on behalf of contracting parties. Given that algorithms cannot be assessed for their outward conduct in the same way people can,[44] when an algorithm errs, the process of determining what an algorithm should have done or was meant to do is complicated, given the complexity in developing concepts such as a 'reasonable

[44] Mindy Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation: The Oxymoron of Smith v Hughes' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 341, 364.

algorithm'. This leads to arguments suggesting incompatibility with current doctrine, resting on the premise that a contract's terms need to look like they were agreed to by a party that can actually intend to agree, something two unconscious, coordinating algorithms cannot achieve due to the impracticality of assessing their outward conduct and words.[45] In this context, it is helpful to refer to the doctrine of objectivity, one of contract law's longest-standing doctrines.[46] Objectivity can be defined by the way in which the actions of parties are typically assessed by reference to their words and actions in contract law.[47] This principle stems from landmark cases such as *Smith v Hughes,*[48] which establish that contractual terms are formed from parties' outwardly manifested intentions and not their undisclosed subjective thoughts or intentions.[49] Objectivity is a critically important doctrine for contract law for two main reasons: (i) it is a central doctrine applicable to the entirety of contract law; and (ii) any area of contract law which undermines this doctrine will risk incompatibility when courts attempt to determine remedies for breach or vitiation.

In this context, for example, it can be difficult to determine which algorithm's intention is relevant and what an algorithm's objective conduct means when a contract may be vitiated due to a mistake. However, the primary concern is not whether algorithms have the capability of forming an intention or holding

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[45] Matthew Oliver, 'Contracting by Artificial Intelligence: Open Offers, Unilateral Mistakes, and Why Algorithms Are Not Agents' (2021) 2(1) ANU Journal of Law and Technology 45, 65

[46] See for example, *Anon* (1478) YB 17 Edw 4, Pasch fo 1, pl 2.

[47] Paul S Davies, *JC Smith's The Law of Contract* (3rd edn, OUP 2021) ch 2, 12

[48] (1871) LR 6 QB 597.

[49] *Smith v Hughes* (n 48) 607.

an objective meaning, but whether contracts can be vitiated when the relevant intention and objective meaning do not reflect that of an AI's employer. Once again, the challenge emerges from a contract being performed by a third-party, the algorithm, and not a contracting party directly.

Consequently, the question which needs to be answered is whose objective meaning is of significance in the context of an algorithm-driven and performed contract: is it the algorithm or the contracting party? This was a major point of discussion in *Quoine Pte Ltd v B2C2 Ltd,*[50] a commonly cited case from Singapore. It concerned a dispute regarding a series of incorrect Ethereum to Bitcoin trades made by automatic trading algorithms at the unconscionable level of '250 times the going market exchange rate',[51] in favour of B2C2. Singapore's Court of Appeal determined that despite the parties not knowing 'beforehand that the Trading Contracts would be entered into... these factors did not prevent the formation of a contract at the point of time when an offer made by one algorithm was accepted by the other'.[52] It is clear through Sundaresh Menon CJ's words that there is a continued reliance on an objective analysis of intention in the context of algorithmic contracting. Similarly, Menon CJ's observation that 'it is wholly artificial to work on the basis of what might have happened if a human element was involved'[53] reaffirms that no exceptions to the objective approach are made for algorithm-driven contracts, given the court's focus on the party's actual programmed acts, not their human intentions.

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[50] [2020] SGCA(I) 02.
[51] Quoine Pte Ltd v B2C2 Ltd (n 50) [2].
[52] *Quoine* (n 50) [96].
[53] *Quoine* (n 50) [87].

Quoine concerns a deterministic AI, and Menon CJ recognises this and states that 'where contracts are made by way of deterministic algorithms, any analysis ... must be done by reference to the state of mind of the programmers of the algorithms at the time of the programming'.[54] Designating responsibility to the individuals/company behind the algorithms applies the same logic as in *Moffat,* where the employers, or in this case the programmers, of an algorithm are to be held liable, as these machines are in effect carrying out actions that would have otherwise been fulfilled by a human, and therefore, it is the intention of those behind the algorithm that needs to be objectively assessed. It is also clear through the words of Thorley LJ, *Quoine's* trial judge in the Singapore International Commercial Court, that courts are also considering the expected significance of probabilistic AI, predicting that the law is likely to continue to adapt and that 'cases where computers have replaced human actions…will, no doubt, develop as legal disputes arise as a result of such actions'.[55] He suggests that 'this will particularly be the case where the computer in question is creating artificial intelligence and could therefore be said to have a mind of its own'.[56]

While probabilistic AI may introduce new questions, the most reliable solution to address the issue of intention is best dealt with similarly to deterministic AI forms, where the significance of the algorithm's involvement is disregarded, and an objective analysis is assessed through the AI employer's conduct at the time of contracting. While probabilistic AI may differ from

[54] *Quoine* (n 50) [97].
[55] *Quoine* (n 50) [206].
[56] *Quoine* (n 50) [206].

deterministic AI in that its outputs will be different for a particular input, there is no reason that the programmers, who can both be the contracting parties or separate from them, should hold any other form of responsibility due to the use of a different AI software. Where a company/individual develops their own programme, it is a risk they have chosen to take and simultaneously, where a company/individual uses a third-party software, that too is an optional risk taken. Comparisons can be drawn with cases such as *Davis Contractors Ltd v Fareham Urban District Council*,[57] where 'a builder who undertakes to finish a building by a certain day is, on the face of it, plainly taking such a risk'.[58] Similarly, whether a deterministic AI or a probabilistic AI is employed, it is not the responsibility of contract law to protect against the consequences of what may become an algorithm-driven bad bargain. Ultimately, they are both tools used by their employers and have outputs traceable back to a particular employer or programmer who bore the risk of an algorithmic error when they decided to pursue the formation of an algorithmic contract. *Quoine* demonstrates a doctrinally restrained approach which weaves algorithms within existing doctrinal structures, such as objectivity, and is an insightful exemplar for how more autonomous, probabilistic forms of AI should also be accommodated within existing doctrinal mechanisms when they give rise to litigation.

[57] [1956] AC 696 (HL).
[58] *Davis Contractors* (n 57) 734.

C. *Ex p Software Solutions Partners (SSP) Ltd v HMCE* and Legal Clarity

Lastly, the driving force behind the concerns around probabilistic AI is the substantial increase in unpredictability it will bring in comparison to deterministic forms. The increased level of autonomy and the lack of preset parameters mean the algorithms can produce unexpected and unpredictable results without a baseline expectation to compare with. Perhaps one of the most significant concerns is the 'black-box problem'. As Bathaee defines it, 'the "black box problem" can be defined as an inability to fully understand an AI's decision-making process and the inability to predict the AI's decisions or outputs'.[59] This is due to complicated code, and the AI's probability-driven element, which can be next to impossible for humans to decipher or predict and raises concerns about when parties should cease to be liable for something an algorithm does. For example, probabilistic AIs designed to negotiate terms for an algorithmic contract may come to a financially unconscionable agreement, and once courts begin to assess that contract for vitiation, it may be impossible to assess what exactly the algorithms did and how they came to their conclusions, leaving courts with no clear direction as to how to remedy the dispute. Potential challenges such as these raise major concerns for predictability and transparency, threatening two major objectives of English law.

[59] Yavar Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) 31(2) Harvard Journal of Law and Technology 889, 905.

Traditionally, in deterministic AI cases such as the English case, *R (ex p Software Solutions Partners (SSP) Ltd) v HMCE*,[60] there are pre-set parameters governing the execution of AI, which provide courts with an element of predictability and a workable benchmark for when an algorithm acts outside of programmed parameters and what it should have done within them. *SSP* concerned a tax dispute arising from deterministic, automatically generated insurance contracts between insurance brokers and insurers. The judgment sustained the validity of automated contracts, stating that 'no further human intervention is necessary for the formation of a binding contract'.[61] However, especially important was the recognition that 'all the information necessary for electronic contract formation has been pre-programmed, according to strict parameters'.[62] While probabilistic AI presents an element of unpredictability, given that its use cannot be restricted to pre-set parameters, they still produce automatically generated results, formed following an input, and can still be used for the purpose of contract formation after receiving a set of instructions. An analogy can be drawn to how two free-thinking employees in a factory can produce the same product with different work styles. In this scenario, the factory owners assume the reputational and potentially financial risk of their employees' work and in theory, if one factory worker is 'smarter' or more efficient than the other, as probabilistic AI is over deterministic AI, the product produced is still a product, the same way a contract remains a contract. The concerns around predictability are best addressed by adopting an approach where contractual parties assume the risk of an algorithm erring, regardless of

[60] [2007] EWHC 971 (Admin).
[61] *SSP* (n 60) [67].
[62] *SSP* (n 60) [20].

whether it is a deterministic or probabilistic form of AI they employed. The approach, as stated by Kenneth Parker KC, as he then was, was that 'the errors in question are failures by SSP to ensure that the computer software functions efficiently according to the parameters set'.[63] In a probabilistic AI context, a potential black box problem is likely another risk contractual parties will be expected to assume, amongst the many other risks, such as deciding to engage in a contract in the first place.

Consequently, with more autonomous forms of AI, such as Language Learning Models like OpenAI's ChatGPT, which by definition adapt beyond preset parameters,[64] the common law of contract is best suited to mitigate the risks of AI through contractual terms defining the course of action when an algorithm falters in executing the outcome contractual parties were expecting, or in cases where an AI is both forming and performing a contract, by defining what an unconscionable arrangement looks like. The lack of predictability and the high potential for errors in the use of probabilistic AI will present a series of new risks to contract law; however, through existing remedies, a standard contractual term which expresses how contractual parties will move forward in the instance their employed algorithms do something unpredictable, is a sufficiently simple solution. This approach may also aid in dealing with the rapid rate at which technology develops, occasionally in leaps so large that the law cannot immediately respond and will serve the purpose of allowing companies and businesses to specify for themselves how their chosen AI system or tool should act,

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[63] *SSP* (n 60) [21].

[64] Jakub Tomczak, 'Deep Generative Modeling: From Probabilistic Framework to Generative AI' (2025) 27(3) Entropy 238, 238.

directly counteracting concerns about programming variances across different AIs.

Additionally, beyond contract law, it may also be helpful to introduce similar expectations as those seen in product safety regulation and product liability in general. Such a development has been suggested by the European Law Institute, which recommends the enforcement of 'a legal requirement…as a design duty or similar, akin to product safety regulation'.[65] This would greatly limit the effects of the 'black-box problem' and, when supported by contractual remedies such as frustration, would ensure a holistic approach to mitigate the unpredictability of probabilistic AI by employing both by the ex ante nature of tort law, where product liability manages risk before harm occurs, and the ex post nature of contract law, where remedies and vitiation are sought after the realisation of a latent risk.[66] The outcome would be a common law framework, supported by regulation, which minimises the significance of the unpredictability concerns raised by algorithmic contracts formed with probabilistic AI. The common law of contract does not need a doctrinal overhaul to adjust from deterministic AI to probabilistic AI. It will instead need to develop a system which mitigates the new risks created by the emergence of probabilistic AI by building on the established principle of contractual parties

[65] European Law Institute, 'EU Consumer Law and Automated Decision-Making (ADM): Is EU Consumer Law Ready for ADM? (Interim Report, 2023) P-2022-28, 31.

[66] Cullen O'Keefe, Ketan Ramakrishnan, Janna Tay and Christoph Winter, 'Law-Following AI: Designing AI Agents to Obey Human Laws' (2025) 94(1) Fordham Law Review 57, 116 – 123

assuming the risk in the employment of AI, as seen in deterministic AI cases such as *SSP*.

V. The Current Trajectory of Algorithmic Contracting

The common law has displayed evidence of its ability and resilience to cope with the challenges of algorithmic contracts. Concerns remain that if delays are made in addressing the present concerns, there may be difficulties in how effectively change can be demanded as new technologies develop.[67] These concerns suggest the need to act quickly and produce regulations that avoid major doctrinal reform. It is important to recognise that it will always take less time and put less pressure on courts to adhere to current legal doctrine than to deal with the hiccups and trial and error that can come with reforming contract law.[68] In this new world of exponential technological growth, the only thing more valuable than innovation is a stable and consistent contract law framework that provides certainty to all parties. An often-overlooked element of long-term development is that everything on the way must operate effectively, and few things are more conducive to progress than holding parties to account for their promises and protecting them from the misbehaviour of others.

While the common law can deal with the emerging challenges, regulation and supplementary legislation will certainly be beneficial in consolidating the law's approach to algorithmic contracting. Positive attempts at comprehensive regulation have

[67] Jane K. Winn, 'Emerging Issues in Electronic Contracting: Technical Standards and Law Reform' (2002) 7(3) Uniform Law Review 699, 704.
[68] Giuffrida (n 28) 452.

been seen with 'The United Nations Commission on International Trade Law Model Law on Automated Contracting' (UNCITRAL Model),[69] which seeks to introduce a model aimed at decreasing the uncertainty raised by algorithms and harmonising the approach that nations take towards algorithmic contracting. A joint approach across the law and, more specifically, the common law will be imperative to ensure that contract law can enforce contracts with doctrinal consistency. It remains to be seen how legislation will adapt as probabilistic AI forms begin to permeate the economy in countless different sectors.

At all times, it must not be forgotten that within algorithmic contracting lies the future of contract. In what will be an incredibly fast-changing and rapidly evolving area of law, the common law is the primary legal mechanism with the capability to keep up and ensure the facilitation and enforcement of transactions formed and performed by algorithms. Where contract law is unable to offer immediately practicable solutions, other areas of private law, such as tort, can offer useful guidance in understanding the relationship between AI and its employers within the common law. It remains the most effective approach to continue finding ways to incorporate new technological developments through traditional doctrines, which will almost always be a more conducive way to ensuring the protection of essential legal values. An approach focused on prioritising the protection of doctrinal principles also serves the double purpose of only restricting the developments which raise genuine legal concerns and issues, thereby encouraging new technology and

[69] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on Automated Contracting' (11 July 2024).

overall progress. The law should also not shy away from the support of other disciplines like ethics. As Sir Robin Knowles notes on AI, it is 'imperative that we take the opportunity for law and ethics to travel with it'.[70] The common law of contract has the tools to cope with the 'new world', as it has with every other 'new world' in the past.

VI. Conclusion

Overall, the current and limited deterministic AI case law illustrates that the common law has the tools to adapt to the concerns raised by algorithmic contracting as a whole. While it remains to be seen how courts address the inevitable challenges faced by more intelligent, probabilistic forms of AI, this article has argued that the challenges created for the common law of contract by the two different forms of AI are largely shared and that the approaches taken in cases of deterministic AI can be applied and replicated when probabilistic forms begin to appear before the courts. However, when dealing with the more confrontational challenges, such as the black box problem, the common law may need to occasionally rely on other private law doctrines, such as vicarious liability, to successfully come to doctrinally founded solutions. This article has asserted that where the common law can adapt, it is unnecessary to resort to extensive doctrinal and regulatory overhaul, as parties need a robust common law system to rely upon in a time of unprecedented development. Commonwealth courts across Canada, Singapore

[70] Nick Hilborne, 'High Court judge: ethical and legal framework for AI "imperative"' (*Legal Futures*, 13 November 2018) <https://www.legalfutures.co.uk/latest-news/high-court-judge-ethical-and-legal-frame
work-for-ai-imperative> accessed 21 April 2025.

and the United Kingdom have been able to address complex issues of algorithms through common law rules without the need for extensive regulatory interventions in cases such as *Moffat*, *Quoine* and *SSP*. Further questions may lie in attempting to determine exactly how courts can produce a system which weaves together multiple private law doctrines to create an effective common law-driven response to address challenges such as the attribution of liability. The use of algorithms is a new medium for legal obligations that must be completely assimilated by the common law of contract.

The Judicial Construction of Fiduciary Loyalty: A Case for English Stewardship

Boris Liu*

Abstract—This article argues that English law, properly developed, offers a more coherent and institutionally attractive framework for fiduciary loyalty in modern corporate governance than Delaware law. The point is not that English law is already satisfactory, nor that Delaware has nothing to teach. Rather, English law contains a distinctive combination of resources: an equitable tradition that regulates entrusted power through objective and prophylactic standards, and a statutory framework in the Companies Act 2006 capable of judicial development in continuity with that tradition. Delaware, by contrast, has addressed modern governance failures by stretching loyalty through the language of good faith and conscious disregard. That move is often admired as sophisticated and realistic. This article contends that Delaware's approach is conceptually unstable, evidentially awkward and insufficiently suited to the governance problems it purports to solve. The article proceeds in four stages.

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First, it reconstructs the English law of fiduciary loyalty before and after codification, identifying the tension between statutory flexibility and equitable discipline as a point of interpretive potential rather than contradiction. Second, it explains why Delaware is a tempting comparator, but argues that its approach lacks the capacity to address contemporary governance failures in a principled and predictable way. Third, it advances three proposals for English law: a stronger proper-purpose reading of section 172; objective systems liability under section 174; and a substantive interpretation of section 172 as inclusive long-termism. Finally, it argues that these developments would not judicialise business judgement but would instead produce a clearer and more coherent jurisprudence of corporate stewardship.

I. Introduction

The fiduciary duty of loyalty is one of equity's most enduring legal achievements. Yet loyalty has never been a self-defining concept, and in company law its judicial construction has taken markedly different forms. English law has historically approached fiduciary obligation through objective and prophylactic controls that regulate the fiduciary's position, the purposes for which powers are exercised, and the conditions under which discretion may be trusted. Delaware law, by contrast, has developed a more subjective and managerially accommodating architecture. Here the language of loyalty, good faith and conscious disregard is used to reach serious failures of directorial performance, while broad deference to business judgement remains intact. Both systems respond to the same problem: how should the law control those who exercise discretionary power over others' economic interests? They do so in different ways.

This article argues that English law offers the superior answer for the modern corporation. Contemporary governance failures do not always appear as straightforward self-dealing. They include weak internal controls, poor monitoring systems, chronic compliance failures, short-termist incentives, the externalisation of costs onto employees and communities, and the neglect of risks whose significance emerges only over time. A law of fiduciary loyalty confined to direct conflict is too narrow, while a law that responds by stretching loyalty into a general inquiry focused on bad faith, culpability or boardroom psychology risks becoming conceptually unstable and institutionally unhelpful.

The task is to modernise fiduciary law without sacrificing coherence.

Delaware is central to that challenge because it is the most influential example of a sophisticated corporate law model responding to modern governance problems.[1] Its specialist courts and elaborate jurisprudence make it the natural comparator for any system seeking to move beyond a narrow model. This article argues that English law should resist that pull. Delaware's apparent modernity conceals real weakness: it blurs loyalty and care, depends too heavily on speculative inquiry into collective states of mind, and often yields accountability that is rhetorically severe but uncertain in practice.

English law possesses a better doctrinal architecture because it can develop the statutory duties in continuity with equity's objective concern for entrusted power. The Companies Act 2006 did not abolish the core fiduciary constraints that had long shaped directors' duties; it restructured them. Section 175 preserves the anti-conflict core, section 174 states an objective duty of care, and section 172 requires directors to promote success while having regard to long-term and relational considerations. The unresolved question is whether those duties will be read thinly, through subjective good faith and broad managerial latitude, or more robustly, through purpose, governance and stewardship.

The article advances three connected proposals. First, section 172 should be interpreted through a stronger proper-

[1] Stephen M Bainbridge, 'Introduction' in Stephen M Bainbridge and others (eds), *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* (CUP 2018) 1.

purpose lens, so that an honestly asserted belief in corporate benefit does not suffice where the real object of the decision is managerial entrenchment, presentational short-termism or some other collateral aim inconsistent with fiduciary office. Second, section 174 should be developed to impose objective systems liability for serious failures to establish, maintain or use governance and monitoring structures adequate to material corporate risks. Third, section 172 should be understood as embodying what this article calls inclusive long-termism: a long-term conception of corporate success that treats the relational and systemic conditions of enterprise viability as internal to what directors are required to promote.

The argument advanced here is one of judicial development, not legislative reform. The Companies Act 2006 preserved open-textured standards whose content necessarily depends upon interpretation, especially in relation to corporate success, proper purpose, and directorial care.[2] The question is how courts should shape the post-codification law.

Part II reconstructs the English foundations and explains what the Companies Act 2006 changed, preserved and left unresolved. Part III identifies the central tension within the post-codification law. Part IV turns to Delaware. Part V develops the three proposed reforms. Part VI addresses the main objections and concludes.

[2] Explanatory Notes to the Companies Act 2006, paras 325–28, 338.

II. The English Foundations: From Equitable Discipline to Statutory Settlement

The English law of fiduciary loyalty did not originate in the public corporation. Its classical habitat was the trust, the agency relationship, and the officeholder entrusted with discretionary authority over another's interests. Yet the institutional logic of fiduciary doctrine remains central to company law. Where one person is entrusted with authority capable of affecting another's interests, the law must decide how far it is prepared to rely on *ex post* inquiry into motive, causation and loss, and how far it should instead insist upon *ex ante* structural discipline. Equity's characteristic response was to prefer the latter.

The classic authorities reveal both the severity and the rationale of this response. In *Keech v Sandford*, the trustee was required to account for a renewal obtained for himself even though the beneficiary could not have secured it.[3] The point was precisely that fiduciary restraint does not depend on proof that the principal would otherwise have obtained the benefit. The rule instead operates prophylactically, by denying the fiduciary the possibility of appropriating an opportunity connected with the office. The same structural logic later appears in *Regal (Hastings) Ltd v Gulliver*[4] and *Boardman v Phipps*.[5] Even where the company or trust could not itself exploit the opportunity, and even where the fiduciary acted in good faith, the law remained unwilling to

[3] (1726) Sel Cas Ch 61; 25 ER 223.
[4] [1942] 1 All ER 378 (HL) 386 (Lord Russell).
[5] [1967] 2 AC 46 (HL).

allow entrusted power to become a source of personal gain. A legal system seriously concerned with entrusted power cannot safely make its primary mode of control depend upon proving disloyal states of mind after the event. It must instead regulate position and power before abuse occurs. The no-conflict and no-profit rules therefore express the idea that certain forms of self-regarding conduct are structurally incompatible with fiduciary office.

Even so, this logic has always required adaptation in company law. Directors are not trustees in any simple or exhaustive sense. They govern an enterprise, deploy assets in pursuit of commercial objectives, assume risk and make strategic judgements under conditions of uncertainty. Company law has therefore had to accommodate entrepreneurial discretion without relinquishing fiduciary discipline altogether. Before codification, that accommodation was achieved through an uneasy combination of equitable conflict rules and common-law duties of care.[6]

The Companies Act 2006 sought to restate and rationalise this field while reorganising earlier fiduciary and common-law constraints in statutory form. In doing so it preserved the conceptual importance of fiduciary responsibility but also made a series of significant choices about the structure of directorial office. Three features matter most.

First, the Act preserved the anti-conflict core of fiduciary doctrine. Section 175 codifies the duty to avoid situations in

[6] *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461 (HL); *Re D'Jan of London Ltd* [1994] 1 BCLC 561 (Ch); Explanatory Notes to the Companies Act 2006, para 300.

which a director has, or may have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.[7] At the same time, it provides mechanisms of authorisation and thereby recognises the practical reality that modern companies cannot operate through an inflexibly rigid anti-conflict regime. The common law's prophylactic logic remains, but it is adjusted to corporate form by allowing certain conflicts to be managed through constitutionally recognised procedures rather than treated as automatically fatal.

Second, the Act codified the common-law duty of care, skill and diligence in section 174.[8] That provision is especially important because it is explicitly objective in part. It measures directors against a reasonably diligent person carrying out the same functions while taking account of any greater skill or experience the particular director in fact possesses. Section 174 therefore confirms that directorial office is not exhausted by honesty, sincerity or the absence of conflict. Directors are expected to perform governance functions with reasonable competence, attentiveness and seriousness.

Third, and most controversially, the Act introduced section 172.[9] This requires a director to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members, while requiring him to have regard to long-term consequences, employee interests, relationships with suppliers and customers, community and environmental impact, high standards of

[7] Companies Act 2006, s 175.
[8] Companies Act 2006, s 174.
[9] Companies Act 2006, s 172.

conduct, and fairness between members. The provision is often described as embodying enlightened shareholder value.[10] The phrase is useful up to a point, but it is imprecise. Section 172 does not establish stakeholder primacy, nor does it merely exhort directors to behave in an enlightened fashion while leaving the substance of corporate success unchanged. Rather, it structures the route through which success is to be pursued.

The statute therefore did more than codify. It provisionally settled the relationship between anti-conflict fidelity, competence in office and judgement about corporate success, but it did not resolve the most important interpretive questions. How subjective is section 172 in practice? What legal force attaches to the listed factors? What relation should courts draw between section 172 and proper purpose? How far can section 174 be developed to address failures of oversight, internal control and governance systems? These questions determine whether English law after codification will become thinner, more subjective and more deferential or whether it will retain and modernise the objective logic inherited from equity.

The Companies Act 2006 reorganised directors' duties in statutory form while preserving the underlying concern with entrusted power and adapting it to the institutional realities of the modern company. It did not itself enact a full jurisprudence of fiduciary stewardship, but neither did it leave the pre-existing equitable and common-law framework untouched. In doing so it left significant questions of content and direction unresolved,

[10] Explanatory Notes to the Companies Act 2006, paras 325–28; Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 1–2.

particularly in relation to corporate success, proper purpose and the demands of directorial care.

That point becomes clearer if attention is paid not only to what the Act did, but also to what it conspicuously left undone. It did not define success exhaustively. It did not specify whether the factors listed in section 172 are merely evidential prompts or substantive components of the duty. It did not determine whether an objectively improper purpose can defeat a sincerely asserted belief in corporate benefit. Nor did it prescribe in detail what governance systems directors must establish to satisfy section 174 in relation to modern enterprise risk. In each of these respects the statute leaves room for judicial interpretation.

These issues remain open not simply because Parliament legislated in broad terms, but because subsequent doctrine has not fully resolved them. Section 172 has often been read through the language of subjective good faith, with the result that its listed factors can appear more rhetorical than constraining.[11] Section 174, though objective in form, has not yet been systematically developed into a doctrine of systems-based responsibility for serious governance failure. Nor has proper purpose, while well established in relation to specific powers, been fully integrated into the general duty to promote the company's success.[12] The interpretation advanced here is therefore an argument for judicial

[11] Keay (n 10) 119, 205; Carrie Bradshaw, 'The Environmental Business Case and Unenlightened Shareholder Value' (2013) 33 LS 141–142.
[12] Andrew Keay and Joan Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35 LS 252, 254–255, 274–275; *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] AC 1343 [15]–[16].

development within an existing statutory framework whose central concepts remain under-specified.

III. Tension as Potential: The Unresolved Structure of the Post-2006 Law

The central tension within modern English company law is best understood as an unfinished accommodation between two competing intuitions. The first is that directors must be given real latitude to manage a complex enterprise, take risks and make commercial judgements under conditions of uncertainty. The second is that directors hold an office of entrusted power and therefore ought not to be judged solely by reference to sincere belief or broad appeals to business complexity. The post-2006 law contains both intuitions; the question is how they are to be reconciled.

Section 172 most clearly exposes this tension. On one view, the provision's requirement that a director act 'in the way he considers, in good faith' gives the duty a strongly subjective cast and encourages substantial judicial restraint. A director who can plausibly maintain that he honestly believed a risky strategy or aggressive restructuring would promote the company's success may therefore appear largely insulated from challenge. Yet the same subsection also requires the director, 'in doing so', to 'have regard' to long-term consequences, employee interests, business relationships, community and environmental impact, standards of conduct, and fairness between members. If that language is to

have practical legal consequences, section 172 cannot be reduced to sincerity alone.[13]

The same tension appears in the relation between section 172 and the proper purpose doctrine. English company law has long recognised that directors may act honestly and yet exercise power for an improper purpose. The doctrine prevents fiduciary control from collapsing into bare assertions of beneficial motive. A share issue designed to manipulate voting control, for instance, may be unlawful even if directors believe themselves to be acting in the company's interests. Yet section 172 has often been interpreted and analysed as though subjective good faith were the dominant consideration. The unresolved issue is therefore how far the proper-purpose doctrine should shape the content of the general duty to promote the company's success.[14]

Section 174 reveals a parallel tension. Its requirement that a director exercise 'reasonable care, skill and diligence', measured in part by 'the general knowledge, skill and experience that may reasonably be expected' of a person carrying out the relevant functions, suggests a robust basis for policing failures of competence and governance structure. In practice, however, courts have often approached directors' decision-making with considerable caution and deference, especially where liability would require close scrutiny of commercial judgement.[15] If section 174 is treated as little more than a residual negligence provision, it will have limited capacity to address the kinds of

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[13] Companies Act 2006, s 172(1); *Regentcrest plc v Cohen* [2001] 2 BCLC 80 (Ch) [120]; *R (People & Planet) v HM Treasury* [2009] EWHC 3020 (Admin) [44]–[46].
[14] *Regentcrest plc v Cohen* [2001] 2 BCLC 80 (Ch) [120]; Keay (n 10) 119, 205.
[15] Companies Act 2006, s 174(1) and (2); *Re D'Jan* (n 6); *Sharp v Blank* [2019] EWHC 3096 (Ch) [118]–[126].

serious oversight failure that modern corporate governance makes salient. Yet there is nothing in the text of the section that requires such weakness. On the contrary, the section's objective component appears designed to make office performance legally assessable.

This tension should be understood as revealing scope for judicial development in continuity with equitable tradition, rather than as a contradiction within the post-codification law. The Act has not dictated a complete and fully determinate model of directorial responsibility. Courts retain a choice about how to interpret the statutory duties, and that choice can be exercised in continuity with equitable tradition. The significance of that continuity is practical as well as conceptual. It means that the law need not await legislative amendment to respond to issues in modern corporate governance; the materials are already present.

That is why the US state of Delaware must be examined before the positive solution is offered. There is a temptation to resolve English law's tension by moving closer to Delaware, which is often admired as the paradigmatic modern corporate law jurisdiction.[16] It offers a body of fiduciary doctrine that seems to combine deference to commercial judgement with the possibility of liability for serious governance failure. For anyone concerned that English fiduciary law may be too rigid, too trust-like or insufficiently adapted to public companies, Delaware's approach may appear to offer the most plausible route of development. Unless the attraction of that model is shown to be misguided, the

[16] Bainbridge (n 1) 1–3.

case for an English jurisprudence of stewardship remains incomplete.

IV. Delaware's Attractiveness and Its Inadequacy

Delaware's prestige in corporate law is not accidental. It is a developed jurisdiction with specialist courts and a large body of case law. The Delaware Court of Chancery is widely recognised as the pre-eminent forum for disputes concerning the internal affairs of corporations, and Delaware corporate law is widely treated as the dominant American model in this field. Its doctrines of fiduciary duty and standards of review have developed against a background of intense transactional practice and repeated judicial engagement with board decision-making.[17] Where English law sometimes appears sparse, Delaware appears rich, nuanced and institutionally confident.

That reputation makes Delaware an especially powerful comparator. The attractiveness does not lie in prestige alone, but in doctrine. Delaware appears to offer a way of addressing serious governance failure without abandoning broad deference to business judgement: direct self-dealing remains subject to classic loyalty review, while failures of board oversight are addressed through the language of good faith and the *Caremark* line of liability for sustained failures of monitoring and reporting. On that model, boards may fail not only by serving themselves, but by consciously failing to establish or respond to systems of

[17] Delaware Court of Chancery, 'Who We Are' <https://courts.delaware.gov/chancery/> accessed 9 April 2026; Bainbridge (n 1) 1–3.

compliance and control. Delaware therefore seems to supply a distinctly modern response to governance failure, one capable of reaching derelictions of attention, monitoring and compliance oversight that a narrower anti-conflict model might leave insufficiently addressed.[18]

The attractiveness is heightened by a common criticism of English law. If loyalty remains conceptually tied to conflict and self-dealing, then non-conflicted but egregious governance failures may seem to fall into a gap. Delaware appears to close that gap by extending the language of loyalty and good faith to certain failures of board oversight, particularly where directors have consciously failed to implement or monitor systems of reporting and control.[19] It can therefore appear to offer a more serious legal response to grave failures of board oversight.

That appearance is misleading. Delaware's solution is conceptually unstable because it makes loyalty do work that is not naturally its own. Loyalty concerns the ends for which fiduciary power is exercised. It addresses conflict, self-preference, misuse of entrusted opportunity and the corruption of office by collateral purposes. By contrast, a board's failure to establish proper reporting systems or respond adequately to compliance risks is better seen as a failure of care, attention or office performance. Delaware's tendency to subsume such matters under good faith and loyalty stretches the meaning of disloyalty to cover conduct that is not about divided purpose at all.

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[18] *In re Caremark International Inc Derivative Litigation* 698 A 2d 959 (Del Ch 1996) 970–71; *Stone v Ritter* 911 A 2d 362 (Del 2006) 369–70.

[19] Stone v Ritter (n 18).

This has practical consequences. Once loyalty is used to condemn serious non-conflicted failures of oversight, courts need some way to distinguish ordinary managerial error from the kind of breakdown grave enough to justify intervention. Delaware's answer has been to insist upon high thresholds: bad faith, conscious disregard and sustained failure to exercise oversight responsibility.[20] This preserves the rhetoric of serious accountability while maintaining broad deference to management, but at a considerable price. The law becomes dependent on retrospective attempts to determine what directors knew, noticed, appreciated, ignored or deliberately failed to confront.[21]

That is a poor organising principle for the governance of large companies. Boards are collective bodies and their knowledge is mediated through committees, management, advisers and incomplete records. The question whether 'the board' consciously disregarded a known obligation often has no clear factual counterpart. It invites courts to reconstruct a collective mental state from records not designed to answer that question. The resulting inquiry is both expensive and unreliable.

A framework built around bad faith can generate dramatic doctrinal language without supplying clear *ex ante* guidance. Directors may know that they must not consciously disregard their duties yet still lack concrete legal direction about what governance systems, reporting structures or monitoring practices are actually required. The high-profile *Disney* litigation illustrates the problem: it generated severe judicial language and

[20] In re Caremark (n 18); Stone v Ritter (n 18).

[21] Robert B Thompson, 'The Case for Iterative Corporate Law' (2012) 1(1) *Journal of Law and Courts* 3; *Stone v Ritter* (n 18); *In re Walt Disney Co Derivative Litigation* 906 A 2d 27 (Del 2006) 66–67.

enormous cost, yet offered limited stable guidance about what ordinary boards are legally required to do before governance failure occurs.[22]

The weakness becomes sharper when one asks how Delaware's model addresses specific modern governance problems. A board may fail to create structures for monitoring climate transition risk, physical risk, disclosure exposure or the financing consequences of a carbon-intensive model. Such failures are unlikely to appear as conflicted transactions or to generate the dramatic evidence needed to prove conscious disregard. The real problem is structural: whether the board treated material long-term risk as requiring institutional oversight.[23]

The same is true of labour abuse in complex supply chains, chronic compliance weakness or data-security failure. A board may not knowingly authorise abuse or breach yet still fail to create reporting channels, escalation mechanisms and supervisory structures capable of bringing serious risk to the centre of decision-making. The wrong is not one of loyalty; it is a failure of governance architecture.

One might defend Delaware by saying that it stretches loyalty because ordinary care claims are too weak or easily exculpated. There is some force in that explanation, but this instrumental defence only underscores the conceptual strain. It treats culpable inattention as a species of infidelity because the law lacks a cleaner doctrinal route for treating it as serious.

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[22] In re Walt Disney (n 21).
[23] Keay and Loughrey (n 12).

English law need not make that move, because section 174 of the Companies Act 2006 already provides the better route.

In short, Delaware law is attractive because it appears to modernise fiduciary doctrine for the public corporation. It is inadequate because it blurs loyalty and care, relies on speculative mental-state inquiry and intervenes rarely, expensively and too late. English law should preserve Delaware's insight that governance failure matters while rejecting its unstable doctrinal route.

V. The English Alternative: Towards a Jurisprudence of Stewardship

The English alternative is not a wholesale reinvention of company law; it is a programme of judicial development within the existing statutory framework. The underlying idea is stewardship. Directors are not trustees in every sense, but they are office-holders entrusted with power over a continuing enterprise whose success depends upon legally recognisable conditions of sustainability, institutional competence and responsible governance. A jurisprudence of stewardship would coordinate loyalty, purpose, care and long-term judgement into a coherent structure of directorial responsibility.

A. Proper Purpose within Section 172

The first step is to reconstruct section 172 of the Companies Act 2006 through a stronger proper-purpose analysis. Much modern discussion treats section 172 as dominated by the subjective formula that the director must act in the way he considers, in good

faith, would be most likely to promote the success of the company. The leading formulations have emphasised whether the director honestly believed the decision was in the company's interests.[24] That reflects a legitimate concern: courts should not simply substitute their own view of commercial wisdom for that of directors charged with managing the company. However, if subjective honesty becomes the whole of section 172, the provision loses much of its legal structure. It becomes too easy for directors to convert fiduciary accountability into an assertion of personal belief.

That cannot be right: section 172 is not merely a sincerity rule, but a fundamental duty attached to fiduciary office. It requires directors to promote corporate success through a mode of deliberation structured by identified factors. The question is therefore not merely whether the director believed he was acting in the company's interests, but whether the power of management was exercised for purposes consistent with the office itself.

The proper-purpose doctrine offers the appropriate conceptual tool. In English company law it has long functioned as a control on the use of directors' powers. Cases on share issuance and shareholder-oriented actions show that a power may be exercised honestly yet for an improper purpose.[25] That distinction reveals a limitation on fiduciary authority deeper than honesty alone. The fiduciary must not only avoid acting

[24] *Regentcrest* (n 13) [120].

[25] Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 (PC) 835; Eclairs Group v JKX (n 12).

dishonestly; he must use his powers for the reasons the law recognises as appropriate to the office.

Applying that logic to section 172 would sharpen the section considerably. It would mean that courts need not accept at face value an assertion that a decision was thought beneficial to the company if, viewed in substance, the decision served collateral purposes inconsistent with proper stewardship. Those collateral purposes may include classic self-interest, but in modern company law they are often subtler. They include managerial entrenchment, the suppression of inconvenient information to preserve executive reputation, the pursuit of short-term metrics at the expense of long-term resilience, or the strategic neglect of stakeholder and systemic risks treated as external to the company's real interests.

This reading is better aligned with the structure of section 172 itself. Directors must act for the success of the company while having regard to long-term consequences, employee interests, supplier and customer relationships, community and environmental impact, standards of business conduct and fairness between members. Those matters would be reduced to near irrelevance if section 172 were nothing more than a test of subjective sincerity. Proper-purpose reasoning helps explain how the statutory factors can have real doctrinal force without transforming the section into open-ended stakeholder review.

To be clear, this is not to suggest that section 172 already unambiguously incorporates the full proper-purpose analysis defended here. The prevailing tendency has been to read the provision primarily through subjective good faith, while proper purpose has remained more closely associated with the exercise

of specific powers than with the general duty to promote success. The argument is therefore one of judicial development, not simple restatement. That development would remain constrained by the existing limits of proper-purpose doctrine: the question is not whether the court regards the decision as commercially unwise, but whether directors' stated pursuit of corporate success can be reconciled with the legal purpose for which the relevant managerial power was exercised.

Nor would this approach collapse section 172 into a judicial mandate to review the merits of business strategy. The inquiry would remain legal and properly structured, since a court would not be required to ask whether it would itself have made the same decision. It would ask whether the power of management was genuinely exercised for the kinds of purposes that section 172, read in light of fiduciary constraints on directors' powers, permits directors to pursue. In answering that question, the court would look not simply to verbal assertions of belief, but to board materials, incentive structures, deliberative process, surrounding context and the relation between the stated rationale and the company's sustainable interests.

This matters particularly in modern governance contexts where serious risk often arises not from classic self-dealing, but from the distortion of corporate judgement by short-term managerial incentives and the underweighting of longer-horizon threats.[26] A board may, for example, pursue a course that preserves short-term market presentation by underinvesting in

[26] John Kay, *The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report* (July 2012) Executive Summary; Jonathan Bailey, Vincent Bérubé, Jonathan Godsall and Conor Kehoe, 'Short-Termism: Insights from Business Leaders' (*FCLTGLOBAL*, January 2014) < https://perma.cc/7PB7-2BSM >.

compliance systems or internal reporting structures, while continuing to insist that it believed the strategy to be in shareholders' interests. A purely subjective reading of section 172 would struggle to scrutinise such conduct unless clear bad faith could be shown. Proper-purpose analysis provides a more stable and more orthodox route. It asks whether corporate power was being used for the lawful pursuit of the company's success, or whether the claimed objective was masking a collateral end inconsistent with the disciplined exercise of fiduciary office.

B. Objective Systems Liability under Section 174

The second step is to develop section 174 into what this article calls objective systems liability: liability directed not at subjective bad faith, but at the objective adequacy of the governance systems through which directors receive information, monitor risk and supervise compliance. If the modern corporate problem is often one of poor information architecture, weak controls and board-level oversight failure, then company law must be able to address those deficiencies directly. There is no need to do so by stretching loyalty or importing a bad-faith framework. Section 174 already provides a more coherent doctrinal basis.

The proposal is not that every corporate misfortune should be recast as a breach of the duty of care. Nor is it that directors should become guarantors of compliance or enterprise outcomes. The claim is that where the company's scale, business model or risk profile makes certain governance systems objectively necessary, a serious failure to establish, maintain or use such systems should be capable of amounting to a breach of section 174. It is not that every compliance lapse should generate liability, but that where the nature of the company's business,

regulatory environment or exposure makes some level of monitoring system objectively necessary, the sustained absence of such systems should be capable of constituting a breach without any need to prove conscious disregard.

The proposal fits the statutory language. Section 174 measures directors against the reasonably diligent person carrying out the functions of the relevant director. That objective structure means English law need not pretend that failures of monitoring are really failures of loyalty. It can address them as what they are: failures to exercise an office with adequate competence, diligence and organisational discipline.

The proposal also improves conceptual clarity. The wrong is not disloyalty, but deficient stewardship in the exercise of a professional office. Large firms are governed through systems, reporting lines, committees, controls and information structures. If law is to discipline governance meaningfully, it must be able to address those structural features directly.

The evidence needed for such claims is also realistically obtainable. Courts can examine board minutes, committee structures, internal audit arrangements, risk registers, reporting protocols, escalation mechanisms and expert governance standards. They can ask whether systems existed, whether they were adapted to the enterprise's risks, whether information reached the board in a usable form and whether repeated failures exposed architectural weaknesses. These questions do not require courts to decide whether a collective board really knew or consciously disregarded enough to warrant fiduciary condemnation.

This has direct relevance to specific governance problems. Each of the following may present a case of deficient systems: a heavily regulated firm that lacks meaningful compliance reporting lines; a multinational enterprise with no serious board-level visibility over labour abuse or environmental disruption in critical supply chains; or a data-intensive firm whose information-security governance is fragmented and under-resourced. The legal issue is not whether directors hated the company or consciously courted disaster, but whether they fulfilled the governance responsibilities inherent in directing it.

An obvious objection is that if a company suffers a major failure, courts will simply infer with the benefit of hindsight that its systems must have been inadequate. The objection is not decisive since the proposed standard is not outcome-based. A company may suffer substantial loss despite having systems that were reasonable at the time, just as a company may avoid visible disaster despite having systems that were seriously deficient. The court's task is therefore to assess *ex ante* adequacy rather than to reason backwards from corporate failure, asking whether the governance architecture was reasonably proportionate at the time to the company's risk profile, regulatory environment and operational complexity.[27]

Nor does this approach imply that courts must become experts in running businesses. Courts would not ask whether the board adopted the best conceivable governance architecture. They would ask whether the board met the standard of reasonable diligence in establishing and maintaining systems commensurate with the company's functions and risks. The inquiry would

[27] Companies Act 2006, s 174(2)(a).

therefore be one of adequacy, not optimisation. That distinction preserves managerial discretion while refusing to treat governance structure as legally optional.

This route is preferable to that of the Delaware system. Delaware reaches oversight failure by forcing it through the language of bad faith and conscious disregard, but English law can reach the same terrain more directly and more coherently. It need not wait for exceptional psychological culpability. It can insist, through section 174, that serious governance responsibilities are part of the ordinary legal content of directorial office.

C. Section 172 as Inclusive Long-Termism

The third step is to interpret section 172 as imposing a substantive duty of what this article terms inclusive long-termism. The term is used to denote a legal conception of corporate success in which directors are required to pursue the company's success by reference to its long-term, relational and systemic conditions of viability rather than through any model of stakeholder primacy or short-term shareholder gain alone. The danger in current interpretation is not only that section 172 is read too subjectively, but that the idea of success is treated too narrowly. If the provision is understood as requiring little more than an honest belief in shareholder benefit, the statutory list of factors becomes largely rhetorical. Long-term consequences, employee interests, business relationships, environmental impact and standards of conduct are then reduced to matters directors may mention without those matters materially shaping the legal content of the duty. That reading is difficult to reconcile with the structure of the section.

The more legally coherent interpretation is one of inclusive long-termism. This is not stakeholder primacy. Section 172 remains framed around promoting the success of the company for the benefit of its members and nothing in the provision converts directors into general arbiters of shareholder welfare.[28] But the route to that success is legally structured. The listed factors are not external moral aspirations appended to an otherwise unchanged model of shareholder advantage; they are part of the statutory framework through which corporate success is to be pursued.

Such an interpretation is not yet the settled position of English law: section 172 has often been treated primarily through subjective good faith, with the result that its listed factors can appear more rhetorical than constraining, and that tendency has made the provision appear difficult to police.[29] On this article's view, the section is not treated as having already settled the matter, but as making available a judicially defensible interpretation that gives real weight to the statutory factors without converting them into freestanding stakeholder rights.

This interpretation offers the most coherent reading of the statutory structure.[30] Parliament did not merely instruct directors to promote success and leave the matter there. It required them, in doing so, to have regard to long-term and relational considerations.[31] That drafting choice would be oddly weak if those considerations were no more than evidential prompts. It makes better sense if the provision is understood as

[28] Companies Act 2006, s 172(1).
[29] *Regentcrest* (n 13) [120]; Keay (n 10) 93–4, 99.
[30] Keay (n 10); Bradshaw (n 11).
[31] Companies Act 2006, s 172(1)(a)–(f).

embedding a legal conception of corporate success that is temporally extended and institutionally situated. Directors are required to pursue the company's success not in abstraction, but in light of the conditions on which that success depends.

Inclusive long-termism therefore requires more than procedural awareness of the statutory factors. A board should not satisfy section 172 merely because minutes record that employees, environmental impact or long-term consequences were mentioned before the preferred course was adopted. The law must be able to ask whether those matters were engaged with seriously enough to form part of the board's actual conception of corporate success.

The strongest illustrations arise in relation to systemic or long-horizon risk. Climate-related exposure is an obvious example. For some firms, transition risk, physical risk, disclosure risk, financing risk and regulatory pressure are not peripheral social concerns but central determinants of future viability. A board that fails to integrate those matters into its decision-making may not be discharging section 172 merely because it can assert an honest belief in present shareholder value. The same is true of chronic supply-chain abuse, repeated compliance failures in a regulated business or commercial practices that predictably erode the trust of employees, customers or counterparties on which the enterprise depends. In such cases the issue is not whether directors owe free-standing duties to every affected group, but whether they have lawfully promoted the company's success considering the conditions that make such success durable. The same basic logic is reflected in adjacent fiduciary contexts, where financially material long-term risks cannot simply be treated as

external to the interests that fiduciaries are bound to protect.[32] In both contexts, fiduciary judgement about long-term financial interests cannot ignore systemic risks that bear directly on the durability of those interests. The analogy should therefore be used carefully. Company directors are not pension trustees, and section 172 is not a pensions provision, but the broader point holds.

The comparison with Delaware is again instructive. Delaware asks whether an exceptional threshold of bad faith or conscious disregard can be shown. The English model asks whether the company's long-term success, as structured by statute, was pursued through proper purpose, adequate governance and serious attention to sustainable enterprise. That is not a weaker standard, but a more coherent one.

VI. Objections and Conclusion: Why Stewardship is the Better Reading

The most predictable objection is that the proposals advanced here judicialise business judgement. If section 172 is read through proper purpose, section 174 through objective systems liability, and section 172 again through inclusive long-termism, are courts not being invited to scrutinise the merits of business decisions under a fiduciary vocabulary? The concern must be taken seriously, but it is overstated.

None of the proposed developments authorises free-ranging merits review. Proper-purpose analysis asks whether a power was used for legally appropriate ends. Systems liability asks

[32] Law Commission, *Fiduciary Duties of Investment Intermediaries* (Law Com No 350, 2014) para 6.56.

whether governance architecture was objectively adequate to the company's material risks. Inclusive long-termism asks whether directors genuinely engaged with the statutory factors and whether the conception of success adopted was legally intelligible in light of those factors. These are legal questions about office, process and statutory structure, not invitations to courts to become shadow boards.

In one respect the English model is less intrusive than Delaware's. A regime centred on bad faith and conscious disregard sounds deferential because the threshold is so high. Yet to determine whether that threshold is met, courts may be drawn into speculative inquiries into motives, awareness and collective consciousness. By contrast, a law focused on objective purpose, governance structure, systems adequacy and reasoned attention to statutory factors channels the inquiry into more verifiable forms of proof.

The second objection is that the proposals conflate loyalty and care. This would be serious if the article argued that all governance failure is a breach of loyalty, but it does not. Proper purpose remains centrally concerned with loyalty in the sense of office-aligned use of power. Section 174 addresses care in the structured performance of governance responsibilities. Section 172 mediates between them by defining the legally relevant conception of corporate success. The resulting framework is one of stewardship, not doctrinal collapse.

The third objection is that section 172 cannot bear the weight of substantive long-termism because Parliament

deliberately avoided creating stakeholder-enforceable duties.[33] The point is correct as far as it goes, but it does not defeat the argument. Nothing in the proposed reading creates freestanding stakeholder claims or equalises the interests of all constituencies. Members remain the beneficiaries of the company's success. The claim is simply that Parliament chose to define the promotion of that success through a list of factors that make long-term and relational conditions legally relevant.

The fourth objection is practical. Would stronger duties not encourage opportunistic litigation and defensive governance? Here the English procedural setting matters. Derivative claims require permission, and the court already filters weak or bad-faith cases.[34] Those gatekeeping mechanisms reduce the risk of opportunistic 'strike suits'. Clearer substantive standards may also reduce wasteful litigation by making expectations more predictable.

The final objection is more political than doctrinal. The article does not argue that directors must maximise welfare across all affected groups, nor that company law should become a general instrument of public policy. It argues only that English law already recognises that corporate success is not intelligible in isolation from the long-term, relational and systemic conditions on which the enterprise depends. A company that undermines those conditions may injure others, but it also jeopardises its own durable success.

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[33] Companies Act 2006, s 172(1); Explanatory Notes to the Companies Act 2006, paras 325–328; Andrew Keay (n 10) 111–113.

[34] Companies Act 2006, s 261.

The judicial construction of fiduciary loyalty is not a marginal classificatory issue, since it determines how the law understands directorial office and what kinds of governance failure it treats as serious. English law need not choose between antiquated anti-conflict formalism and Delaware's unstable subjectivism. It can instead develop a coherent law of stewardship. On that view, directors remain decision-makers rather than trustees in every respect, but they are recognised as holders of an office whose powers must be exercised for proper purposes, within governance systems adequate to material risks and in pursuit of a conception of corporate success structured by long-term and relational conditions of enterprise viability.

If English law develops in this direction, fiduciary loyalty will cease to function merely as a narrow anti-conflict doctrine and instead become part of a broader jurisprudence of responsible corporate governance. The better alternative to Delaware is not less accountability, and not more moralism, but a coherent law of stewardship.