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Foreword

I am very pleased to introduce the first edition of our student journal, the Sunderland Journal of Law and Criminology. I would like to thank all of the students and staff involved in the editorial team and all of our peer reviewers who helped in the creation process of the journal. In particular, I thank Dr Helen Williams for acting as the liaison between me and the school of criminology and in promoting the journal in her department to allow us to be a cross faculty publication. Thanks must also go to Dr Donna Peacock (now of the University of Strathclyde) for all of the support and advice she gave us in setting up the journal and to Dr Ashley Lowerson (Northumbria University) for the ground work that she put in place with our previous iteration, the Sunderland Law Journal, without which we would not have had as solid a foundation to build upon. Finally, thanks go to our student authors who's hard work and enthusiasm in producing their articles and case notes allows us to create this publication to showcase all of their excellent work.

The journal is a cross faculty production which showcases work from our students across all levels and programmes in the schools of law and criminology respectively. In this issue, Louise Ward discusses the rise in fake news and how, in the digital age, social media is able to amplify this. In her article she asks whether the spreading of untruths should be considered a social harm and how it can be used to drive moral panic. Kayleigh Atkins presents a case study on the Covid-19 pandemic and uses zemiology as a means of making sense of the responses that the UK government implemented during the crisis. Next, Paige Scully explores the tragic killing of Lee Irving and how discrimination played a key role in his murder. She asks whether further research is needed within the fields of law and criminology to recognise the diverse number of disabilities in society and whether reform is needed to protect those with disabilities within the criminal justice system. In her second article of the issue, Louise Ward asks whether our understanding of crime should move away from asking why people commit offences and instead ask why individuals stop committing crimes. She goes on to explore whether desistance is an individual act rather than a social act. Finally, Joshua England considers the case of Joseph McCann, a serial sexual offender, and uses this case study to ask whether we can do better in balancing out the approaches of rehabilitation and retribution when sentencing offenders.

This issue also contains two case notes, the first of which, by Ismail Anil Kuru, explores how a decision of the German Supreme Court ending the recognition of the 'British style' limited company used by German after the United Kingdom's exit from the European Union, impacts German businesses going forwards. Next, Miurin Kanijude Amarnath considers a recent Sri Lankan case which looks at the use of corporal punishment in that jurisdiction, asking whether a higher degree of protection is needed for children subjected to physical punishment.

I hope you enjoy reading this issue as much as we enjoyed putting it together and we look forward to bringing you issue 2 in the Autumn of 2024.

Zach Leggett
Editor in Chief

About the Sunderland Journal of Law and Criminology

The Sunderland Journal of Law and Criminology provides students with an opportunity to present their work to faculty members and peers and aims to invigorate both undergraduate and postgraduate law and criminology students' active participation in the community of socio-legal research. The Journal unites students and staff by helping students to engage in the publishing process with support and guidance from experienced members of academia. The peer-reviewed, open-access journal is devoted to socio-legal research and is a platform to publish notes, case comments and papers. The journal is also interested in any proposals to draft and/or amend the existing laws. Our law and criminology students are invited to submit papers, articles and case comments engaging with any area of law and criminology.

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Article

A case study on fake news as a new form of crime or harm in the modern world

Louise Ward

Abstract:
The concept of fake news has been around for many years, dating back centuries. However, it must be argued that the emergence of the world wide web and the recent ascendancy of social media have facilitated an explosion of fake news due to the ease of communication becoming a tool for the spread of misinformation. This article will provide a clear argument for online fake news being considered a "new" site of online communication that generates social harm. To achieve this, there is a dedicated focus on (a) the apparent popularity of conspiracy theories, (b) how the COVID-19 pandemic appeared to be a watershed moment for understanding the potential impacts of fake news, and (c) the utility of moral panic analysis for making criminological sense of these recent developments.

Keywords: zemiology, fake news, crime, social harm, internet

Firstly, this article shall provide an in-depth overview of social harm, focusing on the theoretical perspective of Zemiology, and in particular the effects and implications of the rise and proliferation of the internet in everyday life. Following this shall be a review of the impact of fake news as an example of how the internet can play a significant role in facilitating harm in everyday social life. More specifically, the following will focus on the perceived rise of conspiracy theories and fake news to further evaluate how the internet and social media may have facilitated an increase in the supposed legitimacy of conspiracy theories. This article will then conclude with an outlining of the case for the utilisation of the well-founded criminological concept of 'moral panics' (Cohen, 1972; Garland, 2008) for understanding the rise and consequences of fake news as a potential site of social harm. Finally, this article will summarise recent responses to the rise of fake news and outline current considerations of what can be done to assess the potential dangers it presents in a supposedly post-COVID world.

Zemiology is one of the most well-known criminological perspectives seeking to highlight and understand social harms that fall outside the remit of formally defined crime. It first emerged in the late 1990s when a group of academics began thinking about how criminologists and sociologists could develop 'social harm' into a theoretical category that provided a means to consider how damages, losses, and harms are experienced in everyday life but do not come under the formal definition of being "criminal". All their

work and research were collated, and this would inevitably be published in a book called 'Beyond Criminology: Taking Harms Seriously' (Hillyard et al., 2004). There were nine fundamental criticisms of the discipline of criminology and these ranged from: crime has no ontological reality where what is defined as a crime changes through time and can vary in different societies and cultures; criminology perpetuates the myth of crime where criminologists typically take crime as an unproblematic concept with little or no attempt to offer a definition; and, criminology excludes serious and widespread harms (Hillyard and Tombs, 2004). These criticisms are highlighted further by Roberts (2011: 13) who argues "the process of criminal justice mystifies rather than clarifies what is harmful and what might be done about it". Boukli (2018) argues that criminology should also focus on any act that may be harmful to oneself or others, regardless of if it is defined as a crime or not. Social harm can come in many different forms, whether this is physical, economic, psychological, environmental, or even cultural. It is seen as a wider recognition of the inability to have needs met, damages not recognised in law, long and short-term damage to bodies and loss or absence of social essentials. Boukli (2018: 33) argues for the importance of the concept of social harm and states that "harm is seen to be a fundamentally more useful concept than crime for understanding a whole host of harmful social phenomena". This is not to say harm can overrule the notion of crime; however, it is two concepts that could work together in harmony to help us further understand and gain insight into the 'hidden' or 'disregarded' problems people are facing.

The emergence of the World Wide Web and the creation of social media has become a huge part of people's everyday lives and even though it comes with many positives, it would be unfair to say it did not come with equal to, if not more, dangers for society. The arrival of 'new' media, such as the creation of the radio, television and comics, has always been greeted with mass concern from the public. However, as Newburn (2017) argues, no new medium has ever raised as much concern or scepticism as the internet, which he suggests can be a testimony to the immense power and reach it holds, further reflecting the vast extent of the harms and dangers it can bring to society. The internet has provided promises of privacy and freedom of speech since its public inception. However, Atkinson and Rodgers (2016) argue that the internet, particularly digital and social media are 'cultural zone of exception' where actions *are* largely free from any consequences, but that this freedom must not be mistaken for pro-sociality. These spaces of cultural exception are seen as places where real and virtual harms are permissible due to a lack of prohibition or sanction (Atkinson, 2019). Wood (2017) previously researched social media platforms, more specifically Facebook, and argued that these sites create an online phenomenon that he termed anti-social media. He explained antisocial media as "transgression aggregators: sites dedicated to hosting (1) footage of illicit acts, (2) discourses that condone or legitimise these acts, and (3) forums for individuals to discuss these acts" (Wood, 2017: 169). He also proposed the concept of algorithmic deviancy amplification where individuals increasingly encounter content that promotes or condones illicit acts because of their use of

the internet. This research shows the dangers of online platforms and how easy and widespread information has become.

The UK government has put policies in place to try and keep the internet a safe space for all involved through their Online Safety Bill. UK Parliament (2022: 1) explains it as "a bill to make provision for and in connection with the regulation by OFCOM of certain internet services; for and in connection with communications offences; and for connected purposes". This bill did get paused in the summer of 2022 due to Conservative Party turmoil, however, they have stated it will come back to fruition in December 2022. The Online Safety Bill has a key focus on regulating user-generated content, it will hold social media accountable for protecting children online and the government said it will also criminalize the encouragement of self-harm where platforms will be required to remove any content that may encourage someone to physically harm themselves – or else risk penalties under the legislation.

Fake news and the spread of misinformation are not new phenomenon, and it cannot be said that they arose due to the emergence of the internet (Levi, 2019). However, what must be acknowledged is that today's communication ecosystem, and technology in general is not identical to that of the 19th or even 20th century. This field of communication has been substantially changed by the internet and the increasing prominence of social media platforms, which Lazer et al. (2018) argue is due to access being made cheaper and new channels being offered for the dissemination of information. Disinformation of information is considered as deliberately trying to create harm to a person, social group, organisation, or country by spreading fake news meanwhile misinformation is seen as fake news being spread but not created with any intention of harm being caused (UNESCO, 2018). False communication, lies, propaganda and media bias have always been prominent, extending back centuries, however, the concept of fake news as online misinformation today (either as deliberate misinformation or accidentally believing and spreading misinformation) is widely recognised as a real harm and a potentially dangerous consequence of the rise and proliferation of the internet (Cover et al., 2022). Finding references in relation to the new concept of fake news before 2016 proves to not be an easy task (Tandoc et al., 2017). Singh (2020: 1) defines online fake news as a "specific type of digital misinformation that poses serious harm and threats to democratic institutions, misguides the public and can lead to radicalization and violence". This definition gained popularity during the 2016 presidential campaign (McGonagle, 2016), where for the first-time newspaper articles highlighted and drew attention to the increase of fake news being distributed through Facebook, regarding issues related to the political contest at the time (Silverman and Alexander, 2016). Following the surprise victory of the Republican candidate, many authors started linking fake news with disinformation being spread by social media platforms (Lazer et al., 2018; Tandoc et al., 2017).

Miró-Llinares and Aguerri (2021) argued that this election was the turning point which brought the idea of needing to regulate fake news online public, whether this is through requiring social media

platforms to prevent its dissemination or through the criminalization of those who purposely spread misinformation. Singh et al. (2021) argue that not only individuals but society itself can suffer the consequences of fake news, due to it being so easy to spread in a timely manner. This is because it can break the authenticity that the news is responsible to keep balanced and it results in readers being persuaded to read and welcome false or biased ideas, hence why it is a common theme used by propagandists to convey their political agendas or messages (Khaldarova and Pantti, 2016). The traditional way of verifying online sources was always manually going through the content and having individuals that are specialised in that area fact-check what is written, however, this is something made very difficult, if not impossible, because of how easily content can be diffused to a large volume of people (Conroy et al., 2015). With the influx of social media usage, consumers create and distribute more information than ever (Jermsittiparsert, 2019). As Suangpang et al. (2021) argued, even professionals in a specific field must consider a plethora of factors before judging an article's validity. An automated response would be needed to battle this, however, something of that magnitude is very hard to create, plus people will almost always find a way around it.

The COVID-19 crisis is argued to have "increased the perception that fake news and disinformation are a threat" (Miró-Llinares and Aguerri, 2021: 3). The magnitude of fake news being spread in this period of time was so prominent that the World Health Organisation (2020) had to warn the public that the pandemic was accompanied by an infodemic of information. The United Nations Interregional Crime and Justice Institute (UNICRI, 2021) published a report about the misinformation spread during COVID-19 titled 'Stop the virus of disinformation'. Antonia Marie De Meo, the UNICRI director, stated that "violent extremists, terrorists and organized criminals are trying to take advantage of the COVID-19 pandemic to expand their activities and jeopardize the efficiency and credibility of response measures by governments". According to the situation review conducted on COVID-19, the population has been heavily influenced by fake news in a plethora of areas, the main one being the side effects of the vaccine. As a result of this, the influence of fake news had a detrimental effect on many people's decision-making, and many refused to get the vaccine. Therefore, not only is fake news causing emotional harm in that people are being deceived but also, as Pattaya Mail (2021) argued, the refusal to undergo the vaccine can create physical harm as it may mean COVID can spread around faster, causing harm to the national health system, economy, and people's quality of life.

There are a number of reasonings as to why groups and individuals may create and spread fake news, however, one of the main running themes is economic gain. Fake news makers tend to create sexy, deceptive, or entirely false headlines to enhance their readership, online sharing, and revenue made from internet views. Similar, to the 'clickbait' headlines, online news stories and social media platforms are financially dependent on advertisement money, regardless of if the material is true or not (Ahmad et al.,

2020; Suanpang et al., 2022). This can relate to research by Box (2002) who developed a theory of crime and power through the concept of mystification. The internet can be an example of what Box would call an ultra-competitive capitalist market where, due to its competitive nature, it actively encourages people to break the law in complex and specialised ways, or in this case to commit harm and spread false information for their own gain. Apart from economic gains, there are alternative reasons why fake news is created, such as it may be used for political gain involving manipulative techniques, psychological persuasion or it could be used for the creation of conspiracy theories to confuse consumers and cast doubts on what is facts or evidence (Ahmad et al., 2020).

Stanton (2020) described the era we are now living in today as the golden age of conspiracies. From claims that the moon landing was a hoax to claims that of a conspiracy among airline pilots to hide the fact that the Earth is flat, social media has seen an array of conspiracies stated as 'facts'. The term 'conspiracy theories' encompasses factually unverified attempts to explain certain phenomena (Cover et al., 2015). As Singh Grewal (2016) states, they usually take the form of narratives that allege secret plans by powerful entities (the government or the super-rich for example) to harm or destroy a section of the population. The concept of conspiracy theories precedes the modern and most recent definition of fake news by about a century; however, it is argued that fake news "extends, exacerbates, and affirms the reach of conspiracy theory beliefs" (Cover et al., 2015: 79). Throughout the 20th century conspiracy theories emerged and waned, often in response to a significant or controversial event occurring, for example, who killed US President John Kennedy was a popular one that resurfaces from time to time. This idea of conspiracy theories being more prominent in times of controversiality or in times of crisis is a relevant and established one. Dacombe (2021) found that these ideas are not always prominent in society, but have certain peaks throughout time, commonly during a catastrophic event or a time of social upheaval. Conspiracies were recognised in previous pandemics that occurred around the world, including the Black Death, the Russian flu of the late 19th century and the 1918 flu pandemic. However, as previously stated, the way in which people communicate with each other has changed rapidly over the years due to the emergence of social media platforms, which means that it is significantly easier to share and consume information which is produced by what appears to be reliable sources. Conspiracy theories serve as a "compensatory explanation when, among some people, an existential need is threatened" (Douglas et al., 2019: 8). Social media and the internet generally, encourage individuals to go out and 'discover' information being promoted by their online networks as a substitute to passively accepting data and facts produced by established sources.

Conspiracy theories have a common theme of taking advantage of people, due to them only becoming prevalent in times of crisis, a time in which people are at their most vulnerable. In addition to this, conspiracy theories also offer and allow individuals to find a degree of stability in a confusing or

unsettling time. Vittert (2019) found in a study that 50% of Americans believed at least one conspiracy theory they have heard, this ranged from the theory that the 9/11 attacks were fake to the idea that Barack Obama was born in Kenya, not the USA as required under the US constitution and many more. In June 2020, Pew Research produced a survey on conspiracy theories and found that most Americans (71%) have heard of a conspiracy theory from some type of online source that powerful people intentionally planned the coronavirus pandemic. A quarter of those adults saw at least some truth in it, with 20% arguing it is "probably true" and a further 5% saying it is "definitely true" (Pew Research, 2020). These two pieces of research are obvious examples showing how conspiracy theories have such a vast outreach to those who do have access to the internet and how a large percentage of those do believe, even if it is only somewhat, that these theories are facts.

To provide a clear understanding of the dangers and harms of fake news and conspiracy theories on individuals and society, a key concept that should be utilised is that of moral panic. The concept of moral panic was first coined by Young (1971) but was expanded and popularised by Cohen (1972) in his book about mods and rockers in the 1960s. Another key piece of literature that was created about moral panics was by Stuart Hall (1978) where he focused on the wide media coverage of muggings over a course of 13 months in 1972-1973. He argued that the media coverage and response to these crimes created a moral panic throughout the country and this in turn created a diversion away from the wider economic crisis that was happening at the time, and he argued that this demands some sort of criminalisation. Garland (2008) argues that the term moral panic has expanded throughout the years since the 1970s and has become a distinguished concept that has been used extensively in criminology and public debate. There are five key elements of a moral panic that have been identified by Thompson (1998) – firstly something or someone is identified as a threat, this threat is then depicted in an easily recognisable form by the media, following this there is a rapid surge in public concern and worry, after that, there is normally some form of response from authorities or opinion-makers and finally, it can end one of two ways; either the panic recedes over time or it results in a social change due to the widespread uproar. Even though Cohen's initial theory of moral panic was founded in 1972, a very different time technology-wise to that of modern-day, Simons (2019) argues that it is still a very relevant piece of work, which can be applied to the process that is underway concerning fake news and misinformation. This is most prominently seen in the early stages of moral panic, where someone or something is identified as a threat and then the spread and highlighting of this threat by the media. As Newburn (2017: 90) argues these moral panics are usually unjustified in that they are generally volatile, as they usually disappear as quickly as they appear and the social reaction of these 'threats' is "assumed to be greater than the group, behaviour or event would justify if analysed correctly".

Hall et al (1978: 57) highlight the critical role the news media play in society due to them having the power to define "for the majority of the population what significant events are taking place, but also, they offer powerful interpretations of how to understand these events". Marwick (2008) furthers research on moral panics and suggests that social networks have become the object of social anxieties that create what she termed 'technopanics'. She focused on the cyberporn panic in 1996 and the panic over online predators and the use of the social network platform, MySpace, which she would argue are two examples that demonstrate the link between media coverage and internet content legislation. Marwick stated that technopanics have three key characteristics; "firstly they focus on new media forms, secondly, they pathologise young people's use of media (for example, hacking or violent video games), and thirdly, cultural anxiety manifests itself in an attempt to modify or regulate young people's behaviour" (Marwick, 2008: 5). She would go on to argue that internet content legislation had direct links to forms of media-fuelled panics. Carlson (2020) argues that fake news created and produced by those in the communication and news field has created a deviant other where they present themselves as giving reliable and solid news but are doing the opposite of that.

As illustrated, the effects of fake news and conspiracy theories are very prominent in modern society and with the rapid expansion of the internet and the ease and rapidity of information being spread, the question on many sociologists' and criminologists' minds is: is there anything that can be done to combat this harm? Government action and social media platforms have made attempts to target sources of misinformation; however, as Suanpang et al. (2021) argue, individual participation can add another dimension to the issue through sharing and boosting links – the internet creates a space where distributing sources is made easy and accessible but also it is a space where it is reasonably hard to get rid of something (what goes on the internet stays on the internet somewhere). There have been many institutional responses to try and raise awareness of fake news and try to minimise the damage and harm it can create. These range from declarations by the state (Government of Spain, 2019) or supernational bodies (Europe Commission, 2018) which have tried to make apparent the need for action to try to combat this new phenomenon.

To try to regulate fake news, and all the issues that come along with it are not easy (Pielemeir, 2020), mostly because of the risk of limiting the freedom of speech that the internet has promised to its users (Kaye, 2019). This could be why many governments have not tried to put something in place or succeeded in creating any legislation, such as in the UK where the online safety bill has been "in (re)draft" for a number of years. On the other hand, there have been some, even though a very limited number, of laws passed. For example, Germany created a Network Enforcement Act requiring content censorship (Schmitz and Berndt, 2018). In addition to this, in 2018 Malaysia passed a law called Anti-Fake News Act

which provisioned the possibility of prison sentences for those spreading fake news – however, this was redacted after only one year of being in place.

As previously stated, this case study has taken an in-depth look at the world of fake news as a new site of social harm in the modern world. The rise and proliferation of the internet have created many positives in people's everyday lives; for example, the ease and speed of communication, information and knowledge exchange, and anonymity and freedom of speech. However, as demonstrated, the internet is not an "all-good" space; it has many downfalls and harms that can impact individuals' daily lives. Just one of these social harms facilitated by the internet is fake news which has a direct relationship with emotional harm such as heightened anxiety, economic harm, and even physical harm (COVID-19 as an example) and many more. As previously stated, governments are struggling to compete with this new phenomenon due to the advantages of the internet and social network platforms also having a difficult time trying to balance between reducing fake news and limiting the freedom of speech they promised, risking losing engagement (and money) with the platform. The lack of policies and legislation makes dealing with and recognising the harms of fake news and conspiracy theories on society extremely difficult. Due to the dated nature of moral panic analysis, it would be fruitful to further research recent examples of moral panics in the context of digital media to be able to apply the work to the social construction and consequences of fake news and conspiracy theories. This raises important questions about how the likes of Cohen and Stuart Hall would apply their work to recent examples of misinformation and fake news in relation to the rise of the internet; how, then, can their criminological work from over half a century ago be adapted and applied to the moral panics of today?

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Article

Using zemiology as a means to make sense of responses to the Covid-19 pandemic

Kayleigh Atkins

Abstract

To demonstrate the usefulness of a social harm perspective, the recent ways in which zemiology has been mobilised to make sense of Covid-19 will be explored. The Covid-19 pandemic delivered an unprecedented period of extreme sacrifice. To protect societies vulnerable and preserve life restrictions sacrificing our cultural freedoms, unseen since World War 2, started in March 2020 and were implemented in intensifying levels (Briggs et al., 2021). Borris Johnson's government imposed social harm by delaying appropriate responses, evasion, complications and lies in disproportion to the harms of the virus and its broader effects within marginalised sections of society. Simultaneously capitalising upon features of it as a foundation of political, financial and economic gain (Canning and Tombs, 2021). Is the public health approach justified to protect society from a specific harm when it causes many other exacerbated harms (Ahearne and Freudenthal, 2021)?

Keywords: social harm, zemiology, crime, Covid-19, injustice

Historically there are many criminological theories to account for what establishes "crime" – levels of crime, criminal victimisation, crime control and criminal behaviour. This article will explore the notion that 'social harm' is a more criminologically useful concept than crime – comparing criminological and zemiological juxtapositions – to demonstrate the usefulness of a social harm perspective to make sense of the social injustices brought about by the Covid-19 pandemic.

Social constructs of criminals are subconsciously instilled in us from a young age – children play cops and robbers and determine an idea of what is socially acceptable, discovering what crime is – nonetheless, intrinsically there is not one historic occasion which defines crime. Fictitious events and stereotypical characters must be constructed before crime and criminals can exist. 'Crime has no ontological reality; it is a myth of everyday life' (Hillyard and Tombs, 2008:7). Hillyard and Tombs (2004) believe social harm to be a significant critical concept, rather than crime, because harmful experiences go unpunished within society and only actions constituted as crimes are punishable historically through law.

Criminological thought has progressed from the period of European Enlightenment during the 17th and 18th centuries, when regardless of biology individuals belonged to hierarchical relationships such

as children to parents, employees to employers and church goers to churches. Shifting during the 18th century, humanitarianism prevailed, categorising individuals through biological thought, hierarchy became invented based on what many considered as science (Roediger, 2019). Classicism followed this thought in the 18th and 19th century, theorists such as Cesare Beccaria (1963) and Jeremey Bentham (1879) supported a utilitarianist approach looking to free will to explain criminal behaviour (Moyer, 2001). Utilitarianism suggests decisions should be based on the greatest good for the greatest many (Bentham, 1879), applying it to zemiological thought is difficult because individuals experience harm at distinct levels, highlighting the need for its consideration.

Cesare Lombroso, considered as the founding father of positivist criminology, declared that individuals were born criminal – proposing that the social environment had no effect on criminality (Lombroso, 1876). However, consideration of the social environment is important in zemiological development because it looks to explain social harm through socioeconomic, socio-political and sociocultural environments that cause social injustices and harm and not to the individual that is blamed through the Criminal Justice System (CJS). Social environments are, however, considered in some criminological theories, such as sociological positivism explored by theorists including Robert Merton (1938), linking social factors to crime. Merton, considered a founding father of modern criminology developed Durkheim's strain theory, looking at individual use of illegitimate means to achieve societal, ascertained goals (Merton, 1938). Similarly, environmental factors are considered in Neo-Marxism, looking at aspects of Marxism (Marx, 1867) and interactionalist theory to account for the criminalisation amongst marginalised groups in society. It is important to consider the development of criminological thought in comparison to zemiological thought and its usefulness in making sense of social injustices compared to the notion of crime. Similar concepts such as critical criminology emerged in the 90's (Cohen, 1998) but have limitations failing to incorporate critical theory of social harm, focusing on the key concepts of crime/crime control. Zemiology provides a deeper theoretical basis for analysis of social recognition to understand social harms and the connection to crime (Hall and Winlow, 2012).

Zemiology, derived from the Greek Xemia meaning harm, indicates the study of harm – serving those whose interest lies beyond criminology (Pemberton, 2015). Zemiology can be more clearly articulated using the notion of social harm as a field of study seeking to 'provide an alternative lens that captures the vicissitudes of contemporary life' … [shifting] … 'emphasis from individual level harms to those associated with states and corporations' (Pemberton 2015:7). Types of harm based on socioeconomic positioning are not distributed randomly but linked with intersectional differences such as class, race, sexuality, age, ethnicity etc. Types of harm could be physical, financial/economic, emotional and psychological, sexual and depend on cultural safety, defined by people's understandings, attitudes and perceptions and are usually influenced by policies implemented by those in power. Social harm

systematically denies people opportunity – producing negative outcomes at individual and societal levels which leads to social exclusion – distributed unequally causing social stratifications (Hillyard and Tombs, 2004). Social harms occur from the consequential macro level processes and Wilkerson (1995) argues harm rather than crime is better suited to explain challenging social problems.

To demonstrate the usefulness of a social harm perspective, the recent ways in which zemiology has been mobilised to make sense of Covid-19 will be explored. The Covid-19 pandemic delivered an unprecedented period of extreme sacrifice. To protect societies vulnerable and preserve life restrictions sacrificing our cultural freedoms, unseen since World War 2, started in March 2020 and were implemented in intensifying levels (Briggs *et al.*, 2021). Borris Johnson's government imposed social harm by delaying appropriate responses, evasion, complications and lies in disproportion to the harms of the virus and its broader effects within marginalised sections of society. Simultaneously capitalising upon features of it as a foundation of political, financial and economic gain (Canning and Tombs, 2021). Is the public health approach justified to protect society from a specific harm when it causes many other exacerbated harms (Ahearne and Freudenthal, 2021)?

Countless individuals have suffered sustained separation from support networks, friends and family, institutions and cultural interests that offer structural and meaningful routine, connections, identity and purpose. Saad-Filho (2020) predicted catastrophic economic uncertainty because of the pandemic. The lack of opportunities, to prevent harm, presented to different social groups became progressively more evident: 'the uber-rich moved into their yachts, the merely rich fled to their second homes, the middle class struggled to work from home' (Saad-Filho, 2020: 480). Ultimately, affluence minimised the harms caused by restrictions of daily life and social distancing measures. The working class prospectively employed in frontline occupations 'to help save lives and the economy - cleaning hospitals, manning the checkouts, transporting essentials and ensuring our security' (Schwab and Malleret, 2020: 80), sacrificing their needs against the virus to protect the others in society. Given the title "key worker" to justify their active employment, while others were confined to dwellings, to keep our society functioning. The systemic sacrifices further justified by the "Clap for the NHS" campaign which allowed us to stand at our door and deliver a tokenistic gesture while their working conditions essentially remained unchanged. (Briggs *et al.*, 2020).

Girard (2013:1) links sacrifice to violence, suggesting there is 'hardly any form of violence that cannot be described in terms of sacrifice'. Violence is considered a crime, so can the social harms endured during Covid-19 be described as criminal or better understood through zemiological thought because no criminal law was broken? The sacrifices made during Covid-19 have quickly been overlooked by higher positioned individuals within society, and therefore can be described in an unequal and violent system. A systemic pursuit, perceived as a moral responsibility, can be understood as a symbol of systemic violence

that serves current neoliberal systems by harming certain sections of society. The political ideology of neoliberalism places emphasis on individual societal status (Hall and Winlow, 2013). Consequently, several of those sacrificed belonged to marginalised sections of society, branded as 'losers upon the field of neoliberal capitalism' (Briggs *et al.*, 2021:15). The structural violence and the harms inflicted identifies the consequences of power inequality through the lack of political accountability. Individual capitalistic consumption viewed by zemiological influence can assist us to identify the causes of these harms and how and we can address them (Briggs *et al.*, 2021).

Catastrophic consequences of these harms endured as a result of lockdown restrictions – described as 'social murder' by Friedrich Engels – (Sim and Tombs, 2021) are exposed in statistical evidence and examples of unemployment, poverty, education and mental health will be explored in this section. There were 318,000 more people recorded as unemployed in September 2020 than in the same month of 2019 when the pandemic began and consistent with employment harms 314,000 redundancies recorded from July to September 2020 (ONS, 2020). In relation, closure of businesses in September 2021 was 50% higher than in September 2019 (Williams, 2021). The largest decline was within the retail and hospitality sectors - consistent with governmental policy to close hospitality and retail venues, only allowing shops which sell "essential" items to remain open – many closed never reopening (Briggs *et.al*, 2021). Unsurprisingly the number of people in extreme poverty increased from 1.8 million in 2003 to 6.5 million in 2020 (Butler, 2022). Individual experience of poverty can be categorised further by addressing intersectional inequality such as race – where oppression interacts and reinforces another through interlocking pathways – creating additional segregation from other marginalised groups (Muntu, 2019 cited in Nayak and Robbins, 2019). Ethnic minority people account for 26% of those experiencing deep poverty, despite making up only 15% of the population, 2.2 times more likely than white people. When we break down these figures further, 9.30% of children from ethnic minority backgrounds were in poverty in 2021 compared to 2.90% of white children (Butler, 2022).

Covid-19 disrupted many aspects of life for young people, including education which impacted opportunities through online learning from home. Children of lower socioeconomic positioning spent approximately less than 1.5 hours a day completing schoolwork than higher positioned children - technological deprivation (1.9 million households had no internet access) and lack of parental support affected their capacity of completing work (Harris and Jones, 2020). In comparison to children with access to support and technology, 'it is likely that lockdowns intensified educational inequalities between poorer and more affluent school children' (Andrew *et al.*, 2020 cited in Ellis *et al.*, 2021:6). The documented impact of mental health issues amongst on these youngsters is astonishing! Between Friday 5th June and Monday 6th July 2020 - a period targeting reopening of schools – Young Minds conducted a survey amongst 2036 young people; 80 % agreed Covid-19 had made their mental health worse, 87% said they felt lonely and

isolated during restrictions and 31% receiving support pre pandemic were no longer accessing it. Another survey was carried out amongst 2,438 young people between 26th January and 12th February 2021; 75% agreed the current lockdown was harder to cope with than the previous, 67% believed it would have long term effects on their mental health and 79% said they thought their mental health would improve when restrictions were lifted (Young Minds, 2020). Also consistent with adult members of society, O'Connor *et al.*, (2020) reported that one in seven adults experienced hopeless thoughts relating to suicide, in addition to those experiencing feelings of loneliness due to social isolation.

These statistics allow us analyses through many social scientific disciplines but zemological thought allows us to look at the causes of harm inflicted by breakdowns in control functions and look for solutions to minimise, recognise and contain harms (Ray, 2011). This is particularly evident when looking at domestic abuse through crime figures in comparison to zemiological thought to show how using crime figures alone can create a false perception. ONS (2020), recorded 65,716 domestic abuse related incidents in December 2019 and during the month of April 2020 (during the first lockdown) only 61,947 domestic abuse related incidents were reported. In contrast, the charity Refuge received 25% more calls relating to domestic abuse in the month of April 2020 (Nicola, 2020). The Crime Survey for England and Wales (CSEW) suspended face-to-face interviews from 17th March 2020 and designed a new telephone-based survey with fewer participants (ONS, 2020) which is also consistent with lower figures on this particular survey. According to Women's Aid (2020), 91.3% of their surveyed participants said Covid-19 impacted their experience of abuse in more than one way, with 50.7% saying their abuse got worse during lockdown, 52.2% saying they were more afraid during lockdown, 58% felt they had no one to turn to and 15.9% said they could not access any support services (Austin *et al.*, 2020). This supports the zemiological thought that sacrifice connects to harm and highlights the limitations of criminological thought – crime figures show domestic abuse incidents decreased but upon investigation, Covid-19 restrictions caused the victims of domestic abuse greater harm than public health protection (Ellis, *et al.*, 2021). Maintaining this hypothesis, from April to June 2020 domestic abuse related incidents increased by 9% - coinciding with the reduction of covid-19 related restrictions, making it easier for victims to contact the police (ONS, 2020).

The Covid-19 pandemic represented 'the purest and most extreme embodiment of the abusive, negligent and exploitative relationships between the capitalist socio-economic system and the individual' (Hall and Wilson, 2014: 650). Ethically irreversible violent harms were inflicted, in a social and economic system, amongst categorised disposable members of society. Decisions made by "experts" were expected to be followed without any explanation and regardless of the consequences (Hochuli, *et al.*, 2021). Judgements surrounding the quality of human life could be considered the ultimate harm, exposing discrimination undermining the worth of human life (Bledsoe, *et al.* 2020). In 2020 Do Not Attempt

Cardiopulmonary Resuscitation (DNACPR) orders were utilised and placed on patient's files without consent or discussion from them, their families or services they were under. Justified by these individuals having certain health conditions which categorised their quality of life lower than those without these conditions and freeing up some capacity within the NHS (Booth, 2020). During the Covid-19 pandemic, Compassion in Dying saw an increase (from 6% of calls in 2019 to 13% in 2020) in the number of people contacting them for information and support on DNACPR decisions to protect themselves and loved ones. Sadly, many died without the opportunity to be involved in decisions about their own care and treatment – if a DNACPR decision was discussed – communicated to them inconsiderately without concern for their opinion. Several DNACPR placed on files, including that of Sonia Deleon, were labelled as "Blanket DNACPRs" because the families claimed they did not know about them and would have contested them if they had been informed. Sally-Rose Cyrille (Miss Deleon's sister) said 'Sone was totally written off. She was devalued, dehumanised and her life was not of value', due to her having learning difficulties (Buchanan, 2021:1). Miss Deleon died during a heart attack in hospital when cardiopulmonary resuscitation (CPR) was not administered (Buchanan, 2021). A current inquiry is underway into their moral and ethical usage but at present no one has been held accountable due to inconsistencies interpretating the surrounding laws and policies (Compassion in Dying, 2020).

Box (1983) recognises consequences of serious harms and the lack of criminal responsibility taken due to dominant legal policies serving those in power. If we compare DNACPR policies, outcomes and accountability to legalisation passed to enforce lockdown restrictions, it is evident which is taken more seriously in our CJS system in comparison to which caused most harm. Whilst no one has been held accountable when human rights and equality laws were ignored, causing avoidable deaths surrounding DNACPRs, thousands of Fixed Penalty Notices (FPNs) were issued for breaching lockdown rules (Dyer, 2021). A clear and concise approach amongst CJS agencies was implemented in response to enforcing coronavirus restrictions (Brown, 2020). A new range of powers were given to the police and other agencies to, engage, explain, encourage and enforce the new regulations. The police could enter homes in England and Wales, without proprietors' permission, to enforce restriction rules – restriction rules paradoxically stated no one else could – not even family members could enter another family home. During periods of lockdown the number of FPNs issued by the police have seen a significant increase – between 27 March 2020 and the 20 June 2021, 117,213 FPNs were issued in England and Wales under lockdown regulations. 1,552 FPNs per week were issued during the first lockdown compared to an average of 4,491 during the third lockdown. 737 FPNs up to 20 June 2021 were issued to those breaching international travel regulations, with imprisonment of ten years, if convicted at crown court, for those committing fraud surrounding misleading information to avoid quarantine hotels (Brown, 2020). The former Health Secretary, Matt Hancock, imposed these strict measures – allowed under the 1981 Forgery and

Counterfeiting Act – several MPs, unable to vote for this measure considered them 'utterly ridiculous' and 'misleading spin' used to serve those in power (Elgot and Weaver, 2021:1). Nazir Afzal, (North-West, Chief Prosecutor) attempted to prosecute MP Dominic Cummings when he made a 30-mile round trip during the first lockdown, commented that the measures were disproportionate 'you will get a longer sentence for lying about travel than you do for carrying a firearm in the street' and people with 'means or connections can get round this easily as we have seen' (Elgot and Weaver, 2021:1). Identified by academics as the 'cummings effect' (Bland, 2020:1) it produced an enormous decline in governmental support from the public – the police complained it created difficulties enforcing lockdown rules on the public. Nevertheless and arguably hypocritical, a member of the public, Lukman Majeed was then fined for breaching the law surrounding travel restrictions, travelling to another town for religious purposes (Weaver, 2020).

To conclude findings, the juxtapositions within zemiology and criminology are imperative in understanding the undeniable relationship between inequality and crime – rather than placing sociocultural emphasis on one or the other and the disadvantages of criminal conduct compared to social injustice. The social injustices experienced during Covid-19 and analysed through zemiological thought identified an increase in the relative inequality index (the gap between rich and poor) – creating intensifying and uncontrollable, associated levels of harms throughout society but particularly amongst the marginalised sections. The explored social injustices and harmful experiences would not be fully recognised in criminological thought alone – going unpunished within society because historically only actions constituted as crimes are punishable through law. Crime restricts criminological thought serving to maintain existing power relationships, failing to recognise dangerous acts from those in power – zemiology identifies the consequences of power inequality through the lack of political accountability – proving the notion that 'social harm' is a more criminologically useful concept than 'crime'.

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Article

Disability Hate Crime: The Case Study of Lee Irving

Paige Scully

Abstract

Within the world of criminology, pathologising crime and disability studies are becoming more prominent, not only from a victim standpoint but also from an offender standpoint. This is particularly noticeable within the Criminal Justice System. The emergence of medicalisation is due to The Biomedical Model. This model is used to understand normal and 'abnormal' behaviours (Deacon and Mckay, 2015) and saw the human body as a biological machine, dividing the mind and body. The Biomedical Model thrived on providing 'cures' for disease and discouraged those with disabilities or impairments from feeling comfortable, nor did it empower them to embrace their disability (Deacon and Mckay, 2015). From The Biomedical Model the emergence of medicalisation became prominent however due to the diverse needs of those with disabilities and impairments a discriminatory barrier arose as society responded to those with a disability or impairment (Conrad, 2007). Due to the diverse number of disabilities becoming more recognised and accepted within the 21st century, there is always scope for further disability research within the field of criminology. There is a continuous debate of whether it is society that causes social constructs for disabilities or is it the disability itself. Throughout this article there will be reference to Lee Irving, a real case within the Northeast of England who was described as a 'wonderful, young man' (Moore, 2015). Lee unfortunately lost his life due to prolonged torture and abuse from those Lee thought were his friends. This case study will examine critical disability studies, hate/mate crime and the neurodiversity movement. Additionally, it will place future recommendations for what can be done to stop the discrimination and segregation against people with a disability.

Keywords: Disability hate crime, deinstitutionalisation, criminology, vulnerability

The case study of Lee Irving is nothing but a disturbing one. Lee Irving was a 24-year-old man who had learning disabilities. He was found deceased in Fawdon, Newcastle, in 2015. Irving was brutally beaten up by what he thought was his friends and unfortunately died. Throughout Irving's 24 years on earth, he was continuously targeted for his learning disability and was easily influenced into making bad decisions to fit in with peer groups. Four people were found criminally responsible for Lee Irving's death. Three were convicted for preventing the cause of justice and allowing the death to occur but they were cleared of

manslaughter. James Wheatley was convicted of murder; however, he was cleared of committing a disability hate crime. The case reports suggested that James would heavily drug Lee into a sedative state so Lee could not escape. James would then brutally attack Lee and steal his clothes and money. All four involved in the murder of Lee Irving pretended to befriend Irving to gain his trust, only then to exploit him and lead Irving to his death.

Lee Irving was identified as an extremely vulnerable young man and within his case he was sceptical to mate crime. Mate crime is where individuals befriend someone who may be vulnerable to exploit them and take advantage of them (Corcoran & Smith, 2016). Hate crime is when an individual or group intentionally hurt another human because of their vulnerability such as disability or any of the protected characteristics under the Equality Act 2010 (Corcoran & Smith, 2016). In 2015/16 there were 62,518 crimes reported to the Police where hate crime was considered a contributing factor. This was a 19% increase from the previous year. Of those 62,518 recorded crimes, 6% involved disability hate crime. In the year ending of March 2022 there was a total of 155,841 reported offences where hate crime was considered a contributing factor (Home Office, 2022). Within those 155,841 reported crimes, 14,242 were classed as disability hate crimes (Home Office, 2022). The comparison between 2015/16 and 2021/22 statistics show that hate crime is becoming more problematic. Vulnerable people are being targeted more, and throughout this case study a theoretical understanding towards disability hate crime will be demonstrated. It will also show how people with learning disabilities used to be treated medically, and the progress the United Kingdom has made to deinstitutionalise vulnerable people and the movement towards community care.

Vulnerability

According to the Office for Health Improvement and Disparities (OHID) (Gov.uk, 2022), vulnerable people are defined as those 'in need of special care, support, or protection because of age, disability, risk of abuse or neglect'. Whereas Sparks (1982) defines vulnerability as 'a state in which a person does nothing to put themselves at special risk but finds themselves to be susceptible to being a victim or being at risk.' (Walklate, 2011, P. 181). Although these definitions are many years apart, they are both used within contemporary society. This can be problematic when professionals or even the individual themselves need to identify if they are vulnerable or not. Many people do not like to associate themselves with being vulnerable but without acknowledging vulnerabilities, miscommunication, misdiagnosis and even a miscarriage of justice can happen. Being vulnerable can be associated with an internal feeling. For example, do women feel safe walking home alone in the dark? Maybe not. However, this is different for people with all aspects of a disability. Disability makes an individual more vulnerable without realising they are vulnerable. People with disabilities do not brand themselves as being vulnerable because they are

already labelled as being disabled. Many disabled people have capacity to acknowledge situations where they may become more vulnerable than others, but many do not. It is important that more professionals understand and identify vulnerabilities within people to ensure the correct support can be given. An example of this would be within police custody where vulnerable people are entitled to an appropriate adult. Within this scheme it removed the diagnosis process and instead uses professional judgment or perception to identify is an individual is vulnerable. This ensures an appropriate adult is in place to help the individual understand what is going on and what may happen in the future, removing any barriers. This demonstrates an important and positive progression within police practice when it comes to police custody.

It is important to note that illness, disability, and impairment are all aspects of being vulnerable. Each of these have different meanings however, they all make an individual feel vulnerable. Bury (1982) states illness as a disruption to our ongoing life. He explains acute illness only has a temporary significance on our lives and demonstrates a limited disruption whereas chronic illness changes the underpinning of our lives because the illness creates new and different life conditions (Bury, 1982). Within early thinking of disability, both illness and disability were kept separate. There are multiple definitions of disability, some that still use derogatory terminology. The World Health Organisation (2001, P.28) states 'disability is not an attribute of an individual, but rather a complex collection of conditions, many of which are created by the social environment.' This definition of disability suggests that there are environmental deprivations that are causing peoples disabilities. An example of this would be, not having wheelchair access to all buildings or, disabled toilets. These environmental deprivations are known as social constructs. Likewise, an impairment can be an illness, injury or genetic condition that has the possibility of causing psychological and physiological abnormalities (Walker, 1993). Disability is the interaction with society and a loss of opportunities due to the impairment or illness.

The Move Towards Deinstitutionalisation

The history and, how those with any disability used to be treated is somewhat shocking and disturbing. For example, prior to the advent of Christianity, infants who had physical abnormalities were sacrificed to the gods, and 'deformities' were seen as punishments from the gods, meanwhile people with learning disabilities were subjected to slavery (Albrecht 2001; Stiker, 2002). Medicine was practiced by the church under religious means through priests as they believed health, illness and disability were controlled by supernatural forces. By the 18th century the state opened and funded asylums for 'lunatics' and 'idiots' to be detained and taken care of, through the passing of the County Asylums Act 1808. The asylums, however, soon became over ran, housing up to 1000 people when the capacity was only designed for approximately 115 beds. More and more people went into the asylum but very few left. People within the

asylums they were subjected to inhumane treatments such as being forced to sleep on straw beds, being chained to radiators or walls, given scolding hot baths and subjected to lobotomies, electric shock therapies, and purging (Rushton, 1988). Due to Lee Irving's disability if he were sent to an asylum, he would most likely never have got out and would have been subjected to slavery and the inhumane treatments to 'cure' his learning disability.

By the 1900's, the state closed the asylums and 1962 saw the rise of community care to encourage deinstitutionalisation. Later, with the transition of deinstitutionalisation came new legislation such as the NHS and Community Care Act 1990 and the Care Act 2014. The NHS and Community Care Act 1990 sparked major change to the National Health Service (NHS), as the Act split the establishment and exhibited the start of an internal market within the health service. Additionally, social care departments were given the responsibility for community care. The Care Act 2014 replaced existing legislation around social care within the United Kingdom. The Act requires local authorities to help develop a market that delivers a range of sustainable high-quality care and support services. The Act also introduced national eligibility criteria and the right to independent advocacy; giving more people within the community the chance to be heard.

Despite deinstitutionalisation and the move towards community care being a progressive shift, it can also be problematic for some individuals. Community care can be funded from the Government, but many people are without recourses due to the expense involved, and this can cause vulnerable people and people with disabilities to become highly isolated. Scholars have argued that this can have a detrimental impact upon people's wellbeing with a contemporary example being the Covid-19 Pandemic where vulnerable people were told to isolate for their well-being but instead were left to feel more isolated and lonelier (Victora et al, 2021). Many individuals with a disability that have not been diagnosed or misdiagnosed may not be aware of the help and support they can receive. Overall, deinstitutionalisation is a progressive move but there needs to be more integration within community care to ensure the wider population can acknowledge and appreciate the diversity within contemporary society.

Under the Equality Act 2010, disabled people are protected from discrimination and have the same equal rights and access to opportunities. However, this is not always the case. Disabled people are still discriminated against, indirectly and directly. Disabled people are attached with stigma that they are 'weak', 'feeble-minded', 'unable to keep a job' and, so much more (Macdonald et al, 2018). Disabled people still encounter daily barriers within society. From an early age, Lee Irving was diagnosed with severe speech and learning disabilities (Metcalfe, 2021). Not only is there a cognitive impairment, but there are also communication barriers. Many people can have a learning disability and be non-verbal, this is a huge communication barrier as not all individuals know Makaton or sign-language, causing non-verbal individuals to feel and become very isolated. Lee Irving was known to be easily influenced and three years

prior to his death he found himself in trouble with the law. Lee Irving was subject to community orders due to being influenced into criminal activity. However, Irving stated he would rather be easily influenced, than be rejected by his peers (Wood, 2017).

The National Probation Service assessed Lee Irving as being extremely vulnerable. Although, there were alerts for severe vulnerability and multi-agency safeguarding measures were implemented to protect Lee, it was not enough. Under the Mental Capacity Act 2005, Lee Irving undertook the Wechsler Adult Intelligence Scale 4th Edition (WAIS-IV) which measured his intellectual cognition. The results from the WAIS-IV confirmed that Lee was a risk to himself in the community, he did not have capacity to make decisions and 99.8% of adults his age would have scored higher on the test (Wood, 2017). This indicated a requirement for many additional services to be involved to ensure Lee was not at risk to himself. Prior to Lee's death, multi-agencies were working in partnership to provide suitable accommodation for him within Supported Living due to his incapacity to make decisions. One wish of Lee's was to live independently therefore Support Living was the best solution to prevent his institutionalisation and to enable him to keep his independence. However, over a four-year period from 2011-2015, Irving was reported missing thirteen times and welfare checks were alerted to Northumbria Police.

Lee was serving community orders but due to his lack of engagement with the Probation Service, further support became difficult to implement. Within the Safeguarding Adult Review (Wood, 2017) the National Probation Service had inadequate understanding of the Mental Capacity Act 2005 and how it worked within their role of applying it. Another catastrophe for the Probation Service was their failure to share information or raise appropriate safeguarding referrals when risk was identified (Wood, 2017). Overall, more than ten organisations were working with Lee Irving and approximately six safeguarding referrals were implemented for him. The referrals were passed onto the Newcastle Safeguarding Adults Board however, the board stated that six safeguarding referrals were insufficient to alert an emergency flag on the system (Wood, 2017); another shocking and missed opportunity to save Lee's life.

Theoretical Underpinnings

The Social Model of Disability in simple terms is understanding that disability is something that can be created because of society (Davis, 2013). The Social Model of Disability is used as a theoretical framework. The Social Model of Disability is enforced to encourage to change people's attitudes towards disabled people and acknowledge the barriers disabled people may face daily for example, a physical barrier such as a wheelchair user not having access to a lift, or it can be mental barrier's such as other people's attitudes towards disabled people (Davis, 2013). With the removal of barriers, it gives equal access and opportunities for disabled people and enhance their choices, control, and independence (Davis, 2013). The Social Model of Disability separates impairment and disability (Davis, 2013). A huge positive from

The Social Model of Disability is the modernisation of medicalisation and transitioning the focus from disablism to ableism. Linking to Lee Irving's learning disability, it would be identified as an impairment rather than a disability as it is contemporary society that causes Lee's impairment to become a disability due to the barriers he faced. The Social Model of Disability paved the way how disability and impairment can be distinguished and therefore became the emergence of Critical Disability Studies.

From the theoretical underpinning of The Social Model of Disability comes the emergence of disability politics which underpins Critical Disability theory. Critical Disability Studies is defined as being the 'location populated by people who advocate building upon the foundational perspectives of disability studies whilst integrating new and transformative agendas associated with postcolonial, queer, and feminist theories' (Goodley, 2016, 190–191). Critical Disability Studies' move towards impairment vs disability as Shakespeare (2017) stated different elements of the body can hurt which can give the body an impairment. Therefore, Critical Disability Studies recognises the reality and does not devaluate them (Shakespeare, 2017). Letosa and Retief (2018) defined impairment as 'lacking part of or all of a limb, or having a defective limb, organ or mechanism of the body'. Disability is defined as being 'not an attribute of an individual, but rather a complex collection of conditions, many of which are created by the social environment' (World Health Organisation, 2001, P.28). The language used has also developed and instead of using the term 'learning Disability' we adopt the term 'intellectual impairment' Despite this somewhat demonstrating progress, it is important to note that the language used is still derogatory for those with an impairment as they are still segregated from the wider population.

From these positive steps within theories and medicalisation come the Neurodiversity Movement. The Neurodiversity Movement is understanding and recognising the diverse group of people and how they interpret the world around them (Chapman, 2020). Neurodiversity advocates for people with learning disabilities such as dyslexia and other neurological conditions such as autism and ADHD. This movement encourages individuals and organisations to change their views and the language used towards people with intellectual impairments. Another positive from this movement it is allows those with neurological conditions to feel accepted within society. In terms of Lee Irving, the progressive movement of medicalisation, including the Neurodiversity Movement could have impacted his life within different ways. For example, if Lee had access to the correct services and support (which was picked up from the Probation Service as they identified Lee as an extremely vulnerable man) to recognise his triggers and barriers within society and ultimately befriend positive social peers.

Hate crime is a prejudiced, motivated attack against another person. Hate crime has many subcategories but in relation to the case study, disability hate crime provides explanations leading up to the death of Lee Irving. Although Disability hate crime is a punitive offence under the Equality Act 2010, it can be hard to prosecute the perpetrators of this offence because of how complex the term 'hate' can

be. It can be hard to measure how someone can 'hate' another individual. It can also be hard to prosecute the perpetrator because many disabilities are hidden, and the perpetrator can argue at trial that they did not realise the victim was labelled as 'disabled'. However, there are positive impacts from section 66 of the Sentencing Act 2020, which increased the sentencing powers for disability hate crime. From disability hate crime there is also a sub-category of mate crime. Mate crime is a term used to describe when an individual befriends a vulnerable person and takes advantage of them, for example exploiting the vulnerable person for financial gain. In the case of Lee Irving, he was exploited on a regular basis, he was abused mentally, physically, and financially.

The case of Lee Irving is a disturbing and shocking one, but it is important to acknowledge disability hate crime and mate crime when exploring this case to educate others on what people with disabilities encounter. Since Lee Irving's death, disability hate crime and mate crime is on the rise, however the acknowledgement of disability hate/mate crime has led to the creation of the charity Stop Hate (2006). Stop Hate is a third-party organisation to help tackle the barriers and discrimination that many people encounter every day. It was founded in 2006 after the Stephen Lawrence inquiry and since has become one of the largest charities to provide a helpline to those most vulnerable. According to Stop Hate (2006) many disabled people would rather report the crimes to third party organisation or charities instead of informing the Police. Disability hate/mate crime is underreported to the Police because of the stigmatisation and victimisation vulnerable individuals face and in fact, start to live their life around the abuse, exploitation, and segregation they face daily. In Lee Irving's case he was described as a 'wonderful, young man' (Moore, 2015) who was unable to identify the vulnerable positions he was in. Lee wanted to make friends and unfortunately, he made 'friends' with people who exploited and abused him. James Wheatley was found guilty of Murder but avoided a disability hate crime charge due to flaws within legislation and within the criminal justice system. The Crown Prosecution Service (CPS) was highly criticised for this, and Lee Irving's death was not the only death that was not passed for a disability hate crime. A CPS spokesman stated there was not enough evidence under section 146 of the Criminal Justice Act 2003 to prosecute James Wheatley for the offence. This does not give reassurance to those in similar positions as Lee Irving's family as justice has not been met. On the other hand, the Sentencing Act 2020 has increased the punishment under sentencing guidelines in accordance with the crimes committed but only by six months. Again, this does not give families and friends the closure and justice they need when coming to terms with the murder of a loved one due to their disability.

Future Recommendations

From the research carried out within this case study there is certainly room for improvements within the Criminal Justice System, the legislation, and how vulnerable people with a disability could be

made aware of the support they are entitled to. In the case of Lee Irving, the family express two main future recommendations:

1) The need for the move from children's services to adults' services to be better managed, ensuring the smoother transition without any loss of support. Additionally, the importance of noting the capacity of an individual rather than focussing on their age (Wood, 2017).
2) Ensure families remain part of the decision-making process in the case of vulnerable adults and be entirely involved and consulted on the "best interest" and other decisions relating to family members (Wood, 2017).

The case of Lee Irving demonstrates the recognition of the theoretical underpinnings and explains the rationale for disability hate crime holistically. Unfortunately, Lee is not the only case now or in the future that will exhibit the discrimination and failures from safeguarding and protective agencies. However, this case study can present us with potential reforms too. Firstly, a Parliament should ensure legislation constantly reviewed to remove ambiguity, remove potential flaws and modified to keep up with contemporary society. In Lee Irving's case, his murder was not sentencing under disability hate crime as the judge refuted it due to the prosecutions failure to satisfy the court that James Wheatley showed any hate towards Lee at the time of his death (Wood, 2017). Although, there was proof from text messages referring Lee to a 'spastic' (Wood, 2017) and the injuries Lee suffered, it was still not substantial enough for disability hate crime prosecution. Therefore, a future recommendation would be for legislation to consider all aspects of abuse over a long or short time that attribute to hate crime and the sub-categories within.

A future recommendation that is already implemented within certain agencies is the mandatory training for the Mental Capacity Act 2005 and recognising the diversity and how to apply it within certain professional judgements. A huge let down from the National Probation Service within the case of Lee Irving, was the inadequate application of the Mental Capacity Act 2005 as they were unsure or unaware they were within their right to implement such measures. All professions need mandatory training that needs to be reviewed yearly to ensure knowledge is kept up to date with important legislation. Likewise, with the Equality Act 2010, it is important to know that all individuals regardless of disability, ethnicity, gender, or anything that is likely to make them vulnerable are entitled to equal opportunities and to live a life free from discrimination. However, there is still huge stigma attached to those who are listed under a protected characteristic therefore they are susceptible to victimisation.

A final future recommendation would be to enhance the awareness and diversity from a young age. The United Kingdom can implement all the relevant legislation to protect individuals by law. But law does not shape how individuals perceive one another. Providing diversity in schools opens individuals' interpretation and awareness to the diverse needs that others may have. For example, children with disabilities are still being kept within separate schools for 'additional needs.' This does not give mainstream and special educational schools the opportunity to merge and identify that people can be different and again, that is acceptable. Educating and showing differences within contemporary society from a young age, can help how they perceive other people while transitioning through their adolescences. Without this interaction, people with or without a disability do not know how to conduct themselves around each other because they are both perceived as different. Educating from a young age can plant a seed of thought that can create future movements to stop discrimination and ensure equality for all.

In conclusion, from the research carried out within this case study there is room for improvement, but it is important to identify the progression over time such as the move toward deinstitutionalisation, how medicalisation has improved, and the development of further awareness of the diverse needs the most vulnerable. There is also slow progression within practice to show an understanding of the Neurodiversity Movement for example, Neurodiversity rooms for group discussions or interviews are now in place; making those with disabilities or impairments more accepted within society and ensuring they feel comfortable. However, the key points of concern form the case of Lee Irving have not gone unnoticed and future adaptations within legislation such as the Sentencing Act 2020 is making slow but progressive movements in correlation with the rise of disability hate crime. Lee Irving is not the only case to have been discriminated, abused, segregated, and ultimately killed from disability hate crime. Lee's case will live on to educate the wider population of the barriers and dangers that vulnerable and disabled people encounter daily. He will always be remembered.

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Article

To what extent is desistance from crime ultimately an individual rather than a social act?

Louise Ward

Abstract:

The Criminal Justice System historically has focused on the causation of offending, however, in recent years there has been a shift in research from this focus on why people commit crimes to how and why individuals stop committing crime. Promoting desistance has now become a foundational principle of the Criminal Justice System. This article will focus on the three theories of desistance – individual and agentic; social and structural; and integrated to answer the question of to what extent is desistance a social or individual act. Firstly, this article shall explore what desistance is and highlight the varying nature of definitions surrounding the concept. Following this will be an overview of why and how desistance is hard to measure and the issues that come along with this. This article will then move on to the fundamental explanations of why individuals desist (agency and socio-structural) and the contradicting processes of doing so, comparing and contrasting their strengths and limitations throughout. Finally, the integrated/interactionist approach will be utilised to argue that desistance may not be solely an individual or social act but a mix of both.

Keywords: desistance, agency, socio-structural, criminality, offenders

The concept of desistance has long been pointed out as "unusual" by a plethora of scholars (Maruna, 2001: 17) due to the fact that it is meant to capture the lack of behaviour rather than the presence of it, making it very difficult to measure and observe. This has led to a range of definitions being created and discussed, all varying in different ways. When trying to define desistance two primary types of definitions are used – operational and conceptual definitions. Conceptual definitions "seek to illuminate what is meant by a concept" (Rocque, 2021: 6) so trying to answer the question of what is desistance? On the other hand, operational definitions tend to focus on how a concept is measured in research. Rand (1987) defined desistance as the number of crimes and the seriousness of crime before and after life events, this would be an operational definition because he is arguing that the number of crimes is a way to measure desistance.

Meanwhile, Farrall and Bowling (1999: 253) argue that desistance is "the moment that a criminal career ends" which would be a conceptual definition due to the fact it does not highlight how to measure desistance, it only focuses on what it is. Both definitions however have their own respective flaws for example, in Rand's definition, how do we measure the seriousness of a crime, what is classified as a life event, and it also does not mention the end of any criminal behaviour. Farrall and Bowling's definition can also be picked apart, for example, how do we define and measure a "moment" and how can we know if the criminal behaviour has ended? Laub and Sampson (2001: 11) differentiate between the meaning of termination and the meaning of desistance, with termination being "the time at which a criminal stops offending" and desistance being "the causal process that supports the termination of offending". However, Maruna and Farrall (2004) disagree with this, arguing that this combines the causes of desistance with desistance itself. Instead, using Lemert's (1951) idea of primary and secondary deviance, they argue that this can be applied to desistance, creating a more dichotomised definition where there are two distinguishable phases – primary and secondary desistance. They define primary desistance as any part in time where the individual does not commit any crimes, meanwhile, secondary desistance is seen as the movement from the initial behaviour of not offending to a non-offending role or identity (ibid). Nugent and Schinkel (2016) developed this concept further with their idea of act desistance when the individual is not offending, identity desistance when the individual adopts the non-offending role or identity and then finally relational desistance when the change is recognised by others. As shown here, definitions of desistance vary widely which is a real issue for the concept.

The lack of consensus creates a lack of consistency, with operational and conceptual definitions differentiating from each other greatly. Another limitation of this is that the government favour research that can be applied widely to everyone, however, desistance is not able to do this due to it being a very individualised process. The issue of defining what desistance is also has an impact on how desistance is measured and conceptualised. When trying to outline how desistance is conceptualised, we need to consider a number of things – is it an event? When an individual has stopped offending is that it? Or is it more of a slow process with hiccups along the way (Rocque, 2017; Kazemian, 2007)? This brings in the debate of whether desistance is a static or dynamic process.

Early work surrounding desistance focused on a static approach where it was argued that once the offender stops committing crimes they have then desisted and that is it done (see Farrington and Hawkins, 1991; Loeber et al., 1991; Warr, 1998 etc.). However, there are a number of limitations surrounding a static approach that Bushway et al. (2003) identified – the selection of the cutting point, heterogeneity of offenders and the onset of desistance. Bushway et al. (2003: 131) argue that the cutoff point between the pre- and post-periods "is entirely arbitrary" and they are usually chosen because of the nature of the sample, making comparisons extremely difficult. Furthermore, individuals who may have very different

crimes they have committed with seriousness varying widely are all treated the same (ibid), for example, someone who has committed one crime in their criminal career is treated the same as someone who has committed a series of crimes in their career.

The implication that desistance is a permanent state is also problematic due to the fact that there are many offenders who do go on to re-offend but how would we be able to know an offender will not do this? The follow-up period is argued to be not long enough making it very difficult to know if the offender is likely to re-offend (ibid). Farrington (1992: 523) made an interesting quote regarding this – "strictly speaking, it is not until people die that we can be 100 per cent sure that they have desisted from offending". In more recent years the static approach has become less and less favourable, with the dynamic process being generally more accepted.

The concept of desistance being a dynamic process was first argued by Fagan (1989) and expanded on by Laub and Sampson (2001). Desistance was argued to be a process not just a state and it emphasises the transition from offending to non-offending rather than the end state of non-offending (like the static approach does) (Bushway et al., 2003). Unlike the overly prescriptive approach that the static concept takes, the dynamic process sees desistance as a very individualised process where different things will work for different people, and it also recognises that it is possible that people will have different paths or trajectories to desistance. Bushway et al. (2003: 134) argue that "individuals who experience a decline in offending at different ages or those who differ in their original levels of offending should be differentiated since they may be experiencing different causal forces as they decline to low levels of offending" and by measuring the rate of offending by different groups it can create patterns surrounding offending and also patterns of desistance. A limitation to the dynamic process is that due to its individualised nature, it is very hard to measure and apply to the general population. Because of this, implementing interventions that focus on the dynamic process may also be costly and difficult. Measuring and defining desistance is still very split and argued upon by scholars which makes desistance as a concept difficult to generalise – how can we track successful outcomes without a clear way of defining and measuring desistance? A clear definition and way of measuring desistance is integral for the field and criminal justice system.

Before highlighting the individual and social theories surrounding desistance a bit of background information is necessary. Desistance is still a very new concept in that it started to gain momentum in the 1970s. The concept of desistance was briefly seen in Goring's work (1919) on maturational reform which argued that it was all due to biological factors and it was a natural part of puberty. However, it was not until Gleuck and Gleuck's work from 1930 to 1960 that desistance started to become something scholars saw as a crucial part of the criminal career process, leading to many theories being developed in the 1970s and 1980s and further becoming major enquiry when researching criminals (e.g. Maruna, 1997; Sampson and Laub, 1993). Many of these theories differ in explanations towards why people desist, and these can

be presented under three key distinctions – individual and agentic; social and structural; and integrated. Individual and agentic explanations focus on links between age and crime, and the idea of the individual choosing to desist or not. Meanwhile, social and structural theories focus on social bonds and experiences that may affect the offender but are external to them, for example, marriage, having kids, and cutting ties with peers. Finally, the integrated approach focuses more on the interaction between individual agency and social structures, bringing both theories together to create a more balanced and thorough argument for desistance.

Understanding the agency-desistance relationship is described as the "missing link" in desistance research (Laub and Sampson, 2003: 141) which is significant due to the fact of agency being seen as one of the most important factors in desistance by some scholars. The individual and agential explanations of desistance were largely focused on in the early days with work from the likes of Gleuck and Gleuck (1950), Matza (1964) and Hirschi and Gottfredson (1983). One individual theory is the age-crime curve where it is argued that offending rates peak in late adolescence and most individuals stop offending before they reach age 30 or 40. This theory focuses on desistance being an age-related phenomenon (Blumstein and Cohen, 1987; Farrington 1986). Hirschi and Gottfredson (1983) argue that crime is universally related to age, where all people around the world will naturally start offending less as they grow older. However, Blumstein and Cohen (1987) argue that Hirschi and Gottfredson confused changes in participation with changes in the frequency of offending. The age-crime theory is critiqued by Weaver (2019: 4) due to the fact it "does not reflect divergences across or within crime types".

As previously stated, the maturational reform theory was widely argued in early work when desistance was first accepted as a concept vital to the criminal career. These ontogenic theories focus on the idea that crime is a natural process that most people will grow out of. Gleuck and Gleuck's longitudinal study of crime and desistance was a significant theory for maturation. They argued that desistance was normal and expected and unaffected by any socio-structural behaviours. This was also similarly argued by Gottfredson and Hirschi (1990: 136) who argued that desistance is "a change in behaviour that cannot be explained and a change that occurs regardless of what else happens". They argued that when growing up the biological changes reduce the motivation to commit criminal behaviour and the capacity to re-offend is also reduced. Even though maturation is a relatively old concept, there still has been some more modern research done surrounding it. For example, Shulman et al. (2016) argued that evidence from neuro-imaging research found that reward sensitivity would peak in late adolescence and decline thereafter which suggested that individuals who are in adolescence were more prone to engage in risk-taking behaviour compared to other age groups. Weaver (2019) argues that this theory, like other individual or agential perspectives, fails to take life events into account or any other socio-structural influences. A limitation of this theory is that these explanations fail to unpack what age is (Sampson and Laub, 1993). Maruna (1997)

further expands on this, arguing that age indexes a range of variables where things like life experience, biological changes and social transitions can affect the outcome, therefore age by itself cannot be an explanation for desistance. Furthermore, the term maturation has been critiqued due to its ambiguities in the way it is defined and measured (Rocque, 2015). Some overall criticisms of these individual explanations of desistance are that they are overly reductionist in that they do not account for differences individuals might face and the different pathways offenders may need but also these theories could be seen as an easy way out. These individual explanations can easily be applied and generalised to everyone which is something the government are fond of; however, it can be seen as too simplistic due to it not being able to delve into any differences people may face and experience.

The 1980s saw the emergence of agential perspectives of desistance where it was argued that the act of distance was due to decision-making that can change through ageing and experience which leads to offenders being able to analyse the benefit and the limitations of committing crime. When defining what agency is there is a variety of definitions surrounding the concept with Matza (1999: 28) arguing it is "a sense of command over one's destiny", while Farrall and Bowling (1999) argue that an individual has agency if they were able to "structure the behaviour of themselves and others and resist the structuring capabilities of others".

The lack of consensus in the research means it is very difficult to know how to define and measure agency. An example of an agential approach is the rational choice theory, originally created by Clarke and Cornish (1985), where it is argued that offenders make a conscious decision to no longer offend due to the fact they want to pursue an alternative future that does not involve committing crime. This was expanded on by Cusson and Pinsonneault (1986) who argued that the decision to want to pursue another future was because of an accumulation of unfavourable experiences where the cost of offending outweighs the benefits of offending. They studied a small group of former criminals and identified shock, growing tired of prison, longer sentences, and being able to reassess what is important to them as key factors as to why they desisted. This led to the development of the identity theory of desistance. This theory argues that individuals make a conscious decision to stop offending and change their life because of the dissatisfaction they are facing, known as a "crystallisation of discontent" (Paternoster and Bushway, 2009: 1121). Maruna (2001:7) highlighted that "to desist from crime offenders need to develop a pro-social identity for themselves" and to do this their internal narratives are key. He argues that condemnation and redemption scripts are the differences between offenders who desist and offenders who go on to re-offend.

Unlike the individual explanations of desistance, these approaches do acknowledge socio-structural factors like marriage and having children, however, they argue that these come *after* they have decided they want to change. Weaver (2015) argues that these theories still neglect the impact of social

networks and relations in their role of triggering, enabling and sustaining their decision to desist. Agential perspectives have been prominent in criminology and they have been useful in the creation of youth policies and interventions (Barry, 2013), however, this is not to say these explanations have not been widely critiqued. They fail to acknowledge any other factors that may be impacting desistance, like socio-structural explanations. Also, Farrall and Bowling (1999: 261) critique these perspectives because they see the individual as "super agents" who are free to make their own decisions at all times with no external factors being able to impact them.

In comparison to the individual and agential approaches, the structural perspective of desistance is almost entirely opposite in its way of explaining why and how individuals desist. When explaining the structural theories of desistance there are two distinct types of structures – relational structures and institutional structures (Lopez and Scott, 2000). Relational structures are defined as "the nature and quality of relational arrangements of interconnection and interdependence among agents" whilst institutional structures are defined as "embodying cultural or normative expectations of behaviour" (Lopez and Scott, 2000: 3-4). In society, they are known to be three overarching structures – macro, meso and micro. In early work, the focus was on how socio-structural factors can impact the individual, which would be micro-level research, however, more recent work has started also incorporating macro and meso-level research into how desistance can be impacted by policy, governments, and wider social communities (Farral et al., 2010).

Social learning theories and differential association are examples of some structural perspectives in that they focus on factors that may affect desistance like disassociation from peers due to life events such as marriage (Warr, 1998). It was argued that the offender getting married means there will be less time spent with peer relations who may have a criminal past and therefore convincing the offender to re-offend. However, Warr never explained how or why this might occur. Laub and Sampson (2001) take this initial idea of the relationship between marriage and desistance and expanded on it, creating the social control theory. They argue that ties to institutions of social control can encourage individuals to desist. In comparison to the individual maturation theory, this theory argues that such experiences cannot be applied to everyone universally and they can be controlled by the individual (Laub and Sampson, 2003). Matza (1964) is a key theorist of this social control theory – he argues that most young people who commit criminal behaviour are caught between social bonds of adulthood and peer subcultures with no deep attachment to either. He goes on to argue that when adult roles become available to the young offender they are more likely to desist. Laub and Sampson (2004) argue that these roles can appear by chance and therefore do not have to be down to the individual's rational decision-making. Mischokowitz (1994) disagrees with this slightly in that he argues it is the intensity and severity of the turning points, not just the turning point itself, that may have an impact on if the offender desists or not.

Weaver (2015, 2019) highlights that these explanations tend to generalise and over-simplify their findings due to it being very difficult to gather and apply data surrounding how socio-structural factors can affect offenders as it could be different for everyone. Like the individual and agential approaches, these socio-structural explanations are also overly reductionist since they, for the most part, disregard any correlation between an individual's agency and desistance. Socio-structural theories fail to highlight how these structures affect decision-making, whilst also neglecting how the individual may respond to these impacts (Weaver, 2019). This is where the integrated theories can be very useful.

Desistance research in policy and practice remains very individualistic in focus, whilst almost completely failing to acknowledge how society can affect both offending and desisting. However, the integrated approach is a way for these two very dichotomised approaches to come together and bridge the gap between agency and structure to create a very useful, nuanced explanation as to how and why individuals desist. It should be noted that the integrated approach is still a relatively new concept, so it still needs a lot more research and development into it. Scholars have argued that desistance is an entangled and interactive relationship between agency and structure (Farrall and Bowling, 1999; Farrall et al. 2011) These theories argue that desistance occurs when an offender's attitudes, values and decision-making change and they then create new behaviours and new pro-social roles. These new transitions are not considered successful until the pro-social roles become a permanent state in society and so the person has desisted (King, 2013). However, this can be seen as problematic because how do we know an offender has changed? Can we just take their own word for it? This can link to Goffman's (1959) work on masking and the 'performed self' where he argued that we display a series of masks to others where we control and stage how we appear and behave to show ourselves in the best light possible. So, it could be argued that some of the offenders who have desisted are simply putting on an act and their social roles have not changed at all.

A key theorist for the integrated approach is Dufour et al. (2015) who conducted a small-scale research project on 29 desisters and interviewed them on their experience with the desistance process. Their main takeaway from this research is that their data found that desistance is triggered through structural factors but then continues through agential engagement with these opportunities. However, they highlight that these opportunities must seem tangible to the offender so they can see the way they could change their lives and if these opportunities are not tangible then they will not desist (ibid). They proposed that there are three stages of desistance – the first is the structure opening where the opportunities for change have become present; the second is structure to agent where the individual must embrace these opportunities and create a new social identity; the third and final stage is agent to structure where the individual gets to a point that they do not see themselves as a 'criminal' and their role is now a 'contributor' to the structure (Dufour et al., 2015: 495). These stages propose that both agency and structure are key to

the desistance process – desistance cannot start without structure present as the offender would see no way to rectify their life but then it is not till the final stage that agency is key to maintaining desistance because this is when the offender has successfully adopted one or more pro-social identities and they now start to see that their criminal lifestyle cannot be accepted any longer.

The integrated theory does have its limitations, for example, it is still a very new concept, meaning it still needs a lot of development to become a main, dominant theory of desistance because the practical configuration of agency and structure working together still remains uncertain (Weaver, 2016; Albertson, 2020). However, this approach's strengths and positives greatly outweigh its limitations. Integrated theories, unlike agential and structural, can acknowledge the complex nature of desistance and by being able to address the limitations of both approaches it can further develop the concept of desistance. King (2013) also argues that this new alternative way of explaining desistance can allow for new criminal justice interventions and provide tools for more effective practitioner support, which can further develop the practical side of desistance.

To answer the question of whether desistance is an individual or a social act, it is simply both. The integrated approach between agency and structural perspectives is an explanation that can bridge the gap between the two very dichotomised approaches. No one theory can adequately explain why and how individuals stop offending, however, agency and structure can both shed light on different aspects of desistance, thus a combination of both can gain a wider insight. Both agential and structural explanations are overly reductionist, where they only focus on one aspect and they fail to explore any other factors that may be at play – therefore, the integrated approach gives a more detailed, nuanced explanation that looks at both sides of the argument. Since desistance as a key concept of the criminal justice system is still relatively a new idea, a lot of research is still needed into how we can further close this gap between the two explanations because it becomes very difficult if we are only focusing on two approaches that are very individualised in their thoughts. In addition to this, a solid definition and way of measuring desistance are integral to the field because as of right now these are widely contested and argued upon by scholars.

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Article

Evaluating the case of Joseph McCann using the rehabilitation and retribution philosophies of punishment

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Abstract:

Joseph McCann can be described as a ruthless and heartless serial rapist who was imprisoned after committing countless acts of sexual assault and abduction. However, had the probation service not been mismanaged leading to false recordings of McCann's risk, this outcome could have been different. McCann's case highlights probation officers' responsibilities and suggests that rehabilitation does not always work. From its continuing developments in criminology, rehabilitation has been effective in some cases for low-risk individuals who have drug and alcohol problems. Though it begs the question – why is it being used for the most dangerous offenders? This is where retribution would enact proportionality, believing the offender should receive their just deserts. Being more abundantly accepted by society for removing criminals from the streets, this approach would punish the offender instead of helping them. These two contrasting paradigms are often reflected by social and political changes over time. With rehabilitation emerging after World War 2, the medical model was formed to treat offenders, though with critiques of its failures and being a soft approach, retribution gained popularity following Kantian ideals. Overall, Joseph McCann's case could have been handled better if a retributivist approach was taken though it is also evident that not one punishment philosophy is perfect. This article will examine the case of Joseph McCann and assess to what extent rehabilitation was an appropriate punishment philosophy and whether retribution would be more appropriate.

Keywords: Retribution, rehabilitation, risk, probation, proportionality

Between April and May 2019, Joesph McCann 'abducted, raped, digitally penetrated and sexually assaulted' several victims (Ministry of Justice, 2020: 1). After failing to imprison McCann in 2008 for burglary, he continued to commit 'seven counts of rape', 'three counts of assault', and 'one count of sexual assault' due to mismanagement in the probation service and prison system due to budget cuts (Dodd, 2019). This issue led to inexperienced and confused probation staff inaccurately reporting McCann's risk whereby his 'interpersonal skills and ability to manipulate staff were underestimated' (Inspectorate of Probation, 2020: 11), leading to his release from prison when he was still a risk to society. There will be a comparison

between retributivist and rehabilitative punishment philosophies to determine their effectiveness. The methods of reducing reoffending will be assessed with retribution proportionately punishing the offender and rehabilitation reintegrating them back into society. These contrasting punishment philosophies are important as they govern how offenders are managed and penalised. In this article, the causes of McCann's crimes will be assessed, and the case outcomes will be reviewed. There will be an account of any social and political circumstances that influenced criminal justice legislation and policies. An evaluation will be made to decipher whether the punishments are justified and how they impact McCann's case and society. Accommodating merits and withdrawals of the philosophies, a conclusion will be made regarding which is more appropriate for Joseph McCann.

Rehabilitation is an optimistic punishment philosophy that attempts to reform offenders to make them law-abiding citizens and rejects traditional crime management strategies. It aims to 'reduce crime', 'the fear of crime' and 'reoffending' (Home Office, 2006: 10) and rests on utilitarian principles. Founded by Jeremy Bentham in the 18th century, utilitarianism ensures the 'greatest happiness of the greatest number' by balancing pain and pleasure (Bentham and Mill, 2004). Contemporary utilitarianism is both consequentialist, in justifying individual actions and institutional law by consequences, and reductivist, in which it is forward-looking to prevent future crimes.

After World War 2 and governmental concern with the economy, rehabilitation grew alongside the welfare state. The medical model in the 1950s was created and aimed to 'diagnose and treat offenders both in prisons and in the community' (Mair, 2013). Individuals' 'drug and alcohol abuse or mental health problems' were believed to be symptoms of criminogenesis. (Brooks, 2021: 78). As a result, this left-realist therapeutic intervention was recognised which caused a societal focus on individual needs. By analysing similar criminogenic profiles, rehabilitation provides employment, family connections, and housing, also attributing offenders to 'harnessing and developing their strengths and assets' (Raynor and Robinson, 2009: 13). Not only does rehabilitation highlight causes of crime, but it also reintegrates offenders free from recidivism. Due to its social perception of being a "soft" approach and a lack of empirical evidence its reputation as a "punishment" agency was damaged.

In the 1970s, there was a shift from the welfare model to crime control whereby right-wing critics contrasted rehabilitation with incapacitation, arguing for a 'get tough approach' (Hudson, 1987: 28). The impact of these Thatcherite years authorized the justification of other punishment philosophies. By the 1990s, the 'what works' movement resurged rehabilitative ideals, aiming to do more to prevent and reduce crime by managing risk. Providing guidelines on 'who to target (risk), what to target (needs), and how to target (responsivity and treatment)', the "new rehabilitation" was created (Latessa et al, 2014: 238). Since this renewed approach does not punish offenders and prioritises fairness under due process, it was socially rejected for not being novel. However, it allowed offenders to be supported, enabling them to feel

comfortable. It also collated empirical data formed from risk assessments proving useful in preventing further instances of crime.

Intending to rehabilitate offenders, the Criminal Justice Act 2003 introduced risk management prioritization of criminogenic needs into legislation, strengthening rehabilitation as a punishment philosophy. These high-risk individuals receive exponentially more probation resources so to combat this, the National Probation Service (NPS) launched privatised Community Rehabilitation Companies (CRCs) that manage 'medium- and low-risk offenders' (Walker et al, 2019: 114). This provides a cheaper and cost-effective solution to assessing risk over traditional punishment agencies. Though maintaining the resource equilibrium is difficult since high-risk individuals are more dangerous whilst low-risk individuals are more populous and prolific. In summary, rehabilitation works. It provides help and reforms individuals and does not assume the offender's rationality which situates it as a core punishment philosophy. Though incorrect risk assessments, resource management and anomaly cases of recidivism question if everyone is reformable.

In the case of Joseph McCann, rehabilitation considers his criminogenic needs as the cause of crime. McGuire (2003: 114) categorised social and individual factors such as 'unemployment', 'drug trafficking', 'aggressive tendencies' and 'drug addiction' as needs seen as causing criminal behaviour. In the 1990s, probation moved away from treatment via 'assist, advise and befriend' to the new penology of risk management (Garland, 2001: 177). Following the critique of welfare, the public favoured harsher punishment which meant McCann was being assessed based on his risk rather than the old penology of treatment. Firstly, interventions McCann partook in 2013 'appeared to be having a positive impact', which categorised him as a medium-risk to the public and a high-risk to known adults (Ministry of Justice, 2020: 4). Despite being credited for highlighting McCann's disturbing letters and manipulative behaviour, the assessment underestimated McCann's interpersonal skills.

McCann grew up in a criminogenic family with his two siblings, Sean and Michael, dubbed as the 'Brothers from Hell' for 'terrorising neighbours, shoplifting and setting cars alight' (Hicks, 2019). When McCann was situated with his family it provided an unsafe environment that could 'increase his risk of reoffending' (Inspectorate of Probation, 2020: 28) when he should have been relocated. McCann also received no medication assessment and was not transferred to a mental health institution when required to do so. Clearly, McCann's needs were not being met due to poor practice and ignorance of potential risk by the management team.

With increasing social demand for the crime prevention methodology that circumvents illegal acts before they happen, the Criminal Justice Act 2003 provided a greater focus on assessing criminogenic needs. Yet, displayed risk factors such as a 'planned escape attempt', a 'threatening letter' and McCann 'using a weapon' were responded to negligently (Inspectorate of Probation, 2020: 18-22). OASys was built upon

What Works in 2001 helping 'to achieve greater consistency across probation and MAPPA risk assessments' (Kemshall, 2008: 70). But McCann's OASys 2014 review failed to assess him at the appropriate level. One explanation is that 'the Ministry of Justice… left the probation services underfunded' (Bamford and Bilton, 2020: 181) which 'impacted their ability to comprehensively review JMc's historical record' (Ministry of Justice, 2020: 6). So, McCann was not seen as a risk due to his low-risk crimes of burglary and signs of improvements through attended programmes and thus did not receive the criminogenic needs to be reformed. Moreover, McCann was issued an IPP statement for aggravated burglary in 2008 for two and a half years endorsed by the Criminal Justice Act 2003. It was suggested that 'had his IPP licence been revoked [in July 2017] … he would not have been released' in February 2019, months before his final conviction. (Inspectorate of Probation, 2020: 31). These oversights 'demonstrates a lack of professional curiosity' by the officers constituting the NPS to recommend 'professional training… to enhance skills in interviewing' (Inspectorate of Probation, 2020: 50).

These failures by the staff and the underfunded agencies demonstrate the dangers of implementing a risk discourse system to rehabilitate high-level offenders. In summary, although rehabilitation is broadly viable, it did not work for McCann. It did not achieve utilitarian principles since McCann's release provided more danger to the individual, the public and society – in that it is a waste of money and resources – than a benefit. This asserted risk highlights the public's precaution for welfare, believing it to be a "soft" approach and preferring methods like retribution.

Retribution follows a belief of merit and demerit whereby 'criminals deserve punishment in proportion to their crime' (Brooks, 2012: 15). With the belief that everyone has free will – reflected by classical theorists such as Cesare Beccaria – retributive justice seeks to punish those who have committed wrongful but illegal acts. Crime is retributively believed to be caused by the individual calculating 'the likely costs and benefits' to achieve their self-interest (Scott, 2000). This rightist belief was developed into the rational choice theory which provided guidelines for understanding behaviour. Consequentially, in assuming that everyone is rational, retributivism neglects irrationality present in neurodivergent people or those with personal and social background factors that influence the pursuit of crime. This reactive punishment philosophy saw an upsurge in the 1960s and 1970s after society's critiques of rehabilitative ideals, the failures of the welfare state in reducing poverty and improving education, and the ever-increasing crime rate. The shift to the crime control model prioritized social order and brought along Kantian ideas such as the "just deserts" principle that 'whatever undeserved evil you inflict upon another… you inflict upon yourself' (Kant, 2017: 115).

Contrary to contemporary utilitarianism, this offence-focused approach attributes punishment to offenders in reaction to their crimes rather than those showing pre-meditation. They are managed

according to pre-determined rules of crime severity to protect the larger population of society. Overall, this approach has been credited for allowing society to feel safer by issuing justice to the victims involved. The Criminal Justice Act 1991 supported just desert beliefs, bringing longer custodial sentences along with the twin-track approach for violent and sexual criminals which strengthens it as a punishment philosophy. Proportionality is calculated as 'equal to the harm of punishment' guiding a reflective penalty that acquires justice (Brooks, 2012: 30). However, the concept of harm is subjective and thus crimes could be disproportionately sentenced. The harm caused is often proportionally unquantifiable in rape victims and deaths by serial killers. Additionally, crimes such as traffic or drug offences are not seen as immoral thus proportionating the harm to the crime is difficult. Not everyone wants revenge either; some victims may want to see the individual learn from what they committed. Retribution tends to be related to imprisonment and corporal punishment to equivalate the harm caused to attain proportionality. With society moving towards a stricter attitude to crime, the greater the chances of enacting the death penalty, but this too has had critiques for its inaccuracies, immorality and exorbitant cost.

The 'just deserts' philosophy was further reinstated with the Criminal Justice Act 2003 which introduced extended sentences and showcased that retribution works to an extent. Though crimes such as theft are often harshly punished despite their socially renowned mundaneness. Recent policies have extended criminal responsibility for manslaughter to 18 years old (Police Crime, Sentencing and Courts Act, 2022). Whilst beneficial under society's limited legislature consciousness, retributivist practices highlight the far-right ideology of managing society to a point where it feels too controlling. With 20.6% of prisoners being held in crowded accommodations as of 2022 (Justice Data, 2022), more controlling environments may lead to riots, further overcrowding and policy readjustments. Though retribution's get-tough approach satisfies the societal balance of the public feeling safe and the justified proportionate sentencing of offenders for their crimes.

Retribution follows Kantian ideals of just deserts which allow for public safety by removing the offender. The socio-political climate at the time of the case was guided more towards the new penology of risk management thus retributive ideals were not considered in the management of McCann. In consideration of McCann's initial crimes of burglary as wrongful and illegal, they should have been punished greatly from a retributive standpoint to deter him from further burglaries despite their mundaneness. Furthermore, the early release of McCann does not follow the just deserts principle whereby he should have been punished. Considered primarily responsible for causing his crimes as a 'rational thinker', retribution justifies a proportional sentence for the 'abducted, raped, digitally penetrated and sexually assaulted' victims (Ministry of Justice, 2020: 1). Though, this is debatable judging by his upbringing in a criminogenic family that may allude to his criminogenesis – to which is not retributively considered.

McCann 'raped and kidnapped 11 people', with one victim explaining that 'she suffers PTSD as a result' whereby he 'replaced a life of thriving with one of surviving' (Dirnhuber and Christodoulou, 2019). He received the equivalent of 33 life sentences for his crimes though this does not achieve just deserts since it is impossible to proportionally punish him for the harm caused. In response to criticisms of rehabilitative ideals, the Criminal Justice Act 1991 emphasised just deserts principles and the twin-track approach for violent and sexual offences. However, one of the senior judges for McCann, Lord Burnett, explained that he was not given the whole life tariff to 'ensure that the most severe sentence' is reserved for 'loss of life' and instances involving a 'plan to murder' (Abbit, 2020). This punishment is not proportional to the crimes committed and the long-term harm inflicted. In comparison to murder, in which retribution would assert the cost of a life for a life, rape is difficult to quantify to an equivalent sentence and even more difficult to proportionally punish the offender.

The Criminal Justice Act 2003 imposed harsher penalties for persistent offenders and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) created new EDS licenses requiring violent and sexual offenders to serve 'at least two-thirds of their sentence' before they can be released (Easton and Piper, 2016: 148). These provisions were highlighted and the court 'imposed an extended determinate sentence of 45 years' – over the minimum sentence of 30 years – regarding 'the seriousness of all the offences taken together' and the 'previous criminal offending' (Judiciary of England and Wales, 2019: 3). This highlights retribution's valuable revenge perspective of giving the offender what they deserve. Rejecting the whole life order does not attain an 'eye for an eye' and the pursuit of extended sentences is disproportionate due to their foundation of risk. However, the Sentencing Act 2020 enforced just deserts whereby early release provisions such as the release of a contained 'life prisoner on licence' would no longer apply (Crime Sentences Act, 1997). This assures the victims that McCann will not be a risk due to the permanent licence he received, though still not proportional to the harm caused.

The HM Prisons and Probation Service 'apologised for failings' (Dodd, 2019), though this only highlights the withdrawals of rehabilitative methods – often focusing more on the individual than public safety. Retribution ensures the guilty are punished and the innocent are protected therefore it is the only appropriate moral justification for punishment. In summary, if just deserts principles were considered more in legislation, proportionality could have been achieved in McCann's case though it is arguably impossible to equate the harm caused. Being abundantly definable, retribution is generally accepted by the public, however, it does not identify criminogenesis or help the offender back into society and thus the offender and the offender's family and loved ones suffer.

Rehabilitation and retribution are polar-opposite punishment philosophies. Where leftist rehabilitation centres on treatment and considers criminogenic needs to prevent future crimes, rightist retribution centres on punishment and holds the individual accountable in reaction to their crimes. Rehabilitation is

most successful at reforming individuals and being cost-effective while retribution is expensive. However, the public disputes rehabilitation as "soft", favouring retribution that ensures public safety by locking offenders away and deterring them from further crime. Though, retribution assumes the offender is rational and in favouring imprisonment it may destabilise the 'offender's skills and life prospects' to fall further behind (Brooks, 2021), which could have influenced McCann's failure to reform. The risk management methods used in McCann's case were not up to rehabilitative standards.

In this case, McCann's risk and criminogenic needs were not assessed appropriately, which failed to reform him, made him a danger to the public and failed to achieve the rehabilitative 'greatest happiness for the greatest number' principle (Bentham and Mill, 2004). Retributive ideals were partially achieved as the punishment was set at the highest it could have been collating his previous criminal history and danger to society. Though if retribution had a greater influence, it would not have enabled McCann to commit the 'seven counts of rape', 'three counts of sexual assault' and other offences between April and May 2019 (Ministry of Justice, 2020). This is due to retribution providing a safer assessment of McCann whereby he can receive his just deserts without the risk of releasing him to re-offend. Even in retribution's weakness of disproportionality, other punishment methods do not come close to providing equivalent justice. For example, rehabilitation decides to reform the offender, but 'offenders may not be punished beyond their desert' (Canton, 2017: 118) which highlights the public's concern for probation's soft approach founded on rehabilitative principles. In this context, retribution is a considerably better approach. As for the future of the probation system, the McCann case highlighted the problems needing to be solved to provide better assessments of risk.

In June 2020, the NPS stated improvements to the risk management guidelines, promoting 'changes to Offender Assessment Systems (OASys)', allowing for more effective assessments of risk factors in violent and sexual offenders (HM Prison & Probation Service, 2020). However, the prison and punishment agencies, founded on retributive principles, recently integrated rehabilitative methods such as 'Resettlement Passports', 'Employment Hubs' and 'Intelligence Management' to reduce crime whilst still ensuring just deserts (Ministry of Justice, 2021). This means the two approaches can be united despite being in direct opposition to one another. Both philosophies offer a managerial and reactionary responses to crime, contributing to the decrease in crime rates, in victimisation, in prison populations and recidivism, while allowing for more individuals contributing to the economy. Although it can be acknowledged that rehabilitation has taken greater strides in reforming offenders and the newly classified prison strategy, the McCann case, the public and governmental legislation have benefitted more from retributive justice.

In conclusion, the case of Joseph McCann was treated very unprofessionally by those involved. With the shift between the welfare state and crime control, it is understandable that some officers may have been perplexed by the changing landscape, however, it enabled a serial rapist to run rampant. Rehabilitation and

retribution were criminologically compared in the context of McCann's case, assessing the treatment's appropriateness. These punishment philosophies influence how offenders are managed and punished. Rehabilitation is effective in its application but evident in McCanns case it is sometimes insufficient for some offenders. With a risk assessment of 'systemic failure' and mismanagement evaluating his 'extensive criminal history', rehabilitation had failed at supporting McCann with the appropriate resources (Dodd, 2019). There should have been more acknowledgement of criminogenic factors before assessing him as his treatment failed to reform him and ended up putting the public at risk. Retribution justified McCann's harsh punishment for his crimes due to the inflicted harm he had caused. Though criminogenic factors are ignored whereby rationality is assumed in offenders. Retributivist ideals of proportionality warrant greater consequences than the 34 life sentences for the 'worried and insecure' victims affected by the tragedy (Dirnhuber and Christodoulou, 2019). McCann was given the longest sentence that could have been applied for the crimes committed. Thus, a greater focus on retributive justice could have avoided these tragedies, through McCann receiving a more justified sentence and being equivalently punished for the initial crimes that he committed. The future may see improvements in rehabilitative treatment and risk-managing methods, retributive corporal punishment or the overlap of both to collaborate their criminological impact on treating and punishing offenders for a more cost-effective and socially accepted advanced study of crime and criminals.

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Case Note

German Federal Supreme Court decides on German Based "British" limited companies' future post-Brexit: Order of the German Federal Supreme Court (Bundesgerichtshof) 16.02.2021 – II ZB 25/17

Ismail Anil Kuru

Abstract

In 2021 the German Federal Supreme Court, the Bundesgerichtshof (BGH), decided how British Limited Companies (Ltd), which were well recognised in Germany because of the freedom of establishment pursuant articles 49 and 54 of the Treaty of the Functioning of the European Union, would be treated in the future. The limited liability of the shareholders with a small share capital was unknown in the German legal system before and increased its popularity compared to German company forms such as the GmbH which required a minimum share capital of €25.000. The BGH decided that due to Brexit the British Ltd established in Germany would no longer recognised by the German Company Registry and that the freedom of establishment would no longer be applicable. This decision has the effect that existing Ltds in Germany are automatically transformed into German company forms which changes the liability of the shareholders as well. The two possible German company forms that Ltds can be transformed into are now the OHG which is a partnership that aims to conduct commercial trade, and the Außen-GbR which is a company form constituted under civil law. In both company forms, the shareholders are personally liable which constitutes a tremendous difference to the British Ltd. In this case commentary the considered German company forms are assessed with the result that another German company form, similar to the British Ltd, which might be more appropriate for shareholders. The UG is a relatively new company form which was created as a counterpart to the Ltd and can be established for the cost of only €1. However, the decision of the BGH leaves some space for interpretation since existing Ltds might be protected by the grandfather clause. This clause protects rights that were asserted in the past and are no longer compliant with the law due to changes. Nevertheless, practice will show how existing Ltds will be treated in Germany.

Keywords: Limited, Liability, Partnership, Germany, Brexit

The private limited company, known simply as 'limited', had gained popularity in the European Union (EU), and especially in Germany. One reason was the limited liability of shareholders with a small share

capital which was unknown to the German legal system before. In Germany, the most common company forms which limited the liability of shareholders were the *Gesellschaft mit beschränkter Haftung* (GmbH) and *Kommanditgesellschaft* (KG). The main difference to the British limited company is that the shareholders are liable for the amount they contribute to the company financially. Hence, the company form GmbH is liable with its company assets and to establish this company form shareholders must contribute at least €25,000.

This is similar to a KG where shareholders must contribute a certain amount of money, which is determined by the company agreement. Furthermore, there must be two different kinds of shareholders; one is the fully liable partner, who is personally liable, and the other one is the limited partner, who is liable for the amount of money s/he has contributed to the company. In contrast to that, British limited companies are more simple when it comes to liability since establishing a one is possible with only £1 as share capital, making it quite popular. This avoids personal liability and is cheaper than establishing a German company form. Additionally, founding a German company form can take several weeks, whereas founding a Limited usually takes only a day. Articles 49 and 54 of the Treaty of the Functioning of the European Union (TFEU) created new possibilities for companies. TFEU allowed entrepreneurs to establish limited companies in other EU member states, which resulted in many of these being established in Germany. However, United Kingdom's withdrawal from the European Union changed the simplicity of using the advantages of limited companies as demonstrated in the present case.

The legal matter in the present case was merely a moot regarding the record of a British limited company into the German Company Registry (Handelsregister). A handelsregister is conducted by a Registry Court, which is administrated by a District Court (Amtsgericht (AG)). The claimant, All in One Star ltd, applied on 12th of March 2014 for a record, which was denied by an interim order due to missing documents and information, such as a translated and legally attested articles of association (Frankfurt am Main 11/06/2014 – 72 AR 692/14). Furthermore, a share capital, which is required pursuant to s.13g (3) Handelsgesetzbuch (HGB) (The German Commercial Code) in connection with s.10 (1) Gesetz über Gesellschaft mit beschränkter (GmbhG), was not stated.

The limited company's director challenged the decision of the Registry Court and argued that a translation of the company agreement was not necessary because it was a model contract in accordance with Schedule 2 of the Companies Model Articles 2008. These regulations are in legal terms similar to English company law and comparable to a statutory instrument. Therefore, it is a matter of foreign legal provisions and consequently it is the duty of the Registry Court to determine these within the scope of its official duty. Additionally, according to the claimant, the contribution of a share capital was not needed in the case of a British limited company. The Registry Court, however, upheld their original decision.

The complainant appealed against this decision which led to the jurisdiction of the Higher Regional Court or Oberlandesgericht (OLG). The OLG rebuffed the appeal and approved the view of the Registry Court regarding to the necessity of a translated and legally attested articles of association which is the legal position pursuant to s.13g(2) HGB (Decision of Higher Regional Court Frankfurt am Main from 08.08.2017 – 20 W 229/14). The OLG distinguished between model articles and memorandum of association stating that the model articles constituted English Law and were therefore not to be translated; though they held the view that the memorandum of association was not English Law, and thus needed translation as requested by the Registry Court. The OLD held that All in One Star Ltd had failed to satisfy this requirement.

Although the OLD agreed with the claimant on this issue of the contribution of share capital, they did state that a limited company's share capital required a fixed normative value in line with s.542(1) Companies Act 2006. This meant that the share capital assumed by the shareholders had to be mentioned in the statement of share capital. Under s.10 of the Companies Act 2006, every company with a share capital, including limited companies, had to provide such a statement towards the registrar of companies when formed. For the enrolment to the German Company Register it is mandatory to specify the issued share capital and as this did not happen, the OLG rejected the appeal and upheld the decision of the Registry Court.

The case was further appealed to the Bundesgerichtshof (BGH) (the German Federal Supreme Court). On 14th of May 2019 the BGH discontinued proceedings and sought a preliminary ruling from the European Court of Justice (ECJ) pursuant of article 267 TFEU to determine whether s.13g (1)-(3) HGB in connection with s.10 (1) GmbHG were compatible with Articles 49 and 54 of TFEU, which state the freedom of establishment (Order of the Federal Supreme Court from 14.05.2019 – II ZB 25/17). It is important to re-state that under s.13g (1), (3) HGB in connection with s.10 (1) GmbHG rules that a share capital must be stated. The United Kingdom's withdrawal from the European Union was the reason for the decision of the BGH to continue the proceeding on 16th of February 2021 without waiting for a decision by the ECJ (Order of the Federal Supreme Court 16.02.2021 – II ZB 25/17).

Held, dismissing the appeal, that the claimant was required to provide information regarding the share capital pursuant to s.13g(1)-(3) HGB in connection with s.10(1) GmbHG. The Bundesgerichtshof determined that United Kingdom's final withdrawal from the European Union by 31st of December 2020 impacted the application of TFEU laws and therefore, Articles 49 and 54 TFEU, which contained the freedom of establishment no longer applied to British limited companies. As a result, an interpretation in conformity with EU-Laws was not necessary anymore and ltd companies from the United Kingdom were to be treated as companies from third countries.

Commentary

It must be emphasised that the freedom of establishment and EU Law would not have been under scrutiny had the claimant fulfilled the requirements which were asked by the Registry Court in the first place. However, the appeal led to wide consequences, not only for this claimant but for others in future. Since the United Kingdom's withdrawal from the European Union the inapplicability of the TFEU is consistent. Therefore, the revocation of the preliminary ruling proceeding pursuant article 267 TFEU is not to be criticised. Henceforth, shell companies from the United Kingdom within the EU are no longer recognised, which was the case before Brexit; though, this does not apply to companies with their head office inside the United Kingdom ('Keine "Briefkastenfirmen" nach dem Brexit' (Tagesschau, 11.07.2017)). The inapplicability of the TFEU is irrelevant for those companies since they did not claim these rights to establish.

Entrepreneurs wishing to establish a company in Germany have to fulfil all conditions which are required under German company law. British company forms are no longer recognised because of their inability to fulfil these conditions and the advantages of the TFEU are no longer an aid for a simple establishment. However, there is a distinction between the incorporation doctrine which is used in common law jurisdictions, and the real seat theory which is practised in civil law jurisdictions. In United Kingdom's company law, the incorporation doctrine is applied and according to this theory the governing company law equals the law where companies have been registered or incorporated. This doctrine goes back to the colonial era and made it possible for British businessmen to establish companies abroad based on British company law (Horst Eidenmüller, 'Shell Shock: In Defence of the 'Real Seat Theory' in International Company Law' (Oxford Business Law Blog, 25.03.2022)).

The real seat theory is applied in German company law and determines that the place of the head office is decisive for which jurisdictions laws take precedent. However, it was superseded by the ECJ to favour company forms from member states of the EU. As a consequence of Brexit, the ECJ decision cannot protect limited companies anymore and all in all, it can be determined that Brexit made establishing companies more complicated for foreign businessmen (Marcel Hagemann and Arian Nazari-Khanachayi, 'Karlsruhe locuta causa finita? Der BGH zu den Folgen des Brexit' (CMS Deutschland bloggt, 20.04.2021)). However, this means that German entrepreneurs will also suffer from this decision since they can no longer incorporate British Limited's anymore.

Due to the decision of the BGH some Registry Courts have already begun erasing ltds from the German Company Registry (Jens Eggenberger, 'Ende der UK Limited mit Verwaltungssitz in Deutschland?' (Flick Gocke Schaumburg, 23.06.2021)). Concerns are now being raised regarding how existing limited companies are going to be treated in the future. There is a presumption that these limited

companies will be transformed into one of two possible German company forms: the offene Handelsgesellschaft (OHG) and Außen-GbR ('Brexit – Das Aus für die Limited' (IHK München und Oberbayern)).

The OHG is a partnership which aims to conduct commercial trade (under s.105(1)HGB) and in which partners are personally liable under s.128 HGB. An Außen-GbR is a relatively new company form and the prevailing doctrine and like the OHG, partners are personally liablie under s.128 HGB. This was not always the case since the Außen-GbR was constituted under civil law and not under commercial law. Therefore, the Außen-GbR's only difference to an OHG is that it is formed for the purpose of carrying any business except commercial businesses (Jürgen K. Wittlinger, 'Gesellschaft bürgerlichen Rechts/4.2 Haftung der Gesellschafter' (Haufe)). For example, in Germany many lawyers or tax consultants establish an Außen-GbR because, in German law understanding, these professional fields deal in intellectual work rather than conducting commercial business. This means that if a limited company works on commercial business, it will be likely to be transformed into an OHG, otherwise it will take the form of an Außen-GbR. The reason for those possible transformations is that British ltds do not fulfil all necessary requirements to establish a corporation, such as a GmbH or KG, in Germany. Though, this outcome would have disastrous impacts on the liability of shareholders of existing limited companies.

However, there might be alternative solutions which are preferable. One possibility could be deduced from Article 14(1) Grundgesetz (German Constitution) (GG) which safeguards the protection of property, with business enterprises being protected under this article too (Order of Federal Administrative Court from 22.08.2014 – 4 B 6.14). Some basic laws in Germany are usable for Germans only, such as the freedom of assembly pursuant article 8 GG; yet article 14 GG is not one of them. Furthermore, basic laws are also applicable for corporate bodies according to article 19(3) GG. Nevertheless, this article states that it does not apply for foreign companies, but companies from member states from the European Union enjoy this right likewise due to a decision of the EJC (Mike Wienbracke, 'EU-Recht geht Art. 19 Abs. 3 GG vor' (Publicus, 15.10.2011)). As a result of Brexit, the United Kingdom and its companies cannot claim this right anymore; so that, article 14(1) GG is no longer an option. Yet, a protection might emerge due to the grandfather clause, which is an acknowledged right in German jurisprudence, based on article 14 GG. This clause protects rights which are alleged in the past and are no longer in conformity with the law due to changes in the law.

Another possible prevention from the negative effects of a forced transformation is to change a British limited company into an Irish limited company. Both company forms are very similar and have minor and not noteworthy differences (Sinead Floody, 'The differences between Irish and UK Companies' (CompanyBureau, 13.10.2017)). A major advantage of an Irish limited is that the freedom of establishment

pursuant articles 49 and 54 TFEU are still applicable. Therefore, this might be an attractive solution; although, company owners need to actively change the company form by their own.

Another plausible way of treating limited companies in the future, which seems more equitable, would be the use of the Unternehmergesellschaft (UG). Rather than transforming limited companies into an OHG or an Außen-GbR, the UG, which was created in 2008 as a counterpart for the British limited company, can be established for only €1 and is enjoying increased recognition and popularity in Germany ('Die Unternehmergesellschaft – UG (haftungsbeschränkt)' (IHK Aachen)).

Nevertheless, the decision of the BGH states that the freedom of establishment is principally no longer applicable. This opens up the possibility for existing limiteds to assert a right under the grandfather clause. If the grandfather clause cannot be applied, the most equitable solution would be a transformation of existing Limiteds into UGs, which virtually constitutes a German limited company. Because of the changed liability of shareholders, a transformation into an OHG or Außen-GbR presents major consequences, such as insolvency of many companies. A change of existing limited into an UG would represent, the grandfather clause, in a broader sense, because the company in general stays subsistent. Nevertheless, it remains to be seen how limited companies will be treated in German jurisprudence and in Germany in general, which will be determined by practice.

The decision of the BGH is essentially appropriate and consequent and leads to the result that future businessmen cannot establish British limited companies in Germany under the application of articles 49 and 54 TFEU. They must establish German company forms, such as an UG instead. The consensus that existing limited companies might be automatically transformed into an OHG or an Außen-GbR, presents a significant problem since there are so many limited companies in Germany. This could lead into a mass insolvency for many business people who own a limited companies. Nevertheless, the inapplicability of the freedom of establishment pursuant to articles 49 and 54 TFEU needs to be respected. The United Kingdom's withdrawal from the European Union leads to an inadmissibility of the European Law for limited companies.

It is, however, desirable that these companies receive the protection of the grandfather clause or at least, if a transformation is mandatory, they change into a German UG. This would avoid negative impacts regarding the liability of shareholders and would be less cost intensive. Another possibility for entrepreneurs could be the transformation into an Irish limited company due to the similarity they have to their British counterparts. Yet, practice will show how existing limited companies will be treated in Germany; and the future will reveal which company type is the preference for business persons looking to establish a company in Germany.

Case Note

The use of corporal punishment in Sri Lanka: *Hewa Maddumage Karunpala and others Vs Jayantha Prema Kumara Sriwardhana and others* (SC/FR/97/2017) (Supreme Court of Sri Lanka)

Miurin Kanijude Amarnath

Abstract:

Corporal punishment is widely used in schools around the world, although laws prohibit the use of physical punishment on children. In Sri Lanka, the student is punished physically in the name of discipline, although it is an offence under the national law of Sri Lanka and international conventions that are ratified by Sri Lanka. This case emphasizes a higher degree of protection for children when they have been subjected to physical harm. The national laws have been developed based on this case.

Keywords: Violation, rights, punishment, torture, degrading treatment

The Third Petitioner (hereinafter referred to as Petitioner or Child Petitioner) in this case was a 15-year-old student at Pahuwalla Central College in Sri Lanka when the petition was filed. His parents were the First and Second Petitioners, respectively. The First Respondent was the sectional head, the teacher in charge of discipline, and the art teacher at Puhulwella College. The Second Respondent was the principal of that School. The Third, Fourth and Fifth Respondents were in positions of overall direction and supervision of that school while the 4A Respondent and 5A Respondent were serving as office-bearers of the specified position.

The Petitioner went to school as usual on February 13, 2017 where he was assigned to one of three groups in the class during the first two periods of the day designated for agriculture. Students were instructed to cultivate vegetables by ploughing a certain place in the schoolyard. The Petitioner had been fatigued while performing this activity and had taken a short break by sitting on a portion of a wall next to the plant nursery before resuming the designated task. Two students came up to the Petitioner and informed him that he was requested to visit the First Respondent's office, while he was cleaning his hands and tools. The first respondent asked him where he was sitting at the time and slapped the third Petitioner in his face. The petitioner had been in extreme pain, discomfort, and disorientation. However, after the event, the First Respondent dragged the Petitioner from the classroom.

The Petitioner had been then in his class and had continued to experience severe pain. When the First respondent was informed of this, he told the child petitioner not to consider it seriously and to ignore it. The Petitioner then told his class teacher about the incident and his condition. She did not allow him to go home. However, she instructed the Petitioner to tell the incident to his parent. Further, the 1st Respondent later returned to the Petitioner's classroom together with a teacher, who talked to the Petitioner and requested the Petitioner to tell him if it bled. This incident was not raised with the school principal by any staff member of that school and the Petitioner received no medical assistance from any staff members. The Petitioner had purchased two Panadol as painkillers from the canteen within the school.

When the petitioner got home from school, he told his grandmother that his ear hurt, and that the 1st Respondent had slapped him. After that, the child petitioner's ear was examined at the Kirinda-Puhulwella Rural Hospital where the doctor noted that there was eardrum damage and that it would be necessary for the petitioner to be transferred Matara General Hospital. He was admitted to Matara General Hospital, and on February 14, 2017, the Petitioner was moved to Karapitiya Teaching Hospital for additional research. A police statement was taken before the petitioner was discharged. No proper medical report was given by the hospital. The Third Petitioner continued to have extreme pain after arriving home because there had been no conclusive treatment.

Being dissatisfied with the treatment provided at the prior hospitals, the first and second Petitioners took the Third Petitioner to Colombo National Hospital on February 15th, 2017. The third Petitioner was hospitalized overnight for observation and investigation. According to a medical assessment from the Colombo National Hospital, the Child Petitioner had a perforated ear drum and was experiencing "conductive hearing loss" in his left ear, which affected his ability to hear low frequencies. As the Child Petitioner had no prior record of hearing problems prior to this incident, the Petitioners believed that the First Respondent's assault on the Child Petitioner was the direct cause of this. Subsequently, a case was filed before the Supreme Court of Sri Lanka under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 on March 7, 2017, against the first through sixth respondents, alleging that the respondents had violated the Third Petitioner's fundamental rights, which are protected by Article 11[7] of the Constitution. The

question was whether the Respondent and state violated the human rights of the Child Petitioner enshrined in Article 11 of the Constitution of the Democratic Socialist Republic of Sri Lanka,1978.

Held, unanimously upholding the claim, that the 1st Respondent and the State had violated the fundamental rights of the Third petitioner, which are guaranteed by Article 11 of the Constitution. The court ordered compensation of one hundred and fifty thousand rupees from the 1st Respondent to the

Child Petitioner as well as an additional sum of five hundred thousand rupees from the State to be paid to the Child Petitioner after carefully considering all the facts and relevant matters, particularly permanent lifelong damage to the Child Petitioner's hearing ability.

Commentary

In this case, the petitioners contended that the First Respondent's act amounted to torture, cruel, inhumane treatment, or punishment, all of which are against Article 11 of the Constitution of the Democratic Republic of Sri Lanka 1978. According to Article 11: "No person shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

Further, the Petitioners stated that when the issue was brought up with the school administration, they showed no interest in this matter. In this case, the Petitioners argued that hitting the Child Petitioner in the face, injuring his left eardrum, and withholding or failing to seek medical assistance constituted torture and/or cruel, inhuman, or humiliating treatment or punishment and the Petitioners asked for redress under Article 17 which states regarding remedy for the infringement of fundamental rights by executive action, because the alleged breach was committed by an administrator acting in his official role.

On the other hand, the First Respondent provided a narrative in which he calmly stated that there might be other places the child petitioner could sit down if he felt tired instead of on top of the abandoned wall. He also added that only a disorderly or "rowdy" person would act in such a manner. After warning the Child Petitioner, he only taped the Child Petitioner's shoulder and demanded to change this behaviour in the future (at [10]).

According to the First Respondent's affidavit, the child petitioner neglected to immediately notify the principal and the medical centre about his purported concerns and only did so several hours after returning home. However, he did not attach any document for supporting his statement.

The Third Respondent, The Zonal Director of Education of the Zonal Education Office in Hakmana also provided a report (report 3R1) on the preliminary investigation conducted under his supervision and submitting it alongside his affidavit.

According to paragraph 5 of this report, the 1st Respondent hit the Child Petitioner, even though he didn't mean to hurt her or have any malice against her. It also concludes that by engaging in such conduct, the First Respondent violated Circular No. 14/2016, which was issued by the Secretary of the Ministry of Education on April 29, 2016. Under paragraph 6, the First Respondent would also be removed from the school's Disciplinary Board and advised to 1st respondent never in future to engage in such behaviour as assaulting a student.

The official report expressly stated that the 1st Respondent had assaulted the Child Petitioner.

However, the 1st Respondent then strongly disputed this in his affidavit and claimed that as a result, the Petitioner's case about his acts was *mala fide* and illegal. While answering the question of whether the Respondent of this case violated the fundamental right of the child petitioner, Justice S. Thurairaja cited internal legislation circulars and Cases as well as international conventions and general comments. Further, he illustrated an Indian case as well for supporting his decision.

Justice S. Thurairaja pointed to Article 37 of the Convention on the Rights of the Child at the outset, which highlights the responsibility of nations to protect children from torture and other kinds of cruel, inhumane, or degrading treatment or punishment. Further, the court quoted all significant international declarations which held similar terms, such Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The court also quoted Paragraph 11 of General Comment No.8 (2006) which is issued by the Committee on the Rights of the Child in its 42nd Session and highlighted the following sentence from the paragraph:

> Any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light……. In the view of the Committee, Corporal Punishment is invariably degrading….

Justice S. Thurauraja opined that it is essential to establish from an early age a positive attitude toward a society without violence. Further, causing mental or physical harm is not an option for maintaining discipline. He stated that:

> An individual's understanding of discipline, respect for rules, and a healthy attitude towards a non-violent society are integral attributes that must be instilled from a young age. However, in civilized society, these goals are to be accomplished using alternative forms of discipline which do not inflict physical or mental harm. Sri Lanka as a signatory to the UNCRC has understood the need to curb the widespread use and acceptance of Corporal Punishment. (at [13-14])

The Court referred to the beginnings of corporal punishment and said:

> …our culture was such that it had a negative view on Corporal Punishment. Corporal Punishment was a prevalent method of punishment used during the colonial era of occupation brought into practice from public school practices from [their] respective countries, thereby trickling into the attitudes and daily practices of citizens of the country…It is indeed an outdated and disproven practice from the western world that we are dearly holding on to (at [18]).

Further, the Judge brought to light the illustration of section 341 of Penal Code (Ordinance No.02 of 1883) which expressly states that when 'a person intentionally uses force on any person without the consent of the other person' he would be committing an offence if he used such force 'knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used', however, when 'a schoolmaster, in the reasonable exercise of his discretion as master flogs… one of his scholars. [He] does not use criminal force… because… although… [he] intends to cause fear and annoyance… he does not use force illegally' (at [14]). Even though section 308 Penal Code (Amendment) Act, No.22 of 1995 which states that Anyone with the custody of a child who deliberately hurts, harasses, ignores, or abandons such person has committed a crime of child cruelty. It also includes planning or arranging for an individual to be physically abused, ignored, or left in a manner that will probably result in his suffering or physical harm, the above said illustration remains as unchanged.

Even though *Bandara v. Wickremasinghe* (1995) 2 SLR 167 involved a case before the Penal Code's amendments making corporal punishment illegal or accepting mental trauma, the Supreme Court supported the idea that excessive use of force by administrators and teachers to maintain discipline could constitute cruel and degrading treatment.

In that case, K.M.M.B. Kulatunga PC J., joined by Chief Justice G.P.S. de Silva and Pathmanathan Ramanathan J., set out that the disciplining of students is within the authority of school staff. They could be held accountable for the violation of FR by taking executive or administrative action if they overstepped their authority while doing so because:

> … [D]iscipline of students is a matter within the purview of schoolteachers. It would follow that whenever they purport to maintain discipline, they act under the colour of office. If in doing so, they exceed their power, they may become liable for the infringement of FR by executive or administrative action (at [172]).

He further stated that:

> This Court must by granting appropriate relief reassure the petitioner that the humiliation inflicted on him has been removed, and his dignity is restored. That would in some way guarantee his future mental health, which is vital to his advancement in life (at [174]).

However, in the present case, Thurairaja PC J inclined to accept this view and stated that the developments in society require that the viewpoint be basically held and expanded upon. According to him, the Court, as the child's upper guardian, must make sure that the child receives a sense of justice

being served in light of the teacher's violation of his or her person and disregard for their dignity. Thurairaja PC J. emphasised a higher degree of protection for children stating as follows:

> It is unacceptable to consider that a child assaulted may not be entitled to a remedy for the reason of being a minor while an adult in the same circumstances would be entitled to such relief. In any case, minors, as vulnerable and impressionable members of society must be entitled to a higher degree of protection (at [22]).

Citing *Wijesinghe Chulangani vs Waruni Bogahawatte* SC FR App No. 677/2012, Thurairaja PC J suggested that for the child's healthy development and the recognition of this fundamental dignity of himself and others, it is essential that they be informed that the child's dignity is protected by law and is therefore represented by the Court's order .Thurairaja PC J also referred to the Indian case of *Parents Forum for Meaningful Education v. Union of India and Another* (2001) DLT 705, where the UNCRC, and the Delhi High Court determined that corporal punishment must be outlawed, made

significant observations, such as that the FR of the child will be meaningless if they are not protected by the State and that the children's right to be protected against violence of any type associated with education must be recognized by the State and schools.

It was further said that allowing even minor acts of violence against children could spiral out of control since a teacher using a rod can't always be watching how hard he's hitting the kid. In addition, all constitutional rights are guaranteed to children, and these rights cannot be taken away from a child just because of his or her age because being young does not diminish a person's worth in comparison to an adult (at [23]).

Finally, Thurairaj PC stated that a child is an invaluable national resource that should be nurtured and attended to with tenderness and care rather than with cruelty and that using corporal punishment on children to correct them cannot be considered education because it causes the children irreparable harm to their bodies and minds. Further, it is stated in the judgment that no malice or intent is necessary for the breach of Article 11 to occur (at [23-24]).

It is clear in the circulars issued by the Education Ministry, specifically in paragraph 2.4 of circular 12/2016, that even when acting in the student's best interests and maintaining school discipline, a teacher may still be in violation of all applicable laws regarding corporal punishment. Because it is the responsibility of the State to preserve children from all types of physical violence, the motive of the perpetrator—whether they are a teacher, father, guardian, or any other adult does not matter when corporal punishment occurs.

Section 4 of Circular No. 12/2016 forbids corporal punishment in state schools and

specifies positive disciplinary techniques that teachers may employ; However, this might not be applicable to all schools and is not a legal requirement. National activists claim that the Supreme Court's decision does not forbid physical punishment in schools and that legislative reform is unlikely to be implemented as a result. The government has made a public commitment to changing the law to outlaw corporal punishment in all circumstances. .In reporting to the Committee on the Rights of the Child in 2017, The government admitted that it was aware of the legislative gap and stated that "introducing a law to combat corporal punishment" was an important issue (https://endcorporalpunishment.org/human-rights-law/national-high-level-court-judgments/sri- lanka-2021-supreme-court-judgment - accessed 30 November, 2022).

It is submitted that this case highlights several crucial aspects that the prior case ignored. When considering a case involving a child, the court should function as the child's upper guardian and offer a higher level of protection than an adult and for this reason the decision should be welcomed in Sri Lanka.

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